Gender Equality

Dimensions of Women's Equal Citizenship

Edited by
Linda C. McClain and Joanna L. Grossman

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GENDER EQUALITY

Dimensions of Women's Equal Citizenship

Citizenship is the common language for expressing aspirations to democratic and egalitarian ideals of inclusion, participation, and civic membership. However, there continues to be a significant gap between formal commitments to gender equality and equal citizenship – in the laws and constitutions of many countries as well as in international human rights documents — and the reality of women's lives.

This volume presents a collection of original works that examine this persisting inequality through the lens of citizenship. Distinguished scholars in law, political science, and women's studies investigate the many dimensions of women's equal citizenship, including constitutional citizenship, democratic citizenship, social citizenship, sexual and reproductive citizenship, and global citizenship. *Gender Equality* takes stock of the progress toward – and remaining impediments to – securing equal citizenship for women, develops strategies for pursuing that goal, and identifies new questions that will shape further inquiries.

Linda C. McClain is professor of law and Paul M. Siskind Research Scholar at Boston University School of Law. She is the author of *The Place of Families: Fostering Capacity, Equality, and Responsibility*, which was praised as "the most careful and comprehensive defense to date of the progressive liberal feminist position on the civic role of families." She is currently at work on a book on contemporary challenges over regulating civil society titled *Free and Equal Association*. McClain is a former faculty Fellow of the Harvard University Center for Ethics and the Professions.

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GENDER EQUALITY

Introduction

Joanna L. Grossman and Linda C. McClain

This book addresses a basic problem: a commitment to gender equality and to the equal citizenship of women and men features in the constitutional, statutory, and common law of many countries, as well as in international law and human rights instruments. Yet there remains a palpable and, in some cases, stark gap between formal commitments to the equal rights and responsibilities of men and women and against discrimination and subordination based on sex and the gendered realities of women's lives. Few would deny that women around the globe – and the societies in which they live – have made enormous progress toward the goals of gender equality and equal citizenship, but neither would most claim that those goals have been fully realized in life as well as in law. There continues to be ambivalence about and resistance to equality as well as legal, political, and social obstacles to attaining it.

This book takes stock of the progress toward and remaining impediments to the goals of securing gender equality and the equal citizenship of women and men. It develops strategies for securing such goals and identifies new questions, theories, and perspectives to help shape further inquiries about both gender equality and equal citizenship. It brings together an interdisciplinary group of distinguished scholars in law, political science, and women's studies to investigate several dimensions of women's equal citizenship.

Why use the language of equal citizenship to guide this inquiry about gender equality and the persistence of inequality? Why not simply talk about gender justice? Quite simply, citizenship remains the common language for expressing "the highest fulfillment of democratic and egalitarian aspiration."[1] Even more so, the term *equal citizenship* conveys a society's goals of equal status for all members of society and its ideals of inclusion, membership, and belonging.[2] In his classic work on the evolution of modern citizenship, sociologist T. H. Marshall referred to "an image of an ideal citizenship against which achievements can be measured and towards which

[1] Linda Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* (Princeton, NJ: Princeton University Press, 2006), at 1.

[2] On the importance of "belonging," see Kenneth L. Karst, *Belonging to America: Equal Citizenship and the Constitution* (New Haven, CT: Yale University Press, 1998).

aspirations can be measured."[3] Many decades after Marshall's famous exposition, "political and legal thought today are suffused with talk of citizenship."[4] Even as feminist scholars have criticized the limits of his categories of citizenship rights – civil, political, and social – and suggested that debates over citizenship are in a "post-Marshallian age," they continue to find useful the notion that citizenship "acts as a yardstick against which progress can be measured."[5] Our book is written in this spirit of assessment and aspiration.

Both gender equality and equal citizenship – indeed, citizenship itself – are fundamental *and* contested concepts.[6] On the one hand, they are both fundamental terms in law and in politics in many contemporary societies, but on the other, their meaning, scope, and the proper ways in which to secure them are the subject of dispute. One common understanding of gender equality is gender neutrality or equal treatment (for example, treating like cases alike). Yet ample feminist criticism has illuminated that formal equality may be necessary, but not sufficient, for women achieving a more substantive kind of equality – for example, one that accounts for gender difference and the relics of past discrimination. When gender-neutral laws replace a gendered legal regime, such gendered laws leave their traces. Gender-neutral law may have a gendered impact and fail to address structural obstacles to substantive equality and equal citizenship.

So, too, citizenship is a concept with multiple and contested meanings. Speaking about citizenship as membership may intend, for example, to distinguish *citizens* from *aliens*, and to look at political boundaries and who does and does not have the formal status of citizenship in a particular nation-state.[7] Discussions of citizenship instead may intend an "inward-looking" focus, comparing the relative status of, and relations among, "presumed" members of a society.[8] The rhetoric of "second-class citizenship" often serves to indict the gap between the ideal of full citizenship and the reality of unequal citizenship for certain groups in society. Undeniably, the ideal of citizenship – accompanied by the indictment of second-class citizenship – has been a lodestar in women's struggle for rights in the United States and elsewhere.[9] In this volume, we employ the notion of *equal citizenship* as a standard that encompasses not only formal citizenship in a particular bounded place, but also a more substantive, or aspirational, conception of citizenship. This conception includes the complete rights, benefits, duties, and obligations that members of any society expect to share and aspires to goals of inclusion, belonging, participation, and civic membership.

3 T. H. Marshall, *Citizenship and Social Class* (Cambridge: Cambridge University Press, 1950), at 29.

4 Bosniak, *Citizen and the Alien*, at 1.

5 Barbara Hobson and Ruth Lister, "Citizenship," in Barbara Hobson et al., eds., *Contested Concepts in Gender and Social Politics* (Northampton, MA: Edward Elgar, 2002), at 36; see also Ruth Lister, *Citizenship: Feminist Perspectives*, 2nd ed. (New York: New York University Press, 2003).

6 For an illuminating comparative look at "citizenship" as a contested concept, see Hobson and Lister, "Citizenship," at 23–54.

7 Bosniak, *The Citizen and the Alien*, at 1–2.

8 Ibid. (distinguishing "boundary-focused citizenship" from an "inward-looking framework.")

9 Lister, *Citizenship*, at 5.

What, then, follows if gender equality and the equal citizenship of women are common political and constitutional values? We identify several dimensions of equal citizenship including constitutional citizenship, democratic citizenship, social citizenship, sexual and reproductive citizenship, and global citizenship. This method reveals the multiple factors that shape status and standing in society and foster or impede the ability of persons to fully participate in society.

Given citizenship's potential for exclusion as well as inclusion, we stress at the outset that certain guarantees of gender equality are not confined only to citizens, but apply more broadly to persons within a territory. This volume examines the import of those commitments. At the same time, the volume also explores the rights and obligations of citizenship in specific national contexts. One such context is gender equality and equal citizenship within the United States and strategies for securing them. We also include comparative examination of the United States and other nations and look at citizenship struggles in a number of countries. Moreover, this volume also addresses the increasingly relevant concept of global citizenship. By this, we intend not only the impact of globalization on national citizenship, but also how international law and international human rights norms about sex equality cross national borders and provide benchmarks for advocacy efforts by women's groups and international organizations.

In the remainder of this introduction, we elaborate on our contention that gender inequality persists and that assessing progress made toward and obstacles remaining to the goals of gender equality and equal citizenship, and offering strategies to reach those goals, is an important project. We then explicate our use of the concept of equal citizenship as a framework and yardstick for guiding that investigation. In doing so, we situate our project in the broader debate about the strengths and weaknesses of the concept of citizenship to express ideals of equality, inclusion, and belonging. We then identify the several dimensions of citizenship that our contributors explore.

The Persistence of Gender Inequality

If our project invites the question, why *citizenship*, so, too, might it invite the question, why *gender* equality, or even, why *gender*? The recent election of Senator Barack Obama as the first African-American president of the United States – alongside the near-success of Senator Hillary Clinton in gaining the Democratic nomination and the selection of Governor Sarah Palin as a vice-presidential candidate on the Republican ticket – prompted commentary about whether the United States had finally arrived at a post-race and post-gender society in which it could close "a chapter in American history."[10] This volume is predicated on the belief that gender, like race, remains a salient category in society, politics, and law.

[10] A comment to this effect about the significance of the election was made, e.g., by William Bennett in election night media coverage: "I hope it closes a chapter in American history. The great stain. Obviously you don't change American history. The notion that some people say, well, if you're born black in this country there's just things you're limited from doing, this is the biggest job of all. Think

Citizenship itself, as historical research readily reveals, has always been a "deeply gendered" concept, bound up with the exclusion of women as full citizens.[11] Even today, as national constitutions and statutes and international human rights documents declare the formal equality of men and women and the language of citizenship is increasingly gender-neutral, the gendered history of citizenship – its "gendered historical template"[12] – continues to shape the law and practice of citizenship. Focusing on gender helps to reveal these lingering effects of this earlier gendered law and the limits of formal gender equality. Defining citizenship as a "gendered keyword" in contemporary politics, feminist scholars Barbara Hobson and Ruth Lister speak of the need for a feminist project of "re-gendering citizenship" so that the yardstick it uses is no longer skewed in a way that favors a "false universalism created in a masculine image."[13]

Training a lens on gender equality as it relates to citizenship is productive because gender equality and difference remain at the center of contemporary legal challenges, policy debates, and governmental and public initiatives in the United States and around the globe. Gender equality can be affected by public initiatives, legal norms, institutional culture, and private conduct. A perennial debate is whether fundamental differences between men and women warrant different roles in public and private life and explain or justify economic, social, and political inequality. In some views, gender equality is an appropriate goal in the realm of political self-government and public life but an inappropriate one in the realm of the family and the rest of civil society. Women themselves differ over these issues. When sex equality becomes an official public value, one that government affirms and promotes, new challenges arise from the evident tension between this and other fundamental values such as freedom of religion. These conflicts present new challenges, as they seem to pit the quest for women's equality against an interest in preserving strong families, cultural integrity, and religious values, and even against women's own choices. Thus, gender inequality persists in basic institutions of civil society, such as the family, the workplace, educational entities, and public institutions, such as elected office. This persisting inequality leads many (including contributors to this volume) to conclude that major structural transformation is necessary to bring about women's full civic participation.

Struggles for equality, and the challenges they pose to existing frameworks, are evident in the judicial, legislative, and executive arenas. Consider workplace discrimination as one example of such a contemporary gender struggle. If, as liberal political theorist Judith Shklar argued, the right to work, along with the right to vote, is a pillar of citizenship,[14] then this aspect of women's equal citizenship remains

of what you can say to children now. Every child of every race." "Awaiting America's Decision," *The Situation Room*, Nov. 4, 2008.

[11] Lister, *Citizenship*, at 1; see also Stephen T. Leonard and Joan C. Tronto, "The Genders of Citizenship," 101 *Am. Polit. Sci. Rev.* 33 (2007).

[12] Hobson and Lister, "Citizenship," at 24.

[13] Ibid., at 36.

[14] See Judith N. Shklar, *American Citizenship: The Quest for Inclusion* (Cambridge, MA: Harvard University Press, 1991).

elusive for many women. The U.S. Supreme Court has taken on basic issues of gender equality in the employment discrimination context in several recent cases, reflecting the continuing prevalence of sexual harassment, wage discrimination, and retaliation against women who try to enforce their statutory rights. Sometimes, the Court's interpretations of antidiscrimination laws themselves exacerbate the underlying problem of inequality, as when the Court, in the recent case of *Ledbetter v. Goodyear Tire & Rubber Co.*, interpreted the statute of limitations for pay discrimination in a way that foreclosed a discriminatory wage claim brought by a woman who had experienced years of unequal pay.[15] This led Justice Ruth Bader Ginsburg, a chief architect of the successful equal protection challenges brought in the 1970s to sex-based laws, to take the fairly unusual step of reading an oral dissent, in which she both indicated that it was now up to Congress to act to counter the Court's erroneous ruling and spoke directly to the female workers whose quest for equality would be harmed by the Court's ruling.[16] The ruling in *Ledbetter* triggered the introduction of fair pay legislation in Congress to overturn the Court's ruling, which was the first bill Obama signed into law as president.[17] Obama linked the bill to America's "founding principles" about equality and the pursuit of happiness, as well as to the need for just laws that help people "make a living and care for their families and achieve their goals."[18] He has also pledged to support other measures designed to improve workplace equality for women.[19]

Work-family, or work-life, conflict provides a second example of gender's continuing relevance. While men's participation in family caregiving and housework has increased, a stark gender gap remains. The Court, in upholding the Family and Medical Leave Act against a state sovereign immunity challenge, observed that "stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men," resulting in a "self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver" and often led employers to deny men accommodation offered to women.[20] Other biological and social differences between men and women also reinforce inequality. In effect, work-family conflict remains, in the United States and elsewhere, if not a "woman's problem," then a problem with particular impact on women.

[15] *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).

[16] Oral opinion of Justice Ginsburg at 4:25, *Ledbetter*, at 2162, available at http://www.oyez.org.cases/2000–2009/2006/2006_05_1074/opinion (accessed April 9, 2009) ("Initially, you may not know that men are receiving more for substantially similar work. . . . If you sue, only when the pay disparity becomes steady and large enough to enable you to mount a winnable case, you will be cut off at the Court's threshold for suing too late.").

[17] Lilly Ledbetter Fair Pay Act of 2009, 111 P.L. 2; 123 Stat. 5 (signed Jan. 29, 2009).

[18] The White House Blog, http://www.whitehouse.gov/blog_post/AWonderfulDay/ (Jan. 29, 2009).

[19] Barack Obama, *Change We Can Believe In: Barack Obama's Plan to Renew America's Promise* (New York: Three Rivers Press, 2008), at 165 (noting support for an increase in the minimum wage and paid family leave).

[20] *Nevada Department of Resources v. Hibbs*, 538 U.S. 721 (2003).

Political representation is a third example of persistent gender inequality. Though gender issues of this sort span the globe, the events and campaigns of the 2008 United States presidential election provide a vivid and instructive illustration. Clinton's bid for the Democratic nomination, while ultimately unsuccessful, reenergized feminists and caused many people to grapple with the role of gender in politics and as an aspect of leadership. The battle between Clinton and Obama for women's votes also reopened debates about essentialism and revealed divides among women on the basis of other, often complicated identity categories. Explaining the disappointment, and even anger that some women felt when Clinton lost the nomination to Obama, Susan Faludi wrote of "second place citizens" and the frustration that 88 years after women's suffrage advocates secured the right to vote, women still hit the glass ceiling in reaching the highest political office.[21] At the same time, women's votes ultimately clinched Obama's victory, as many of them perceived him to speak directly to their economic concerns.[22] The problem of political representation and of ambivalence about women in positions of political power is pervasive: women are underrepresented in the law-making bodies of the world's states. There is still a "political empowerment gap" between men and women, measured in terms of "political decision-making at the highest levels."[23]

Reproductive rights serve as our final example of the continuing struggles over gender equality. Despite national and international declarations about such rights, such rights remain controversial and fragile. For example, in 1992, the Court, in *Planned Parenthood v. Casey*, which affirmed women's constitutional right to decide whether to terminate a pregnancy within certain constraints, observed that the "ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."[24] Yet, in 2007, in *Gonzales v. Carhart*, the Court upheld the Federal Partial Birth Abortion Ban Act, even without an exception for women's health. It adopted a paternalistic view of women's decision-making capacity, drawing on unsubstantiated claims about how women's maternal nature causes them to regret their decisions to end a pregnancy and how doctors might withhold information from them about the procedure.[25] In a strongly worded dissent, Justice Ginsburg reminded the Court of its prior acknowledgment of the centrality of reproductive decision making to women's

[21] Susan Faludi, "Second-Place Citizens," *New York Times*, Aug. 26, 2008, at A1. Some commentators, though, have argued that Obama is a "unisex" president, incorporating a "feminine" managerial style that emphasizes communication, inclusion, consensus, and collegiality. Frank Rudy Cooper, "Our First Unisex President?: Black Masculinity and Obama's Feminine Side, 86 *Denv. L. Rev.* 633 (2009) (reviewing news stories).

[22] Institute for Women's Policy Research, "Women's Vote Clinches Election Victory: 8 Million More Women Than Men Voted for Obama; Gender Gap Large in Key Battleground States Where African American Women Make Their Voices Heard," PR Newswire, Nov. 6, 2008.

[23] Richard Hausmann et al., *The Global Gender Gap Report* (World Economic Forum, 2008), at 4.

[24] 505 U.S. 833, 856 (1992).

[25] *Gonzales v. Carhart*, 550 U.S. 124, 159–60 (2007).

"dignity and autonomy," "personhood," "destiny," and equal participation in the nation, while criticizing the Court's acceptance of the "antiabortion shibboleth" about women's "fragile emotional state" reflecting "long-discredited" "notions about women's place in the family and under the Constitution."[26] Legal scholar Reva Siegel warns that the use of this "woman-protective argument," relying on stereotypes about women's capacity and maternal nature, to justify abortion restrictions is spreading.[27] Beyond abortion rights, other aspects of reproduction – such as unequal access to contraception and fertility treatments, pregnancy discrimination, and workplace discrimination against mothers – also pose challenges to women's equality.

Persistent gender gaps in gender equality are reflected not only in U.S. legal challenges, but in international human rights initiatives and reports. The United Nations, which includes advancing women's equality among its Millenium Development Goals, issued a 2007 report identifying gender inequality in the domains of the household, the workplace, and the political sphere as a persisting problem and contended that fostering gender equality in these three arenas would yield a "double dividend" in terms of improving the lives of women *and* of children.[28] This report echoed, and built on, previous gender and development reports on problems of sex inequality such as women's disproportionate poverty, their disproportionate contribution of work in the home, unequal bargaining power between husbands and wives in the home, the toll of domestic violence on women and their children, and the lesser investment in female than in male children. Likewise, similar conclusions were reached by the most recent Global Gender Gap Report, issued by the World Economic Forum, which seeks to quantify "the magnitude of gender-based disparities" and to design measures to promote gender parity. The report found, for example, a persistent gap between women and men in "economic participation," as well as in "political empowerment."[29]

These examples of the salience of gender show the importance of continuing to document instances of gender inequality and to theorize about how to address them.

The Citizenship Framework

Equal citizenship provides the framework – or yardstick[30] – that guides this volume's inquiry about gender equality. A conventional conception of citizenship is of one's formal (or technical) status within a bounded nation state: "the legal recognition, both domestic and international, that a person is a member, native-born or

[26] *Carhart*, at 183–86 (Ginsburg, J. dissenting).

[27] Reva B. Siegel, "The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions," 2007 *U. Ill. L. Rev.* 991.

[28] United Nations Children's Fund, *The State of the World's Children 2007: Women and Children – The Double Dividend of Gender Equality* (New York: UNICEF, 2006), available at http://www.unicef.org/ (accessed April 9, 2009).

[29] Hausmann et al., *Global Gender Gap Report*, at v, 4, 7.

[30] Hobson and Lister, "Citizenship," at 36.

naturalized, of a state."[31] But what does the status of member entail? Marshall, for example, defines citizenship as "a status bestowed on those who are full members of a community. All who possess the status are equal with respect to the rights and duties with which the status is endowed."[32] This reference to "full" membership provides an opening to investigate not just formal assertions of equal status but also more substantive questions about whether community members truly have the same rights and opportunities, or participate on equal terms. "Equal citizenship," according to Linda Bosniak, "is understood to entail enjoyment of various kinds of rights – civil rights, political rights, social rights, and cultural rights – . . . rights [all] described in the language of citizenship."[33]

The notion of second-class citizenship illustrates the disaggregation between citizenship as a formal status and citizenship as entailing more substantive rights and a broad principle of inclusion.[34] The rhetoric of avoiding second-class citizenship featured centrally in the struggles for women's rights and in other battles to extend such rights and recognition. It continues to animate courts and policy makers. In the majority opinion in *United States v. Virginia*, Justice Ginsburg tapped into the language of citizenship to frame the harm of the Virginia Military Institute's long-standing male-only admissions policy: "neither federal nor state government acts compatibly with equal protection when a law or official policy denies to women, simply because they are women, full citizenship stature – equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities."[35]

It is useful, when considering citizenship as a nonunitary, evolving concept, to return to Marshall's formulation of citizenship, which continues to shape the modern citizenship framework. Marshall divided citizenship into three parts:

> *Civil, political and social.* The civil element is composed of the rights necessary for individual freedom – liberty of the person, freedom of speech, thought and faith, the right to own property and to conclude valid contracts, and the right to justice. . . . By the political element I mean the right to participate in the exercise of political power, as a member of a body invested with political authority or as an elector of the members of such a body. . . . By the social element I mean the whole range from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilized being according to the standards prevailing in the society.[36]

[31] See Shklar, *American Citizenship*, at 4.
[32] See T. H. Marshall, *Class, Citizenship, and Social Development: Essays by T. H. Marshall* (Garden City, NY: Doubleday, 1964), at 84.
[33] Linda Bosniak, "Citizenship and Work," 27 *N.C. J. Int'l L. and Comm. Reg.* 497, 500 (2001–2002).
[34] Ibid.
[35] *United States v. Virginia*, 518 U.S. 515, 532 (1996).
[36] See Marshall, *Class, Citizenship, and Social Development*, at 71–72.

Marshall argued that these dimensions of citizenship develop sequentially – civil, then political, then social rights. This may not hold true in all contexts, but it is certainly the case that different aspects of citizenship do not necessarily develop in tandem with one another. The history of women's rights in the United States is a testament to the fact that groups can earn citizenship status, and even a subset of citizenship-based rights, while being deprived of others. Advocates for women's rights were repeatedly told by courts and policy makers that not all citizens were created equal – that women's unique physical characteristics and social role justified differential treatment in a wide range of areas despite their claims to equal citizenship.

This history illustrates what feminist citizenship scholars have called the "gendered historical template of citizenship."[37] Women (at least "free" women, who were not enslaved) were generally not denied the legal status of "citizen" solely on the basis of their sex in this country. However, women who married noncitizens were stripped of their citizenship until the passage of the Cable Act in 1922, while men suffered no similar deprivation.[38] Marriage had other dramatic effects on women's citizenship: married women were long deprived of civil law rights regarding property ownership and contract. All women were denied political rights such as suffrage – rights that we now understand to be essential components of full participation in society. American women obtained civil citizenship, in Marshall's terms, in part through the enactment of the married women's property acts which gradually removed the legal disabilities of coverture over the course of a century, as well as through and other legal developments.[39] Political citizenship came through the Nineteenth Amendment in 1920 and access to jury service later in the twentieth century.[40]

Programs such as mother's pensions and other public assistance for mothers and children might be viewed as a form of social rights; however, they were cast more as "welfare" (with the stigma that term has invoked) rather than as social insurance or an entitlement.[41] The quest for women's social citizenship through paid work began in earnest in the 1960s and 1970s, when women mobilized a right-to-work movement that brought down many formal barriers to entering the workplace.

37 Hobson and Lister, "Citizenship," at 24.

38 Linda Kerber, *No Constitutional Right to Be Ladies: Women and the Obligations of Citizenship* (New York: Hill and Wang, 1998), at 42 (pointing out that the act had "severe limitations" and "loopholes").

39 Under these principles, married women essentially had no *legal* identity. They thus were prohibited from owning property, including their own wages; entering into contracts; suing or being sued, and so on. See generally Richard H. Chused, "Married Women's Property Law: 1800–1850," 71 *Geo. L. J.* 1359 (1983).

40 See generally Reva Siegel, "She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family," 115 *Harv. L. Rev.* 947 (2001–2002). An equal right to jury service was not cemented until 1994, when the Supreme Court ruled that gender-based peremptory challenges violated the Equal Protection Clause. See *J.E.B. v. T.B.*, 511 U.S. 127 (1994).

41 Linda Gordon, *Pitied, But Not Entitled: Single Mothers and the History of Welfare* (New York: The Free Press, 1994), at 105–06, 181.

The same rolling pattern of women's rights and participation can be observed in other nations as well. Furthermore, as contributors to this volume elaborate, the struggle for realization of social citizenship continues. Marshall's focus, for example, on the working *man* did not contemplate such issues as accommodating pregnancy in the workplace, reconciling the demands of paid work with the responsibilities of caregiving, or conceptualizing social rights to address the universals of human dependency and vulnerability.[42]

This volume builds on and suggests the limitations of Marshall's framework. In doing so, it is informed by feminist literature on citizenship.[43] There has been a clear resurgence of interest in citizenship in recent years, but modern feminists are not of one mind on whether to rely on the citizenship framework to gauge women's progress toward equality or to argue for specific rights or protections.[44] Even though we embrace the citizenship framework, characteristic feminist criticisms warrant acknowledgment and are instructive.

Many feminists have been wary of the citizenship framework because citizenship itself is such a gendered concept. Our brief review of women's rights struggles in the United States confirms that citizenship was contoured differently and unequally for them. The ideal of the good citizen itself has a gendered history. The ideal male citizen and the ideal female citizen were not one and the same; each aspired, or was held, to a different set of expectations.[45] The gendered citizenship ideals persist today. As Stephen Leonard and Joan Tronto observe, "the quality of our democracy will depend on which of the *genders* of citizenship we choose for ourselves and expect of each other."[46]

A persistent feminist critique of citizenship is that to the extent citizenship embodies not just a bundle of rights, but a series of expectations and preconditions, those expectations are less likely to be met by women than by men.[47] Judith Shklar has argued that citizens are individuals who vote and earn. Yet women, despite retaining formal citizenship status, were long deprived suffrage and continue to have unequal access to paid work. Although the gendered aspects of citizenship have certainly dissipated somewhat, current notions of citizenship arguably continue to frame aspirations and ideals about the prototypical man who, among other characteristics, engages in paid, rather than unpaid, work. Moreover, a frame that focuses on the right to earn and to vote as pillars of citizenship leaves out a vital domain of human life explored in this volume: family.[48]

In emphasizing independence and self-sufficiency, this traditional frame diverts attention from dependency and vulnerability. The gendered allocation of care work

[42] See Joanna Grossman, Chapter 10, and Martha Fineman, Chapter 11.

[43] E.g., Lister, *Citizenship: Feminist Perspectives*; Hobson and Lister, "Citizenship"; Marilyn Friedman, ed., *Women and Citizenship* (Oxford: Oxford University Press, 2005).

[44] Lister, *Citizenship: Feminist Perspectives*, discusses some of these feminist criticisms.

[45] See, e.g., Leonard and Tronto, "Genders of Citizenship."

[46] See ibid., at 44.

[47] Shklar, *American Citizenship*.

[48] See contribution by Mary Lyndon Shanley, Chapter 15.

poses the same problem for the citizenship framework as it does in many other contexts: less value is placed on the work done disproportionately by women. Thus, an extensive feminist literature in the United States and elsewhere has argued for developing the notion of the citizen carer, to highlight that "citizens are both wage workers and unpaid carers, and that policies and social rights should therefore address both dimensions."[49] Joan Tronto urges a definition of citizenship that speaks of "care as the work of citizens," and of citizens as "engaged in relationships of care with one another."[50] But this shift to the citizen carer itself invites complex feminist interrogation about whether the care recipient will not be perceived as a citizen.[51]

Another recurring feminist critique of citizenship is its privileging of the public sphere to the exclusion of the private sphere and its narrow focus on public acts of citizenship to the exclusion of other arenas for the practice of citizenship. As Alison Jaggar explains, "throughout Western history, citizenship has been gendered masculine. . . . The activities regarded as characteristic of citizens – fighting, governing, buying and selling property, and eventually working for wages – have all been viewed as masculine, as have been the social locations where these activities are undertaken."[52] By contrast, "although the activities carried out in the private sphere have always been recognized as indispensable to the reproduction of human life, they have typically been viewed as closer to nature, less fully human, and so less valuable than the activities that distinguish citizenship."[53]

Rather than abandoning the concept of citizenship, feminists have made efforts to rechart the terrain by expanding understanding of the activities, practices, and locations of citizenship, for example, women's activities in civil society.[54] While we agree with Jaggar that an "undue emphasis on" women's engagement in civil society may draw attention away from the importance of women's empowerment in formal politics, we support this recharting to expand understandings of the locations and practices of citizenship.

Finally, feminist criticism of citizenship's gendered history reminds us that when contemporary models of citizenship find expression in gender-neutral language, this does not signal the irrelevance of gender to citizenship. Formerly gendered laws leave their traces, as several contributors in this volume explain.[55] Moreover, critiques of an evidently gender-neutral standard cogently warn that models of

[49] This term and a useful literature summary are found in Arnlaug Leira and Chiara Saraceno, "Care: Actors, Relationships and Contexts," in Hobson et al., *Contested Concepts*, at 55, 71.

[50] Joan Tronto, "Care as the Work of Citizens: A Modest Proposal," in Friedman, *Women and Citizenship*, at 130, 131.

[51] See contribution by Nancy Hirschmann, Chapter 7.

[52] Alison M. Jaggar, "Arenas of Citizenship: Civil Society, the State, and the Global Order," in Friedman, *Women and Citizenship*, at 91.

[53] Ibid.

[54] Ibid. Jaggar expresses wariness that this focus on civil society may encourage turning away from formal politics.

[55] See Kerry Abrams, Chapter 2.

citizenship should reflect men's and women's experiences. They argue for a "gender-differentiated" model of citizenship, even as they worry that doing so may construct "sexually segregated norms of citizenship," with the connotation of different and unequal.[56] In essence, this reveals the continuing relevance of the sameness-difference debate within feminism and whether arguments for women's equality should appeal to their sameness to or their difference from men. For the reasons noted, we concur with feminist citizenship scholars who propose the need for a regendering of citizenship to make sure that gender-neutral language does not mask more subtle forms of exclusion or gender bias, but who caution of the need to avoid lapsing into essentialism. Helpful on this point is Iris Marion Young's distinction between *identity* and *social experience*: "people differently positioned in social structures have differing experiences and understandings of social relationships and the operations of the society because of their structural situation."[57] It is possible to talk about gender as contributing to women's group difference from men, and men's from women, without ascribing to women a unified identity.[58] Attention to the pertinence of gender can help in the project of regendering citizenship. Further, attention to other salient sources of difference such as religion, ethnicity, and sexual orientation may contribute to a more adequate model of citizenship. We believe that the rich contributions to this volume that elaborate various dimensions of citizenship in an array of contexts will contribute toward this project.

We now consider a possible objection to our employment of the citizenship framework: should the term *equal citizenship* in the broader aspirational sense we intend be avoided because citizenship is an "inherently exclusionary concept"[59] that reinforces the dichotomies between citizen and alien, or citizen and other? If citizenship is the basis for claiming rights, then noncitizens have even less of an opportunity to experience the benefits of a particular society or culture.

This is an important critique, but, for several reasons, we do not believe that it compels abandoning the citizenship framework. First, using the citizenship frame for this book's task of assessing and advancing gender equality is faithful to the historical tradition of asserting citizenship-based rights in the struggle for gender equality. In the United States, early women's rights advocates relied on citizenship arguments to claim a broad range of rights. The advocates at Seneca Falls, the first

[56] Hobson and Lister, "Citizenship," at 37 (discussing the work of Kathleen Jones, "Citizenship in a Woman-Friendly Polity," 15 *Signs* 781 [1990]). Hobson and Lister discuss the feminist debate over gender-neutral versus gender-differentiated models of citizenship. Ibid., at 36–37. Chantal Mouffe argues for a "gender-pluralist" model, rather than a "bi-gendered" conception of citizenship that makes "sexual difference politically relevant" to citizenship's definition. Chantal Mouffe, "Feminism, Citizenship, and Radical Democratic Politics," in Judith Butler and Joan Wallach Scott, eds., *Feminists Theorize the Political* (New York: Routledge, 1992), at 369.

[57] Iris Marion Young, *Inclusion and Democracy* (Oxford: Oxford University Press, 2002), at 98.

[58] Ibid., at 99.

[59] See Jennifer Gordon and Robin Lenhardt, "Rethinking Work and Citizenship," 55 *UCLA L. Rev.* 1161, 1188–89 (2008).

women's rights convention held in 1848, based their entire platform on the idea that women were citizens and entitled to the same rights as men. Their demands were presented as a gender-neutral version of the Declaration of Independence, challenging men to explain why women, as citizens, should not be granted the full panoply of rights enjoyed by men. From the late nineteenth century until the 1970s, arguments for – and litigation over – a host of rights, such as jury service and equal employment opportunity, were similarly couched in citizenship terms.[60] The claim to full citizenship defined the early women's rights movement and continues to resonate today, as Justice Ginsburg's language from the *VMI* case, quoted previously, indicates. Our project reflects fidelity to that usage.

A second response to this critique is to offer a necessary clarification: gender equality, as a political and constitutional commitment, does not apply only to citizens. The constitutional guarantees of equal protection and antidiscrimination laws to which Justice Ginsburg refers apply to resident aliens as well as to citizens. Thus, this book's focus on gender equality as measured by the yardstick of equal citizenship does not intend to leave out persons territorially present in the United States.

Third, undeniably, there are "citizenship-related confusions" that ensue because of the tension between the boundary-focused (or external) versus more aspirational (or internal) conceptions of citizenship. But we concur with Linda Bosniak that, because citizenship is both a term "infused with enormous political and moral resonance" and one that continues to evolve, it need not be abandoned so long as we acknowledge these "inevitably" divided understandings.[61] Thus, sometimes this volume focuses expressly on formal citizenship, examining what nation-states ask of persons who become citizens and revealing the gendered ways in which immigration and naturalization law structure access to the formal status of citizen. But more often, it investigates equal citizenship in the more substantive or aspirational sense of full belonging, participation, and membership in society. Moreover, its focus on global citizenship looks beyond U.S. borders or any particular national borders to the instantiation of equality norms in international law.

Finally, one response to citizenship's potential for exclusion is to employ alternative terms or to find a more inclusive vocabulary of citizenship. Gretchen Ritter limits citizenship to one's formal legal status but uses *civic membership* to refer to the "broader political, legal, and social meanings that attach to one's place within the polity."[62] Judith Shklar speaks of "standing" to describe a similar range of rights and benefits.[63] Kenneth Karst uses the idea of "belonging" – an insistence that "the organized society treat each individual as a person, one who is worthy of respect, one

[60] See Joanna Grossman, "Women's Jury Service: Right of Citizenship of Privilege of Difference?," 46 *Stan. L. Rev.* 1115 (1994); see also Eleanor Flexner, *Century of Struggle: The Women's Rights Movement in the United States* (Cambridge, MA: Harvard University Press, 1972).

[61] Bosniak, *Citizen and the Alien*, at 120–21.

[62] See Gretchen Ritter, *The Constitution as Social Design: Gender and Civic Membership in the American Constitutional Order* (Stanford, CA: Stanford University Press, 2006), at 6.

[63] See Shklar, *American Citizenship*, at 2–3.

who 'belongs.'"[64] Bosniak suggests that eligibility for "citizenship-based" rights be based on territorial presence, rather than formal citizenship status.[65] Ayelet Shachar uses the term *citizenship* to connote a certain package of protections, independent of literal citizenship.[66] In effect, these scholars point to the idea of a multivariate measure of the degree to which individuals or groups are truly included or integrated into society, even as some shy away from the term *citizenship*. It is in this same spirit that we appeal to the notion of multiple dimensions of equal citizenship as a lens through which to assess gender equality.

Dimensions of Citizenship

We have explained why this book focuses both on gender equality and on equal citizenship. We now elaborate on the contribution a focus on dimensions of citizenship can make to taking stock of progress toward these goals and painting a nuanced picture of the gender landscape in the United States and around the globe. This book is organized around five important dimensions of women's equal citizenship: constitutional citizenship, democratic citizenship, social citizenship, sexual and reproductive citizenship, and global citizenship. The dimensions draw on Marshall's classifications, but adapt them to a contemporary study of gender inequality. Given that focus, constitutional citizenship warrants a separate category because of the increasing relevance of and reliance on constitutions and constitutional litigation to establish women's rights.[67] Likewise, while Marshall's typology did not extend to intimacy and reproductive life, we treat sexual and reproductive citizenship as a separate category. This is consistent with feminist efforts to expand the location and practices of citizenship and is also appropriate given the centrality of gender in laws regulating sexuality, marriage, and reproduction.

These different categories are a useful organizing device, but they are not meant to be independent of each other. This book illuminates how the various dimensions of citizenship overlap and shape each other. For example, constitutional equality norms not only define constitutional citizenship, but also shape women's opportunities for exercising other forms of citizenship. International human rights norms contribute toward a conception of global citizenship but also shape the exercise of democratic citizenship. Accommodating pregnant women in the workplace fosters their social citizenship, but also aids their reproductive and democratic citizenship. This book posits that together, the dimensions of citizenship provide a framework that enables

[64] Karst, *Belonging to America*, at 4.

[65] See Bosniak, *Citizen and the Alien*.

[66] Ayelet Shachar, "Privatizing Diversity: A Cautionary Tale From Religious Arbitration in Family Law," 9 *Theoretical Inquiries L.* 573 (2008).

[67] On the increasing importance of constitutional litigation to women's rights, see Beverley Baines and Ruth Rubio-Marin, eds., *The Gender of Constitutional Jurisprudence* (Cambridge: Cambridge University Press, 2005).

us to draw a nuanced picture of how well women fare against a standard that calls for equal participation in society. The many local, national, and international contexts examined in the volume's contributions offer readers instructive guidance about obstacles to equal citizenship and strategies for securing it.

Constitutional Citizenship

By the term *constitutional citizenship*, which includes some of what Marshall spoke of both as "civil" and "political" rights, we attend to the role that constitutions play in fostering women's equal citizenship and forbidding discrimination based on sex. Focusing on this dimension responds to what Beverley Baines and Ruth Rubio-Marin identify as a "gender gap" in contemporary comparative constitutional analysis – an inattention to matters of women's rights and the role of constitutions in fostering them.[68] Similarly, Helen Irving, in her recent book *Gender and the Constitution*, introduces the helpful idea of a "gender audit" of constitutions and the constitution-making process.[69]

Our contributors address a host of significant questions. Rogers Smith argues that questions of gender and constitutional citizenship have been at the margins of recent U.S. Supreme Court decisions involving discriminatory treatment based on sex. He explores the limits of constitutionalism as a means of securing gender equality and what role courts can and should play in the structural transformation needed to bring about women's substantive equality.[70] Kerry Abrams reminds us that one dimension of constitutional citizenship is Congress's power to regulate immigration and naturalization. She demonstrates that, although current immigration and naturalization law concerning how persons become citizens is stated in gender-neutral terms, that law still bears traces of its earlier gendered form.[71] In particular, family status and marriage serve a gatekeeping function in women's access to citizenship.

Other dimensions of constitutional citizenship include how a constitutional structure protects rights and enables civic membership. Gretchen Ritter explores how constitutional protection of civil society has both hindered and facilitated women's civic inclusion, focusing on controversies involving jury service and religion.[72] She urges contemporary proponents of equal citizenship to explore the potential of the Bill of Rights of the U.S. Constitution for a model of citizenship that is attentive to local and community-based aspects of democratic citizenship.

Religion and women's citizenship is also a focus of Beverley Baines's chapter. She examines how religious arbitration of family law matters sparked a recent

[68] Baines and Rubio-Marin, *Gender of Constitutional Jurisprudence*, at 2.
[69] Helen Irving, *Women and the Constitution: Equity and Agency in Comparative Constitutional Design* (Cambridge: Cambridge University Press, 2008).
[70] See Chapter 1.
[71] See Chapter 2.
[72] See Chapter 3.

controversy in Ontario, Canada, and how many Muslim women's organizations and other women's groups there mobilized because they believed their citizenship rights under the Canadian Charter of Rights and Freedoms faced a threat.[73] Unsatisfied with a simple dichotomy between religious and secular citizens, Baines asks if it is possible for women to identify *both* as feminist and religious and make, as it were, intersectional claims about their rights as citizens.

Mary Anne Case develops an analogy between religious and feminist fundamentalism to ask: if sex equality is a constitutional fundamental in the United States and many other constitutional democracies, then what implications follow for the obligations of government to affirm and promote it? She explores how these commitments and citizenship are at issue in the context of several recent controversies over bans on veiling in various Western European countries and in Turkey and the recent reported denial of citizenship by the French government to a Muslim woman on the rationale that her religious practices conflicted with French values of sex equality and *laïcité*.[74] Case urges that using the citizenship frame to discuss sex equality should not obscure that, when nations have fundamental commitments to such equality, they extend not only to citizens but to all persons.

Democratic Citizenship

Another dimension of equal citizenship is democratic, or political, self-government, captured in part by Marshall's category of "political rights." One criticism of traditional models of citizenship is its focus on practices and activities traditionally performed by men. Contributors assessing democratic citizenship and gender address such questions as: What gains have been made in fostering women's active participation in political deliberation and self-government? What forms does such participation take? What obstacles remain? Despite the revival of interest in questions of citizenship, Kathryn Abrams argues, one activity of citizenship – protest during wartime – has not received sufficient study. Looking at several examples of women and women's groups mobilizing anti-war protest in the United States, Israel, the former Yugoslavia, and Western Europe, she explores the complex performances or "rearticulation" of gendered citizenship found in such protests by women and women's groups.[75]

Examining the ongoing controversy over stem cell research, Nancy Hirschmann argues that this issue implicates not only women's reproductive rights but the equal citizenship of pregnant women and disabled women. Contrasting the treatment of pregnant women and persons with disabilities with the treatment of embryos and fetuses reveals the paradox that sometimes actual citizens are treated as less than

[73] See Chapter 4.
[74] See Chapter 5.
[75] See Chapter 6.

equal, while noncitizens are treated as virtual citizens, at the expense of actual citizens.[76]

One area in which a gender gap persists is women's political leadership. One strategy adopted in many nations to increase women's political participation is electoral gender quotas. Anne Peters and Stefan Suter assess this strategy, the domestic and international law bases for such quotas, the theories of representation on which quotas rest, and whether such gender-specific measures are justly criticized as discriminatory to men.[77] They evaluate the efficacy of such quotas and identify lingering obstacles to women's political participation. Gender quotas are also examined in Eileen McDonagh's comparative look at women's rates of public office-holding around the world, as she asks what accounts for the United States' low rates. Revisiting and expanding Marshall's categories of citizenship to include such conceptions as biological citizenship , she argues that adopting explicitly maternalist public policies contributes positively to women's political representation.[78]

Social Citizenship

Social citizenship, the particular focus of Marshall's classic essay, connotes social rights to the material preconditions for effective participation in society. It encompasses the economic security that Franklin Delano Roosevelt included in a "Second Bill of Rights." A persistent feminist criticism of accounts of social citizenship is that they often focus on paid work as the avenue to citizenship, leaving out the contribution to citizenship made by the family work of women. A different problem, Joanna Grossman argues, is second-class citizenship when pregnant women seek paid work but do not receive workplace accommodations. She offers an equal social citizenship-based model as an alternative to a discrimination model as a way to tackle the remaining obstacles pregnant women face in the workplace.[79] Martha Albertson Fineman contends that, despite decades of efforts organized around equality, substantive equality and social citizenship remain elusive. She proposes, as a strategy, new theoretical investigations that begin with gender as a door to a broader inquiry into how society addresses human vulnerability and how the allocation of privilege benefits certain institutions and persons and burdens others.[80] Martha McCluskey observes that, in the United States, social citizenship remains at the margins of plausible politics and fundamental constitutional rights and argues for a model of social citizenship that insists on the necessary connection among political, civil, and social rights. Using tax policy as an example, she reveals how gender ideology about the breadwinner-homemaker marriage undermines social citizenship.[81]

[76] See Chapter 7.
[77] See Chapter 8.
[78] See Chapter 9.
[79] See Chapter 10.
[80] See Chapter 11.
[81] See Chapter 12.

Sexual and Reproductive Citizenship

The category of sexual and reproductive citizenship is not in Marshall's typology, but invites examination of how matters of sexuality and reproduction bear on citizenship. Assertions that government has a vital interest in strong families and debates over marriage (particularly, same-sex marriage) and sex education have brought to the fore the more general question of government's interest in regulating sexuality and reproduction and the social institution of the family. Historically, the expected model of sexual citizenship is heterosexual marriage. At the same time, there has been an astonishing shift in recent decades toward beginning to include formerly excluded sexual subjects, such as gay men and lesbians, as equal citizens. In her chapter, Brenda Cossman explains that sexual citizenship connotes ways in which citizenship has always been sexed; belonging and inclusion depend upon adherence to an appropriate model of sexuality.[82] She ponders whether this shift toward inclusion portends greater sexual freedom, investigating how, increasingly, intimate life – and particularly marriage – features as a site of self-governance such that sexuality is a project for citizens to manage.[83] As sexual norms change, Maxine Eichner argues, critical examination of what norms should guide sexual citizenship is in order; the ongoing debate between feminist legal theory and various critical theories of sexuality (such as queer theory) proves a useful ground for generating such norms.[84]

Turning to reproductive citizenship, Mary Lyndon Shanley argues that the "right to family" should be a third pillar of citizenship – along with the right to vote and the right to work – and that such a framework could help address issues such as how infertility poses questions of social justice.[85] She examines how racial and economic inequality operate in tandem with gender inequality to shape reproduction in contemporary societies.[86] Barbara Stark details how reproduction, traditionally viewed as one of women's duties to the state, is the subject of many human rights protections. She considers governmental pro-natalist and anti-natalist policies in several countries, arguing that these international human rights commitments should constrain states from enacting policies that "reproduce" gender by perpetuating gendered stereotypes.[87]

Global Citizenship

Global citizenship is an increasingly relevant dimension of citizenship in an era of globalization. Such citizenship has many connotations. One notion is of a form of citizenship developed by the norms of equality, and the obligations of states to foster

[82] See Chapter 13.
[83] See Chapter 13.
[84] See Chapter 14.
[85] See Chapter 15.
[86] See Chapter 15.
[87] See Chapter 16.

such equality, embodied in international human rights treaties and international law. These human rights norms can then become a resource on which women's groups draw in their demands for equal citizenship under domestic law in such areas as reproductive freedom and protection against domestic violence. Another aspect is the impact of globalization on persons as they cross national boundaries. As Regina Austin details, globalization may lead to women living at borders and experiencing unequal citizenship because they lack the protection to which citizens should be entitled.[88] Through studying several documentary films about the murders of young women in Ciudad Juárez, she explores how, as persons attempt to take advantage of the economic opportunities of globalization, they may be at the margins of national citizenship where they may be vulnerable and lack protection.[89] Elizabeth Schneider elaborates the emergence of domestic violence as a human rights issue, indeed, a matter of global citizenship. She suggests how the notion of citizenship as belonging aptly captures the ways in which domestic violence impairs women's full participation in society.[90]

Anisseh Van Engeland-Nourai explores the problem of unequal citizenship that arises when a nation's constitution declares sex equality, but this guarantee is not enforced in practice because the constitution is to be read or interpreted in light of religious law that treats women and men differently in key spheres such as the family.[91] Using several Muslim countries as case studies, she examines how human rights norms, constitutional declarations of equality, and religious interpretation have shaped the efforts by Muslim women in various Islamic countries to challenge the most patriarchal interpretations of Islamic law and to secure equal rights by pursuing political, judicial, and juridical strategies.[92]

Finally, Deborah Weissman examines the conditions under which local grassroots groups of women may successfully deploy global human rights norms to address these and other problems, looking at women's activism in Ciudad Juárez, Cuba, and the Encuentros in Latin America.[93] The emergence of gender equality in human rights documents signals notable progress toward securing women's equality, she argues. By the same token, when a national government such as the United States intervenes militarily in another nation and invokes gender equality and women's human rights as a rationale, such invocations warrant close scrutiny to what other national interests are being advanced and at what cost for women's rights and human rights.[94]

[88] See Chapter 17.
[89] See ibid.
[90] See Chapter 18.
[91] See Chapter 19.
[92] See ibid.
[93] See Chapter 20.
[94] See ibid.

PART

I

CONSTITUTIONAL CITIZENSHIP AND GENDER

1

Gender at the Margins of Contemporary Constitutional Citizenship

Rogers M. Smith

One revealing fact about the subject of this chapter is that if we wish to focus on recent United States Supreme Court decisions that specifically address the relationship of gender to constitutional citizenship, there are very few cases to consider. If we leave aside related but distinguishable issues involving abortion rights and sexual orientation, the most discussed constitutional cases involving discriminatory treatment of women in the past decade are probably *United States v. Virginia*[1] and *United States v. Morrison*,[2] followed by a less famous but in some respects more pertinent case, *Nguyen v. INS*.[3] Feminist legal scholars have also been struck by the late Chief Justice William Rehnquist's surprisingly strong defense of the Family and Medical Leave Act of 1993 (FMLA) against an Eleventh Amendment challenge in *Nevada Department of Human Resources v. Hibbs*.[4]

In all these cases, questions of gender and constitutional citizenship were, in important respects, marginal issues, though in different ways in each case. In *United States v. Virginia* and *Nguyen*, issues of equal constitutional citizenship for women were explicitly at the center of the matters the Justices considered. But the contexts of the cases – a woman seeking admission to an all-male public military college, a man claiming citizenship who was born abroad to an unmarried citizen father and a noncitizen mother – were ones well outside the experiences of most Americans. Conversely, in *Morrison* and *Hibbs*, the problems presented – inadequate governmental protection of women against violence, unequal provision of paid leave for men and women under the FMLA – were crucial ones for the well-being of women. But none of the Justices who wrote opinions gave any substantial, explicit attention to issues of gender and equal constitutional citizenship. Beyond these decisions, such questions are even less detectable in most recent judicial constitutional discussions.

This dramatic marginality of the topic of gender and equal citizenship is what I wish to explore here. Perhaps alarmingly, my thesis is that it is in some ways

[1] *United States v. Virginia*, 518 U.S. 515 (1996).
[2] *United States v. Morrison*, 529 U.S. 598 (2000).
[3] *Nguyen v. INS*, 533 U.S. 53 (2001).
[4] *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003).

appropriate for gender and constitutional citizenship to be a marginal theme in Supreme Court decision making today because the most important tasks in restructuring American institutions to remove barriers to meaningfully equal citizenship for women and men now go far beyond the capacities and the legitimate authority of the judiciary when engaged in constitutional interpretation. Although the role of the courts in this area may be appropriately marginal, it should not be trivial. The courts do have a constitutional duty to pursue gender equality and civic equality to the very margins of their institutional competence. Even when it would be wrong for them to devise and mandate sweeping remedies, they should scrutinize more closely public policies and institutional arrangements that foster conditions in which women do not, on balance, have equal practical opportunities to be politically active citizens. Their rulings can then help highlight the most important tasks of civic restructuring that confront the rest of us. I believe too many recent decisions are instead focusing on the wrong issues in the wrong ways, failing to call attention to what, from the standpoint of constitutional citizenship, still needs to be done to realize gender equality in life as well as in law.

Recent Constitutional Decisions

Modern gender equal protection doctrine arose as part of the manifold efforts to combat diverse forms of second-class citizenship inspired by the modern civil rights movement. Ruth Bader Ginsburg was, of course, a major, perhaps *the* major, leader of struggles to overcome denials of equal citizenship to women via litigation, and she made those themes rhetorically central to her opinion for the Court in *United States v. Virginia*.[5] The case provided a suitable occasion for addressing citizenship because it considered whether women could be constitutionally excluded from the Virginia Military Institute (VMI), a public institution that takes as its "distinctive mission" the training of "citizen-soldiers" who will be leaders in military and civilian life.[6] Ginsburg ruled that VMI's gender exclusion was not substantially related to this goal as some women could benefit from the "adversative" education VMI provided. False judgments to the contrary, she wrote, had "attended, and impeded, women's progress toward full citizenship stature throughout our Nation's history."[7] But today, she observed, women "count as citizens in our American democracy equal in stature to men."[8] Therefore, "the Court has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship

[5] Philippa Strum, "Women and Citizenship: The Virginia Military Institute Case," in Sybil A. Schwarzenbach and Patricia Smith, eds., *Women and the United States Constitution: History, Interpretation, and Practice* (New York: Columbia University Press, 2003), at 335–46.

[6] *Virginia*, at 520.

[7] Ibid., at 544 n. 12.

[8] Ibid., at 545.

stature – equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities."[9]

Ginsburg's reasoning put the decision squarely in the line of civil rights cases and statutes that have, over time, invalidated a great variety of institutional exclusions that limited material opportunities and also symbolized inferior civic status.[10] The civic republican traditions that have played so great a role in defining the meaning of citizenship in America have often presented the full citizen as a citizen-soldier, someone who has been willing and able to make the ultimate sacrifice for the common good. Hence military service has long been a pathway to citizenship – but through most of U.S. history, not for women.[11] Ginsburg was on solid ground when she saw VMI's denial of access to preparation to become a citizen-soldier and civic leader as a denial of an opportunity to be recognized as a full and equal citizen, as defined by certain influential American conceptions of citizenship. It might seem, then, that there is nothing marginal about the issues of gender and constitutional citizenship in this case.

The reality is, however, that by the time of the VMI decision, all the U.S. military academies that actually feed directly into the military services (as VMI largely does not) had come to admit women.[12] After the Citadel in South Carolina changed its policy, VMI was left as the *only* remaining public military college that was exclusively male, and it was "one of the last remaining male bastions" among public and, indeed, private institutions generally.[13] Although VMI is an important institution in Virginia, and the Court was surely right to protect female opportunities in the case, the decision was essentially the final nail in a crowded coffin for male-only public colleges. However we assess its symbolic value, a point to which I will return, it had only a minor impact on the material circumstances and prospects of most American women.

In contrast, *United States v. Morrison* addressed an issue central to some highly adverse and all too material circumstances facing American women today. It concerned whether Congress had the constitutional power to enact Section 40302 of the Violence Against Women Act of 1994, which sought to create a "Federal civil rights cause of action for victims of crimes of violence motivated by gender."[14] They were to be empowered to sue for "compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate."[15] Like major portions of the 1964 Civil Rights Act, Congress based the Violence Against Women Act (VAWA) on congressional powers to regulate activities that substantially

9 Ibid., at 532.
10 Strum, "Women and Citizenship," at 337–40.
11 Linda L. Kerber, *No Constitutional Right to Be Ladies: Women and the Obligations of Citizenship* (New York: Hill and Wang, 1998), at 236–52.
12 *Virginia*, at 522, 544 n. 13.
13 Strum, "Women and Citizenship," at 340.
14 42 U.S.C. § 13981(a) (1994).
15 Ibid., § 13981(c).

affect interstate commerce, and it also invoked its authority to enforce equal protection violations under Section 5 of the Fourteenth Amendment. When seen in their broader political and historical contexts, both the 1964 Civil Rights Act and VAWA clearly sought to make the civic status of those they protected more secure as well as, and in part through, assisting their physical and economic well-being.[16] And at the height of the civil rights movement, the Court had little trouble upholding the 1964 Civil Rights Act.

But in 2000, Chief Justice William Rehnquist, writing for the Court, concluded that to read congressional commerce powers broadly enough to encompass noneconomic crimes against women along with economic activities would be to turn Congress into a national police power, something the Constitution did not provide.[17] He also held that even though "a voluminous congressional record" showed "pervasive bias in various state justice systems against victims of gender-motivated violence," this pattern did not permit Congress to create a new federal cause of civil actions against the individual perpetrators of gender violence across the nation.[18] The federal government did have power to act against officials in particular states who were guilty of failing to protect victims of such violence – but Section 40302 of VAWA was not addressed to such officials. Consequently, the Supreme Court voided that portion of the act, taking away a major instrument through which women could gain redress for economic and personal injuries that states were failing to remedy.

Substantively important as this decision was, it turned on arguments about federalism and the scope of congressional powers. Gender and constitutional citizenship receive no attention in any of the opinions in the case. Neither the government's brief nor that of the original petitioner, Christy Brzonkala, so much as mentioned citizenship.[19] Of the twenty-two other briefs in the case, only the amicus brief of the law's original sponsor, then-senator Joseph Biden, expressed explicit concern about combating women's "second-class citizenship." It did so only via a short, unelaborated quotation from testimony given by Helen R. Neuborne, formerly deputy director of the NOW Legal Defense and Education Fund, during Senate hearings on the bill.[20]

Perhaps in consequence, the Court's language and reasoning reflected "resistance to the 'public' nature of the problem, to the link between violence and liberty, violence and autonomy, violence and women's full participation and citizenship," as Elizabeth Schneider has argued elsewhere and in this volume.[21] Despite their

[16] Peggy Cooper Davis, "Women, Bondage, and the Reconstructed Constitution," in Schwarzenbach and Smith, *Women and the United States Constitution*, at 53–69.

[17] *Morrison*, at 617–18.

[18] Ibid., at 619.

[19] Ibid., nos. 99–5, 99–29 (Brief for the United States), nos. 99–5, 99–29 (Brief for Petitioner Christy Brzonkala).

[20] Ibid., nos. 99–5, 99–29.

[21] Elizabeth M. Schneider, "Battered Women, Feminist Lawmaking, Privacy, and Equality," in Schwarzenbach and Smith, *Women and the United States Constitution*, at 214. See also Chapter 18.

strengths, neither of the dissents by Justices David Souter and Stephen Breyer gave any attention to the ways the act sought to combat behavior that had long contributed to women's subordination in their civic roles as well as in many other regards. This decision, then, is perhaps the most consequential, and adversely consequential, of recent Supreme Court cases concerning women, but it is one in which gender and citizenship are at the margins of analysis and, indeed, must be interpolated by readers if those themes are to be part of the case discussion at all.

In the third pertinent recent Supreme Court decision, *Nguyen v. INS*, citizenship and gender are certainly front and center, both in the majority opinion by Justice Anthony Kennedy and in Justice Sandra Day O'Connor's blistering dissent. The case arose because while working for a corporation in Saigon, a U.S. citizen, Joseph Boulais, fathered a child, Tuan Anh Nguyen, with a Vietnamese woman, whom he did not marry. When the boy was six, Boulais brought him to Texas and raised him to adulthood. But at age twenty-two, Nguyen was convicted of sexual assault on a minor, and the Immigration and Naturalization Service (INS) initiated deportation proceedings. Nguyen subsequently claimed that he was a U.S. citizen, exempt from deportation. He acknowledged that his father had not done all that federal statutes require to obtain citizenship for children situated like himself, but he and his father challenged the constitutionality of 8 U.S.C. § 1409, which sets out the conditions under which a person born out of wedlock to one citizen parent and one noncitizen parent can gain American citizenship.

Specifically, they raised a gender equal protection challenge to the differential treatment of women and men under Section 1409. When the father is the citizen parent, Section 1409(a) requires that the blood relationship be established by "clear and convincing evidence," and while the child is under eighteen, the relationship must be legitimated under the law of the child's place of residence, or the father must acknowledge paternity in writing under oath, or the paternity must be established by adjudication of a competent court. In contrast, if the mother is the citizen parent, Section 1409(c) provides that the child is automatically a U.S. citizen, so long as the mother has previously been physically present in the United States or one of its possessions for a continuous year.[22]

Clearly these provisions treat male and female citizens differently. The Court found, however, that this differential treatment met its doctrinal demand that such distinctions be "substantially related" to "important governmental interests." The two governmental interests discerned by Justice Kennedy were, first, "assuring that a biological parent-child relationship exists,"[23] presumably so that birthright citizenship might not be inaccurately awarded. In this regard, Kennedy argued, fathers and mothers are "not similarly situated": a birth certificate signed by witnesses to the physical birth confirms who a child's mother is, whereas the putative father might not even be present or, if present, might still not actually be the biological father.[24]

[22] *Nguyen*, at 56–60.
[23] Ibid., at 62.
[24] Ibid., at 62–63.

Therefore asking more for proof of paternity than maternity in such cases seemed reasonable.

Kennedy defined the second governmental interest as ensuring "that the child and the citizen parent have some demonstrated opportunity or potential to develop not just a relationship that is recognized, as a formal matter, by the law, but one that consists of the real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States."[25] For the mother, that opportunity could be presumed to come at birth. For the father, who again might be absent from the birth, some further demonstration that such an opportunity existed at some time could legitimately be required. In Kennedy's view, the government could rightly treat assurances that there was once an opportunity for a real, continuing relationship as a substantial contribution to the important goal of having citizens feel an attachment to their country.

Justice O'Connor's dissent contended that it was not enough to show that men and women were not similarly situated in regard to the birth process. To uphold the gender discrimination, the government had to show that the discrimination itself substantially advanced important governmental interests that could not be so readily achieved through gender-neutral policies.[26] She thought the government had failed to meet this burden. Given the unreliability of documentation, it could have required all citizen parents, male or female, to prove their parental status via DNA tests. Or it could have extended citizenship to the children of all citizen parents whose parental status and presence at the birth were attested to on a valid birth certificate – as is often true of fathers and not always true of mothers.[27] And in regard to the state interest in demanding proof of merely the "opportunity" for an actual relationship, an interest that Justice O'Connor regarded as Justice Kennedy's invention, she noted that the government might more sensibly require parents of either sex to show that they had had some real contact with the child over a period of time.[28] She insisted that neither the government nor the majority of the Court had shown why the discriminatory provisions furthered the stated governmental interests *better* than gender-neutral approaches.

O'Connor contended that the provisions instead were "paradigmatic of a historic regime that left women with responsibility, and freed men from responsibility, for nonmarital children." It reflected and thereby reinforced stereotypes "that mothers must care for these children and fathers may ignore them."[29] By structuring the capacity to transmit citizenship in these gendered terms, the statute built into the law the expectation that mothers would normally be responsible for their children and fathers frequently would not, especially in the cases of children born outside of marriage – an expectation likely to perpetuate arrangements that

[25] Ibid., at 64–65.
[26] Ibid., at 75 (O'Connor, J., dissenting).
[27] Ibid., at 81–82.
[28] Ibid., at 84, 89.
[29] Ibid., at 92.

disproportionately burdened women and thereby limited their opportunities for equal citizenship.

Here, then, is a case in which issues of gender and constitutional citizenship are at the very heart of what is in question. Yet central as our topic is to this decision, the case itself involves circumstances that are rare. Times have changed in many ways, but it remains true that in relation to the U.S. population, only a tiny number of people have been born out of wedlock to citizen fathers overseas. Although the U.S. Census lacks reliable data on this topic, the advocacy group American Citizens Abroad estimates that in the 1990s, roughly 45,000 children a year were born overseas to a U.S. citizen parent, and only 10 percent of those, or 4,500 a year, fell into categories in which, like Tuan Anh Nguyen, they did not automatically receive citizenship at birth. An unknown subset of those 4,500 children were children born out of wedlock to an American father.[30] Whatever the precise numbers, in a nation of over 300 million people, these births undeniably represent a demographically minor phenomenon. Although the denial of citizenship to those affected is a significant concern, most American women and most forms of gender inequality have not been affected by this ruling one way or another. Add in the fact that, like so many modern gender equal protection cases, the case involves a challenge by males against a statutory discrimination that they reasonably perceive as working against them, however much it may also perpetuate constraining stereotypes about women, and again, this is a decision that seems marginal in its implications for achieving equal constitutional citizenship for women.

Nevada Department of Human Resources v. Hibbs is, in many respects, a heartening counterpoint to *United States v. Morrison* in that it upheld federal power to address economic conditions vital to the practical realization of gender equality. But although Chief Justice Rehnquist, in his last opinion addressing sex discrimination, wrote with far more sensitivity to state failures to protect women's rights than he had just three years before, he still did not explicitly connect the issues at hand with constitutional citizenship. That topic receives only one scant mention in any of the opinions of the case, in Justice Kennedy's dissent.

William Hibbs had taken leave from the Nevada Department of Human Resource's Welfare Division to care for his wife after she had suffered neck injuries in an automobile accident. The department eventually contended that he had exhausted his leave under the FMLA and had to return to work or be terminated. Disagreeing, Hibbs sued the agency for violating the FMLA, arguing that, exercising its powers under Section 5 of the Fourteenth Amendment, Congress had overridden the state's Eleventh Amendment immunity against suits brought by its own citizens. The Court had previously ruled that Congress could abrogate the Eleventh

[30] Andy Sundberg, *Overseas American Demographics: Estimates Based on Data From U.S. Department of State, U.S. Department of Commerce, OECD* (Geneva, Switzerland: American Citizens Abroad, 2007) (on file with author); see Andy Sundberg, "ACA Believes That All U.S. Citizens Deserve the Same Human Rights Under the Laws of the United States, No Matter Where They Live," American Citizens Abroad, available at http://www.aca.ch/ (accessed Nov. 15, 2008).

Amendment[31] so long as it was exercising legitimate Section 5 powers (though it could not do so as an exercise of its authority over interstate commerce).

Chief Justice Rehnquist held that the clear congressional intent to abrogate the Eleventh Amendment via the FMLA was valid because Section 5 powers include authority to pass "prophylactic" laws deterring unconstitutional conduct. He believed that Congress had found solid evidence that prior to the FMLA, states had continued "to rely on invalid gender stereotypes in the employment context, specifically in the administration of leave benefits."[32] States often adopted policies that permitted women, but not men, to have more leave than was medically required, out of the belief that care for children, elderly parents, or ailing relatives was fundamentally "women's work."[33] The act therefore gave all state citizens the right to sue their state if they believed that its agencies were perpetuating such unconstitutional discrimination.

Justice Kennedy, joined in dissent by Justices Scalia and Thomas, found the evidence that states discriminated in the provision of family leave insufficient to "support the charge that a State has engaged in a practice designed to deny its citizens the equal protection of the laws."[34] It is likely that Kennedy was not in fact particularly focused on the equal protection implications for *citizens* per se, and that he could as easily have written that states had not sought to deny "persons" equal protection. In any case, other than that single reference, none of the opinions in *Hibbs* related the issues of gender equality to constitutional citizenship, apart from the substantively unrelated question of when state citizens can constitutionally sue their own state governments.

In a perceptive analysis of Chief Justice Rehnquist's "new approach" to pregnancy discrimination in the *Hibbs* case, Reva Siegel repeatedly invokes "the equal citizenship principle" to clarify his holding.[35] She does not define that principle, but she does stress that the "practices of sexual differentiation" understood to violate it "have evolved over time" and that Rehnquist came to recognize this historical shift.[36] In particular, he saw that policies that presumed that the father had primary responsibility to provide outside income, while women were the "center of home and family life," could operate as unjust "artificial constraints" on women's opportunities. Siegel's invocation of the equal citizenship principle implies, reasonably enough, that those opportunities include arrangements that allow women to be equally active, politically effective citizens. And it is also reasonable to suggest that such considerations might have contributed to Rehnquist's concern with invidious gender discrimination in *Hibbs*.

[31] *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976), cited in *Nev. Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 727, 730 (2003).
[32] *Hibbs*, at 730.
[33] Ibid., at 728–29 (2003).
[34] Ibid., at 754 (Kennedy, J., dissenting).
[35] Reva B. Siegel, "You've Come a Long Way, Baby: Rehnquist's New Approach to Pregnancy Discrimination in *Hibbs*," 58 *Stan. L. Rev.* 1871, 1881, 1886, 1888, 1897 (2006).
[36] Ibid., at 1888, 1897.

Nonetheless, his explicit argument was simply that the FMLA "is narrowly targeted at the fault line between work and family – precisely where sex-based overgeneralization has been and remains strongest."[37] For him constitutional gender equality, which the Fourteenth Amendment extends to persons, not citizens, was most challenged by the ways governments have structured familial and workplace roles and responsibilities. If these structures were connected to equal constitutional *citizenship* in his analysis, those connections remained unstated, left at the level of implication. Siegel's argument reflects the reality that contemporary feminist legal scholars and political activists have continued to stress the links between structures of family and work and equal citizenship. But Chief Justice Rehnquist and his colleagues did not do so, leaving the topic of gender and constitutional citizenship, again, at the margins of discussion in this case.

Why Marginality?

Why is it that the current Supreme Court either deals with gender and constitutional citizenship in circumstances that seem marginal to the main structures of inequality that still stand in the way of civic equality for women, or else, when it does deal with such circumstances, as in the case of violence against women and the structuring of familial and workplace rights and duties, gender and citizenship become marginal to the constitutional analyses the justices conduct? My answer here is not very original because a host of feminist scholars, including Catharine MacKinnon, Martha Fineman, Iris Young, and many others, have ably identified the pertinent considerations over several decades, although their analyses, of course, vary in important ways. As I see it, the difficulties of the approach to gender equal protection adopted by most Justices of the Supreme Court are well exemplified in Justice O'Connor's generally compelling dissent in *Nguyen*. There she rehearses how, in light of America's "long and unfortunate history of sex discrimination," the Court has come to treat "the avoidance of gratuitous sex-based distinctions" as the "hallmark of equal protection," so that such distinctions merit heightened scrutiny.[38] In contrast, "facially neutral laws that have a disparate impact are a different animal," one that "does not trigger heightened scrutiny."[39] Even those Justices most concerned with achieving equality of constitutional citizenship for women and men become vigilant chiefly when laws explicitly distinguish between the sexes, not when formally neutral laws affect women and men very differently.

But in so doing, they are probably focusing their attention, and ours, in the wrong places if we are to confront the major obstacles to gender civic equality today. In the wake of the egalitarian reforms of the civil rights era, laws that explicitly disadvantage women on the basis of their sex alone, or even laws that explicitly treat women and

[37] *Hibbs*, at 735.
[38] *Nguyen*, at 74, 82 (O'Connor, J., dissenting).
[39] Ibid., at 82–83.

men differently, are far less common than once they were. As many scholars have recognized, the greatest gendered barriers to civic equality now derive from the fact that working women continue to do almost twice the amount of care for children and family dependents per day as working men as well as almost 50 percent more of the shopping and more than twice as much housework, while spending somewhat less time in paid employment positions.[40] These conditions create barriers to economic advancement that are compounded by greater risks of sexual harassment in the workplace. Both burdens are reinforced by criminal justice and social policies that often fail to punish domestic and workplace abusers and that often impose heavy child care and wage labor requirements on poor women, frequently single mothers.[41] Many of those laws and institutions are, however, facially gender neutral; and some of those that are not are protective of women in ways that express, not demeaning stereotypes, but recognition of real problems. It is the inadequate and inappropriate enforcement of some laws and the all too predictable impact of the practices that prevail under many policies that do the damage.

And the damage is great. Although women have far greater formal opportunities than in the past, and many are achieving great economic and political success, overall public policies and social practices still structure the lives of most women so that they carry disproportionate responsibilities for family and household care and face greater difficulties acquiring economic resources – as the authors of the Family and Medical Leave Act recognized. Schneider, Siegel, and others are right to stress explicitly, even if Rehnquist did not, the civic and political consequences of these disproportionate everyday burdens. In practice, they mean that overall, women do not really have meaningfully equal chances to gain and exercise political influence, or to have "full citizenship stature," as Justice Ginsburg appropriately defined it in *United States v. Virginia*: "equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities."[42]

And as Kerry Abrams argues elsewhere in this volume, for foreign-born women, U.S. immigration and naturalization laws structure access to American residency and citizenship in ways that effectively penalize women for their limited economic opportunities in many other lands, while rewarding them for embracing traditional gender roles, especially via marriage to American husbands, who are empowered to decide their access to the United States.[43] As a result, naturalized citizenships are conferred disproportionately on women whose economic and domestic circumstances may well work against their full and equal political participation. In these regards, too, American laws often inhibit the achievement of meaningfully equal citizenship statuses for women, but the courts have chosen not to examine

[40] Bureau of Labor Statistics, "U.S. Dep't of Labor, American Time Use Survey – 2005 Results Announced by BLS," available at http://www.bls.gov/ (accessed Nov. 15, 2008).

[41] Nancy J. Hirschmann, *The Subject of Liberty: Toward a Feminist Theory of Freedom* (Princeton, NJ: Princeton University Press, 2003), at 102–69.

[42] *United States* v. *Virginia*, 518 U.S. 515, 532 (1996).

[43] See Kerry Abrams's discussion of spousal sponsorship in Chapter 2.

the connections between economic and marital provisions and full citizenship for all.

More needs to be done. As writers like Martha Fineman[44] and Joan Tronto[45] have argued, it seems necessary today to recognize that many forms of caregiving are shared, collective, human responsibilities that should be borne equally by women and men through whatever combination of public and private agencies seems most equitable, efficacious, and politically obtainable. On the basis of such recognition, we need to go far beyond the willingness to extend men as well women leave time for domestic care as provided by the FMLA, important as that is. We need to engage in a massive restructuring of how child care, housework, and marketplace employment are practiced and given social support, even as we also better enforce protections against gender discrimination and abuse at home, in workplaces, and in public arenas. Laws structuring access to citizenship also need to be designed so as not to favor so heavily either wealthy women or women who embrace traditional marital arrangements by accepting a measure of legal subordination to their American spouses.

But gaining support for such measures from a critical mass of men is an extraordinarily daunting task. I have previously argued that this is so both because current arrangements spare men a good deal of domestic work that is inherently unappealing and, even more, because many men receive a so-called psychological wage from perceiving themselves as the dominant gender. This psychological affirmation may well be more fundamental to their identities than the wage that W. E. B. DuBois argued many whites receive from seeing themselves as the superior race.[46] Most men are not only content with, but they are also profoundly invested in, public and private practices that permit them to continue to sustain most of the advantages traditional gender roles have provided them, even under a regime that largely embodies formal legal equality. (If this generalization seems harsh, let me note that I do not exempt myself from it.)

Given these contemporary conditions, when courts employ doctrines that prompt them to focus on cases that present something like old-fashioned, overt, invidious gender discrimination, they inevitably end up giving lots of attention to controversies involving circumstances that are now fairly rare or marginal, like those of VMI and Tuan Anh Nguyen. When, in contrast, the courts confront institutional arrangements that do not explicitly treat women worse or even differently, such as the assignment of police powers under American federalism and doctrines defining the boundaries of what constitutes interstate commerce, their refusal to pay attention

44 Martha Albertson Fineman, "What Place for Family Privacy?," in Schwarzenbach and Smith, *Women and the United States Constitution*, at 238–39.

45 Joan Tronto, "Care as the Work of Citizens: A Modest Proposal," in Marilyn Friedman, ed., *Women and Citizenship* (Oxford: Oxford University Press, 2005), at 138–43.

46 Rogers M. Smith, "The Distinctive Barriers to Gender Equality," in Jytte Klausen and Charles S. Maier, eds., *Has Liberalism Failed Women? Assuring Equal Representation in Europe and the United States* (New York: Palgrave, 2001), at 190–94.

to impacts often means that they do not see equal protection analyses of gender and constitutional citizenship as relevant to their decision making. That can remain true even when courts recognize, as Chief Justice Rehnquist did in *United States v. Morrison*, that there is a good deal of empirical evidence showing that workplace harassment and other forms of violence against women incapacitate women in many ways and go uncorrected in many states. The judiciary's doctrinal commitment to giving minimal scrutiny to the differential impact of facially neutral laws still permits the judiciary to avoid considering whether these practices mean that in actuality, women do not have the equal opportunities that constitute the heart of constitutional citizenship. Even in *Hibbs*, Rehnquist really only permitted a state citizen to sue to ensure that he was being granted the facially neutral leave time provided for in the act. There was no clear indication that state laws might be constitutionally deficient if, despite their gender neutrality, they still worked in practice to perpetuate the disproportionate burdens for domestic care that women bear, in ways that often constrain women's civic engagement. Prevailing modes of equal protection analysis thus often end up marginalizing the topic of citizenship and gender precisely when courts consider many of the circumstances that today stand as the greatest barriers to concretely equal civic status for women and men.

Setting the Margins Straight

If these points are even roughly correct, they have implications for the sorts of processes and institutions that can be expected to contribute to meaningful change. In some ways, I would like to be able to say that they point to a reorienting of judicial doctrine in which the courts would adopt strict scrutiny for laws that have differential impacts on the basic opportunities that American institutions, policies, and practices provide to women and men, both those who are currently citizens and those seeking American citizenship. Yet I doubt that is the right answer. Although restructuring care for children, the elderly, and other dependents; changing the structure, expectations, and reward systems of private as well as public workplaces; recasting immigration provisions; and transforming customary divisions of labor within households all seem necessary to achieve more meaningfully equal citizenship, it is far from clear that courts should make mandating such transformations central to their equal protection decision making. It is not clear because courts do not obviously possess the expertise or authority to devise new public policies and institutional arrangements that would really work better. They also do not command the political support to ensure acceptance for the innovations they may prefer.[47] Above all other examples, the bitter failures of fifty years of judicial efforts to integrate public schools stand as chastening warnings to all who presume that because existing arrangements

[47] Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge, MA: Harvard University Press, 1999).

fail to realize core constitutional values, it is therefore incumbent upon the judiciary to create arrangements that will do so more fully.

At this point, I risk coming to a not very appealing conclusion: precisely because the chief barriers to gender civic equality are deeply entrenched, and public and private institutional arrangements have grossly disparate impacts, burdening women in ways that still make it harder for women than for men to be politically and economically powerful citizens, it is likely that gender and constitutional citizenship must remain marginal in modern constitutional jurisprudence. The courts cannot do a great deal to change the things that need to be changed if we are to realize constitutional goals more fully. Although I think there is a good deal of truth in that doleful conclusion, I also believe that what the courts are doing now is not the best that they can do. And I think that the quest to overcome gender obstacles in realizing constitutional citizenship for all is a goal that can usefully be made part of political discourses outside the courts, throughout all of American political life.

First on courts: I have already suggested that if judges seek to assess the differential gender impacts of every law, they may soon fall into speculative inquiries well beyond their competencies, and in any case, they are unlikely to command the political support required to implement whatever changes they may order. The difficulties of such inquiries do not mean, however, that courts should abstain from them entirely. They call, rather, for courts to seek to learn from the parties involved in litigation whether there are impacts of laws and policies that are largely agreed upon; and when judges find such agreements, they should feel entitled to act in appropriate ways, especially through support for governmental actions working in the right directions. In the case of VAWA, for example, greater weight should have been given to the acknowledged fact that America's structure of federalism means that many women in many states are not adequately protected against many forms of gender-motivated violence. In light of those facts, which are recognized to be part of long-standing patterns of subordination of women and which therefore perpetuated major obstacles to civic equality as well as to personal safety for women, the Court should not have had difficulty in finding that the act was justified by Congress's authority under the Fourteenth Amendment to ensure that all states provide to all persons the equal protection of the laws. In this regard, Chief Justice Rehnquist's subsequent *Hibbs* decision, relying on evidence of state discrimination in leave policies to support the Fourteenth Amendment authority of Congress to pass prophylactic legislation, is indeed exemplary. Yet even that refreshing opinion would have been strengthened if the Chief Justice had explicitly connected the structures of workplace and domestic inequality in question to principles of equal citizenship, as Siegel did in analyzing his decision. More generally, judicial attention to differential impacts on constitutional citizenship should not just be seen as appropriate. It should be mandatory when judges assess whether other government officials, legislators and executive officers, have had good and constitutional reasons for adopting the measures that are challenged before the courts.

I do think that the limitations of judicial competence, authority, and power make it advisable to exercise caution in imposing sweeping remedies based on the courts' own assessments of differential impacts. With Robert A. Burt, I believe the courts often operate most appropriately and constructively when they decide cases in ways that highlight the constitutional failings of current arrangements, without seeking themselves to mandate all that must be done to reform those arrangements. I would therefore have courts extend something like the intermediate scrutiny they apply to explicit gender classifications to laws that operate in ways that generate differential gender outcomes, with the understanding that intermediate scrutiny does not mean that laws must be frequently invalidated and existing institutional arrangements overturned on a wholesale basis. However, if, for example, laws and public policies foster work requirements, including the number and scheduling of hours worked, that means that persons who are doing extensive child care are less likely to retain employment or be promoted, and if in practice, these stand as obstacles to equal citizenship for women, then judicial review of those laws and public policies should call attention to those consequences. Although grounds may be sought, in the fashion Louis Brandeis and Alexander Bickel advocated, for deciding cases narrowly and avoiding radical remedial orders, the courts can usefully highlight the ways existing arrangements appear to be working against constitutional goals and values. Such decisions can prompt other political actors – legislators, executive agency officials, advocacy groups, policy analysts, and yes, citizens – to seek to define and win support for more desirable alternate arrangements.

To be sure, as the *Hibbs* decision suggests, much useful work along these lines can be done in the process of interpreting statutes governing employment, social welfare, education, and other policies, without necessarily introducing the dimension of constitutional citizenship. Yet to fail to do so is to minimize what is at stake and to miss an opportunity for political education, even mobilization, even if adding concerns for equal citizenship would not necessarily result in a different ruling. Thus, even in opinions where courts find other grounds adequate to sustain their decisions, it would be valuable for courts to call attention to the implications of existing policies and practices for gender civic equality more frequently.

Otherwise, the current judicial focus on explicit sex classifications, as in *United States v. Virginia* and *Nguyen*, conveys a message to other political actors and the broader public that in relation to gender, achieving civic equality today remains primarily a matter of combating conscious invidious discrimination against women in public laws. Although it undoubtedly remains symbolically valuable to hold such discrimination unacceptable, that message should not, I think, be the predominant one now; rather, the main message should be that in a whole panorama of cases, the Court is confronted with laws, institutions, and practices that many, sometimes most, participants in the cases credibly believe to pose major obstacles to women reaching the stature of full citizenship because they deny equal opportunities to aspire, achieve, participate in, and contribute to society. Even if the courts do not

seek to fix all these problems, they can play a more useful role than they are now doing in reminding us that the problems exist and that they represent failures to realize the most fundamental commitments of our constitutional system.

Michael McCann detailed some of the reasons this role is useful in his important book *Rights at Work*, which examined the impact of the ultimately unsuccessful *comparable worth* movement. There he argued convincingly that even though activists seeking pay equity for women won only "limited judicial support" when litigating to achieve their goals, the development of legal discourses defining the harms to be addressed and the existence of cases dramatizing the issues "opened up more than closed debates, exposed more than masked systemic injustices, stirred more than pacified discontents, and nurtured more than retarded the development of solidarity among women workers and their allies."[48] The elaboration of constitutional discourses highlighting the inequities that many existing pay arrangements involved helped mobilize other political actors to pursue change, even when the courts did not embrace most of the specific legal claims being advanced.

In the same way, it is plausible to believe that even if courts felt constrained from invalidating laws or ordering strong remedial measures in many instances, frequent judicial attention to the differential impact of current laws, policies, and practices on gender and citizenship might assist other political actors in defining in compelling ways the problems that need to be addressed. Those actors might then be more able to build political support for change. As many political scientists today are stressing, major constitutional innovations have historically often been brought about by a number of political institutions, agents, and movements that did not rely heavily on litigation or courts.[49] Precisely because they are so deep and pervasive, the transformations needed to promote greater gender civic equality today seem to me ones that need to be addressed through large political movements that affect all the branches of government over time, far more than through judicial decisions. But major changes have often come with constitutional themes playing prominent roles, and courts have played a lesser but meaningful part in bringing those themes to the consciousness of elite governmental actors and the general public.

I do not want to overstate my claims here. Just as I do not think the courts can hand down orders that can radically improve the major structures that stand in the way of gender civic equality today, I also do not think they can enlighten and galvanize other political actors or the public in ways that will play a major role in generating progressive transformations. The impact of judicial decisions that focus less on overt, invidious discrimination and more on the differential impacts of laws and policies on constitutional citizenship is likely to remain fairly marginal, whether the courts try to order substantial changes themselves. But as stock traders, journal editors,

[48] Michael W. McCann, *Rights at Work: Pay Equity and the Politics of Legal Mobilization* (Chicago: University of Chicago Press, 1994), at 14.

[49] See, e.g., Keith E. Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* (Cambridge, MA: Harvard University Press, 2001).

and Florida voters all know, changes in the margins often matter significantly, and they sometimes have momentous consequences. If we cannot hope to move the topic of gender and constitutional citizenship from the margins of contemporary constitutional jurisprudence, we can hope for judicial decisions that embroider those margins in ways that help bring out the best in the rest of the constitutional fabric of American society today.

2

Becoming a Citizen: Marriage, Immigration, and Assimilation

Kerry Abrams

Introduction

Most U.S. citizens are born that way. But for immigrants, becoming a citizen is a slow process. This process includes applying for a "green card," which gives an immigrant the right to reside legally in the United States. A limited number of green cards are available, and applicants must demonstrate that they qualify for a green card, most commonly by showing a family relationship to a U.S. citizen or employment with a U.S. company. Obtaining a green card can take many years, and once an immigrant has obtained one, she must reside in the United States for several more years before she can apply to become a naturalized citizen, which in turn requires a civics test, an English language test, demonstration of good moral character, and an oath of loyalty to the United States. Becoming a citizen is not a one-time event that occurs when an immigrant takes the loyalty oath, but a slow process of demonstrating value to the nation and assimilation to its culture and values.

This chapter examines how this experience of becoming a citizen is affected by, and in turn further entrenches, gender inequality. Although the law of immigration and naturalization comports with principles of formal gender equality, the law, especially the law of immigration, has gendered effects. Women are eligible to apply for green cards based on a variety of qualifications, and their ability to qualify is determined primary by the economic and cultural circumstances from which they come. Most women are unable to meet the qualifications required for a green card based on employment because they lack the skills deemed important by the United States. Instead, the vast majority of women who apply to become permanent residents do so based on relationships with U.S. citizen family members, usually husbands. The result is that the pool of people available to seek naturalized citizenship includes a disproportionate number of women who are eligible because of their marital relationship and a disproportionate number of men who are eligible because of their occupational skills.

Because marriage itself is a gender-producing institution, a system that creates future citizens based on marital status has profound effects for the way in which men and women experience becoming American. For both men and women who

seek citizenship through marriage, it is heterosexual marriage itself, and not the loyalty oath or civics test, that provides the most important vehicle for assimilation. Although marriage, and immigration law's use of marriage, have changed dramatically over the past hundred years, immigration law still makes the assumption that heterosexual marriages include a breadwinner, with decision-making authority over issues such as residency, and a subordinate spouse (a "derivative spouse" in immigration law terms), who is dependent financially on the breadwinning spouse. It requires couples to demonstrate their conformity with these norms, even in cases where the norms simply do not fit. And in cases where the norms do fit, the requirement of conformity further entrenches the notion that these norms represent what is expected of American families.

One of the legal mechanisms for imposing this dichotomous and gendered view of marriage is the discretion it gives a citizen to decide whether or not to sponsor his immigrant spouse for a green card. Because this broad discretion is often abused by spouses who are batterers, Congress has created numerous exceptions to the normal rules for immigrants who can prove they have been battered. The creation of this class of future citizens further genders the pool of immigrants eligible for naturalization: many future U.S. citizens are eligible because they are battered spouses; they must show victimhood to demonstrate their worth as citizens. The remainder of this chapter examines in more detail how immigration law produces future citizens and the relationship between this process and the production of gender.

Immigration as the Gatekeeper of Citizenship

Citizenship, like all status categories, serves a gatekeeping function. By demarcating who is in and who is out, it defines the collective whole.[1] Those who are in are, in the famous words of T. H. Marshall, given the "basic human equality associated with . . . full membership of a community."[2] Most citizens in the United States today are citizens by birth: their experience of citizenship is essentially ascriptive. In contrast, citizens who naturalize make a choice to be governed by the United States, and the United States makes a choice to accept them as citizens. In the United States, the criteria the government uses in making the decision to accept an immigrant as a naturalized citizen include a civics test, an English test, demonstration of good moral character, residency for a number of years, and an oath of loyalty to the United States. Much has been written about what these criteria say about American self-definition and the meaning of American citizenship.[3]

[1] See Rogers Brubaker, *Citizenship and Nationhood in France and Germany* (Cambridge, MA: Harvard University Press, 1992), at 23–31.

[2] T. H. Marshall, *Citizenship and Social Class and Other Chapters* (Cambridge: Cambridge University Press, 1950), at 8.

[3] See, e.g., Gerald Neuman, "Justifying U.S. Naturalization Policies," 35 *Va. J Int'l L.*. 237, 267 (1994); Peter J. Spiro, "Questioning Barriers to Naturalization," 13 *Geo. Immigr. L. J.* 479 (1999).

But naturalization law does not tell the entire citizenship story. The naturalization oath takes only a minute to recite, but the demonstration of worth required to become a citizen begins the minute an immigrant applies for legal residency. Simone de Beauvoir famously stated that "one is not born, rather, one becomes a woman." Similarly, immigrants who become naturalized citizens of the United States obtain their citizenship status not through an accident of birth, but instead, by repeatedly demonstrating their worth in ways that shape their identity and encourage assimilation to American culture. For naturalizing citizens, the oath is a rite of passage, the institution of a new relationship between individual and nation. But the citizenship oath itself is merely the last in a lengthy series of acts that the immigrant must undertake to demonstrate his or her value to the country.

To become a naturalized citizen, an immigrant must first become a lawful permanent resident (commonly referred to as a "green-card holder"). Green cards are not available to everyone one who wants one. Instead, U.S. immigration law sets out specific categories of immigrants who can qualify for permanent residency, and even those who qualify may sometimes have to wait many years before obtaining lawful residency because most categories are subject to annual quotas. Eligible immigrants include family members of U.S. citizens or permanent residents, immigrants who are sponsored by a U.S. employer for a particular job, political refugees, and so-called diversity immigrants from underrepresented countries who enter a lottery for U.S. residency. Of these categories, family-based immigrants receive by far the most generous quotas and therefore dominate the number of immigrants who receive a green card each year. For example, in 2007, over 1 million immigrants were granted green cards, and of these, approximately 65 percent received them based on a family relationship to a U.S. citizen or resident, while around 15 percent went to immigrants sponsored by an employer and nearly 8 percent went to refugees or asylees fleeing persecution in their home countries.[4] Family relationships, with a strong emphasis on nuclear family relationships, predominate in shaping the pool of people eligible to obtain naturalized citizenship.

Once an immigrant demonstrates that she fits within one of the prescribed categories, she must also demonstrate what she is *not*: a terrorist, an addict, a prostitute, a polygamist, or a child abductor. Even people who otherwise satisfy the admissions criteria will be excluded if they fall into any of these categories. So, too, will a person with a criminal record, if the crime involved "moral turpitude" or if more than one crime was committed; anyone who enters illegally or with false documents (even if the correct documents would demonstrate that the person fits one of the admission categories); or a person with a communicable disease. There are very few ways around these exclusions; for most of them, the only way to obtain discretionary relief is by demonstrating "extreme hardship" to a U.S. citizen or permanent

4 "Yearbook of Immigration Statistics: 2007," Table 6, U.S. Department of Homeland Security, available at http://www.dhs.gov/ (accessed Oct. 30, 2008). The percentages do not total 100 because there are other categories such as diversity immigrants.

resident family member.[5] Thus, these requirements function to limit further the pool of potential citizens, once again by privileging those with family ties over others.

After an immigrant has obtained green card status, the clock begins ticking until the date when she is eligible to apply to become a naturalized citizen. A would-be citizen must reside continuously within the United States for at least five years. In addition, to naturalize, an immigrant must demonstrate sufficient seriousness and assimilation to American values, language, and culture by carrying on a conversation in English, passing a civics test, swearing allegiance to the United States, and demonstrating "good moral character."[6] But never again must the naturalizing immigrant demonstrate that she qualifies for admission by virtue of a family tie, employment, persecution, or luck. Those gatekeeping questions were already asked and answered through the immigration process and now appear to be irrelevant for purposes of naturalization. The immigration restrictions, however, belie the idea that citizenship is merely a question of loyalty and assimilation. Only those immigrants who initially qualified for permanent residence will be qualified to apply for citizenship. Immigration laws, even though they are not formally considered to be rules of naturalization, thus regulate membership by acting as gatekeepers of who can be admitted to the pool of eligible applicants for naturalized citizenship. Accordingly, immigration law performs much of the gatekeeping function usually attributed to naturalization in citizenship theory.

This function is easy to overlook, in part because the law has neatly divided citizenship and immigration into two separate areas, with citizenship law treated as constitutional and important to national identity and immigration law as technical and statutory. Citizenship is clearly constitutional: all persons born in the United States and subject to the jurisdiction thereof are, under the language of the Fourteenth Amendment, U.S. citizens, and the U.S. Constitution gives Congress the power to create a "uniform rule of naturalization." But the power to regulate immigration is constitutional as well: although no particular clause grants Congress this power, the Supreme Court has repeatedly held that the federal government enjoys "plenary power" over immigration for a variety of reasons, including the country's status as a sovereign nation entitled to protect its borders.[7]

The law governing citizenship takes its cue from the naturalization clause and focuses on a uniform rule. But there is nothing in the Constitution requiring that immigration law be uniform, and, indeed, it is not. The United States frequently makes distinctions between incoming immigrants based on national origin, marital status, or educational background in the context of deciding who qualifies for a green card and offers immigration officials significant discretion in determining whom to admit. The law of immigration focuses not on uniformity, but on diversity: how to

5 See 8 U.S.C. §§ 1182 (a), (g), (i) (2008).

6 8 U.S.C. §§ 1427 (a)–(b) (2006).

7 U.S. Constitution, Amendment XIV; U.S. Constitution, Article I, § 8, cl. 4; *Fiallo v. Bell*, 430 U.S. 787 (1977) (articulating plenary power doctrine); *Kleindienst v. Mandel*, 408 U.S. 753 (1972) (same).

choose from a variety of possible future citizens the ones who will become eligible to qualify under the uniform rule.

Citizenship, as this book demonstrates, has many meanings. It can refer to the possession of political, civil, and social rights; active engagement in the life of the political community; and ties of identification and solidarity. Many people who are not technically citizens enjoy some of these features of what we call "citizenship": they may, for example, be actively engaged in their communities, feel solidarity with the United States, and intend to live here permanently (a green card holder is, after all, a "permanent resident"). But becoming a naturalized citizen gives an immigrant full political rights, including the right to remain in the country even if she commits a crime, the right to return if she leaves the country's borders, and the right to vote in federal elections. Citizenship status is durable: it cannot be taken away unless the citizen expresses a clear intent to expatriate herself, and under many circumstances, U.S. citizens can transmit their American citizenship to their children even if their children are born abroad, thus creating a new generation of American citizens. A green card holder is a permanent resident, but only a partial member; it is only upon naturalization that an immigrant becomes a full-fledged member of the political community.

Understanding how immigrants become citizens, then, requires an understanding of the entire process of becoming, not just the moment of naturalization. It is through the entire naturalization process that the United States most clearly articulates what it requires of its citizens. Unlike citizens by birth, naturalized citizens are in a position to consent as adults to be governed and to take part in the governing that democracy entails. The questions the country asks of naturalizing citizens and how naturalizing citizens experience their becoming American are therefore crucial to understanding what American citizenship means.

Neither the uniform rule of naturalization nor the law of immigration appears to be gendered. Nowhere does the Immigration and Nationality Act distinguish, for example, between husbands and wives of U.S. citizens, between brothers and sisters, or between male employees of U.S. companies and female employees. Yet immigration law is profoundly gendered in the way that it shapes the pool of immigrants available to become naturalized citizens because it uses the family as a preselection device in deciding which immigrants are worthy of gaining legal resident status and because it privileges some employment skills over others.[8] Given the gendered

[8] In this chapter, I focus solely on the process of becoming a naturalized citizen. There are certainly things to say about the gendered aspects of citizenship by birth. Many commentators have pointed out the highly gendered nature of the *jus sanguinis* (citizenship by blood) doctrine, as shown in *Nguyen v. INS*, 533 U.S. 53 (2001), a case in which the U.S. Supreme Court upheld a statute that gives automatic citizenship to children born abroad to female U.S. citizens but requires children born abroad to male U.S. citizens to demonstrate their fathers' intent to parent, through either marriage to the mother or other acts demonstrating intent to claim paternity before the child turns eighteen. Although it is true that this case shows a stark disparity in how the law conceives of male and female citizens and their ability to transmit citizenship to their children based on biological and social gender roles, as Rogers Smith argues in Chapter 1 of this volume, the number of people affected by the *Nguyen* holding

family systems and employment markets that exist in immigrants' home countries, it should be no surprise that their ability to obtain legal residency is also influenced by gender.

Becoming a Citizen Through Employment

One path to citizenship for immigrants is employment-based permanent residency. To obtain a green card under most employment preference categories, an immigrant must have a job offer from an American company that has demonstrated its inability to find an American worker to do the job. The employee is, at least theoretically, filling a gap in the American work force and contributing to the efficiency of the U.S. economy. The most preferred category goes to "priority workers," which include aliens with "extraordinary ability" who have obtained "sustained national or international acclaim" for their work; "outstanding professors or researchers;" and "multinational executives and managers." The second category includes "professionals holding advanced degrees" and immigrants with "exceptional ability in arts, sciences, or business." The third category includes "skilled workers in short supply," "professionals with baccalaureate degrees," and "unskilled workers." Each of the first three categories has an annual quota of 40,000 workers, but the third category has a special subquota for so-called unskilled workers of just 10,000. There is also a fourth category for "special immigrants," which include clergy and former government employees, with a quota of 10,000, and a fifth category for "investors" who plan to hire Americans and invest at least $1 million in a business venture.[9] Together, these categories work to generate a large pool of highly skilled workers and keep the number of unskilled workers low.

As one might suspect from examining the employment-based immigration options, most people who enter the United States to work cannot achieve permanent residency. They either use temporary work visas that expire after a certain amount of time, or they enter illegally. Employment-based *permanent* residence visas (those that confer a green card) are limited by Congress to a maximum of 140,000 per year. The supply of these visas is far less than the demand, whether demand is measured by the immigrants who would like permanent residence and work in the United States or by the employers who would like to hire them. The government limits the number of employment visas because of the broad rights they confer. As a green card holder, an immigrant can quit her job and take another, or not work at all; she is not a temporary worker or guest, but a potentially permanent part of the work force, with the personal autonomy that a U.S. citizen worker would have. In five years, she will be eligible to naturalize even if she quit her job immediately after

is relatively small. I deal here with an issue that affects more people and has greater consequences for the expressive power of law: the requirements that citizenship law and immigration law place on immigrants who desire to naturalize and the gendered consequences of these requirements.

9 8 U.S.C. § 1153 (b) (2006).

arrival. Granting an immigrant permanent resident status based on a particular job offered by a particular employer is a risk for the country, and it is a risk the country is willing to take only in cases where the immigrant has skills that are relatively scarce and likely to produce employment regardless of the solvency or status of a particular employer. The result is that the majority of slots for employment-based immigration go to immigrants with high levels of education or practice-based skills.

It should be no surprise that a system that values education and skills that require sustained employment would lead to unequal outcomes for men and women. Throughout much of the world, women are less likely than men to have received an education or have work experience and are more likely to be involved in care work for their families that will interrupt or slow down a career. This reality is reflected in statistics on permanent residency. On the surface, employment visas appear to be allocated in a gender-neutral manner: in 2004, for example, 75,025 went to women and 80,289 went to men.[10] But a closer look at these statistics reveals that women are gaining immigrant status not as employees, but as family members. A green card based on employment categories carries with it the privilege of bestowing "derivative status" on the employee's dependents. That means that an employee who gains residency under, say, the multinational executive category can also obtain green cards for his spouse and children. They, in turn, will be considered employment-based immigrants, and they will count toward the annual total of *employment* visas. So to determine whether the men and women who receive employment-based green cards are really coming here as employees or as family members of employees, we must look to statistics on whether they are primary or derivative beneficiaries of the employment visa category. Again using the numbers for 2004, of the 75,025 women who received employment-based green cards, only 20,125 did so as the primary beneficiary; the other 54,900 were wives or children (derivatives) of primary beneficiaries. Of the 80,289 men who received employment-based green cards, 52,417 were the primary beneficiaries, and 27,872 were derivative beneficiaries.[11] Men overwhelmingly predominate as primary beneficiaries in employment-based immigration.

There certainly are some women who manage to obtain green cards through their own employment – in 2004, these women represented 3.9 percent of the women who obtained green cards. But the vast majority of women cannot immigrate this way. The economic experience of women in sending countries illustrates why. Imagine, for example, a very common example: an immigrant woman who would like to apply for green card status based on her ability to be a nanny. The employment categories are designed to attract immigrants in high-demand fields that are unlikely to be saturated by American workers. The Department of Labor (DOL) lists "child

[10] I chose to use the numbers from 2004 because they were the most recent statistics I could find. See "Women Immigrants and Family Immigration," Legal Momentum, available at http://www.nilc.org/ (accessed Oct. 29, 2008) (citing Kelly Jeffreys, *Characteristics of Family-Sponsored Legal Permanent Residents: 2004* (Washington, DC: Office of Immigration Statistics, Department of Homeland Security, 2005).

[11] Ibid.

care worker" as an in-demand field,[12] and yet, our prospective immigrant would have a very difficult time finding work as a nanny in the United States – at least legally. First, she would have to apply for a green card. To do this, she would have to find an employer to sponsor her. It is unlikely, given the nature of the job, that many employers would be willing to make a commitment to sponsor a nanny without at least *meeting* the person who will care for their children for an interview, but this is impossible if the immigrant is living abroad.

Even if she can find an employer to sponsor her, a child care worker will have a long wait for a green card. She is not a first-preference person of extraordinary ability, outstanding professor or researcher, or multinational executive, nor is she a second-preference professional holding an advanced degree or person of exceptional ability in the arts, science, or business. Immigrants entering under these categories can be at work in the United States within several months of applying because there is a large enough supply of slots (40,000 for each preference annually) to meet the demand. The only conceivable category our hypothetical child care worker will qualify for is the third preference for skilled and unskilled workers. This category has 40,000 spots per year but limits unskilled workers to only 10,000 slots, and the child care worker is likely to be considered unskilled. This is partly the result of the way the United States construes the terms *skilled* and *unskilled*. Immigration law defines skilled labor as work that requires at least two years of training or postsecondary education. The DOL, in turn, makes findings about specific occupations and how much training is needed for each. Because the DOL characterizes child care as needing "very little" experience, it generally counts as unskilled labor for immigration purposes.[13] Because the number of unskilled workers who would like to immigrate to the United States far exceeds the 10,000 slots available, there is a long waiting list for this category. In October 2008, for example, the Citizenship and Immigration Bureau was finally processing green card applications for unskilled workers who applied for their green cards on January 1, 2003.[14] By the time our hypothetical nanny gets her green card, the infant she is to care for will be in kindergarten.

The classification of child care work as unskilled rests on certain assumptions about how skills are acquired. The child care worker's skill set was not acquired during an apprenticeship or graduate school, but instead during a lifetime of caring for other family members, gender socialization, and prioritizing family tasks over more individualistic pursuits. Child care is a job that many men would be unqualified for precisely because they have *not* received the same training and acculturation that many women have received – because they lack certain skills. The DOL's classification of this work as unskilled means that for the millions of

[12] "Summary Report for Child Care Workers," O*net, available at http://online.onetcenter.org/ (accessed Feb. 23, 2009) (listing "child care worker" as an in-demand field).

[13] Ibid. (listing "child care worker" as an occupation for which "some previous work-related skill, knowledge, or experience may be helpful . . . but usually is not needed" and for which "employees need anywhere from a few months to a year of working with experienced employees").

[14] See "Visa Bulletin for October 2008," available at http://travel.state.gov/ (accessed Oct. 29, 2008).

women who count extensive child care experience as their primary employment credential, legal employment-based immigration is not an option, nor is citizenship flowing from legal employment-based immigration. Such a woman, unlike the computer programmer, biology professor, clergyman, or physical therapist, cannot say, "I acquired citizenship in part because I had an important skill that was in short supply in the United States." Her most likely option for obtaining citizenship is to do so by marrying a U.S. citizen or as a derivative spouse of a male employment-based immigrant.

Becoming a Citizen Through Marriage

Why Marriage?

In employment-based immigration, the theory behind the preferences is easy to deduce. Congress has allocated the largest numbers of slots to immigrants who have skills or experience that will be useful to the American economy, without displacing native workers. Family-based immigration is more complicated. It is not self-evident why spouses of U.S. citizens would be more likely than other immigrants to add value to the nation, both as permanent residents and, eventually, as naturalized citizens.

Surely from the perspective of immigration law, the reason to privilege marriage is largely one of administrative convenience; marriage provides a clear-cut category for determining whether a romantic relationship is significant enough to trigger permanent resident status for an immigrant. Inquiring into the details of individual relationships to determine whether a relationship is substantial and permanent would be unwieldy and potentially invasive. As in other areas of law, by allowing the state to cut through potentially enormous amounts of red tape, marriage does the work. But administrative convenience does not tell the whole story. The United States provides much broader family-based immigration than most Western receiving countries; there is nothing about marriage that necessarily gives an immigrant the right to relocate or change her citizenship. So why would the United States rely on marriage to do so much work in creating the pool of future citizens?

There are several ways of thinking about why marriage, immigration status, and citizenship might, as a normative matter, be so closely tied. First, marriage is a useful way to determine whether someone is already a partial member of a community. By demonstrating a marital relationship, a prospective immigrant or citizen is in one sense already demonstrating that she is worthy of membership in the society. She is essentially saying, "I *am* a member because I have close ties to a member," or even, "I am a member because a member has chosen me." Marriage makes the membership. A strong version of this theory of citizenship was evidenced in the Citizenship Act of 1855, which made any woman who married a male U.S. citizen automatically a U.S. citizen herself, and the Expatriation Act of 1907, which automatically divested any female U.S. citizen of her citizenship if she married a foreigner. Under this theory,

a woman could not be loyal to a nation and a husband of a different nationality. The act of attaining or renouncing citizenship was simultaneous with the act of marriage. There was no process of "becoming a citizen;" it simply happened when marriage happened. Today, women are no longer treated differently than men as an official matter, and marriage and citizenship are not statuses that immigrants enter into simultaneously. But the privileging of marriage relationships in citizenship still represents a weak form of the view that the fact of marriage gives us evidence that some cultural assimilation has already occurred.

Second, we might think of the treatment of marriage as a prediction of assimilation and value. A person who marries a U.S. citizen might be perceived as more likely to become a stable, productive citizen. This might be because the U.S. citizen is more likely to be already embedded within American culture, in terms of friendships, employment contacts, linguistic competence, and cultural literacy. It also might be because a married couple is more likely to achieve financial stability, and this will reduce the immigrant's likelihood of becoming a public charge. In this view, the family functions as a crucible for assimilation. What exactly are the American values we expect to be inculcated through the marital relationship? These values depend in part on the kind of marriage being practiced, which may explain why immigration law does not recognize, for example, polygamous marriages. Immigration law's preferences for spousal immigration could rely on a strong presumption that the citizen spouse will exert a stronger pull, possibly because she will be constantly supported by the surrounding culture, than the immigrant spouse, thus working to acculturate the noncitizen. But in some communities, especially where the citizen spouse is a recent immigrant himself, this may not be the case at all. The more recent immigrant spouse could perform the role of preventing the citizen spouse from becoming too American by acting as a reminder of the cultural norms of the home country and thwarting assimilation.

Third, marriage and citizenship may be linked because we care about the rights of U.S. citizens to exercise their own citizenship through transmitting it to others. Citizens exercise citizenship in many ways – by voting, by participation in public and civic life, by service on juries, and by service in the military (although many of these exercises of citizenship are or have been available to noncitizens as well). One way in which citizens can exercise their citizenship is by transmitting it to someone else – to a child or to a spouse. Although courts have been reluctant to explicitly grant rights to immigrants based on the interests of their citizen relatives, sympathy for the plight of U.S. citizens stranded without their loved ones pervades the immigration statutes. Not only do the admissions categories favor family immigrants, but the waivers to exclusions based on the immigrant's health, criminal background, or fraudulent activity all focus on the question of whether excluding the immigrant will cause hardship to the U.S. citizen or permanent resident, not the immigrant. Although there is no *constitutional* right to family unity in this regime, Americans who seek to reunite with their foreign family members are given statutory assistance.

Marriage, then, is linked to immigration and citizenship status in important ways, and for a variety of reasons. Some of these reasons may include the idea that marriage tells us something, both retrospectively and prospectively, about the likelihood that an immigrant will assimilate successfully, and the idea that marriage is a valuable enough activity for citizens that we should facilitate their ability to marry, even if their choice of mate is not an American. But marriage also requires the parties to the marriage to take on certain burdens, including a duty of support and a duty of services to the other. Requiring couples to be married does not simply take the temperature of the relationship to determine the legitimacy of the bond. It also measures how willing a couple is to enter into an institution with a lot of moral and political baggage and to take on obligations of financial support to each other. And because marriage operates as a near prerequisite to citizenship for many women, it is worth thinking about how marriage shapes women's identity and what the costs of relying on it to create a pool of citizens might be.

How Immigration Law Shapes Marriage

A first-order issue is the conditions under which women marry in their countries of origin. Despite divorce reforms, including the move to a no-fault divorce system that took place in the United States and many Western democracies in the 1970s, many countries still retain divorce laws in which it is difficult or impossible for a woman to extricate herself from a bad marriage. In many countries, the average age of marriage for women is very young, and because women have scarce opportunities to enter into professions or trades that would make them self-supporting, marriage is the only economically viable option, even if the terms of marriage are not optimal.

Once they arrive in the United States, immigration law encourages immigrants to shape their marriages in ways that conform to an American model of marriage. To demonstrate that a newly entered marriage is not fraudulent, immigrants (and their citizen spouses) must provide evidence of the legitimacy of their marriages. This evidence usually goes far beyond documentation that the marriage occurred; the regulations, for example, list the following as factors to be considered: (1) documentation showing joint ownership of property; (2) a lease showing joint tenancy of a common residence; (3) documentation showing commingling of financial resources; (4) birth certificates of children born to the marriage; (5) affidavits of third parties having knowledge of the bona fides of the marital relationship; or (6) other documentation establishing that the marriage was not entered into to evade the immigration laws of the United States.[15] In other words, the immigrant is encouraged, although not required, to shape her identity in ways that will make her marriage look bona fide, and these ways basically boil down to cohabitation, commingling of funds, and children, regardless of what marriage means to her and her spouse. It is the

[15] 8 C.F.R. § 216.4 (2007).

interdependency of marriage, and its sexual and reproductive aspects, that are seen as indicia of genuineness. Although the regulations do not say it, it is highly unlikely that a married couple who admitted they had no romantic or sexual relationship would qualify as bona fide for immigration purposes. Participation in heterosexual marriage, and a very particular kind at that, is the prerequisite for permanent resident status based on a personal relationship. This requirement can shape marriages in various directions. Some couples may make their marriages more traditional in an effort to demonstrate their bona fides. But for some couples, the requirements may force them to make their marriages more egalitarian. A joint bank account, for example, might be a step back from separate bank accounts but an improvement from one bank account, accessible only by the husband.

The act of becoming a citizen through heterosexual marriage carries with it the corollary that one cannot become a citizen through other relationships. Under the Defense of Marriage Act, a "spouse" is defined as an opposite-sex marital partner, and "marriage" is defined as a union between a man and a woman. Therefore, every time an immigration law provision refers to "spouse" or "marriage," it means only opposite-sex spouses and marriages, regardless of whether a couple has been legally married under the law of another country.[16]

Much has been written on the effect that this exclusion has on gay and lesbian couples seeking immigration status.[17] In many cases, it means that couples are unable to live together because there is no alternative immigration category available. Some couples have resorted to marriage fraud (in which the immigrant spouse marries a U.S. citizen of the opposite sex) to live in the same place. The nonrecognition of same-sex relationships may affect the development of these relationships. In nascent relationships in which two people know they have little chance of being able eventually to live together, investing in a long-term relationship may simply seem out of the question. Denying gay and lesbian citizens the opportunity to sponsor a spouse puts them in a different relationship to the state than other citizens. Their citizenship rights are reduced; this particular aspect of their citizenship can be exercised only by entering into a marriage that feels like a sham. Because marriage is the institution that assimilates the noncitizen spouse to American values and culture, the law's refusal to recognize same-sex marriages implies that there is something un-American about these marriages. Assuming that the noncitizen spouse plans to reside in a state that recognizes same-sex marriage or domestic partnerships, which seems fairly likely, it is unclear what makes him or her so different from the American citizens already living there. (If anything, a person who immigrates to the United States might be doing so because a gay or lesbian identity is more accepted in American culture than in her country of origin.)

[16] *Adams v. Howerton*, 673 F.2d 1036, 1038 (9th Cir. 1982); 1 U.S.C. § 7 (2000).

[17] In addition, much has been written about the history of the categorical exclusion of gays and lesbians as immigrants, regardless of their relationship status. See, e.g., William N. Eskridge Jr. and Nan D. Hunter, eds., *Sexuality, Gender, and the Law* (New York: Foundation Press, 2004), at 1360–67.

In addition to encouraging immigrants to shape their marriages into a particular brand of heterosexual union to avoid the appearance of fraud, immigration law also shapes immigrant marriages in other ways. The first of these is the somewhat curious practice of requiring the citizen or legal resident spouse to "sponsor" the immigrant spouse for immigration status, rather than simply having the immigrant apply herself. Under the Immigration and Nationality Act, an immigrant who wants to use his or her status as a spouse of a U.S. citizen or permanent resident does not automatically become eligible to file for a green card. Instead, the immigrant's citizen spouse must sponsor her for green card status. In other words, a citizen can prevent his spouse, whether intentionally or negligently, from obtaining legal status simply by failing to file the appropriate paperwork, and there is nothing the immigrant spouse can do about it.

In the context of current family law, the spousal sponsorship requirement looks quite unusual. Marriage in family law is a hybrid institution that is part status and part contract, and there are some core status concepts that exist to prevent one spouse from taking unfair advantage of the other. For example, many states have elective share laws that ensure that a surviving spouse will receive a fair portion of a deceased spouse's estate, even if the deceased spouse explicitly disinherited the surviving spouse in her will. Furthermore, courts frequently refuse to enforce contracts between married couples if the contract would work a financial injustice on one party, and they certainly do not allow one spouse to dictate to the other whether to work outside the home, where to live, or whether to travel. In one sense, the whole point of marriage is to access a set of benefits and burdens: each spouse gains rights vis-à-vis the other, and those rights create reciprocal burdens – the right to be supported also means a duty to support.

Immigration law turns the idea of marriage as a committed status into an institution into which a citizen spouse can selectively opt in or out. If citizen spouses want their immigrant spouses to come to the United States to live with them, they can choose to sponsor them, but if they would rather keep them at a distance, they have the option of refusing to do so. Immigration law essentially gives the reins to the citizen spouse to decide what his or her marriage means, regardless of the wishes of the immigrant spouse.

Although the spousal sponsorship requirement strikes an odd chord in the context of marriage law today, when it was first instituted, it made much more sense. At common law, a woman's citizenship followed her husband's, and husbands, as heads of household, had decision-making control over many aspects of their wives' lives, including whether to administer chastisement, how to manage the wife's property, and where the couple would live. Although domestic relations law had changed considerably by the 1920s, when the first numerical quotas were placed on immigration, the idea of the husband as head of household was still reflected in the laws. Unlike today's immigration law, which defines an "immediate relative" as the spouse or child of a citizen, the 1921 Immigration Act defined an immediate relative as the *wife* of a *male* citizen. Husbands of female citizens were not eligible to

immigrate based on their marriages; in fact, their citizen wives *lost* U.S. citizenship by marrying a foreigner.[18] Control over a wife's immigration status was seen as part and parcel of a husband's right to control his household; wives did not share the same right. When a visa requirement was added in 1924, it made sense that a wife claiming to be entitled to a visa by virtue of her marriage to a U.S. citizen husband would need, in essence, to seek her husband's permission to do so by asking him to file a petition on her behalf.[19] The male head of household was the decision maker regarding the domicile not only of his children, but of his wife.[20]

This formal discrimination between husbands and wives was eliminated in 1952, when Congress changed the word "wife" to "spouse" and gave both male and female citizen spouses control over their immigrant spouses' immigration status.[21] But making the statute gender-neutral has not resulted in substantive equality. Because a majority of immigrants who use their status as the spouse of a U.S. citizen to obtain legal immigration status are female, the law disproportionately affects immigrant women. The law continues to grant astonishing power to the citizen spouse. People often do things their spouses do not like – they spend too much of the couple's joint income; they work outside the home (or do not); they have different standards of cleanliness, or television watching, or parenting – but the law does not usually interfere to give one spouse power over the other's decision-making process. In marriages in which wives already experience subordination, the additional power to the husband conferred by immigration law can exacerbate these power dynamics.

Contemporary immigration law's retention of the spousal sponsorship requirement may once again rest on concerns about administrative convenience: this is the way things had been done before, and the spousal sponsorship requirement neatly matches the requirement that an employer sponsor an immigrant in the employment categories. There may also be concerns about fraud: what if the immigrant spouse is lying about the marital relationship? Although this should be easy to detect through documentation, requiring the citizen spouse (who, in theory, might have less of an interest than the immigrant in the immigrant's permanent residency if the marriage were a sham) to sponsor the immigrant might reduce the number of fraud cases. Convenience aside, however, the spousal sponsorship requirement has serious consequences for immigrant spouses. As an expressive matter, the citizen spouse stands in for the nation. The immigrant spouse's reason for obtaining legal permanent residency (and, ultimately, citizenship) is her tie to the citizen spouse. A marriage on paper may not be enough to ensure that the tie is significant enough to

[18] Act of May 29, 1921, Pub. L. 5, §2(a), 42 Stat. 5; Expatriation Act, ch. 2534, § 3, 34 Stat. 1228, 1228–29 (1907).

[19] Act of May 26, 1924, ch. 190, § 7(b), 43 Stat. 153, 156 (1952).

[20] Indeed, a wife's domicile was presumed to follow that of her husband for jurisdictional purposes well into the twentieth century. See *Mas v. Perry*, 489 F.2d 1396 (5th Cir. 1974) (overturning a lower court decision that a U.S. citizen wife's domicile followed that of her foreign husband).

[21] An Act to Revise the Laws Relating to Immigration, Naturalization, and Nationality; and for Other Purposes, Pub. L. 82–414, 66 Stat. 163, 178 (1952).

warrant lawful permanent resident status; the emergence of no-fault divorce means that marriage as a legal status has ceased to have permanence. The nation relies on the citizen spouse to make this judgment call, based on his feelings about the immigrant spouse. Is the couple really in it for the long haul? If so, then the nation is, too.

The spousal sponsorship requirement also has the potential to alter the dynamics of a marriage in unintended ways. It gives the citizen spouse power that one spouse does not normally have over the other, at least not in the United States. Indeed, the spousal sponsorship requirement was a major cause of the passage of the immigration portions of the Violence Against Women Act (VAWA), which create exceptions to the spousal sponsorship rules for battered spouses. Because citizen spouses sometimes use the threat of nonsponsorship to keep an immigrant spouse in an otherwise abusive relationship, VAWA created exceptions for immigrant spouses who could prove they were battered. But the necessity of VAWA should make us wonder about the sponsorship requirement altogether: why should one member of a married couple be allowed to dictate what marriage means for immigration and, ultimately, citizenship? The act of sponsorship becomes a symbolic act of charity, altruism, and sacrifice on the part of the citizen spouse, in part because it is not required. The immigrant spouse comes to the United States already indebted to the citizen spouse: she eventually becomes eligible for naturalization because of the good graces of an American who was kind enough to sponsor her. For the citizen spouse, the act of sponsorship is an exercise of citizenship: through sponsorship, he transmits his citizenship to another, and this act is independent of the decision to marry. Control goes to the citizen spouse in part because of the notion that citizen spouses have rights to be with their families *if they want to be*. It is a right not of marriage, but of citizenship.

Immigration law not only puts the immigrant spouse in a subordinated position, but it also forces the sponsoring, citizen spouse into a breadwinning position. In addition to sponsoring his immigrant spouse, the citizen spouse must also sign an affidavit of support that demonstrates that he can support the immigrant at an annual income that is not less than 125 percent of the federal poverty line. This number is calculated by adding the immigrant (and any relatives immigrating with her) to the number of people already in the sponsor's household and looking up the federally published salary necessary for that year. The immigrant spouse's ability to earn an income herself will be deemed irrelevant in the calculation. The obligation of support is potentially permanent; it ends only if the sponsored immigrant becomes a naturalized citizen; she works for approximately ten years (or, in the case of a married immigrant, her spouse works for ten years while they are married); she relinquishes permanent resident status and leaves the country; or she dies. None of these exigencies is completely within the control of the citizen sponsor. If the immigrant spouse chooses not to apply for citizenship or refuses or cannot work, she can sue her citizen sponsor for support under the affidavit of support, even if they have divorced. The affidavit of support requirement forces the citizen spouse

into a breadwinning role regardless of the actual dynamics of the relationship, and has the potential to do so even once the marriage is over.[22]

Together, the requirement that marriage be heterosexual, the grant of control to the citizen spouse over the immigrant spouse's immigration status, the requirement that the citizen spouse demonstrate that he can function as a breadwinner, and the strong incentives couples are given to conform to particular ideals of cohabitation, commingling of funds, and children add up to a vision of a particular kind of heterosexual marriage in which one family member subordinates her autonomy and identity to her spouse. Of course, the law is completely gender-neutral. There is no requirement that the citizen spouse be a man, or that the immigrant spouse be a woman. A woman citizen will have to demonstrate breadwinning capabilities and will have decision-making authority over whether her husband can apply for a green card. But given the gendered dynamics that already exist in many marriages, and given that the majority of marriage-based immigration involves citizen husbands sponsoring immigrant wives, the implications of the law for many citizen-immigrant marriages are troubling. By demanding that immigrants fit a traditional model of marital gender roles, the law may be perpetuating and exacerbating these roles in ways that are harmful to women.

Naturalization

Immigration law, then, shapes the pool of potential naturalized citizens and puts them through a crucible of training to become Americans by their participation in heterosexual marriage. But once a green card is acquired, this process goes on. The default rule for citizenship is that the applicant must undergo a five-year residency period after obtaining a green card. But for spouses of citizens, regardless of the immigrant category used for green card purposes, this period is reduced to three years if they are "living in marital union." Unlike in the context of immigration law, there is no administrative convenience purpose for this rule. There, the law is trying in part to ascertain whether a relationship really counts as a family relationship, but here, all green card holders are eligible to naturalize if they meet the residency requirements, take the oath, pass the tests, and are of "good moral character." In the case of the reduced number of years for citizenship, we see a more concentrated example of what we saw in the immigration context: marriage to a citizen is a proxy for

[22] 8 U.S.C. § 1183a (2002); 8 C.F.R. § 213a.2(e) (2007); Form I-864P. The sponsor's obligation to support the immigrant also terminates if the sponsor dies. 8 C.F.R. § 213a.2 (e)(ii) (2007); see also *Cheshire v. Cheshire*, 3:05-cv-00453-TJC-MCR, 2006 WL 1208010, at *fn. 8 (M.D. Fla. May 4, 2006) (holding that the husband in divorce action is liable for payments based on affidavit of support, that it is immaterial whether the defendant can afford the judgment, and that the wife is not required to work). The sponsor's obligation to support the immigrant also terminates if the sponsor dies. 8 C.F.R. § 213a.2 (e)(ii) (2007). However, if the deceased sponsor failed to support the immigrant while alive, the immigrant may sue the deceased's estate. 8 C.F.R. § 213 a.2 (e)(2) (termination does not relieve the sponsor's estate from any reimbursement obligation that accrued before termination).

assimilation, both prospectively and retrospectively, and the reduced waiting period can also be construed as a privilege of citizenship enjoyed by the citizen spouse. Once again, engagement in heterosexual marriage is thought to shape immigrants in a way that makes them more likely to be true "Americans" by the time they naturalize. Also, once again, same-sex marriages do not qualify. From the government's perspective, perhaps a married legal resident is less risky than a single resident or someone married to a foreigner. The government is willing to make the jump from granting legal residency (which can be revoked if the immigrant commits a crime, or spends too much time living abroad, or demonstrates bad moral character) to granting citizenship (which is permanent) at an earlier date than it would for someone else. Marriage tames the immigrant into a citizen.

Becoming a Citizen by Becoming a Victim

By privileging family immigration and granting citizens the power to withhold sponsorship from their immigrant spouses, U.S. immigration law has created a need for a patchwork of exceptions to the normal rules of immigration admissions. Whereas normally, an immigrant must demonstrate family ties, employment opportunities, or refugee status or win the diversity lottery to gain legal admission, the law makes exceptions for battered spouses and children. It does so in part because of the perverse effect of the spousal sponsorship requirement: some spouses withhold or threaten to withhold sponsorship to keep their spouses in an abusive relationship. The law provides a self-petitioning option for immigrants who demonstrate that they have been battered or subjected to "extreme cruelty" by their citizen or permanent resident spouses. In these cases, because of the immigrant's status as a battered spouse, the citizen spouse loses control over the immigration process.[23]

In addition to qualifying for exceptions to the general immigration rules, battered spouses are also eligible for exceptions to the general naturalization rules. Battered spouses are entitled to naturalize in three years, just as if they were married to a U.S. citizen, even if they have divorced the citizen. If a person obtained lawful permanent resident status "by reason of his or her status as a spouse or child of a United States citizen who battered him or her or subjected him or her to extreme cruelty," then the person is still entitled to the three-year, instead of the normal five-year, waiting period.[24]

All of these provisions became law as part of the VAWA of 1994 and subsequent VAWA amendments. As the title of the act suggests, Congress was concerned about the plight of battered women, not battered men, when it passed VAWA. The immigration provisions, like most immigration provisions today, are gender-neutral on their face. But they are designed to treat a problem that Congress believed affected mostly women, and indeed, women are far more likely to bring VAWA claims than

[23] 8 U.S.C. § 1154(a)(1)(A)(iii) (2006).
[24] 8 U.S.C. § 1430(a)(2008).

men and to have those claims taken seriously when they do. The law thus affects men and women very differently, both in terms of who is likely to take advantage of it and in terms of how it shapes the identities of those who do.

The VAWA exceptions provide a challenge to the usual idea that citizenship involves a consenting relationship between citizen and state. In the case of a battered spouse, the reason for her relationship with the state – both in the initial inquiry concerning her green card status and later, during the naturalization process – is her battering. She thus consents to a relationship with a nation because of her involvement in a relationship that violated her consent. We might even think that she is not in a position to consent because she is fleeing a relationship of coercion. These exceptions also twist the usual way in which marriage is used as a shortcut to citizenship status. In the usual case, the law presumes that marriage helps to assimilate the immigrant; through the relationship with the citizen spouse, the immigrant becomes more likely to be a productive citizen. In the battering cases, the state steps in to replace the battering spouse. The new citizen's treatment by her spouse in a private space becomes the basis for her public relationship with the nation. But instead of the private relationship standing in for the project of assimilation, public belonging is now the result of the deviance and corruption of the private relationship; the prospective citizen's relationship with the nation is a substitute for her relationship with a husband/protector who has gone wrong. The nation must step in as her protector.

From the government's perspective, a green card given because of an immigrant's victim status looks very different from one given based on an immigrant's employment potential or family connections. In the latter cases, the decision to make residency legal – and ultimately, to open the possibility of citizenship – appears to be based on a calculation that the immigrant is likely to be of value to the country, either because of the skills she brings as a worker or the stability she offers as a family member of a citizen or resident. As we have seen, in the case of the family preferences, there is also a sense that she is more assimilable because of her family relationship. In the case of the battered immigrant, it is unclear what exactly the nation gains by giving the immigrant a green card. Battered spouses do not appear to have superior character traits or skills (at least not any that result from their being battered), and if the family relationship that produced the visa application has ended, it is unclear why the government would think that the immigrant would provide stability to the citizen's family life. If anything, a truly merit-based immigration system might worry that admitting victims of domestic violence would undermine the principles of immigration law; even if it is not the immigrant's fault, being a victim is not usually a qualification for a green card or citizenship, just as being poor or unskilled is not. In the case of domestic violence victims, the nation appears to be offering a helping hand not because the immigrant brings something special to the nation, but because the nation placed the immigrant at risk. It is the nation's fault, in a sense, that it required the victim to be sponsored by her spouse, so if the nation wants to justify keeping the spousal sponsorship requirement in most cases, it must

make exceptions for the cases in which the citizen spouse has not upheld his end of the bargain.

The VAWA petitioner who ultimately becomes a citizen, then, stands in marked contrast to the family- or employer-sponsored immigrant. The immediate relative is worthy because of a flourishing relationship (even if we might worry that flourishing marital relationships can nevertheless be subordinating); the employee is worthy because she can do work that is needed in this country, for which American workers are not available. But the battered spouse petitioner gains green card status not because she is a desirable worker or family member, but because the state has stepped in to protect her. To become a citizen, a VAWA immigrant must first become a victim.

Conclusion

This chapter has shown that citizenship does not occur at the moment of naturalization, but is instead a process, occurring over several years. The law explicitly imposes this process by specifying the categories of immigrants who may ultimately apply for naturalization. These immigrants become citizens not primarily through studying for their naturalization exams or learning English, although these are important elements, but through the everyday actions of living their lives. The United States puts particular stock in the ability of citizens to acculturate their immigrant spouses through marriage. Encouraging immigration based on marriage, then, is both a reflection of this reality and a way of reifying it.

The emphasis on family-based immigration and the limitation on access to employment-based immigration have a profound influence on the way in which women become citizens. For many women, the process of becoming occurs through participation in heterosexual marriage, an institution that shapes identity in ways that are sometimes subordinating for women. As Nancy Cott has shown, the institution of marriage has been "the vehicle for the state's part in forming and sustaining the gender order," and the law of immigration and citizenship has, throughout history, aided and abetted this formation and sustenance.[25] In the case of immigration law, the law deepens marriage's subordinating potential by putting immigrant spouses at the mercy of their citizen sponsors, who can refuse to offer sponsorship; even a woman who does not experience heterosexual marriage as subordinating has the dynamics of her marriage altered through the requirement that she seek her husband's approval to apply for permanent resident status and by the requirement that he demonstrate his financial ability to support her regardless of her own earning potential. For those women whose marriages fail due to violence and abuse, the system offers an unfortunate resolution: they may become citizens capable of choosing allegiance to the

[25] Nancy F. Cott, "Marriage and Women's Citizenship in the United States, 1830–1934," 103 *Am. Hist. Rev.* 1140, 1442 (1998).

United States, but only by demonstrating that they have experienced a failure of autonomy in their personal lives.

In addition to telling us much about what the United States values in assessing potential citizens, immigration law also tells us something important about how the United States allows its citizens to exercise their citizenship. Citizens can sponsor their spouses, and indeed are given control over the decision of whether an immigrant spouse will live in the United States. For some citizens (who are likely to be disproportionately male), this ability may often mean not only access to companionship and friendship, but also access to someone to care for children and to perform household labor. But for citizens who wish to sponsor an *employee*, rather than a relative, to perform care work, immigration law fails to provide a legal means. Because of the gendered allocation of household labor that persists in the majority of American families, immigration law's privileging of the family member over the care worker affects the ability of U.S. citizens to exercise their citizenship by extending immigration status to others in ways that are also gendered. Men are simply more likely to be able to depend on a wife to perform care work for free than women are able to depend on men; most women must go to the open market if they seek assistance in this work, and immigration law does not allow them to do so legally. Just a few decades ago, immigration patterns commonly involved early migration by men, followed by family migration of their wives and children. That pattern is now changing: many women are migrating, including women with families, alone, commonly to do care work for other people's families.[26] Although there are reasons to be very concerned about commodification of care work and exploitation of domestic workers, pushing these practices underground and refusing to recognize the citizenship potential of women involved in this work does nothing to ameliorate these concerns.

Of course, not all immigrants who obtain legal residency, and ultimately, citizenship, through employment are men, and not all those who obtain it through family relationships or victim status are women. For some couples, the system may even have subversive potential. A system that demands that the U.S. citizen spouse take on the role of decision maker, sponsor, and breadwinner may not only entrench the subordination in some marriages, but also may provide the possibility of role reversal in others. Given the ways in which many marriages retain at least some vestiges of traditional gender roles, however, it seems likely that much of the effect of the law is a one-way ratchet. Even an ostensibly gender-neutral requirement like the spousal sponsorship requirement, or the exceptions for battered spouses – male and female – set forth in VAWA, may have, on average, very different influences on men and women because of their different experiences of marriage as an institution.

Every naturalized citizen has an immigration story and a citizenship story. This chapter has tried to show that these stories are related, perhaps even coextensive. The

[26] See, e.g., Rhacel Salazar Parrenas, "The Care Crisis in the Philippines: Children and Transnational Families in the New Global Economy," in Barbara Ehrenreich and Arlie Russell Hoschschild, eds., *Global Women: Nannies, Maids, and Sex Workers in the New Economy* (New York: Metropolitan Books, 2002), at 39–54.

story of naturalization is not simply a story of jumping through the hoops required by the naturalization laws; it is also one of establishing a legal identity as an immigrant by qualifying for a particular type of immigration status, and then living in the United States for a period of time, most often engaging every day in the activity, be it marriage or employment, that justified the status in the first place. Thus, a person's immigration story informs her citizenship story.

The woman whose immigration story is one of following her husband because of his job prospects is in a different position vis-à-vis the nation on the eve of her naturalization ceremony than is the immigrant computer programmer who obtained an employment-based green card, or the refugee who suffered political persecution, or even the diversity lottery winner who was simply lucky. Her contribution to the United States is qualitatively different, based not on the value of her skills, a moral claim of entitlement because of persecution, or growing up in an underrepresented country, but instead on her participation as a wife in heterosexual marriage. In cases of spouses who obtain legal status because of domestic violence, the contribution is even more attenuated. The archetypical story of the fresh, entrepreneurial spirit contributed by the immigrant, of the constant reenergizing of the population through the assimilation of new blood, takes on a different cast in the case of family immigration, one where the new voices are telling an old story of marital duty and self-denial in the face of a spouse's life projects. On the eve of their naturalization, immigrants who achieve legal status as a result of family relationships or victim status have a relationship with the nation, but it is a relationship that has been mediated by their spouses. This mediated relationship between individual and nation is one that develops over time and in a process of becoming, rather than in a moment of consent between individual and nation. For some women, "becoming a woman," as defined by Beauvoir, and becoming a citizen are intertwined processes: both occur through the crucible of marriage, and learning how to be a woman in marriage is part of learning to be a citizen.

There are no easy solutions to the dilemmas outlined in this chapter. Eradicating immigration law of its privileging of the family would create serious problems, especially for children. Much of the gender difference in immigration law results from the conditions in immigrants' countries of origins and not because of the law itself. But some of the particularly troubling aspects could at least be tempered. Recognizing care work as skilled labor, for example, would give child care workers a path to citizenship because of the skills they possess. Eliminating the spousal sponsorship requirement would give immigrants the autonomy to decide for themselves whether their residency and domicile should follow that of their U.S. citizen spouses. Eliminating the affidavit of support, or altering it to reflect total family income instead of the income of the citizen spouse, would avoid reinscribing a breadwinner-dependent dynamic in marriages. Recognizing the changing gender dynamics in immigration law is an important first step to gaining substantive equality in the acquisition of citizenship.

3

Women's Civic Inclusion and the Bill of Rights

Gretchen Ritter*

The Bill of Rights is often treated as the foundation of America's rights-conscious culture.[1] Prior to the adoption of the Fourteenth Amendment, it was the Bill that most clearly delineated the relationship between "the People" of the Constitution and the federal government. Before the terms of citizenship were defined by the Fourteenth and Fifteenth Amendments, it was the Bill that provided a vision of democratic community and liberty for those governed by the American constitutional order. Since the conclusion of the Civil War, the terms of U.S. citizenship have been anchored in both the Bill and the Reconstruction Amendments. The Bill continues to play a vital role in shaping the terms of American citizenship today.

Given this account and this history, it seems odd that women's rights advocates have largely avoided the Bill in their efforts to advance rights and civic inclusion for women. *Civic inclusion* here refers to democratic engagement and the political recognition of the rights and interests of citizens as individuals and members of groups under the Constitution.[2] Instead, women's rights advocates have turned primarily to the Fourteenth Amendment in their efforts to bolster women's individual rights and civic standing under the American constitution. This chapter reconsiders the problematic relationship of women's rights advocates to the Bill and contends that the Bill has historically served as both an instrument for preserving gender hierarchy and as a foundation for claims of public voice for women. To illustrate these claims, I focus particularly on constitutional controversies involving jury service, religious establishment, and the free exercise of religion.

When it was adopted, the democratic political community envisioned by the Bill of Rights was neither inclusive nor egalitarian. Married women and slaves were not seen as members of that political community, and in all likelihood, neither were

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[1] William J. Brennan, Jr., "Why Have a Bill of Rights?," 9 *Oxford J. Legal Stud.* 425, 425–40 (1989).

[2] For more on citizenship, civic membership, and how struggles over democratic inclusion propel constitutional development, see Gretchen Ritter, *The Constitution as Social Design: Gender and Civic Membership in the American Constitutional Order* (Palo Alto, CA: Stanford University Press, 2006).

white men without property.[3] The individual rights protected by the Bill tended to support the authority of male heads of household in relation to their dependents. The original Bill implicitly endorsed a more limited vision of the democratic political community and protected this vision through its reliance on federalism and the ability of states to restrict political rights. Given these limitations, women's rights advocates have mostly focused on public realm equality for women as individuals, which they advanced under the Fourteenth and Nineteenth Amendments. But constitutional equality has its limits. The liberal vision of individual constitutional equality fails to recognize the more relational and community based aspects of democratic citizenship. That is why I contend that the political vision contained within the Bill, which links democratic participation with fundamental rights, still offers powerful tools to those who aspire to democratic inclusion.

The Body Politic Under the Original Bill of Rights

At the time that the U.S. Constitution was ratified, it was understood that a Bill of Rights would be added by the new Congress to bolster further individual rights and popular sovereignty by protecting against possible encroachments by the federal government. Because of this understanding, the Bill is generally viewed as part of the original constitutional design, for without the commitment to these ten amendments, the Constitution might not have been ratified.

The Bill articulates a vision of politics that fosters civil society and shields people, both in their community associations and in their personal lives, from the intrusion of the federal government. Religious freedom; freedom of assembly, speech, the press, and the right to bear arms; and the reliance on militias and on impartial juries all suggest a recognition of the role that associations of citizens play in nurturing a commitment to justice and the common good. On the other hand, in its protections against unreasonable search and seizure, established religion, standing armies, the quartering of troops, and indefinite imprisonment without charge, the Bill protects individuals against a potentially partial, self-serving, and overbearing federal government. The key political values expressed in the Bill are those of liberty for individuals and democratic majorities and the rule of law as a restraint on governmental authority. Akhil Reed Amar suggests that "the People" of the preamble are also "the People" of the Bill (as expressed in Amendments I, II, IV, IX, and X) – they are the democratic sovereigns imagined in the principle of popular sovereignty.[4]

[3] Mary Becker, "The Politics of Women's Wrongs and the Bill of 'Rights': A Bicentennial Perspective," 59 *U. Chi. L. Rev.* 453 (1992); Eric Foner, *The Story of American Freedom* (New York: W. W. Norton, 1998).

[4] Akhil Reed Amar, "The Bill of Rights as a Constitution," 100 *Yale L. J.* 1131 (1991). It should be noted that Amar has been criticized for his reading of the Bill of Rights by those who argue against the kind of textual analysis in which he engages, which is, according to William Treanor, too rooted in the words of the document itself and insufficiently attentive to the historical context in which the document

At the time of the ratification debates, dispute emerged over the nature of representation in a large democratic republic. The Federalists sought to unify the nation and legitimated the new Constitution by grounding its authority in the people as a whole, as articulated in the preamble.[5] But the anti-Federalists had a different view of popular sovereignty, one that was rooted more locally in diverse communities so that representatives were acquainted with the "interest and condition" of the people.[6] Localism brought to politics a richer representation of cultural understandings and social identity, and not just refined economic interests. Feelings, circumstances, distresses, wants, and sympathies were all the things that the anti-Federalists hoped to have their representatives express in national politics. This enriched democracy required the cultivation of intermediary associations such as militias, congregations, women's clubs, or reading publics.[7] While the democratic community invoked in this view was still quite narrowly cast, as suggested by Chief Justice Roger Taney's *Dred Scott* opinion,[8] it offered the possibility of a richer, more particularized and diverse civic membership. Given the limits of liberal constitutionalism as a path toward an inclusive and engaged citizenship, this vision of democratic engagement remains a promising alternative.

What sort of foundation does a rights-protective political structure provide for democratization? Perhaps the two most important aspects of the Bill include its enforcement provisions (which exist in connection with the constitutional structure as a whole) and the connection the Bill supplies between rights and democracy through its encouragement of intermediate associations in civil society. Enforcement, as Justice William Brennan once said, is necessary to make rights meaningful.[9] In its reliance on the rule of law, and its provisions for limiting excessive exercises of governmental authority, the Constitution supplies a governing structure that is conducive to rights enforcement. With regard to rights and democracy, in considering the purported tension between majority rule and individual rights, Robert Dahl argues that "far from being a threat to fundamental rights and liberties, political equality requires them as anchors for democratic institutions."[10] Rights serve as precursors to democratic participation – they allow citizens to debate, consider, and contend over the interests of the community without fear that their views or activities will be held against them.

was produced. William Michael Treanor, "Taking Text Too Seriously: Modern Textualism, Original Meaning, and the Case for Amar's Bill of Rights," 106 *Mich. L. Rev.* 487 (2007).

5 Edmund Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (New York: W. W. Norton, 1988).

6 Ibid., at 278.

7 Jurgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry Into a Category of Bourgeois Society* (Cambridge, MA: MIT Press, 1989); Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso, 1983).

8 *Dred Scott v. Sanford*, 60 U.S. 393 (1856).

9 Brennan, "Why Have a Bill of Rights?"

10 Robert Dahl, *A Democratic Critique of the American Constitution* (New Haven, CT: Yale University Press, 2001), at 135.

Were all Americans part of the democratic political community invoked by the Constitution and protected by the Bill? Furthermore, to what degree did the Bill articulate a notion of political equality and protect political rights of participation such as voting? To answer these questions, it is important to realize three things. First, the rights articulated in the Bill were part of a federal political structure in which the states were seen as the true representatives of local political interests and sentiments. Second, the political rights of citizenship, to the degree that they were recognized and protected at the time of the founding, were seen as rights that were connected to state citizenship. Consequently, the guaranty clause that appears in Article IV, Section 4 of the Constitution guarantees to "every state" a "republican form of government," which was generally understood to include democratic political rights such as the right to vote. Third, and finally, it is clear from other parts of the text of the Constitution (e.g., Article IV, Section 2) and from the political debates surrounding its creation that not all of the people governed by the Constitution were imagined as members of the rights-bearing democratic political community protected by the Bill. Clearly, married women and slaves were not seen as members of that political community, and in all likelihood, neither were white men without property.[11] Those who were without property, or who were barred by state law from owning property, bearing arms, serving on juries, or voting, were not the rights-bearing members of the political community envisioned by the Bill. By establishing a link between democratic participation and fundamental rights, the Bill suggests a path toward democratic inclusion that tolerates social diversity. Yet, in implicitly endorsing a more limited vision of that democratic political community and protecting this more constrained vision through its reliance on federalism and the ability of states to restrict political rights, the Bill allows for the continuation of democratic exclusions as well.

The desire to rekindle the Bill's vision of democratic engagement, while guarding against the hierarchical potential present in community governance proposals, is also expressed in modern-day debates over civic republicanism and multiculturalism. Ayelet Shachar uses the multicultural citizenship literature as a starting point for her proposal on how to balance recognition of social embeddedness and communal ties with respect for individual rights.[12] She summarizes the multicultural vision (drawing on the work of Will Kymlicka, Iris Young, and Charles Taylor) as follows:

> Instead of prioritizing either individual rights or a strong sense of membership in the political community, as in the classic liberal or civic-republican conceptions of membership, proponents of differentiated citizenship called for a new vision: citizenship, they claimed, should be re-imagined as "a heterogeneous public, in which persons stand forth with their differences acknowledged and respected." This understanding of citizenship has as its foundation the view that

[11] Becker, "Politics of Women's Wrongs"; Foner, *Story of American Freedom*.

[12] Ayelet Shachar, "Religion, State, and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies," 50 *McGill L. J.* 49 (2005).

> group-based distinctiveness should be recognized, respected, and even nourished by the contemporary state, rather than ignored in favor of assimilation into the dominant or majority identity.[13]

The problem with this new vision, as Shachar and other feminist critics have pointed out, is that it tends to insulate cultural communities from external political pressures, thereby allowing practices of subordination (particularly in relation to women and children) to go unchallenged. This is, indeed, the danger inherent in the popular sovereignty vision as well. Does appreciation for the role of communities in creating social orders and providing a foundation for civic engagement require an attitude of tolerance or neutrality toward cultural practices and values that produce social hierarchy and subordination? Furthermore, what if the invitation to bring one's social experiences and values into public politics results in an influx of racist, sexist, and homophobic beliefs about how societies should be morally governed? Such concerns have motivated Brian Barry to call for a strict separation between private cultural commitments – such as religion – and public politics.[14]

But on both normative and empirical grounds, it seems that the liberal constitutional vision of individual rights (most commonly associated with the Fourteenth Amendment) is insufficient to promote democratic inclusion and empowerment for women.[15] Instead, Shachar proposes a joint governance plan, which rejects theories that "encourage groups to insulate themselves from the wider society in which they operate" and recognizes that "cultures are not static, and that group members may emphasize different aspects of their identity in different social contexts."[16] She suggests a deliberative approach that encourages voice among all members of a group and provides incentives for groups to improve the rights and standing of their more vulnerable members by allowing for greater community autonomy when there are fewer rights violations asserted by group members. While Shachar's main concern is with the place of women in minority religious communities, her proposals are useful for those seeking to supplement liberal constitutionalism with popular sovereignty, while avoiding the pitfalls of community-imposed forms of social subordination.

The Bill of Rights in American Political Development

The Civil War wrought great changes in the American constitutional order. According to Hendrik Hartog, "the long contest over slavery did more than any other cause to stimulate the development of an alternative, rights conscious, interpretation of the federal constitution. Still, a modern American understanding of constitutional

[13] Ibid., at 57.

[14] Brian Barry, *Culture and Equality* (Cambridge: Polity Press, 2001).

[15] Ritter, *Constitution as Social Design*; Eileen McDonagh, "Political Citizenship and Democratization: The Gender Paradox," 96 *Am. Pol. Sci. Rev.* 535 (2002); see also Rogers Smith, Chapter 1 (on the failure of equal protection doctrine to expand our understanding of women's citizenship in recent years).

[16] Shachar "Religion, State," at 71–72.

rights could only become embedded in the Constitution after the Civil War and emancipation."[17] The war reshaped the American constitutional order, through changes in the nature of federalism, and the relationship between the people and governmental authority. Before the war, the federal government was seen as the greatest threat to rights, and the rights that were protected were both individual and majoritarian in nature. After the war, the state governments came to be seen as the source of potentially abusive authority, and the federal government was celebrated as the defender of individual rights, including the rights of unpopular minorities when they were threatened by overbearing majorities.[18] The meaning of the Bill was altered by the Reconstruction Amendments (the Thirteenth, Fourteenth, and Fifteenth Amendments) as well. Today, the Reconstruction Amendments are seen as extending and securing the Bill: "together with the Civil War Amendments, outlawing slavery and involuntary servitude and insuring all citizens equal protection of the laws and due process of law, the Bill of Rights stands as a constant guardian of individual liberty."[19]

Nonetheless, historically, the Bill provided little inspiration to women's rights advocates before the twentieth century. According to Mary Becker, "the Bill of Rights does less to solve the problems of women and nonpropertied men than to solve the problems of men of property, especially white men of property."[20] Imagining the Bill as conducive to the formation of civil society, the social order constructed under the Bill during the first century and a half of constitutional history was one that presumed male authority within the home. As masters of their households, it was men who were protected by those amendments that shielded the home, including the Third, Fourth, and Fifth Amendments. Violations against the "natural" dependents of these men (their wives, children, servants, and slaves) were legally seen as grievances against their masters. Likewise, protections of public rights – such as those contained in the First, Second, and Fifth through Tenth Amendments – were protections of the democratic citizenry, men whose capacity to engage in civic life was demonstrated through their roles as property owners and heads of households in civil society. This helps to explain why the women's rights movement of the nineteenth and early twentieth centuries became so focused on the vote as a way of gaining rights for women. Obtaining the vote meant coming to see women as public persons, entitled to the protections of the First, Second, and Fifth through Tenth Amendments. Until women were seen primarily as public persons, rather than private dependents (a gradual development over the course of the twentieth century), the protections neither of the Bill of Rights nor of the Fourteenth Amendment were considered applicable to them.

[17] Hendrik Hartog, "The Constitution of Aspiration and the Rights That Belong to Us All," 74 *J. Am. Hist.* 1013, 1017 (1987).

[18] Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven, CT: Yale University Press, 1998).

[19] Brennan, "Why Have a Bill of Rights?," at 425.

[20] Becker, "Politics of Women's Wrongs," at 454.

Yet the Bill, the Reconstruction Amendments, and the nature of citizenship have been contested and redefined throughout the course of American constitutional development. Struggles over the meaning of the Constitution have been struggles over the meaning of freedom: "the meaning of freedom has been constructed not only in Congressional debates and political treatises but on plantations and picket lines, in parlors and bedrooms."[21] During the twentieth century, American ideals of freedom and constitutional rights were shaped by both world wars and by the subsequent cold war.[22] In contrast to the Nazi commitment to racial supremacy, the United States represented itself as committed to social pluralism: "it was during the war that a shared American Creed of freedom, equality, and ethnic and religious 'brotherhood' came to be seen as the foundation of national unity."[23] While the Cold War solidified the American commitment to racial equality, it also promoted tolerance for domestic containment and gender traditionalism, while entrenching a negative ideal of rights as governmental noninterference, in contrast to the Communist ideal of substantive rights to housing, health care, and employment.[24] After the 1960s, citizenship and equal opportunity were expanded to reflect new understandings of constitutional equality under the Fourteenth Amendment. In time, the rights revolution spread beyond African Americans to other groups, including women.[25] As Dahl has emphasized, American political culture (albeit a dynamic, evolving culture) has been important to the meaning and exercise of rights: "in the end, a democratic country cannot depend on constitutional systems for preservations of its liberties. It can depend only on the beliefs and cultures shared by its political, legal, and cultural elites and by the citizens to whom those elites are responsive."[26]

Religion, Freedom, and Community

The community vision contained within the Bill is apparent in its treatment of religion. The First Amendment bars Congress from engaging in the "establishment of religion" or from interfering in "the free exercise" of religion. Religion provides a source of social authority and a source of social regulation for Americans. The recognition of religious freedom may be understood as both an individual right of conscience and as the liberal constitutional order's reliance on nonpolitical sources of community formation. Generally, in American history, when religion is seen as

[21] Foner, *Story of American Freedom*, at xv.

[22] John Skrentny, *The Minority Rights Revolution* (Cambridge, MA: Harvard University Press, 2002); Daniel Kryder, *Divided Arsenal: Race and the American State During World War II* (New York: Cambridge University Press, 2000); Mary Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy* (Princeton, NJ: Princeton University Press, 2001).

[23] Foner, *Story of American Freedom*, at 30.

[24] Jane Sherron De Hart, "Containment at Home: Gender, Sexuality, and National Identity in Cold War America," in Peter Kuznick and James Gilbert, eds., *Rethinking Cold War Culture* (Washington, DC: Smithsonian, 2001).

[25] Nancy MacLean, *Freedom Is Not Enough* (Cambridge, MA: Harvard University Press, 2006).

[26] Dahl, *Democratic Critique*, at 99.

strengthening the political system, then it is constitutionally protected. But when religion threatens the political system – either because it competes with the government as an alternative source of public authority or because it fails properly to order social relations and create virtuous citizens – then it is less likely to receive constitutional protection. For women, religion has served both as an alternative way of claiming public voice and as a source of constitutionally sanctioned social oppression.

It may be easy to imagine the religious clauses contained within the First Amendment as protecting both individual rights and community governance of moral behavior. At first glance, the free exercise clause protected freedom of conscience or thought, while the establishment clause prevented the federal government from favoring some religious associations over others. Drawing on the philosophy of such Enlightenment thinkers as John Locke, Americans associated religious belief with personal reason. As the Virginia Bill of Rights (adopted in 1776) stated, "religion . . . can be directed only by reason and conviction, not by force or violence; and therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience."[27] Restriction on the federal government's ability to favor an established religion, on the other hand, drew upon states' rights concerns over the ability of local communities to self-determine the role that religious institutions would play in organizing civil society. Locally, religious establishments were regarded as intermediary social institutions that (along with schools) operated to cultivate civic virtue. This is reflected in the Northwest Ordinance of 1787 (governing the western territories), which states that "religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."[28] Yet this apparent distinction between the free exercise clause (as protective of individual rights) and the establishment clause (as protective of community governance of religion) is not as clear or simple as it first appears.

According to Eric Foner, freedom in the early American republic was understood as obedience to a moral code. As John Winthrop, governor of Massachusetts colony, put it, "moral liberty" was "liberty to do only what is good."[29] In Christian terminology, liberty came through submission to God's will. So rather than think of freedom of religion as connoting an absence of constraint, it might be better understood as a mandate voluntarily to adopt religious principles (and thereby accept them more deeply) that would guide or constrain one's actions in the world. There was also a freedom component of the establishment clause. As suggested previously, the establishment clause did not sever the relationship between state governments and religious establishments. Indeed, when the Constitution was adopted, many

[27] John Witte, "The Essential Rights and Liberties of Religion in the American Constitutional Experiment," 71 *Notre Dame L. Rev.* 371, 384 (1996).
[28] Northwest Territory Ordinance of 1787, 1 Stat. 50 (1789), at 52.
[29] Foner, *Story of American Freedom*, at 1.

states had soft establishment provisions in their state laws or constitutions, most commonly involving religious qualifications for office holding.[30] Yet, in response to the first Great Awakening (a religious revival movement in the early eighteenth century), the colonists came to believe that Americans should be free to choose which church or (Protestant) denomination to belong to and that the success of particular churches in attracting members would be a sign of their adherence to God's commands. It was this aspect of the antiestablishment vision that called for state and colonial governments to avoid favoring a particular denomination through their tax provisions or school support. The freedom component of the establishment clause protected a narrow understanding of religious pluralism – narrow because it was assumed that everyone would belong to *some* church and because it supported religious pluralism only within Protestantism. In this sense, the establishment clause may be read as supportive of civil religion – a shared religious discourse and social formation that helps constitute the political culture of the nation.

Religion and Women's Public Voice

The religion provisions in the First Amendment recognize an intimate connection between religious life and civic membership. For women, that connection has manifested itself both in claims for public voice and in assertions of social subjection. Both social movement history and Supreme Court cases illustrate the various ways in which religion has structured women's civic membership over the course of American political history.

Anne Hutchinson and her family came to America in 1634 to follow her former minister, John Cotton, who had migrated to the Massachusetts Bay Colony the year before. At the time, church membership was a requisite for membership in the commonwealth because "social order was thought [by the leaders of the colony] to depend on religious orthodoxy."[31] Obedience to Puritan religious authority and law was expected of all the colony's residents. Hutchinson, however, expressed an emerging evangelical sentiment that suggested that individuals have a personal, unmediated relationship to God, and that it was through that personal relationship that salvation was to be found. She expressed her beliefs in private meetings with other religious women. But the growing popularity of those meetings attracted negative attention, eventually resulting in Hutchinson's trial and banishment from the commonwealth. While it would be a mistake to claim that Massachusetts's religious and political leaders in the early seventeenth century held views that were comparable to those of the authors of the Bill, this historical episode is instructive for our understanding of the role of religion in governing women's place under the Constitution.

[30] Akhil Reed Amar, "Some Notes on the Establishment Clause," 2 *Roger Williams U. L. Rev.* 1 (1996).
[31] Ann Withington and Jack Schwartz, "The Political Trial of Anne Hutchinson," 51 *New Eng. Q.* 226, 227 (1978).

Hutchinson's claim to public voice through religion suggests both the radical democratic potential inherent in the evangelical tradition and the countervailing weight of religious institutional authority as sustained by government. Before the mid-nineteenth century, it was considered unacceptable for American women to speak publicly. Yet women as well as men were encouraged to acquire knowledge of moral truth through the Bible, religious teachings, and ultimately (in the evangelical understanding), directly from God's revelations. For the Puritans, this truth came from the Word (the Bible), the meaning of which was conveyed to them by their ministers.[32] In time, as worship provided women with a sense of insight and understanding of the truth, it also authorized them as speakers of that truth. At her trial, Hutchinson defended herself by quoting scripture – publicly proclaiming her moral authority through religious understanding. At the end of her trial, Hutchinson even proclaimed that she had been subject to an immediate revelation by God. This proclamation of direct revelation was considered blasphemy, which threatened to upend a political order in which law and authority were tied to submission to the Church. The offense was compounded by Hutchinson's sex and her willingness to assert her beliefs against the authority of male ministers and magistrates. Her proclamation was also viewed by future generations as an act of individual conscience, in which disobedience to secular authority was justified by adherence to a higher law.

Time and again in American history, religion has provided a language of inspiration for the politically marginalized to proclaim moral truths in the public sphere. The converts of the second Great Awakening (which occurred in New England in the early nineteenth century) were predominantly young women, whose participation in these religious revivals simultaneously expressed the power of personal choice and conscience and submission to a moral order.[33] Sojourner Truth, an abolitionist and evangelical preacher, often justified the rights of women and slaves in the language of religion. She once criticized a minister for claiming that "woman can't have as much rights as man because Christ wasn't a man." Truth then asked, "Where does your Christ come from?" and answered, "From God and a woman. Man has nothing to do with him."[34] After the Civil War, women's rights leader Reverend Antoinette Brown Blackwell faced a mob of angry men, who denounced her call for women's suffrage. She recalled, "There were angry men confronting me and I caught the flashing of defiant eyes, but above me and within me, there was a spirit stronger than them all."[35] Even today, efforts to assert community standards and moral values in politics are often led by religiously inspired men and women.

[32] Edmund Morgan, "The Case Against Anne Hutchinson," 10 *New Eng. Q.* 635, 636 (1937).

[33] Nancy Cott, "Young Women in the Second Great Awakening in New England," 3 *Fem. Stud.* 15, 21 (1975).

[34] Ibid.

[35] Elizabeth Cady Stanton et al., eds., 2 *History of Woman Suffrage* (Rochester, NY: 1881–1922).

Religion and Community Governance

A late-nineteenth-century Supreme Court case on polygamy illuminates the role of religion in undergirding the political system. In *Reynolds v. United States*,[36] the Court rejected George Reynolds's contention that his conviction for bigamy should be overturned as a violation of his religious freedom. Reynolds lived in Utah Territory and was a member of the Church of Jesus Christ of Latter Day Saints. In addressing the question of religious freedom, the Court commented that polygamy was "odious among the northern and western nations of Europe" and was "almost exclusively a feature of the life of Asiatic and African people."[37] Immediately, then, this practice was cast as contrary to the moral traditions that informed American society and public culture, a view that was also expressed in racial terms.

According to the majority, the social ordering function of religion was expressed in laws governing marriage: "marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal." Marriage was a sacred institution. It was also an institution that created a social order ("social relations and social obligations"), upon which the governments of civilized nations relied. Preserving this social ordering function required legal oversight because there was a direct connection between the moral principles that governed marriage and the democratic character of the government: "according to as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people . . . rests." Polygamy might threaten the constitutional order: "polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism."[38] The concern here was not with what Carole Pateman calls *paternal* (rather than fraternal) patriarchy, namely, with the rise of a community in which religious, social, and political authority was concentrated among a few male elders.[39] Religion could play either a positive role in providing the social foundations for democracy or a negative role in concentrating social authority and undermining democracy. Yet the Court's concern with religion's impact on democracy was a concern only for the democratic rights of men.

Decades later, religion and civic identity reemerged as themes in a group of education cases. In a series of cases over the 1920s (*Meyer v. Nebraska*; *Pierce v. Society of Sisters*), 1940s (*Prince v. Massachusetts*), and 1970s (*Wisconsin v. Yoder*), the Court provided a doctrinal bridge between the religion clauses of the First Amendment and the substantive due process protection found in the Fifth and

[36] *Reynolds v. U.S.*, 98 U.S. 145 (1878).
[37] Ibid., at 164.
[38] Ibid., at 165–66.
[39] Carole Pateman, *The Sexual Contract* (Stanford, CA: Stanford University Press, 1988).

Fourteenth Amendments.[40] This doctrinal link was grounded in liberty, as stated in the Fifth Amendment's guarantee that no one could "be deprived of life, liberty or property without due process of law." This doctrinal migration from religious freedom to due process liberty is important in two respects: because of the parallel between the two due process clauses, the Court was able to restrict the actions of not only the federal government, but also the state governments; and in social governance terms, the Court gave greater attention and protection to the family as a site of social ordering. In time, the Court would develop the privacy doctrine (which is commonly grounded in the due process clauses) as a way to encapsulate both the idea of individual freedom of conscience expressed in choices that relate to family formation, sexuality, and reproduction and the idea that homes and families are social institutions that inculcate moral values and provide for community responsibility for social dependency.

Meyer and *Pierce* both address a parent's right to choose alternative schooling for his or her children. Education was often associated with religion as both were considered social institutions that create good citizens. The constitutional view of educational establishments tended, as it did with religious establishments, toward limited pluralism. Education is necessary and important to the creation of national identity and civic virtue, but within that broad mandate, the Court expressed tolerance for a degree of community and family governance over education. Yet this pluralism was challenged in the early twentieth century, as tensions arose regarding the political loyalties and civic integration of recent immigrant groups.

At issue in *Meyer* was a state law that barred instruction in foreign languages prior to the eighth grade. The plaintiff was a parochial school teacher convicted of teaching German to his students. Meyer challenged the state statute as an unreasonable infringement on his liberty as protected under the due process clause of the Fourteenth Amendment. The law was justified, according to the Nebraska Supreme Court, because "to allow the children of foreigners, who had emigrated here, to be taught from early childhood the language of the country of their parents was to rear them with that language as their mother tongue," which would "naturally inculcate in them the ideas and sentiments foreign to the best interests of this country."[41] The state court viewed the public schools as providing a necessary counterweight to the socializing functions of families and private schools, when those institutions are

[40] *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Wisconsin v. Yoder*, 406 U.S. 205 (1972). For other discussions of these cases, see Tamar Ezer, "A Positive Right to Protection for Children," 7 *Yale Hum. Rts. and Dev. L. J.*, 1 (2004); Anne Dailey, "Developing Citizens," 91 *Iowa L. Rev.* 431 (2006); Josh Chafetz, "Social Reproduction and Religious Reproduction: A Democratic-Communitarian Analysis of the *Yoder* Problem," 15 *Wm. and Mary Bill Rts. J.* 263 (2006); Lisa Biedrzycki, "'Conformed to the World': A Challenge to the Continued Justification of the *Wisconsin v. Yoder* Education Exception in a Changed Old Order Amish Society," 79 *Temple L. Rev.* 249 (2006).

[41] *Meyer*, at 398.

regarded as suspect in their civic allegiances (just as the Mormon Church was seen as suspect in its civic orientation).

The Supreme Court saw the issue differently. Reversing the lower court's ruling, it elaborated on the meaning of constitutional liberty:

> It denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[42]

Liberty had both personal and communal elements. Personally, it protected freedom of conscience, as expressed through religious worship, self-education, and the decision to marry and create a family. Communally, liberty was grounded in the social obligations created by church membership, marriage, and family formation (including the obligation to educate one's children) – activities regarded as "essential to the orderly pursuit of happiness by free men." At a social level, these were necessary, rather than optional, activities – they were activities that created order within the community of free men. During times of "peace and domestic tranquility," state interference with the right of parents to educate their children in accord with their cultural and religious values was intolerable.

This coupling of liberty and order was also expressed in *Pierce*. When the state of Oregon mandated that all children be sent to public school, the law was challenged by a private religious school. Citing *Meyer*, the Court ruled that the state of Oregon had infringed on "the liberty of parents and guardians to direct the upbringing and education of children."[43] The Court elaborated on the rights and duties of parents:

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.[44]

The state's role in regulating the education of children was limited because the government could not "standardize its children." For parents, a child's education was not only a right, but also a "high duty" that would lead a parent to prepare his or her child for "additional obligations." The obligations that the Court likely had in mind were social obligations such as work, civic involvement, religious participation, and marriage and parenting – preparing a child's place in the community he or she

[42] Ibid., at 399.
[43] *Pierce*, at 534.
[44] Ibid., at 535.

would join as an adult. Tension was evident in the Court's account of the socializing functions of public schools versus families, but so long as families and religious communities inculcated the proper civic values in their children, then tolerance for educational and religious pluralism should be respected. Stephen Carter applauds the Court's ruling in *Pierce* for its implication that "the state may not use its power to compel education as a tool for destroying religion."[45]

In *Prince*, the Court more explicitly paired concern for religious liberty with substantive due process reasoning. The case involved Sarah Prince's conviction under the state's child labor law for allowing her niece (and ward) to proselytize in the public square for the Jehovah's Witnesses. Prince claimed the state had violated her religious freedom and her liberty as a parent to raise her niece according to her beliefs. In upholding Prince's conviction, the Court reaffirmed its concern for parental liberty and religious freedom, while also detailing the limits of those rights – limits that were framed in gendered terms.

The Court began by confirming parental authority as a constitutionally protected aspect of liberty: "it is cardinal with us that the custody, care and nurture of the child reside first in the parents."[46] Yet a parent's authority was constrained by the state's obligation to safeguard the welfare of children.[47] In siding with the state over Sarah Prince, the Court seemed to show less respect for her authority role as a parent than for the parents in these earlier cases. Recounting the events leading up to Prince's arrest, the Court recalled, "That evening, as Mrs. Prince was preparing to leave her home, the children asked to go. She at first refused. Childlike, they resorted to tears and, motherlike, she yielded."[48] Maternal emotions overcame Sarah Prince's better judgment.

Further on, the Court considered Prince's assertion of religious freedom, rather than freedom of speech:

> It may be doubted that any of the great liberties insured by the First Article can be given higher place than the others. . . . Heart and mind are not identical. Intuitive faith and reasoned judgment are not the same. Spirit is not always thought. But in the everyday business of living, secular or otherwise, these variant aspects of personality find inseparable expression in a thousand ways. They cannot be altogether parted in law more than in life.[49]

Religion – as practiced by Sarah Prince – was a freedom of the *heart*, while speech was a freedom of the *mind*. While denying that such rights could be separated, the Court cast Prince on the side of heart, intuition, and spirit, rather than mind. This was not a rational, enlightened pursuit of ordered liberty. The emotional, disordered outcomes were created when a lone woman tended to her niece on the street,

45 Quoted in Chafetz, "Social Reproduction," at 278.
46 *Prince*, at 166.
47 Ibid., at 169.
48 Ibid., at 162.
49 Ibid., at 164–65.

beyond the safety of the home or the guidance of a father. The disorderly aspect of this intuitive faith may also reflect the Court's disregard for a nonmainstream religion such as the Jehovah's Witnesses.[50]

In allowing her to engage in "zealous" street preaching, Prince was putting her niece in an unsafe situation that was "wholly inappropriate for children, especially of tender years, to face." The majority was concerned for the possible "psychological or physical injury" entailed and concluded that parents are not free "to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."[51] The danger derived partly from the location of this religion practice on a street corner. Both the nature of the parental error and the fear of the harm that might ensue were cast in gendered terms. The portrait provided is of an emotional aunt who left the shelter of domesticity to expose her young, impressionable niece to the harms of the street. These cases suggest that claims of parental authority were more likely to succeed as substantive due process claims when they were made by authoritative, rational fathers, rather than solitary, emotional mother figures. Freedom of religion and the liberty of parents were protected by the Bill when they conformed to our larger vision of the social ordering role of families and religious establishments – a vision that was challenged by the presence of solitary women or marginalized religions.

The Court's treatment of Sarah Prince contrasts with the deference shown to the Amish fathers in *Yoder*. Wisconsin state authorities had fined Jonas Yoder (along with two other fathers from local Amish and Mennonite sects) for their refusal to send their children to school beyond the eighth grade. The fathers challenged the compulsory school attendance law as a violation of their religious freedom and parental authority. Citing *Pierce*, the Court upheld the right of parents "to guide the religious future and education of their children."[52] For the Amish, public high school threatened their religious beliefs and way of life "because the values they teach are in marked variance with Amish values and the Amish way of life."[53] Given the conflict between these competing sources of social ordering, the Court sided with church and family. While the Amish were committed to creating a life "aloof from the world and its values," the Court also found that they were "a highly successful social unit within our society" with an "excellent record as law-abiding and generally self-sufficient members of society."[54] Indeed, the Court seemed to idealize the productive, agrarian Amish as emblematic of the Jeffersonian "ideal of the 'sturdy yeoman.'"[55]

[50] Indeed, in another religion and education case from the previous year, *Minersville Sch. Dist. v. Gobitis*, the Court upheld the state of Pennsylvania's right to expel students who refused to say the Pledge of Allegiance because it conflicted with their religious beliefs as Jehovah's Witnesses. 310 U.S. 586 (1940), overruled by *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 62 (1943).

[51] *Prince*, at 169–70.

[52] *Yoder*, at 233.

[53] Ibid., at 210–11.

[54] Ibid., at 210, 222, 213.

[55] Ibid., at 225.

Responding to *Pierce*'s invocation of a parental duty to prepare children for "additional obligations" (as well as the state's claim that children should be educated to prepare them for public life), the Court in *Yoder* concurred, stating that this duty "must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship."[56] Yet the Amish were a community apart, who were exempted by Congress from paying social security taxes in light of their refusal to accept any public welfare. However, because the Amish community did not challenge the political authority of the state (as the Mormons had), nor threaten the health or welfare of minors (as Sarah Prince purportedly did), nor offer social ordering values that clashed with the nation's predominant Judeo-Christian traditions (regarding marriage, work, and family), they were allowed to exist separately.

In his dissent, Justice Douglas chastised the majority for failing to consider the interests of the children represented in this case and for assuming "that the only interests at stake in the case are those of the Amish parents on the one hand, and those of the State on the other."[57] The established religious community of the Amish was, of course, a patriarchal one, where men spoke for their wives and children both in the Courts and in their churches. In contrast, Douglas offered a view of Amish families as containing individuals with possibly competing interests on matters of faith and education. For Douglas, religion spoke more to matters of conscience and judgment than community control. In this distinction between religion as individual truth and public voice versus religion as an institution of community control and social ordering, the Court affirmed the latter perspective in protecting the authority of Amish fathers over the religious and educational training of their children.

As James Morone illuminates in his book *Hellfire Nation*, religion is enmeshed with American public culture and nationalism.[58] Over the course of American history, religion and morality have invoked efforts to unite the nation; make legitimate candidates and policies; fuel social divisions along racial, ethnic, and gender lines; prevent the formation of countercoalitions, for instance, along class lines; and provide the impetus for state building. The tendency toward moral ordering in public life has both engaged many women in religiously inspired social movements and also subjected them to legal regulation. The regulation of women and morality provided an acceptable realm of governmental action long before the regulation of industry did. This may be partly because "women and the family often serve a crucial symbolic role in constructing group solidarity vis-à-vis wider society."[59] While the vision of the original Bill may have been one in which community regulation of women and morality provided the social foundation for a democratic public sphere, over time, the pressures of religious, ethnic, and national diversity created tension

[56] Ibid., at 233.
[57] Ibid., at 241.
[58] James Morone, *Hellfire Nation: The Politics of Sin in American History* (New Haven, CT: Yale University Press, 2001).
[59] Shachar, "Religion, State," at 50.

between the socializing function of groups and the state's role in the civic reproduction of the nation. Because women and families stand at ground zero in the fight over social and civic reproduction, the constitutional governance of gendered roles (including those of mother and father) tells us a great deal about ongoing tensions between individual rights and community-ordered liberty.

A Jury of Peers

Since the Magna Carta, trial by jury has been regarded as a fundamental right of free men. Within the Bill, juries are upheld in three amendments: the Fifth Amendment, which provides that a person cannot be held for a capital crime, except under "indictment by a Grand Jury"; the Sixth Amendment, which guarantees a public trial for a criminal offense "by an impartial jury of the State or district wherein the crime shall have been committed"; and the Seventh Amendment, which protects the "right to trial by jury" in civil suits. At the time that the Bill was adopted, these jury guarantees were intended both to protect individuals from abuses of power by the federal government and to give communities a voice in administering justice. Over the course of American history, women's struggle to be included in these protections (as jurors and as individuals entitled to a jury of one's peers) expressed both their effort to be seen as rights-bearing individuals in the public sphere and concerns over the place of women within the American political community.

In *The Law of the Other*, Marianne Constable writes about an older tradition of jury trials dating to the early modern era in England.[60] The institution of the mixed jury was used when a plaintiff and defendant came from different communities – defined by occupation, religion, nationality, or ethnicity, for instance. At such times, the court would impanel a jury that drew equally from members of both communities, believing that these communities had their own particular understandings of justice that might shape their judgment of a crime. Constable writes, "Early juries embody a principle of personal law, whereby both non-alien and alien persons are entitled to be judged *secundum legum quam vivit* – by the customs of the community to which the person belongs, or, literally, 'according to the law by which one lives.'"[61] Over time, community governance of justice was displaced by a system of written law and rules dictating the way that judgments regarding guilt or innocence must be made. By the time of the American Revolution, there was only a weak echo of the community justice ideal expressed in the mixed-jury system. Over recent decades, even this echo has largely been silenced by the rise of positive law, the belief that standards of justice come from above, and the commitment to an impartial jury, in which social experiences and community norms have no bearing on determinations of justice.

[60] Marianne Constable, *The Law of the Other: The Mixed Jury and Changing Conceptions of Citizenship, Law and Knowledge* (Chicago: University of Chicago Press, 1994).

[61] Ibid., at 2.

The inclusion of a right to trial by jury in the Bill represented a compromise between the Federalists and the anti-Federalists. Alexander Hamilton outlined the difference in the views of these two groups during the debates over ratification: "the friends and adversaries of the plan of the convention, if they agree on nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government."[62] Echoing the anti-Federalist position, Alexis de Tocqueville noted that Americans regarded the jury "as a political institution . . . one form of sovereignty of the people."[63] Yet the sovereignty enacted on juries was limited to those regarded as full citizens – typically white male property owners, at the time of the founding. In Maryland, even atheists were among those disqualified from jury service.[64]

After the Civil War, as the Bill was read through the Fourteenth Amendment as primarily protective of individual rights, rather than community governance, jury service became an issue of political incorporation – an issue first signaled by Chief Justice Roger Taney's discussion of citizenship in *Dred Scott*.[65] In support of his contention that African Americans were not citizens, Taney reviewed numerous legal restrictions imposed on them by the states and colonies, including prohibitions on voting, holding public office, militia service, labor rights, intermarriage, and education. Detailing one such law, barring African Americans from serving in the militia in New Hampshire, Taney reflects that this indicates that "he forms no part of the sovereignty of the State, and is not therefore called on to uphold and defend it."[66] The rights of popular sovereignty contained within the Bill of Rights were rights that indicated civic standing and membership. After Reconstruction, jury service was seen as a marker of civic inclusion, at least for African Americans.

In *Strauder v. West Virginia*,[67] the Supreme Court overturned a law barring African Americans from jury service: "the very idea of a jury is a body of men composed of peers or equals of the person whose rights it is summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds." Denying African Americans the right to sit on juries would serve to place "practically a brand upon them, affixed by law, an assertion of their inferiority," resulting in unequal citizenship.[68] Although it was framed as an equal protection matter, the Court referred to jury service as a right or immunity and stressed its concern with protecting the citizenship status of the freedmen. Indicating that juries were still institutions of community governance, the Court suggested that

[62] Clinton Rossiter, ed., *The Federalist Papers* (New York: Penguin, 1961), at 499.
[63] Alexis de Tocqueville, *Democracy in America* (New York: Knopf, 1945), at 283.
[64] Albert Alschuler and Andrew Deiss, "A Brief History of the Criminal Jury in the United States," 61 *U. Chi. L. Rev.*, 867, 877 (1994).
[65] *Dred Scott*, at 415.
[66] Ibid.
[67] *Strauder v. West Virginia*, 100 U.S. 303 (1879).
[68] Ibid., at 308.

other forms of discrimination in jury selection remained acceptable: "it may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications."[69]

Despite *Strauder*'s ringing proclamation of civic inclusion for African Americans, racial exclusion from juries continued to operate de facto for many more decades. For women, the battle for inclusion gained momentum after the Nineteenth Amendment was adopted in 1920, but rights advocates faced considerable resistance from courts and legislatures, who saw women's commitment to domestic life as a bar to their participation in the more demanding duties of public citizenship such as jury and military service. In contrast, some early women's rights advocates called for women's inclusion on juries as a means of countering masculine control over the implementation of justice. As Antoinette Brown said in 1852, "The law is wholly masculine; it is created and executed by man. . . . The law then could give us no representation as woman, and therefore no impartial justice even if the present lawmakers were honestly intent upon this; for we can be represented only by our peers."[70] In an echo of the mixed-jury tradition, Brown presented jury service as a form of officeholding in which women represented other women in their communities.[71]

By the early twentieth century, women's claim for jury service was akin to the Court's opinion in *Strauder*: it provided recognition of the legal status of potential jurors.[72] Hoping to build on the parallel between the Fifteenth Amendment and the Nineteenth Amendment,[73] women's rights advocates claimed that suffrage had made them full citizens with all the rights and duties that went with that status. Yet this call frequently fell on deaf ears, as judges and legislators took the view that the Nineteenth Amendment had given women the right to vote and nothing more.[74] Following the adoption of the Nineteenth Amendment, women's citizenship was caught between a narrow understanding of their rights as individuals in the public realm and their place as domestic dependents within their families and communities.[75] Given the old Bill of Rights vision of those communities as hierarchically structured, and

[69] Ibid., at 310.

[70] Stanton et al., *History of Woman Suffrage*, at 594.

[71] One special form of the mixed jury was the matrons' jury, in which a group of twelve women were called upon to judge whether a woman defendant was with child. In colonial America, matrons' juries also served in some witchcraft trials. The presumption in both instances was that women (especially married women and mothers) had the experience and understanding to judge the testimony and physical condition of other women. See Carol Weisbrod, "Images of the Woman Juror," 9 *Harv. Women's L. J.* 59, 60 (1986).

[72] Gretchen Ritter, "Jury Service and Women's Citizenship Before and After the Nineteenth Amendment," 20 *L. and Hist. Rev.* 479 (2002).

[73] The parallel between the Fifteenth and Nineteenth Amendments was elaborated in connection to the ruling in *Neal v. Delaware*, which found that once African Americans were given the right to vote through the Fifteenth Amendment, they were entitled to all the rights and duties of electors, which in Delaware included jury service. 103 U.S. 370 (1880).

[74] Ritter, "Jury Service"; Jennifer K. Brown, "The Nineteenth Amendment and Women's Equality," 102 *Yale L. J.* 2175 (1993).

[75] Ritter, *Constitution as Social Design*, at 300–02.

governed by independent men, it is not surprising that when women were seen in gendered terms (as socially situated within families and communities), they were commonly excused from the burdens of jury service.

By the 1940s, the Supreme Court vacillated between support for women's civic inclusion and continued tolerance of their civic exclusion in relation to jury service. The majority in *Ballard v. United States* upheld the plaintiffs' claim that the exclusion of women from the jury had adversely affected their right to a fair trial.[76] Women's presence made a difference in determinations of justice, but the concern in this case was not with the rights of women as potential jurors; rather, it was a concern for the civil rights of defendants and the potential biases of an all-male jury: "the truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; . . . The exclusion of one may indeed make the jury less representative of the community." What made the presence of women particularly relevant to this case was the fact that it involved the "prosecution of a mother and her son for the promotion of an allegedly fraudulent religious program."[77] Quoting from a lower court opinion, the Court affirmed the association of women with parental nurture, education, and religion:

> In the public schools over ninety-five per cent of the primary and grammar school teachers are women. In the churches of all religions the numbers of women attendants on divine service vastly exceed men. . . . Well could a sensitive woman, highly spiritual in character, rationalize all the money income acquired by Mrs. Ballard.[78]

By the 1940s, the language of gender difference had begun to shift from one of natural difference to one that focused on social roles such as the roles of women as mothers, teachers, and church members. These invocations of community roles allowed for safe articulations of social difference in an era when the legal language of equal individual rights was growing stronger.

Over time, the states came to recognize women's eligibility for jury service as a right of citizenship, while the courts recognized a defendant's right to a jury drawn from a fair cross section of the community.[79] State by state, over several decades, the laws changed. Yet even after eligibility was established (in all fifty states as of 1968), many states allowed for the de facto exclusion of women through exemptions in deference to women's domestic duties. This policy of gender-specific exemptions was upheld by the Supreme Court in *Hoyt v. Florida*, only to be finally overturned in *Taylor v. Louisiana*.[80] That judgment was reaffirmed in *Duren v. Missouri*, which

[76] *Ballard v. United States*, 329 U.S. 187 (1946).
[77] Ibid., at 193–94.
[78] Ibid., at 194–95.
[79] Barbara Allen Babcock, "A Place in the Palladium: Women's Rights and Jury Service," 61 *U. Cin. L. Rev.* 1139 (1993).
[80] *Hoyt v. Florida*, 368 U.S. 57 (1961); *Taylor v. Louisiana*, 419 U.S. 522 (1975).

ended automatic exemptions for women.[81] In an article on women's jury service, Joanna Grossman contends that the slow pace of full inclusion reflects the reluctance of states and courts to make jury service a recognized right of citizenship for women.[82]

The difficulty of achieving full inclusion is illuminated by situating jury service in relation to both the popular sovereignty provisions within the Bill and the equality of status protection offered by the Fourteenth Amendment. As a right of popular sovereignty (within the Sixth Amendment), jury service suggests political participation, and in accordance with the antebellum reading of the Bill, it also suggests community governance and regulation of community members by their states. While the popular sovereignty view of jury service is appealing in its participatory guise, it can be limiting because it allows for a hierarchically ordered community, in which only some members have the social requisites of full participation. The history of women's exemption from jury service recalls the connection between women's domestic roles and their exclusion from civic life. While the equal protection argument for jury service argues against exclusion, it may not provide an affirmative argument for inclusion. Treating jury service (like voting) as an individual right also left women little room to elaborate a public, feminist vision of civic membership. Individual equality does not speak to what women might bring with them, from their experience as community or family members, to the voting booth or jury box. An alternative vision might bring together the participatory, community-based aspects of the Bill with the nondiscriminatory provisions of the voting amendments to create a robust mandate for civic inclusion.[83] Yet this appealing alternative has yet to be realized.

Conclusion: Community Governance and Individual Rights

Over the middle and latter parts of the twentieth century, the United States underwent a rights revolution that celebrated equal treatment and unfettered opportunities for individual achievement, without regard to ascriptive social differences. The terms of American citizenship were expanded in the 1960s to include support for economic opportunity for African Americans and other previously marginalized groups, including women. In the wake of the civil rights movement, civic equality was defined as freedom from economic discrimination on the basis of race or sex, and the machinery of nondiscrimination (particularly the Equal Employment Opportunity Commission (EEOC) as well as the Civil Rights Division of the Justice Department) was available for use by those who could claim ascriptive discrimination. Once discrimination is addressed (under the terms of Title VII of the Civil

[81] *Duren v. Missouri*, 439 U.S. 357 (1979).

[82] Joanna L. Grossman, "Women's Jury Service: Right of Citizenship or Privilege of Difference?," 46 *Stan. L. Rev.* 1115, 1138–39 (1994); see also Linda Kerber, *No Constitutional Right to Be Ladies: Women and the Obligations of Citizenship* (New York: Hill and Wang, 1998).

[83] Vikram David Amar, "Jury Service as Political Participation Akin to Voting," 80 *Cornell L. Rev.* 203 (1995).

Rights Act of 1964), and all Americans are treated as individuals who are judged by their ability and effort, then the government's responsibility for creating economic opportunity ends, and the responsibility of individuals to succeed through their own efforts begins.

For women, the Equal Pay Act, Titles VII of the Civil Rights Act, Title IX of the Education Amendments of 1972, the Pregnancy Discrimination Act, and equal protection jurisprudence have all contributed to the expansion of economic opportunity.[84] What the antidiscrimination framework did, in effect, was encourage women's rights advocates to claim equal rights for women as individuals in the public realm, regardless of their ascriptive status. The appeal of this approach was based upon its proven success for other groups. In the mid-1960s, the National Organization of Women was inspired by the successes of the civil rights advocates, who worked with allies on the EEOC to address race-based economic discrimination. Similarly, Ruth Bader Ginsburg self-consciously modeled the judicial approach of the American Civil Liberties Union's Women's Rights Project (which she directed) on the National Association for the Advancement of Colored People Legal Defense and Education Fund's successful effort to overturn *Plessy v. Ferguson*.[85]

There are several things worth noting about the effect of the antidiscrimination model on women's rights and gender politics in the United States. First, this model neglected issues that were connected to the domestic economy and relational obligations. Second, the rights revolution happened largely in the courts, a realm suited to activism by legal advocacy groups, rather than regular citizens. In that sense, rights advancements were less likely to be tied to increases in civic participation for women. Third, the antidiscrimination model is premised on a rejection of ascriptive identities as an appropriate foundation for citizenship. Ascriptive identities are treated as something that should be overcome – their relevance in the form of legal classification is taken as an indication of discrimination.[86] The ideal end point of the antidiscrimination approach is the complete erasure of sex and race as markers of civic difference. As such, policies and politics that emphasize gender-related social experiences and concerns, including family care concerns, do not find ready purchase in a rights-based, antidiscrimination framework.[87]

In contrast to the antidiscrimination model, I contend that the republican vision of popular sovereignty expressed in the Bill provides some hope for those seeking a more inclusive notion of equality and citizenship that draws on women's experiences in their families and communities as well as their interests as autonomous individuals in the public realm. The popular sovereignty vision emphasizes that social experience and social diversity matter to politics. Instead of suggesting that we should strip away or leave aside our religious values, family ties, community commitments, ethnic

[84] *Reed v. Reed*, 404 U.S. 71 (1972).
[85] Ritter, *Constitution as Social Design*, at ch. 7.
[86] Wendy Brown, *States of Injury* (Princeton, NJ: Princeton University Press, 1995).
[87] Ritter, *Constitution as Social Design*.

heritage, and gendered experiences when we enter the voting booth or the jury box, this perspective calls upon citizens to bring those values and experiences with them into dialogues over the larger common good.[88] As Shachar suggests, this should be done in a way that encourages voice and expression within communities (and not just between them), so as to allow for dissent and to guard against subordination.[89] Allowing for consideration of different sources of cultural traditions and community norms in political and judicial venues, while remaining attentive to claims of injury of subordination by the less powerful or privileged, is a promising starting point for such an approach. A politics that is responsive to the needs and concerns of a diverse society cannot merely be based on a stripped-down liberal individualism – it must expose and appreciate the way that social embeddedness and community values shape us all.

[88] See Chapter 4, in which Beverley Baines discusses whether feminists ought to be secular.
[89] Shachar, "Religion, State."

4

Must Feminists Identify as Secular Citizens? Lessons From Ontario

Beverley Baines*

Introduction

Must feminists identify as secular citizens? Conceptualizing citizenship as secular is a recent phenomenon. There is no reason to advert to the secularism of liberal citizens because distinguishing secularism from religion and affirming secularism are two defining features of liberal states. However, the revitalization of religion in the public sphere portends a postsecular state in which some citizens will opt to participate as religious adherents. Recently, the Canadian province of Ontario appeared to become postsecular when some religious adherents initiated a political campaign for recognition of Sharia family arbitration. Since feminists participated actively in the ensuing political deliberations, my objective in this chapter is to identify them and to explore the implications of postsecularism for their citizenship.

Theories of citizenship abound. However, one of the few scholars to theorize postsecular citizenship is Jürgen Habermas.[1] According to Habermas, the postsecular state is constituted by religious lobbyists and their secular opponents. Because the advocates of Sharia family arbitration met his criteria for religious citizenship, I focus on their secular opponents, who were mainly feminists. The debate between these religious citizens and secular feminists resembled the deliberations that Habermas would attribute to a postsecular state. Presumably he would also find the outcome of this debate – Ontario imposed a ban on all faith-based family arbitrations[2] – consistent with postsecularism.

This outcome did not please some religious citizens, who threaten to challenge its constitutionality by invoking their guarantee of religious freedom under the Canadian Charter of Rights and Freedoms.[3] Secular feminists remain ready to respond

* I appreciate the helpful comments received from Daniela Hrzán, Vibeke Blaker Strand, Anne Hellum, Tone Linn Waestad, Karima Bennoune, Martha Bailey, Roberta Hamilton, Rosemary King, and the editors of this volume.

1 Jurgen Habermas, "Religion in the Public Sphere," *Holberg Prize Lecture*, Nov. 29, 2005, available at http://www.holberg.uib.no/ (accessed Nov. 20, 2008).

2 Kirsten McMahon, "McGuinty Raises Legal Eyebrows: No More Faith-Based Arbitration," *Law Times*, Sept. 19, 2005, at 1.

3 Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, § 2(a).

by asserting their right to sex equality.[4] However, as I will explain, the claims of another group of women complicate this adversarial description of Charter citizenship. Sherene Razack,[5] Natasha Bakht,[6] and others[7] portray these claims as made by women for whom sex equality and religious freedom are equally compelling values. The women who advance these claims should be analogized to intersectional feminists, who refuse to choose between their race and/or sexuality and their feminism.[8]

Recognition of intersectional feminists raises the issue of their citizenship, which I analyze from two perspectives: postsecular theory and the Charter. This chapter explains why Habermas's theory fails to offer intersectional feminists any mechanism for becoming citizens in a postsecular state. It also critiques the Supreme Court of Canada's Charter jurisprudence for not recognizing the claims of intersectional rights seekers. I conclude that we will have to wait for postsecular theory and Charter jurisprudence to catch up to the lives of these intersectional feminists. Until then, they must identify as secular feminists to intervene in postsecular and Charter deliberations involving faith-based family arbitration. They must, in short, repudiate their intersectionality.

The Religious Lobby

The Canadian controversy about religious arbitration of family matters dates back to the mid-1980s, when the Ontario government began to address the issue of state control over alternative dispute resolution processes. Arbitration, which is binding once the parties consent to the process, was first regulated in Ontario by legislation copied from the U.K. Arbitration Act of 1889.[9] Over the next two decades, Ontario enacted into law three major policy changes relevant to the religious arbitration controversy. First, the Arbitration Act, 1991, reduced the broad discretionary supervisory powers of courts to an itemized list of grounds for setting aside awards, including when the "applicant was not treated equally and fairly."[10] According to a lower court decision, judges could interpret *fairly* more broadly than procedural fairness.[11] Second, mediation (but not arbitration) became mandatory for most case-managed civil

4 Ibid., at §§ 1, 15(1), 28; see also Mary Anne Case's analysis in Chapter 5.

5 Sherene H. Razack, *Casting Out: The Eviction of Muslims From Western Law and Politics* (Toronto: University of Toronto Press, 2008).

6 Natasha Bakht, "Were Muslim Barbarians Really Knocking on the Gates of Ontario? The Religious Arbitration Controversy – Another Perspective," 40th Anniv. Ed. *Ottawa L. Rev.* 67 (2005).

7 Sheema Khan, "The Sharia Debate Deserves a Proper Hearing," *Globe and Mail*, Sept. 15, 2005, at A21; Anna Morgan, "Shackles That Bind Women of Faith," *Toronto Star*, Oct. 9, 2005, at A17; Haroon Siddiqui, "Charter, Gender Equity and Freedom of Religion," *Toronto Star*, Sept. 7, 2006, at A21.

8 Kimberle Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Colour," 43 *Stan. L. Rev.* 1241 (1991).

9 International pressure forced adoption of a distinctive law for international commercial arbitrations in the mid-1980s. See W. H. Hurlburt, "A New Bottle for Renewed Wine: The Arbitration Act, 1991," 34 *Alta. L. Rev.* 86, 87 (1995).

10 S.O. 1991, ch. 17, § 46(1).

11 James Thornback, "The Portrayal of Sharia in Ontario," 10 *Appeal* 1, 6 (2005) (citing *Hercus v. Hercus*, 103 A.C.W.S.(3d) 340 [2001], at para. 96).

lawsuits in 1998.[12] This change extended to a number of family matters under the Family Law Act (FLA)[13] and the Children's Law Reform Act,[14] both of which were amended to authorize court-ordered mediation in some circumstances.[15]

Finally, on September 11, 2005, Ontario Premier Dalton McGuinty issued a policy statement directly relevant to the religious arbitration controversy: "there will be no sharia law in Ontario. There will be no religious arbitration in Ontario. There will be one law for all Ontarians."[16] The Ontario Legislature subsequently enacted this policy into law as the Family Statute Law Amendment Act, 2006 (FSLA).[17] However, absent knowledge of the premier's prior declaration, it would be hard to read the FSLA's text as a ban on religious arbitrations of any type.[18]

The main thrust of the FSLA is to require compliance with the FLA[19] as a precondition to enforcement of arbitral awards in the civil courts. The new legislation does not ban faith-based family arbitration, but merely denies enforcement of awards that are inconsistent with Ontario (and Canadian) law. Religious arbitrations are thus neither illegal nor subject to prosecution; yet the law rejects legal pluralism. As Audrey Macklin observes, withholding enforceability "does not mean that faith-based arbitration . . . will not happen."[20] Over two decades, therefore, Ontario moved from restricting judicial supervision and strengthening arbitration to reasserting state control and repudiating pluralism. This change was the direct result of a Sharia arbitration proposal pursued by a small organization, the Canadian Society of Muslims (CSM),[21] and its president, attorney Syed Mumtaz Ali.

In 1986, Ali made a little-noticed submission to the inquiry investigating whether alternative dispute resolution processes had a place in Ontario's civil justice system. He proposed recognition of Muslim personal law in arbitrations involving family matters.[22] Although nothing came of his submission, he did not abandon his quest. Instead, he began to issue statements elaborating it. He explained that Muslim personal/family law covers "issues such as marriage, divorce, separation, maintenance, child support and inheritance."[23] He contended that these issues should be

[12] Shelley McGill, "Religious Tribunals and the Ontario Arbitration Act, 1991: The Catalyst for Change," 20 *J. L. and Soc. Pol'y* 53, 54 (2005).
[13] R.S.O. 1990, ch. F 3, § 3.
[14] R.S.O. 1990, ch. C 12, § 31(1).
[15] Mary Jane Mossman, *Families and the Law in Canada: Cases and Commentary* (Toronto: Harcourt Canada, 2004), at 325.
[16] Prithi Yelaja and Robert Benzie, "McGinty: No Sharia Law," *Toronto Star*, Sept. 12, 2005, at A1.
[17] S.O. 2006, ch. 1.
[18] Some media and women's groups were grievously misled by the premier's announcement: "Ontario Bans Religious Tribunals in Law Disputes," *Kingston Whig Standard*, Feb. 15, 2006, at 9.
[19] Family Law Act.
[20] Audrey Macklin, "The Debate Over Faith Based Arbitration," *Nexus*, Spring/Summer 2006, at 48.
[21] Canadian Society of Muslims, Home page, available at http://muslim-canada.org/ (accessed Feb. 27, 2008).
[22] Canadian Society of Muslims, "The Genesis: A Word From the President," available at http://muslim-canada.org/ (accessed Feb. 27, 2008).
[23] Canadian Society of Muslims, "Oh! Canada: Whose Land, Whose Dream?," available at http://muslim-canada.org/ (accessed Feb. 27, 2008), at 41.

decided by dispute resolution tribunals "set up, staffed and monitored by people from the Muslim community."[24]

In 1994, Ali made another submission calling for recognition of Muslim personal/family law, this time to the Ontario Civil Justice Task Force.[25] It now became clear that he intended arbitrations to begin and end in the civil courts. Upon receipt of a statement of claim, a court should refer the matter to arbitration to settle the issues in accordance with Sharia law; thereafter, the award would be filed with the court to make it enforceable as the court's judgment.[26] Ali did not propose to sever the relationship between arbitration tribunals and courts. Instead, he sought to restrict the role of courts to purely procedural matters: judges should not be called upon to interpret Sharia law.

The task force did not adopt Ali's proposal.[27] Instead, it made recommendations that led Ontario to adopt court-ordered mediation for family matters. The CSM took advantage of this change by establishing a Muslim Marriage, Mediation, and Arbitration Service.[28] However, Ali continued to pursue Sharia arbitrations. In October 2003, he convened a conference of Muslim community leaders in Toronto, telling them that they had no choice but to set up their own arbitration board. By March 2004, the Islamic Institute of Civil Justice (IICJ) was established.[29] The IICJ's primary task would be to set up Muslim arbitration boards (Dar-ul-Qada).[30] Dar-ul-Qada decisions would be binding and enforceable in the civil courts under the authority of Ontario's Arbitration Act.[31]

Ali warned that "'to be a good Muslim,' all Muslims must use these sharia courts."[32] Maintaining Muslim religious beliefs and practices is not a matter of choice, he warned; dire consequences awaited Muslims who fail to subscribe to a complete system of Muslim conflict resolution. Ali wrote,

> If the governmental authorities and judicial system of a non-Muslim country have in place methods of conflict resolution that are rooted in principles and values that are governed by motives other than the intention to please God or which do not serve the best interests of the Muslim community or which contain less wisdom than do the guidelines which have been given by Allah and His Prophet, then Muslims place their spiritual and social lives in dire peril

[24] Ibid., at 43.

[25] Canadian Society of Muslims, "The Review of the Ontario Civil Justice System: The Reconstruction of the Canadian Constitution and the Case for Muslim Personal/Family Law," available at http://muslim-canada.org/ (accessed Feb. 27, 2008), at 53.

[26] Ibid., at 41.

[27] Canadian Society of Muslims, "Shariah Implementation in Canada," available at http://muslim-canada.org/ (accessed Feb. 27, 2008).

[28] Ibid. Arbitration differs from mediation: only arbitration decisions are binding on the parties.

[29] Canadian Society of Muslims, "An Update on the Islamic Institute of Civil Justice (Darul-Qada)," available at http://muslim-canada.org/ (accessed Feb. 27, 2008).

[30] Ibid.

[31] Arbitration Act, 1991.

[32] Margaret Wente, "Life Under Sharia, in Canada?," *Globe and Mail*, May 29, 2004.

> when they submit to that which is other than what Allah has ordained for those who wish to submit themselves to Him.[33]

In short, religious doctrine justifies Sharia arbitrations.

Among the founding members of the IICJ, however, there were conflicting views about the model of Sharia that would be used by the Dar-ul-Qada. Not only does Sharia differ "among various sects and countries of origin,"[34] but in addition, conflicts could arise between Sharia and Canadian laws. Responding to both concerns, Ali stated categorically, "If there is a conflict, Canadian law will prevail."[35] In contrast, another founding member of the IICJ, Syed Soharwardy, asserted, "Sharia cannot be customized for specific countries. These universal, divine laws are for all peoples of all countries for all times."[36]

Other religious organizations played no appreciable public role in Ali's lobby. In June 2004, however, the Ontario government appointed Marion Boyd, a former attorney general, to review "the use of private arbitration to resolve family and inheritance cases," including "religious based arbitrations."[37] The establishment of this review resulted in other religious voices joining the public debate. Between July and September 2004, Boyd spoke to 198 individuals, including representatives of Muslim, Islamic, Ismaili, Dar-ul-Qada, Jewish, and Christian organizations.[38] She received submissions from individuals as well as a multitude of religious organizations.[39] Because only half of the identifiably religious presentations came from Muslim, Islamic, Ismaili, and Dar-ul-Qada individuals and organizations, the arbitration controversy was reframed almost overnight from being about Sharia to being about faith-based tribunals.

Boyd's lengthy report, released in December 2004, supported religious arbitration of family matters but also offered many recommendations.[40] She recommended adding arbitration (and mediation) agreements[41] to the definition (and protection) of domestic contracts in Ontario's Family Law Act; recommended that arbitration agreements be reconfirmed at the time of the dispute; set out the form of religious law to be used and recommended that an acknowledgment that the parties had received and reviewed the arbitrator's statement of principles of faith-based arbitration be included; and recommended that agreements contain either a certificate

[33] Syed Mumtaz Ali and Anab Whitehouse, "The Reconstruction of the Constitution and the Case for Muslim Personal Law in Canada," 13 *J. Inst. Muslim Minority Aff.* 156, 170 (1992).

[34] Lynda Hurst, "Ontario Sharia Tribunals Assailed: Women Fighting Use of Islamic Laws," *Toronto Star*, May 22, 2004, A1, at A26.

[35] Ibid.

[36] Ibid.

[37] Marion Boyd, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion*, available at http://www.attorneygeneral.jus.gov.on.ca/ (accessed Nov. 23, 2008), at 143.

[38] Ibid., at App. II.

[39] Ibid., at App. III.

[40] Ibid., at 133 (recs. 1–2).

[41] Ibid. (rec. 3).

of independent legal advice or an explicit waiver of it.[42] She recommended that arbitrators be members of voluntary professional organizations and certify that they have screened the parties separately about issues of power imbalance and domestic violence.[43] Finally, Boyd recommended public education initiatives; professional training of lawyers and arbitrators; arbitral decision record-keeping processes; community involvement; and "further policy analysis of the legality and desirability of providing a higher level of court oversight to settlements of family and inheritance cases based on religious principles than is available to non-religiously based settlements under Part IV of the *Family Law Act*."[44]

Boyd's recommendations were criticized.[45] Her statement that she "did not find any evidence to suggest that women are being systematically discriminated against as a result of arbitration of family law issues"[46] was especially mystifying to feminists. The report is replete with references to the unequal treatment of Muslim and other religious women, including information about young women forced to marry, polygamy, domestic violence, poverty among women and girls, and double standards in law for men and women. It also included reports of the difficulties faced by Jewish women appearing before the rabbinical courts and the need for religious women's organizations, especially, but not only, Jewish and Muslim, to form and provide support to the vulnerable women among them.[47] The depiction of the socioreligious context in which arbitration decisions are made impugns the credibility of Boyd's statement about the absence of evidence of discrimination against women in that process.

The report stirred up more tensions than it quieted. The premier of Ontario reacted by passing the law that denied enforceability to arbitration awards inconsistent with the province's (or other Canadian) family law. Ironically, the main thrust of this law is very similar to what Boyd had recommended. Immediately after the premier announced his ban, various religious organizations and individuals – particularly Muslim and Jewish organizations – excoriated him. Mohammed Elmasry of the Canadian Islamic Congress stated that the new policy "will alienate many people of faith in this province."[48] Explaining that arbitration "is part of our social fabric," Elmasry argued instead for recognizing and regulating it to produce "transparency and accountability."[49] Mark Freiman, honorary legal counsel for the Canadian Jewish Congress (CJC), stated, "What's really unfortunate about this is it removes . . . the opportunity to supervise and oversee this sort of thing."[50] Joel Richler, also of

[42] Ibid., at 134–35 (recs. 5, 12–13).
[43] Ibid., at 135–36 (recs. 14, 18).
[44] Ibid., at 142 (rec. 46); ibid at 138-139 (recs. 25–30, 31–35, 36–42, 43–44).
[45] Caroline Mallan, "Sharia Report Called 'Betrayal' of Women," *Toronto Star*, Dec. 21, 2004, at A1.
[46] Boyd, *Dispute Resolution*, at 133.
[47] Ibid., at 46–131.
[48] Yelaja and Benzie, "McGinty: No Sharia Law," at A1.
[49] Ibid., at A14.
[50] McMahon, "McGuinty Raises Legal Eyebrows," at 5.

the CJC, contended that there was no reason for change and that he was unaware of any problems flowing from rabbinical court decisions.[51] Another Jewish organization, B'nai Brith Canada, proposed holding a special meeting to decide whether a constitutional challenge should be launched.[52]

An Islamic legal scholar, Anver Emon, maintains that "what the folks have done is basically negate an opportunity to create something new and to create opportunities for Muslims here in Canada and human rights activists around the world to . . . see how Islamic law and Canadian law can co-exist."[53] He also warns that women will not fare better under Ontario's approach. As long as religious mediation remains a viable alternative, "nothing has fundamentally changed for Muslim women whose vulnerability to bad-faith husbands and patriarchal imams is the central concern of opponents to Sharia arbitration."[54] To address this problem, Emon advocates the development and regulation "of non-profit Muslim social service organizations that are dedicated to critically understanding the Sharia and the contextual setting in which these organizations apply their mediation services."[55] A multiplicity of these service providers should provide "a spectrum of choices for the Muslim consumer who seeks mediation services as opposed to civil litigation."[56]

Habermas and the Postsecular State

When the government of Ontario intervened in the Sharia family arbitration controversy to ban faith-based family arbitrations, the religious lobby expanded its ranks to include members of all major faiths, and its quest for Sharia arbitration morphed into a quest for faith-based arbitration. While not all religious adherents support this lobby, the fact that some do poses the question, must they still identify as secular citizens? Or do their claims connote the need for a new concept of citizenship, one that would transform Ontario from a liberal into a postsecular state?

I propose to seek answers from one of the first scholars to theorize postsecularism, Jürgen Habermas. According to Habermas, citizenship is crucial to distinguishing the postsecular state from its liberal counterpart. He defines citizenship in the postsecular state as consisting of religious lobbyists and secular citizens. In this part, I outline Habermas's theory of postsecularism and apply his concept of religious citizenship to the lobbyists who advocated Sharia, and now, faith-based family arbitrations in Ontario. In the next part, I ask whether his concept of secular citizenship applies to the feminists who opposed the religious lobby.

[51] Yelaja and Benzie, "McGinty: No Sharia Law."
[52] McMahon, "McGuinty Raises Legal Eyebrows."
[53] Ibid., at 1.
[54] Anver M. Emon, "Islamic Law and the Canadian Mosaic: Politics, Jurisprudence, and Multicultural Accommodation," University of Toronto Legal Studies Research Paper, available at http://ssrn.com/ (accessed Nov. 22, 2009), at 39–40.
[55] Ibid., at 43.
[56] Ibid., at 44.

Habermas advanced his theory of the postsecular state in a lecture titled "Religion in the Public Sphere."[57] A well-known secular philosopher, he never expected to find a resurgence of religious traditions and communities of faith. He had accepted the "conventional wisdom of mainstream social science and assumed that modernization inevitably goes hand in hand with secularization in the sense of a diminishing influence of religious beliefs and practices on politics and society at large."[58] He acknowledges his surprise at finding "the political revitalization of religion at the heart of Western society."[59]

According to Habermas, this revitalization is strong enough to justify changing our conception of contemporary Western societies. Modernity has run its course, and its secular hallmark – the separation of church and state – no longer prevails, if it ever did. The increase in theocracies elsewhere has been paralleled in the West by religious adherents pressuring governments to accommodate their beliefs. Western states are becoming, or already have become, postsecular. Nor is his conclusion unique. For instance, it is borne out in the work of sociologist Peter Berger, who contends that it is false to assume we live in a secularized world.[60]

In Habermas's theory, religious citizens maintain that they "do not have good reasons to undertake an artificial division between secular and religious within their own minds, since they couldn't do it without destabilizing their mode of existence as pious persons."[61] They believe that decisions concerning fundamental issues of justice must be based on their religious convictions. When they participate in public debates and contribute to forming public opinions, they must not be expected to split their identity into public and private components. They are likely to resort to the religious language of a specific religious community in those debates, but they must translate it into a generally accessible language. Indeed, this process of translation is fundamental to the process of postsecular deliberations.

Nor should this translation burden fall only on religious citizens, lest it become an asymmetrical encumbrance. While religious citizens "have to learn how to adopt new epistemic attitudes toward their secular environment," secular citizens must "not refuse to understand their political conflict with religious opinions as a reasonably expected disagreement and to give public religious comments the benefit of a check whether they contain something translatable."[62] Complementary learning processes are involved.

Secular citizens must learn, Habermas contends, how to live in a postsecular society. This means developing a "post-metaphysical mentality" – "the secular

57 Habermas, "Religion in the Public Sphere."
58 Ibid., at 2.
59 Ibid., at 4.
60 Peter Berger, ed., *The Desecularization of the World: Resurgent Religion and World Politics* (Grand Rapids, MI: Eerdmans, 1999), at 2.
61 Habermas, "Religion in the Public Sphere," at 7–8.
62 Ibid., at 11.

counterpart to a religious consciousness that has become self-reflective."[63] His complex notion of postmetaphysical thought draws a strict line between faith and knowledge and rejects the exclusion of religious doctrines from the genealogy of reason. This line-drawing exercise is not easy to achieve. Effectively, Habermas requires postmetaphysical thinkers, that is, secular citizens, to remain strictly agnostic, while also being prepared to learn from religion.

Habermas is not optimistic about religious and secular citizens acquiring the requisite mind-sets. Predicting that their absence will lead to an increase in cultural polarization because neither law nor politics is sufficient to address the void, he stresses the need for toleration in a postsecular world. More specifically, he criticizes the "unfair exclusion of religion from public life" and emphasizes the necessity for secular citizens "to retain a feeling for the articulative power of religious discourse."[64] He concludes by exhorting secular majorities to give "a hearing to the objections of opponents who believe their religious convictions to have been injured," insisting that "they must also make an effort to learn something from them."[65]

Habermas's theory of the postsecular state raises many issues, not least of which is the question of power imbalances. He offers no mechanism for resolving a controversy between religious and secular citizens. If dialogue fails to produce consensus, presumably, the process defaults to raw political power, as ultimately happened in Ontario, when the premier rejected legal pluralism. Moreover, rights are nowhere in Habermas's landscape. While rights litigation is by no means perfect, it represents another process available to resolve differences. Habermas must clarify the functions of, and relationships between, legislatures and courts to advance our understanding of the resolution of religious and secular strife in postsecular states.

These concerns notwithstanding, his theory of the postsecular state offers a way to analyze the Ontario religious arbitration controversy. The claims of the CSM, Syed Mumtaz Ali, and the various other religious organizations and individuals who lobbied Miriam Boyd and the premier for faith-based arbitrations were those of religious citizens. These claimants spoke in both religious and secular voices throughout the two decades of this controversy; that is, they translated their religious doctrines into legal discourse about arbitrations. Admittedly, these religious citizens did not represent all religious voices in Ontario. But Habermas nowhere makes either comprehensiveness or unanimity criteria for citizenship, whether religious or secular.

[63] Ibid., at 12–14.

[64] Jurgen Habermas, "Speech on Accepting the Peace Prize of the German Publishers and Booksellers Association," available at http://www.csudh.edu/ (accessed Nov. 22, 2008), at 6.

[65] Ibid.; Jennifer Nedelsky, "Legislative Judgment and the Enlarged Mentality: Taking Religious Perspectives," in Richard W. Bauman and Tsvi Kahana, eds., *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (New York: Cambridge University Press, 2006), at 93, 123 (concluding that "religiously based arguments must be invited into the public forum of legislative deliberation"). The Archbishop of Canterbury recently predicted the introduction of some aspects of Islamic law in Britain. Paul Majendie, "Top Anglican Cleric Sees Sharia in U.K.," *Toronto Star*, Feb. 8, 2008, at AA3.

Secular Feminists

What remains is to identify the secular citizens who opposed religious arbitration. Just as a subset of religious citizens initiated the controversy, so, too, were their opponents a subset of the secular citizenry. Virtually all of these opponents were women, whether Muslim or non-Muslim. Moreover, they were feminists because they lobbied for women's rights, contending that all major religious traditions, including Islam, subordinated women. The first feminists to respond were individual scholars who challenged the subordination of women under Sharia law. Thereafter feminist advocacy groups began to intervene, arguing vigorously for women's equality. Shahnaz Khan was among the first, if not the first, to respond directly to Ali. In an important article published in a Canadian law journal in 1993, Khan identifies as a feminist Muslim academic.[66] While she agrees that Muslims experience "discrimination and exclusion from mainstream life in Canada,"[67] Khan refuses to accept that imposing Sharia laws on Muslim Canadians is the solution; rather, she criticizes this proposal on three counts: no single version of Sharia law is acceptable to all Muslims in Canada; Sharia laws "will further isolate and subordinate women;" and multiculturalism is the wrong approach because it "reproduces the dominant liberal ethos of the management of race relations and the maintenance of the status quo of power relations in Canada."[68] Thus Khan's critique clearly signals that if Ali's objective was to disarm or placate feminists, he had failed.

Another feminist scholar, Haideh Moghissi, published a book critiquing the claim for a uniquely Islamic brand of feminism.[69] Moghissi, whose credentials include founding the Iranian National Union of Women before she came to Canada, is well qualified to make this critique. Her argument is that Islamic feminism is based on gender hierarchy, whereas the concept of feminism "at its core, is a political and intellectual project advocating equal gender rights."[70] She does not deny that women in Islamic societies have been active in the struggle for women's rights, dating back to the late nineteenth century; rather, Moghissi's point is that women who fight for equity in Islamic societies "do not apply the term 'feminist' to themselves, or ever consider 'feminist ideas' as applicable to the Middle East."[71] Therefore she exposes the claim for a brand of feminism that is uniquely Islamic as a justification not for sex equality, but rather, for "sexual hierarchy, with women as sexual objects at the service of men."[72]

66 Shahnaz Khan, "Canadian Muslim Women and Shari'a Law: A Feminist Response to 'Oh! Canada!,'" 6 *Can. J. Women and L.* 52, 53 (1993).
67 Ibid., at 53.
68 Ibid., at 55.
69 Haideh Moghissi, *Feminism and Islamic Fundamentalism: The Limits of Postmodern Analysis* (London: Zed, 1999), at ch. 7. Although Moghissi did not mention him, Ali made this claim. See inf. n. 111.
70 Moghissi, *Feminism and Islamic Fundamentallism*, at 126.
71 Ibid.
72 Ibid., at 22.

Activists followed academics into the fray with the establishment of the IICJ. Prominent among them are two women: Alia Hogben and Homa Arjomand, "the former an observant Muslim, the latter not."[73] Both spokeswomen work tirelessly on behalf of their respective organizations. Indeed, it is their organizational links with the grassroots members whom they represent that distinguishes these activists from the academics. Thus, Hogben and Arjomand can and do speak powerfully for countless, albeit not all, Muslim women in Ontario whose voices might otherwise not be heard.

To illustrate, Arjomand was a professor of medical physics when she fled Iran in 1989 to become a transitional counselor for immigrant women in Toronto. By October 2003, she had formed and become coordinator of the International Campaign to Stop Sharia Courts in Canada.[74] The campaign grew quickly to become "a coalition of 87 organizations from 14 countries with over a thousand activists."[75] In addition to lobbying, the campaign organized demonstrations on September 8, 2005, in Toronto, Montreal, Ottawa, Victoria, London, Amsterdam, Paris, and Dusseldorf. These demonstrations signaled that the campaign not only objected to faith-based arbitrations in Ontario, but also believed they would "create a precedent for religious fundamentalists working to suppress women's rights, and give fodder to political Islamists in Europe who are also lobbying for sharia law to be used to settle family matters."[76] Moreover, they were successful. Within three days, these and other activities compelled the Ontario premier to accede, announcing his intention to ban faith-based family arbitrations.

Hogben's contribution to this change in policy is equally impressive. A retired social worker, she is the Indian-born executive director of the Canadian Council of Muslim Women (CCMW), an organization with 900 members from all Islamic sects: Shia, Sunni, Sufi, Wahhabi, Somali, and Ismaili.[77] Founded in 1982, the CCMW "is a national non-profit organization of believing women committed to the equality, equity and empowerment of Muslim women."[78] With Hogben as spokeswoman, the CCMW rejected the use of religious laws to settle family matters under the Arbitration Act, arguing that this approach "violated the hard won equality rights guaranteed under the *Canadian Charter of Rights and Freedoms*, and created a two-tiered, fractured justice system."[79] In support, they drew on two commissioned studies.

73 Wente, "Life Under Sharia."

74 Hurst, "Ontario Sharia Tribunals Assailed."

75 Women Living Under Muslim Laws, "Update: Canada: McGinty Rejects Ontario's Use of Shariah Law," available at http://www.wluml.org/ (accessed Nov. 22, 2008).

76 Marina Jiménez, "Sharia Protesters Target Canada: Groups to Fight Ontario's Tribunal Plan in Cities Across Europe Next Month," *Globe and Mail*, Aug. 30, 2005, at A11.

77 Hurst, "Ontario Sharia Tribunals Assailed."

78 Canadian Council of Muslim Women, Home page, available at http://www.ccmw.com/ (accessed Nov. 22, 2008).

79 Ibid.

One study by Pascale Fournier examines the application of Sharia family law in France, Germany, and Britain.[80] Since French and German courts may recognize the application of Sharia family law in cases involving noncitizen Muslims, Fournier maintains that there is potential for "a discriminatory result for Muslim women: inheritance laws favoring males, financial support for wives limited to four months time, division of property against the woman's interest and child custody given to fathers depending on the age of the child."[81] However, Britain has taken a different stance. The British government rejected the proposal to apply Sharia family law, attempting instead "to uphold universally accepted human rights values, especially gender equality."[82] Therefore, while various Sharia councils may still resolve family disputes in Britain, there is no formal recognition of the Sharia system of laws.[83]

The other study by Natasha Bakht examines the impact of Ontario's Arbitration Act on women.[84] Bakht begins by reporting that various religious groups – including Jewish communities, the Islamic Council of Imams–Canada, and Ismailis – have conducted arbitrations using the Arbitration Act for some time. Next she describes some of the many problems: there is no withdrawal from an agreement to arbitrate once signed, and most are signed upon marriage, which may be years before they are invoked; arbitrators do not require special training; and Charter rights do not bind arbitrators. Furthermore, there are no express limits to the content of arbitrations, which can even include custody/access or child support matters; parties can and frequently do contract out of the right to appeal; and review courts are likely to defer to the expertise of arbitrators, particularly when the parties have opted to be governed by Sharia law. In addition, lawyers will refuse to represent clients before arbitration tribunals not conducted according to Canadian/Ontario law because their liability insurance does not cover them; there are multiple interpretations of Sharia law; studies show that private bargaining in family law tends to yield inferior results for many women; and women may not be truly free in their choice to arbitrate. In sum, Bakht concludes that the Arbitration Act does not safeguard the equality rights of women. Nor is her critique limited to Sharia family arbitration; rather, it applies to any arbitration that does not acknowledge the dignity and worth of women.

By 2004, national women's groups such as the National Organization of Immigrant and Visible Minority Women of Canada and the National Association of Women and the Law (NAWL) had joined forces with the CCMW in expressing concerns about

[80] Pascale Fournier, "The Reception of Muslim Family Law in Western Liberal States," Women Living Under Muslim Laws, Dossier 27, available at http://www.wluml.org/ (accessed Nov. 22, 2008), at 65–79.

[81] Ibid., at 74.

[82] Ibid., at 75.

[83] Ibid.

[84] Natasha Bakht, "Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and Its Impact on Women," 1 *Muslim World J. Hum. Rts.* (2004), available at http://www.bepress.com.proxy.queensu.ca/ (accessed Nov. 22, 2008). The remainder of this paragraph derives from this article.

the impact of the arbitration regime on immigrant women.[85] Pamela Cross, the legal director of the Metropolitan Action Committee on Violence Against Women and Children, articulated concern about "the vulnerability for women leaving abusive relationships created by a regime of privatized dispute resolution."[86] These and other women's groups opposed arbitration of family law matters, citing Quebec's policy as precedent.[87] "While arbitration may be suitable in the commercial law setting," a report commissioned by NAWL states, "it is entirely inappropriate in family law where gender dynamics, unequal power relations between men and women and systemic discrimination are always at play."[88] Ultimately, these groups contended that "decisions of religious authorities ought not to have any civil effect and they should never be legally binding."[89]

This abbreviated account of the feminist response to the Sharia arbitration proposal confirms that Ali was right to depict the ensuing media debate about his proposal as erupting "like a volcano;" but he was widely off the mark when he blamed "a certain women's group who . . . had an imaginary fear that Muslim women would be pressured into taking their disputes to Muslim arbitral tribunals."[90] Many women's groups became very active in lobbying against faith-based family law arbitrations. His own words that "all good Muslims" must use Sharia tribunals fed the realistic fear of the pressures Muslim women would experience. Women's groups are conscious that Ali chose to establish the IICJ in a post-9/11 Islamophobic context and are wary of co-option by forces hostile to Muslims in the diaspora. Nevertheless, they know from experience that it is not just Islam, but all major religions, that proselytize and/or practice sexual hierarchy. Thus, the feminist response is clear: family matters must be resolved consistently with the protection and promotion of women's equality rights.

Only one major women's organization, the Women's Legal Education and Action Fund (LEAF), supported retention of religious arbitrations.[91] LEAF is a national nonprofit advocacy group founded in April 1985 to work for women's equal rights through

[85] Natasha Bakht, "The Arbitrariness of Ontario's Arbitration Act: Examining the Impact on Women," 23 *Jurisfemme* 1, 8 (2004).

[86] Pamela Cross, "Should Different Kinds of People Living in the Same Province Be Governed by Different Kinds of Laws?," Women Living Under Muslim Laws, Dossier 27, available at http://www.wluml.org/ (accessed Nov. 22, 2008), at 51.

[87] Bakht, "Arbitrariness of Ontario's Arbitration Act," at n. 7 (citing "Article 2639 of the *Civil Code of Quebec*, S.Q. 1991, c. 64, which provides: 'Disputes over the status and capacity of persons, family matters or other matters of public order may not be submitted to arbitration.'").

[88] Natasha Bakht, *Arbitration, Religion and Family Law: Private Justice on the Backs of Women* (Ottawa, Ontario, Canada: National Association of Women and the Law, 2005), at 63, available at http://www.nawl.ca/ (accessed Nov. 22, 2008).

[89] Ibid., at 65.

[90] Canadian Society of Muslims, "An Update on the Islamic Institute of Civil Justice (Darul-Qada)," at 3.

[91] According to Razack, "LEAF later reversed its position, announcing that it now believed that the government should prohibit the use of the *Arbitration Act* to protect women from being coerced into settling their disputes in accordance with religious law." Razack, *Casting Out*, at 155.

litigation, research, and public education.[92] LEAF conditioned its support on the imposition of eight safeguards, arguing that religious arbitration decisions must be consistent with Ontario's family law regime and must be attentive to the concerns pertaining to vulnerable women.[93] It also argued for procedural and substantive conditions similar to those in the Boyd report, all primarily designed to respect women's equality rights. LEAF recognized that some of the safeguards might produce objections based on the ground of religious freedom.

Moreover, the safeguards that LEAF recommends are very onerous. In April 2006, LEAF published a study of the application of religious law in family law arbitration across Canada.[94] This study's province-by-province details reveal that seven provinces (Alberta, British Columbia, Manitoba, New Brunswick, Nova Scotia, Ontario, and Saskatchewan) allow faith-based family arbitrations; two provinces (Newfoundland and Labrador, and Prince Edward Island) and all three territories (Northwest Territories, Nunavut, and Yukon) permit family but not faith-based, arbitrations; and one province (Quebec) precludes arbitration of family matters.

Of the seven provinces that allow faith-based family law arbitration, none subscribes to any of the safeguards recommended by LEAF, with the exception of British Columbia (and now Ontario[95]), wherein enforceable decisions must be consistent with the provincial family law regime. To date, however, there are no studies sustaining the conclusion that the courts in the five remaining provinces – Alberta, Manitoba, New Brunswick, Nova Scotia, and Saskatchewan – have enforced religious doctrines inconsistent with provincial family law regimes. Appearances notwithstanding, therefore, it is not clear whether any of these five provinces actually subscribe to legal pluralism as the policy that governs religious arbitration of family matters.

The lengthy story of feminist opposition to religious arbitration is attributable to the fact that it was never coordinated by a single individual, unlike much of the religious story. The feminist story is also longer because it spans so many initiatives. Nevertheless, these various initiatives cumulate into a consistently expressed opposition to recognition of Sharia, and now faith-based, family arbitration. Clearly these feminist opponents fulfilled the role of secular citizens.

As such, however, did they remain denizens of the liberal state, or did these feminist opponents meet the more stringent requirements that Habermas sets out for the "post-metaphysical mentality" necessary for secular citizenship in the postsecular state? I maintain that they did. First, many of these feminist opponents are Muslim women who never hesitated to use their knowledge of Islam in their advocacy.

92 Women's Legal Education and Action Fund, Home page, available at http://www.leaf.ca/ (accessed Nov. 22, 2008).

93 Bakht, *Arbitration, Religion*, at 62.

94 Polly Dondy-Kaplin and Natasha Bakht, "The Application of Religious Law in Family Law Arbitration Across Canada," Women's Legal Education and Action Fund, available at http://www.leaf.ca/ (accessed Nov. 22, 2008).

95 The Ontario statute and regulation came into force on April 30, 2007. The text of the statute is available at http://www.attorneygeneral.jus.gov.on.ca/ (accessed Nov. 22, 2008).

Second, they always articulated their interventions in terms of the harms caused by the subordination of women not only in familial, but also in religious, contexts. In other words, these feminists opposed Sharia and then faith-based family arbitration by translating their religious convictions into the agnostic discourse of women's rights. Thus, their voices affirm their entitlement to secular citizenship in a postsecular state.

Until the Boyd review provoked a few nonfeminist, nonreligious entities to respond, feminists were virtually the only secular citizens to oppose the claims of religious citizens. Thus, the controversy about religious arbitration of family matters was waged mainly by religious citizens, led by the CSM and Syed Mumtaz Ali, on one side, and by the many feminist individuals and organizations who opposed them as secular citizens on the other. Accordingly, this controversy unfolded consistently with the tenets of Habermas's theory about conflicts in the postsecular state.

Intersectional Feminists

The controversy over Sharia and now faith-based family arbitration is not limited to the religious lobby and secular feminists, however much these citizens might wish it were otherwise. Although their voices were muted, there were women (and men) who evinced concerns about being forced to choose between the opposing positions in these deliberations.[96] They opted to distinguish themselves from both secular feminists and religious citizens. They pursued a strategy of valuing feminism *and* religion, claiming their approach might resolve the arbitration controversy.

Who are these women? Rather than personifying them individually, I rely on the work of Canadian sociologist Sherene Razack to capture the main features of their claim. In the post-9/11 environment, Razack herself no longer identifies as a secular feminist with a Muslim name.[97] Instead, she warns secular feminists about the racist implications of framing their claims in terms of multiculturalism, religion versus secularism, or a human rights strategy based on gender alone. Understanding that each of these frameworks is racist is essential to becoming an antiracist, which is how Razack now identifies.

First, regarding multiculturalism, Razack acknowledges that the focus of multiculturalism is tolerance and respect for different cultures and religions.[98] However, she is critical of this approach, maintaining that it ignores the existence of violence against women within minority cultural communities. Multiculturalists fail to recognize that powerful patriarchs control minority communities. Nor would multiculturalists treat white women in this way, that is, by ignoring the violence directed

[96] Khan, "Sharia Debate"; Morgan, "Shackles That Bind"; Siddiqui, "Charter, Gender Equity"; Pascale Fournier, "In the (Canadian) Shadow of Islamic Law: Translating Mahr as a Bargaining Endowment," 44 *Osgoode Hall L. J.* 649 (2006).

[97] Razack, *Casting Out*, at 18, 86.

[98] Ibid., at 142–43.

against them. Effectively, multiculturalism is racism masquerading as respect for culture. While not completely dismissing it, Razack nevertheless recommends turning "to culture as the *last* reason for behaviour."[99]

Regarding religion versus secularism, Razack maintains that it is "risky for feminists to work with ideas of the secular over the religious."[100] In support of this, she evokes the Sharia family arbitration controversy, explaining that Canadian feminists (both Muslim and non-Muslim) were concerned with curtailing conservative and patriarchal forces within the Muslim community. However, their approach was pernicious insofar as they "utilized frameworks that installed a secular/religious divide that functions as a colour line, marking the difference between the white, modern, enlightened West, and people of colour, and in particular, Muslims."[101] Treating "the categories of the secular and the religious as oppositions" meant that "Sharia law became an issue of the importation of immigrants' feudal and premodern values into a civilized land."[102] Razack suggests that feminists should have complicated this picture by, for example, opting "to flood the market with alternative stories of culture."[103] This approach might have prevented the conservative religious narrative from receiving the legitimacy it won when feminists opposed it in the name of secularism.

Third, regarding human rights, Razack argues that a human rights strategy based on gender alone is disastrous. This strategy has come to mean that "the minority culture is required to clean up its gender act, while the majority culture can take all the time it wants."[104] It "harnesses real concern with the status of women to racist images of barbaric Muslims."[105] Instead, Razack asks, "What would have been the outcome had Muslim feminists in particular, regardless of their own misgivings, expended more energy on the question: what is needed to safeguard faith-based arbitration for women?"[106] The CCMW considered this alternative and then rejected it as too risky. Suggesting their strategy was wrong, Razack proposes including more safeguards in the Arbitration Act as well as "the circulation of ideas about alternative ways to be Muslim"; such approaches "might have tempered the production of the neo-liberal subject as citizen."[107]

By depicting the women who make these claims as anti-racist, Razack intends to distinguish antiracists from secular feminists. Antiracists cannot espouse secularism. Her distinction is novel. Only time will tell whether other feminist theorists will adopt

[99] Ibid., at 144.
[100] Ibid., at 147.
[101] Ibid., at 148.
[102] Ibid., at 167.
[103] Ibid., at 168. See also ibid., at 159 (citing Amina Jamal, "Transnational Feminism as Critical Practice: A Reading of Feminist Discourses in Pakistan," 5/2 *Meridians* 57 [2005], who "stressed women's rights as citizens," rather than their vulnerability).
[104] Ibid., at 169 (citing Abdullahi An-Na'im).
[105] Ibid., at 102.
[106] Ibid., at 169.
[107] Ibid., at 170.

it. Bakht avoids this dilemma by describing these women as religious feminists.[108] But what distinguishes them from secular feminists, if not religion? If secular feminists maintain that sex equality trumps religion, what remains for religious feminists is the opposite position, namely, that religion trumps sex equality. Clearly Bakht does not intend this outcome; like Razack, she seeks terminology to describe women who value both religion and sex equality. Pending further study, I suggest analogizing antiracist/religious feminists to intersectional feminists who refuse to choose between their race and/or sexuality and their feminism.[109]

One clarification is essential: intersectional feminists do not resemble the Islamic feminists for whom Ali and the CSM claimed to speak. According to Ali, the contemporary Western feminist movement is fighting for things that "have been regular features of Islamic personal/family law for more than eleven hundred years."[110] Maintaining that Islam respects the sovereignty of women, Ali offered marriage contracts as an example of women's rights because women have long had the right to specify the arrangements that men must observe, although he provided no details about women's take-up rate. In contrast, intersectional feminists would never take the equality of Muslim women for granted. Unlike Ali, they would ask what is needed to safeguard faith-based arbitrations for women.

But there is no reason to believe that religious and secular feminist citizens would welcome intersectional feminists. These citizens monopolized postsecular deliberations, and they would likely try to monopolize constitutional litigation. If intersectional feminists are to intervene, therefore, they must be perceived as citizens of the postsecular state and/or as Charter citizens. I now explore their postsecular citizenship briefly and, at greater length, their Charter citizenship.

Postsecular Citizens

In the Habermasian postsecular state, there is no place for citizens who will not choose between religious and secular values. Although Habermas makes no mention of feminists, if they oppose the claims of religious citizens, feminists must be secular citizens. It matters not that secularism is not an inherent or transparent feature of feminist discourse or that few feminists theorize about secularism's relevance, implications, and/or consequences. Habermas is unambiguous. Citizens may – indeed, must – identify either as religious or as secular. Thus, the anchor of postsecular citizenship is identity.

When Habermas refers to postsecular citizens, invariably, he means religious citizens. Since he does not mean citizens who wish to speak in secular as well as religious voices, he would never refer to intersectional feminists as postsecular citizens. In fact, he has no citizenship to offer intersectional feminists. They are not

[108] Bakht, "Were Muslim Barbarians."

[109] Crenshaw, "Mapping the Margins"; Frank Rudy Cooper, "Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance, and Hierarchy," 39 *U. Cal. Davis L. Rev.* 853 (2006).

[110] Canadian Society of Muslims, "Oh! Canada," at 42.

secular feminists because they do not oppose faith-based family arbitrations. Nor are they religious citizens because they insist that these arbitrations respect gender equality. Thus, his theory of postsecular citizenship is harsh; it silences the voices that subscribe to intersectionality, or what José Medina theorizes as "disidentification."[111]

In effect, only the Habermasian state is postsecular, never its citizens. Yet it is possible to conceptualize a postsecular citizen. Intersectional feminists epitomize such citizens, being proponents of both religion *and* secular feminism. Does Habermas fear that their recognition would destroy the necessity for bivalent secular-religious translation processes, or even for deliberative processes? Perhaps we need to stretch our imagination to encompass multicitizen deliberations that permit intersectional feminist/postsecular citizens and others to disidentify. The corresponding state, which would be neither liberal nor postsecular, might be conceptualized as dis- or postidentity.

Charter Citizens

Despite failing to acquire citizenship in Habermas's postsecular state, might intersectional feminists qualify as Charter citizens? Is there a Charter right available for them to challenge the constitutionality of "one law for all Ontarians"? To explore this possibility, I outline the Charter arguments that religious citizens and secular feminists would advance. Then I ask, does the Charter offer intersectional feminists any opportunity to intervene in this hypothetical constitutional challenge?

Religion Versus Sex Equality

Religious citizens seeking to challenge the constitutionality of the new act (FSLA) would invoke Section 2(a) of the Charter, which guarantees the right to freedom of religion.[112] In an early Charter decision, the Supreme Court of Canada defined this right to include protection for religious conduct as well as belief: "the essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination."[113] This definition is very broad; it encompasses faith-based family arbitrations that sanction not only religious beliefs, but also practices.

The Court does not question the link between practice and belief or the obligatory nature of beliefs: "a court is not qualified to rule on the validity or veracity of any given religious practice or belief, or to choose among various interpretations of

[111] José Medina, "Identity Trouble: Disidentification and the Problem of Difference," 29 *Phil. and Social Criticism* at 655 (2003) (disidentification involves shared identities and identity-based solidarity without the erasure of difference); see also Gretchen Ritter, Chapter 3.

[112] Section 2(a) provides, "2. Everyone has the following fundamental freedoms: (a) freedom of conscience and religion."

[113] *R. v. Big M Drug Mart*, 1 S.C.R. 295 (1985), at 336.

belief."[114] Courts will "inquire into the sincerity of a claimant's belief, where sincerity is in fact at issue."[115] To date, however, no one has questioned the sincerity of proponents of faith-based arbitrations. Thus this requirement should not impede their Charter claim.

Nevertheless, religious citizens will have difficulty establishing state interference with their religious freedom. Since religious entities may still engage in faith-based family arbitrations, religious citizens must portray the infringement as a failure to retain or to enact a civil enforcement process that includes them. Similar arguments failed when the Ontario government repealed its public service employment equity legislation; the Ontario Court of Appeal ruled that the Charter mandates neither retention nor enactment of positive measures.[116]

The Supreme Court of Canada is receptive to claims for freedom *from* state intervention in religious matters, but not to claims *for* state intervention. For example, in *R. v. Big M Drug Mart*, the Court held that the federal Lord's Day Act was unconstitutional because it prohibited non-Christians as well as Christians from carrying out commercial activity on Sundays, the Christian religious observance day.[117] In contrast, in *Adler v. Ontario*, the Court denied the claim for public funding of independent religious schools, even though Ontario funds public secular schools and Roman Catholic separate schools.[118]

In *Adler*, the justices gave various reasons for denying the claim for state intervention. Justice Sopinka held that any disadvantage suffered by parents whose religion requires them to send their children to a private religious school "is one flowing exclusively from their religious tenets."[119] Although parents are free to decide to educate their children in accordance with their religious beliefs, it does not follow that government must pay for their education. He held, categorically, that "failure to act in order to facilitate the practice of religion cannot be considered state interference with freedom of religion."[120] He added, perhaps presciently, that "the appellants' argument would lead to an obligation by the state to fund parallel religious justice systems founded on canon law or Talmudic law, for example. These are clearly untenable suggestions."[121]

Nor wasthen justice Beverley McLachlin any less categorical. "Never," she opined, "has it been suggested that freedom of religion entitles one to state support for one's religion."[122] Justice McLachlin became the first woman chief justice in 2000. Under

[114] *Syndicat Northcrest v. Amselem*, S.C.C. 47 (2004), at para. 51.
[115] Ibid. (continuing, "It is important to emphasize, however, that sincerity of belief simply implies an honesty of belief").
[116] *Ferrel v. Ontario*, 42 O.R. (3d) 97 (Ont. C.A.) (1998), leave to appeal to the Supreme Court of Canada denied, S.C.C.A. 79 (1999).
[117] *Big M Drug Mart*, at 336.
[118] 3 S.C.R. 609 (1996).
[119] Ibid., at para. 174 (Sopinka, J.).
[120] Ibid., at para. 175.
[121] Ibid.
[122] Ibid., at para. 200 (McLachlin, J.).

her tutelage, therefore, the Court may continue to deny claims for state intervention in religious matters.

Religious citizens could try to distinguish their claim from the one made in *Adler* by establishing that their religious beliefs and practices are not matters of choice. Clearly some Muslim and Jewish citizens would make this claim. For example, Ali emphasized the dire consequences faced by Muslims who fail to subscribe to a complete system of Muslim conflict resolution.[123] Similarly, some Jews are required to resolve conflicts by going to the Beis Din, religious tribunals that resolve civil disputes using Jewish law pursuant to provincial arbitration acts. "In this city," Rabbi Reuven Tradburks stated, "we actually push people a little to come because using the *Beis Din* is a *mitzva*, a commandment from God, an obligation."[124]

The notion of obligation is contentious. On one hand, it leads religious citizens to advocate (1) perpetuation of religious communities, (2) disavowal of the idea that religion is a matter of autonomy and choice, and (3) public recognition for religious laws. On the other hand, these three features do not conform to the ones contained in Charter jurisprudence, which portrays religion as (1) essentially individual, (2) centrally addressed to autonomy and choice, and (3) private.[125] This contrast does not bode well for religious citizens.

Their only hope is to influence someone like Chief Justice McLachlin, who believes that religion is a cultural form.[126] However, this is a faint hope because it is unclear that she would ever do more than ask law to create a space for religious expression "without compromising core areas of our civil commitments."[127] Effectively, support for the rule of law dominates her approach: "the challenge faced by the courts when attempting to find space *within* the rule of law for diverse expressions of religious conscience is one of balancing competing cultural values."[128] By situating conflicts within the rule of law, she obviates the possibility that other laws, that is, religious laws, might be definitive. According to Chief Justice McLachlin, religious laws must conform to the rule of law, not the other way around. Therefore it seems unlikely that she would be moved by arguments such as the one that Ali made about the dire peril Muslims face when non-Muslim conflict resolution processes prevent them from following what Allah has ordained.

In sum, religious citizens may not persuade the Court that "one law for all Ontarians" infringes their religious freedom. This legislation allows religious individuals to make a choice between faith-based family arbitrations that are not civilly enforceable and those that are. None of the Charter religious freedom precedents would appear

[123] See n. 33 and accompanying text.
[124] Lynne Cohen, "Inside the Beis Din," *Canadian Lawyer*, May 2000, at 27, 30 (referring to Toronto).
[125] Benjamin L. Berger, "Law's Religion: Rendering Culture," 45 *Osgoode Hall L. J.* 277 (2007).
[126] Beverley McLachlin, "Freedom of Religion and the Rule of Law: A Canadian Perspective," in Douglas Farrow, ed., *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion, and Public Policy* (Montreal, Quebec, Canada: McGill-Queen's University Press, 2004), at 12.
[127] Ibid., at 22.
[128] Ibid., at 28 (emphasis added).

to compel the state to provide a civil enforcement mechanism for family arbitrations decided according to religious laws that do not conform to Ontario's family law regime.[129]

If, contrary to what I have just argued, religious citizens were successful in establishing an infringement of their Charter right to religious freedom, the litigation would proceed to the next stage. Unlike the American Bill of Rights, the Canadian Charter explicitly states that the infringement of a right may be justified. Known as the limitations (or nonderogation) clause, this defense is found in Section 1 of the Charter, which provides,

> s. 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.[130]

Normally, the burden of justifying the infringement of a right falls to the state. Therefore Ontario would defend its legislation by invoking Section 1.

In *R. v. Oakes*, the Court adopted a two-step approach to Section 1.[131] The first involves identifying the objective of the impugned provision and establishing that it relates "to concerns which are pressing and substantial."[132] The second step is "a form of proportionality test" with three prongs: the measures "must be 'rationally connected' to the objective;" they "should impair 'as little as possible' the right or freedom in question;" and "there must be a proportionality between the *effects* of the measures . . . and the objective."[133]

Ontario would apply the *Oakes* test first by arguing that the "pressing and substantial" objective of the new act is protection of women's equality. This objective is feminist and secular. Next Ontario would argue that there is a rational connection between the measure (refusing to enforce civilly faith-based family law arbitrations) and its objective (sex equality), pointing to the evidence of women's subordination by religious organizations, as detailed in the Boyd report and other sources. Religious citizens would counter with claims that the connection is both under- and overinclusive, and hence irrational. It is underinclusive from the perspective of the women who argue against arbitrating any family law matters because all such private arrangements harm women. It is overinclusive from the perspective of women who support the Jewish Beis Din or Shia Ismaili Conciliation and Arbitration Boards. The Court might prefer the documentary evidence of a rational connection over the anecdotal evidence supporting irrationality, given that judges seldom rely on this prong of the proportionality test to deny states'claims.

[129] Shirish P. Chotalia, "Arbitration Using Sharia Law in Canada: A Constitutional and Human Rights Perspective," 15 *Const. Forum* 63, 70 (2006).
[130] Charter.
[131] 1 S.C.R. 103 (1986).
[132] Ibid., at 138–139.
[133] Ibid.

Ontario might find the second prong of the proportionality test – minimal impairment – more difficult to meet. Courts usually construe total bans as excessive, as more than minimally impairing the right in issue. Much will depend on whether the policy of "one law for all Ontarians" is seen as imposing a total ban. Ontario will argue that this ban is partial because it applies only to faith-based arbitrations that are inconsistent with provincial family law; all other family arbitrations can be civilly enforced. Religious citizens will contest Ontario's portrayal, claiming that the ban is total from their perspective.

Religious citizens would then claim that there is an alternative to a total ban. They would point to those provincial jurisdictions (Alberta, Manitoba, New Brunswick, Nova Scotia, and Saskatchewan) that allow enforcement of faith-based family law arbitration without requiring consistency with the respective provincial family law regimes.[134] In effect, they permit legal pluralism, which has not been politically or legally challenged. We could speculate endlessly about why not. One possibility is that these provinces are simply less religiously diverse. Perhaps feminists in those provinces might someday initiate constitutional challenges to the permissive arbitration legislation using their Charter Section 15(1) sex equality rights. However, irrespective of how religious citizens phrase this claim, it is not about a partial ban. Legal pluralism is the antithesis of, rather than an alternative to, a total ban.

According to the third prong, Ontario must show that its law does not have a disproportionate effect on religious freedom. Religious citizens will contend that they are obliged to follow religious laws. Ontario will maintain that its law does not interfere with this obligation because it does not ban faith-based family arbitration. In sum, this prong of the proportionality test requires judges "to balance the interests of society with those of individuals and groups."[135] Ontario would insist that "one law for all Ontarians" balances women's equality against religious freedom.

Ontario's claim might be successful given the recent case of *Bruker v Marcovitz*.[136] In *Bruker*, the husband invoked freedom of religion to claim immunity from damages for breaching his contract to provide his wife with a Jewish religious divorce (*get*). The trial court decided that the wife's claim was civilly enforceable; the provincial appellate court reversed, finding that the substance of the obligation was religious in nature and therefore unenforceable by the courts. At the Supreme Court of Canada, the seven-person majority (including two women justices) held that "any infringement of Mr. Marcovitz's freedom of religion is inconsequential compared to the disproportionate disadvantaging effect on Ms. Bruker's ability to live her life fully as a Jewish woman in Canada."[137] However, two women justices dissented: "the instant case is one in which the religious and civil worlds collide. In my opinion, the problem is a matter for Hebrew law. I see no reason to change, for this case, the

[134] See Dondy-Kaplin and Bakht, "Application of Religious Law."
[135] *Oakes*, at 139.
[136] *Bruker v. Marcovitz*, 2007 S.C.C. 54 .
[137] Ibid., at para. 93 (Abella, J.).

clear rule that religion is not an autonomous source of law in Canada."[138] It is too early to know whether *Bruker*, a private law contracts case, will serve as a precedent in a Charter conflict between religious freedom and women's sex equality rights.

Religion and Sex Equality

Does the Charter offer intersectional feminists who refuse to choose between sex equality and religious freedom an opportunity to intervene in this hypothetical constitutional challenge? Regrettably, the Supreme Court of Canada has yet to advert to, let alone affirm, intersectional rights.[139] I have argued elsewhere that it could be otherwise, at least when sex equality is in the frame.[140] The Charter contains two sex equality provisions: Sections 15 and 28. Section 15(1) is the general equality rights provision that includes sex equality:

> s. 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[141]

Section 28 is restricted to sex equality:

> s. 28. Notwithstanding anything in this *Charter*, the rights and freedoms referred to in it are guaranteed equally to male and female persons.[142]

However, the Supreme Court of Canada has never explained why the Charter has two sex equality provisions or the relationship between them, nor has the Court interpreted Section 28.

Scholars, litigators, and judges rely on Section 15(1) for sex equality arguments. They treat Section 28 as an interpretive, rather than rights-bearing, provision, constraining it to situations where it would be used in tandem with another right in the Charter. If we adopt this approach, then it should be possible to combine Section 28's protection of sex equality with the right to religious freedom in Section 2(a) to enable intersectional feminists to make a rights-based claim in our hypothetical Charter challenge to "one law for all Ontarians." Absent this approach, intersectional feminists would find the Charter's silence about intersectional rights fatal to recognition of their constitutional citizenship.

[138] Ibid., at para 183 (Deschamps, J., writing for herself and Charron, J.) (continuing in para 184, "The courts may not use their secular power to penalize a refusal to consent to a *get*, failure to pay the Islamic *mahr*, refusal to raise children in a particular faith, refusal to wear the veil, failure to observe religious holidays, etc.").

[139] Two provincial appellate courts have affirmed intersectional rights: *Dartmouth/Halifax County Regional Housing Authority v. Sparks*, N.S.J. 97 (1993), and *Falkiner v. Ontario*, O.J. 1771 (2002).

[140] Beverley Baines, "Section 28 of the Canadian Charter of Rights and Freedoms: A Purposive Interpretation," 17 *Can. J. Women and L.* 45 (2005).

[141] Charter.

[142] Ibid.

Intersectional feminists could not turn to the multiculturalism provision in Section 27 of the Charter:

> s. 27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.[143]

Razack explained the racist implications of making a claim based on multiculturalism, hence foreclosing it to intersectional feminists. Even if she were wrong, Section 27 does not use rights language. Accordingly, courts treat it as they treat Section 28 – as an interpretive, rather than a rights-bearing, provision.[144] Standing alone, therefore, it provides no guarantee of constitutional citizenship to intersectional feminists.

In sum, if religious citizens invoke religious freedom and secular feminists respond with sex equality, there is no jurisprudence to support a rights-based claim by intersectional feminists. They might rely on sex equality in Section 28 in conjunction with religious freedom in Section 2(a) to argue an intersectional rights claim. However, the Supreme Court of Canada has yet to sustain such a claim. Under these circumstances, it would be premature to treat intersectional feminists as Charter citizens.

Conclusion

Intersectional feminists are not citizens of the political (postsecular) state or of its legal (Charter) regime. Just as Habermas is unable to conceptualize postsecular citizens who identify as both religious and feminist, so, too, would it be unprecedented for the Canadian Supreme Court to invoke the Charter to guarantee their intersectional rights. Accordingly, if intersectional feminists want to intervene in postsecular and/or Charter deliberations pertaining to faith-based family arbitrations, they must identify as secular feminists. They must, in short, repudiate their intersectionality.

It would not be difficult to attribute postsecular citizenship to intersectional feminists, always assuming that postsecular theory is flexible enough to imagine dispensing with identity politics. Similarly, if the value of the Charter lies in its offer of constitutional citizenship, it should protect all who fall within its analytical categories, even when they personify more than one category. Adapting to the messiness of overlapping commitments, rather than expunging intersectional claims, would be more consistent with protecting human dignity, the overarching Charter value. Surely it is time for law and theory to catch up to life.

[143] Ibid.

[144] Saeed Rahnema portrays "the biggest threat to multiculturalism" as the movement toward a faith-based multiculturalism policy in Canada. Saeed Rahnema, "Islam in Diaspora and Challenges to Multiculturalism," in Haideh Moghissi, ed., *Muslim Diaspora: Gender, Culture, and Identity* (Portland, OR: Book News, 2007), at 23, 30. Similarly, Haroon Siddiqui observes that "the possibility of using religiously based arbitrations in domestic disputes ha[s] little, if anything, to do with multiculturalism." Haroon Siddiqui, "Don't Blame Multiculturalism," in Janice Gross Stein, ed., *Uneasy Partners: Multiculturalism and Rights in Canada* (Waterloo, Ontario, Canada: Laurier Press, 2007), at 23, 29.

5

Feminist Fundamentalism and Constitutional Citizenship

Mary Anne Case

At a time when so many different religious fundamentalisms are coming to the fore and demanding legal recognition, I want to vindicate something I have come to call feminist fundamentalism, by which I mean an uncompromising commitment to the equality of the sexes as intense and at least as worthy of respect as, for example, a religiously or culturally based commitment to female subordination or fixed sex roles. As I shall argue, both individuals and nation-states can have feminist fundamentalist commitments.

Fundamentalism and Perfectionism Defined

I define myself as a feminist fundamentalist. I am deeply and profoundly committed to the equality of the sexes and, in particular, to its instantiation in the repudiation of "fixed notions concerning the roles and abilities of males and females."[1] These commitments are at my fundament, my root, my base. My commitment to them is such that I would find it very difficult to act in ways contrary to or inconsistent with them, much like a believer who, even when the alternative is martyrdom, would refuse to deny the faith and sacrifice to what she believes are false idols, or, less dramatically, like a believer who would rather go hungry than eat forbidden food. A few examples may make this clear: first, recall that the Southern Baptists fairly recently declared that it was a wife's duty to "submit herself graciously to the servant leadership of her husband."[2] Nothing would induce me to submit, graciously or otherwise, to the leadership of my husband, and to avoid doing so, I will avoid acquiring a husband, if necessary. There is also nothing that would induce me to veil in the way that many Muslim women willingly do, as a precondition for appearing in public or in the presence of unrelated adult males.[3] My refusal to veil has consequences for, among other things, my freedom of movement. One

[1] *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982).

[2] See Baptist Faith and Message Study Committee, "Report to the Southern Baptist Convention," http://www.utm.edu/staff/caldwell/bfm/1963-1998/report1998.html (accessed April 8, 2009).

[3] While I would reject veiling as a condition of entering a country, such as Iran, or of entering the presence of an unrelated male, I would accept veiling as a condition of entering, e.g., a mosque.

consequence is that, unless there is profound regime change, I will not be in a position to travel freely in much of the Middle East. I cannot, for example, so much as enter Iran because I will not veil.

Of course, many who would also identify themselves as feminists would not share my difficulties. Indeed, for some Muslim feminists, the very act of veiling is itself a manifestation of their feminist commitments. Like the religious commitments to which I am pressing an analogy, feminist commitments can vary in content as well as in character. Feminists, like those within a faith tradition, diverge somewhat in their beliefs and in their views of what their beliefs require of them. Moreover, many committed feminists, like many devout religious believers, would not embrace nor be accurately described by the term *fundamentalist*. I am using the word *fundamentalism* here in ways I will seek to define which have a family resemblance, but not perfect identity, with the way the term is used by others or in other contexts. I am also seeking to maintain a distinction here between fundamentalism and perfectionism, another term others may use in somewhat different ways. I may not be clear about the edges of this distinction, but I think of myself as a fundamentalist feminist and not as a perfectionist feminist. If I were less of a fundamentalist when it comes to veiling, I might be more willing to accommodate by covering my head on occasion. If I were more of a perfectionist with respect to veiling, I might favor the position that no one, not even women who are freely willing to declare their religious commitments or even their subordination by covering their heads, should be allowed to veil.

For me, the hallmark of fundamentalism is an unwillingness to compromise, and that of perfectionism is a willingness to impose on others. Another way of formulating the distinction is that perfectionism speaks in the second or third person – it is about what "you" or "they" should or must do, not just about what "I" or "we" (as in "We, the people of the United States") must do. It is possible, I think, to be both fundamentalist and perfectionist, neither perfectionist nor fundamentalist, fundamentalist without being perfectionist, or perfectionist but not fundamentalist. With respect to any commitment or set of commitments, people can decide that they will not compromise without wishing to impose or can decide that they wish to impose and, perhaps in the interests of that imposition, compromise. Illustrations of these distinctions can be found in ongoing debates concerning, for example, civil marriage, veiling and sex segregation, abortion, and the teaching of values in public schools. Note that, perhaps not so coincidentally, in each of these examples, there are not only feminist perfectionist and feminist fundamentalist positions, but also religious perfectionist and religious fundamentalist positions.[4] This, of course, does not exhaust the range over which fundamentalism and perfectionism can apply, even to these debates. In the same-sex marriage debates, for example, there are

[4] I discuss this in greater detail in Mary Anne Case, "Perfectionism and Fundamentalism in the Application of the German Abortion Laws," in Susan Williams, ed., *Constituting Equality* (New York: Cambridge University Press, 2009).

gay, lesbian, and queer fundamentalist and perfectionist positions. It is worth asking more generally what possibilities for nonreligious fundamentalist positions other than feminist ones there are. I am fairly confident that the framework I am setting out here can fruitfully be applied to pacifism and to animal rights and that there is a fruitful connection to what used more often to be called *freedom of conscience*.

In much the same way as the various feminist positions I describe are not necessarily antireligious, or even nonreligious (in the sense that these positions can also be defended by religious arguments), many religious fundamentalist and perfectionist positions are not necessarily antifeminist or nonfeminist.[5] At least for the purposes of this chapter, I want readily to concede that notwithstanding that they are quite inconsistent with some of my own feminist commitments, veiling, sex-segregated public spaces, sex-role differentiated marriage, and bans on abortion can not only be reconciled with some other people's feminist commitments, but they can also be endorsed as feminist and defended with feminist arguments by them.

My own unwillingness to compromise gives me something in common with some Muslim women who have become embroiled in litigation because they refused to remove their veils, such as Fereshta Ludin and Shabina Begum, whose cases went to the German Constitutional Court and the British House of Lords, respectively.[6] In each case, these women were offered a compromise they refused. Ludin, who taught grade school, acknowledged that she did not believe herself required to veil in front of her young pupils but refused the compromise of removing her veil for only the time she was in class because of the off chance an adult male might enter the classroom. It was this very unwillingness to compromise that the local school system claimed made her "unsuitable" as a teacher. Begum's school offered pupils the possibility of veiling and wearing modest dress approved of by most Muslims, but she insisted that after puberty, nothing less than a more extreme bodily covering, the *jilbab*, would suffice for her to meet the Islamic requirement of *hijab*, or modest covering of women's bodies. In the House of Lords, Lord Hoffman rebuked her because she "sought a confrontation" and thereby failed to acknowledge the extent to which "common civility also has a place in the religious life."[7] Hoffman stressed the "expectation of accommodation, compromise, and, if necessary, sacrifice in the manifestation of religious beliefs" he saw in the jurisprudence of the European Court of Human Rights (ECHR).[8] It may therefore be worth reflecting on the extent to which compromise itself could be a particular fundamental local value of both the German and the British constitutional order, such that there could be, somewhat paradoxically, an uncompromising commitment to compromise. Central

[5] For an example of how religious and feminist commitments can coincide in a way relevant to constitutional citizenship, see Beverley Baines's discussion in Chapter 4.

[6] See Bundesverfassungsgericht (BVerfGE) (Federal Constitutional Court), Sept. 24, 2003, 2 BvR 1436/02; *R (on the application of Begum) v. Headteacher and Governors of Denbigh High School* UKHL 15 (2006).

[7] R (on the application of Begum), at para. 50.

[8] Ibid., at para. 54.

to my argument on behalf of feminist fundamentalism is that asking women like me, or like U.S. Air Force colonel Martha McSally, whose litigation against the U.S. military's requirement that she don *hijab* while in Saudi Arabia I will discuss later, to veil, given our particular feminist fundamentalist commitments, should be seen as *in pari materia* with asking devout Muslim women not to veil. It seems to me that too little attention has been paid in the discourse around these matters to two things: first, there is a vast literature on the duties of the liberal state to accommodate the religiously fundamentalist individual. But there is, as far as I can tell, at least in languages I know, very little discussion about the religiously fundamentalist state's duty to accommodate the liberal individual. Second, there is some, but not nearly enough, attention paid to the fact that liberal states can and do have commitments, including fundamental, and, indeed, fundamentalist, commitments.

Sex Equality Is a Particular as Well as a Universal Value

One of my chief purposes in pursuing a feminist fundamentalist project is to disrupt the oft-perceived dichotomy between feminist or liberal universalism, on the one hand, and local cultural commitments, on the other, by insisting that we in the liberal, feminist, constitutional West have our localized, cultural commitments, too, which are at least as important to us, at least as worthy of respect and as entitled to protection, as the local cultural commitments of others are to them. In seeking to dissolve this dichotomy, I only wish to bracket for the purposes of this chapter, not to deny, disparage, or obviate, universal human rights claims. The fact that some of the norms of Western constitutional cultures are required by, and others are at least consistent with, universal human rights norms is an independent justification for demanding respect for our norms, quite apart from their cultural significance to us; just as the fact that some other cultural norms violate or are in tension with universal human rights norms is a basis for denying such norms respect, notwithstanding their cultural significance. My claim in this chapter is simply that in addition to whatever force our norms derive from their consistency with universal rights norms, they can also derive additional independent force from the fact of their imbeddedness in or centrality to our particular culture.[9]

The fundamental commitments of the United States and of the other Western constitutional democracies I have studied as a comparativist include equality and freedom with respect to sex and gender. The cultures produced by these commitments are at least as extraordinary, fragile, and in need of defense as cultures more generally recognized as unique and endangered such as those of, say, the hunter-gatherers of Papua New Guinea. Very few cultures over the history or territorial expanse of the world have embraced commitments to sex equality, the integration of the sexes, and freedom from enforced sex roles, and they remain at risk.

9 For some, these commitments can be religious as well.

Although widely shared in the liberal constitutional West, these and related commitments can be spelled out differently by different constitutional cultures, just as a shared commitment to the principles of Christianity or to Islam can work itself out in importantly different ways among different denominations or communities of believers. Thus, for example, a feminist fundamentalist perspective on the French legal system would have to take account of both *parité* and *mixité* as well as the interaction of these specifically French feminist commitments with other fundamental French values. As French president Nicolas Sarkozy said, "The meaning, the values, of French 'identity' is clear. It means laicity, sexual equality, opportunity. I believe in a mix, not in communitarianism, and, when you forget those national values, communitarianism is what you get."[10] That the French mix is somewhat different from the American, or, for that matter, the Dutch, the British, the Canadian, or the German, leads France, famously, to answer the question of whether Muslim girls may wear *hijab* in public school classrooms differently than these other nations have, although each of these nations, like France, is also committed to the equality of the sexes.

The diversity of responses among the signatories to the European Charter of Human Rights, all of whom share fundamental commitments to sex equality and freedom of religion, to the question of *hijab* by Muslim teachers and students in state-sponsored schools is a useful illustration of how common and widely shared fundamental commitments can work themselves out differently among different constitutional cultures, just as among different denominations within a faith tradition. (One of my difficulties with the litigated cases generated by these diverse responses to *hijab* in schools is that the local cultural norms that received the overwhelming bulk of judicial attention in them were those pertaining to religious neutrality, rather than sex equality, but this does not affect the usefulness of the example as an illustration.) In France, a ban on the wearing of headscarves by pupils in public schools was driven by the French fundamentalist commitment to *laïcité*, which, contingently and fortuitously, happened to have been worked out historically in opposition to Roman Catholicism and not originally in opposition to the display of Muslim particularity.[11] A similar long-standing fundamental constitutional commitment to secularism led to a similar ban in Turkey, which was upheld by the ECHR as being within Turkey's margin of appreciation.[12] But the petitioner in the

[10] Jane Kramer, "Round One: The Battle for France," *New Yorker*, April 23, 2007, at 30, 37.

[11] The French situation is a complicated one and, for feminists, a potentially historically problematic one because *laïcité* rests on the French revolutionary repudiation of communitarianism in favor of a commitment to atomized, indistinguishable individuals, and from the time of the 1789 Revolution to the present and the *parité* debate, women in France have tended to be excluded from that commitment to neutral, fungible individuals. That is for the French to work out, although my own feminist fundamentalist commitments lead me to wish that the French would work it out by integrating women more, rather than by abandoning the initial commitment.

[12] *Şahin v. Turk.*, App. 44774/98, Eur. Ct. H.R. (Nov. 10, 2005), at paras. 1–13, 166. The ECHR's decision did not end controversy over the headscarf in Turkey. The Turkish legislature, prompted by the prime minister's Islamist party, legislatively authorized headscarf wearing by university students, but on June

Turkish case, Leyla Şahin, completed her education, still veiled, in a university in Austria, which has no comparable commitment to secularism. More recently, the British House of Lords, invoking, not secularism, but the British value of reasonable compromise sided with the governors of a state school, who were prepared to allow their pupils, the overwhelming majority of whom were Muslim, to wear a uniform veil, but not the more all-encompassing *jilbab*.[13] The ECHR had previously upheld the prohibition on veiling by a teacher in a Swiss public school, accepting the Swiss court's determination, inter alia, that the Koranic precept mandating veiling was "hard to square with the principle of gender equality."[14] In Germany, controversies about veiling in schools also centered on teachers, not students: a German Federal Constitutional Court ruling that allowed the German states some leeway in regulating the wearing of the veil by public school teachers and other representatives of the state[15] generated an ongoing debate in the federal and local German parliaments concerning the desirability of banning the veil by schoolteachers in state-sponsored schools because of the message they, as agents and representatives of the state, may send to their pupils, with feminist arguments on all sides.

What Does Citizenship Have to Do With It?

As the volume in which this chapter appears demonstrates, it has become increasingly fashionable for scholars to describe any and all questions of sex equality as dimensions of women's equal citizenship. A connection to citizenship comes particularly readily to mind when the issue is one related to education in public schools, as it is in the European cases involving the veiling of teachers and students.[16] After all, as the ECHR acknowledged in upholding the German Federal Constitutional Court's approval of a ban on home schooling by Christian parents who objected, inter alia, to sex education in schools, a central function of public schools is "the education of responsible citizens to participate in a democratic and pluralistic society."[17] For this reason, the U.S. Supreme Court held it permissible for public schools in Massachusetts to require that those who taught in them be U.S. citizens.[18]

5, 2008, the Turkish Constitutional Court overturned the legislation as unconstitutional. See "Beyond the Veil," Economist.com, available at http://www.economist.com/ (accessed Sept. 10, 2008).

13 *R.* (on the application of Begum).

14 *Dahlab v. Switz.*, 2001-V Eur. Ct. H.R. 447.

15 BVerfGE, Sept. 24, 2003, 2 BvR 1436/02.

16 The United States also has cases involving bans on veiling by teachers, which, perhaps to the surprise of some U.S. commentators on the European bans, uphold such bans, focusing on the obligation of religious neutrality in public schools and often relying on earlier restrictions on the wearing of habits by Roman Catholic nuns in public schools. See, e.g., *Cooper v. Eugene Sch. Dist.*, 723 P. 2d 298 (Or. 1986), appeal dismissed, 480 U.S. 942 (1987).

17 *Konrad v. Germany*, App. 35504/03, Eur. Ct. H.R. (Sept. 11, 2006) at 2–4.

18 *Ambach v. Norwick*, 441 US 68, 78–79 (1979) ("Within the public school system, teachers play a critical part in developing students' attitude toward government and understanding of the role of citizens in our society").

In Turkey, a majority Muslim country with an entrenched constitutional commitment to Ataturk's secularism, Şahin's attempt to attend university classes wearing a headscarf was rebuffed in part through reliance on a constitutional provision explicitly framed in terms of citizenship: according to the Turkish Constitution's Article 42, "citizens are not absolved from the duty to remain loyal to the Constitution by freedom of instruction and teaching." More generally, in European countries where Muslims are in the minority, whether a woman wearing *hijab* can study or teach in a public institution will understandably be seen to implicate the question of her acceptance as a full citizen on grounds of both religion and sex. Similarly, as advocates for gay rights so often remind us, access to both marriage and the military, the feminist fundamentalist implications of which I will discuss later, have historically been seen as markers of full citizenship.

I want, however, to offer some resistance to the reflexive tendency to speak simply in terms of citizenship when such matters are at issue. It is important to remember that noncitizens, too, in the United States and elsewhere, have the opportunity, indeed, often the right, to engage in activities I analyze herein in connection with feminist fundamentalism – for example, to enroll in public schools,[19] to marry, to adopt and raise children, to enter the civil service,[20] even to enlist in the military. Liberty and the equal protection of the laws are guaranteed by the text of the U.S. Constitution's Amendments V and XIV to all "person[s]," not only to citizens.[21] In other nations, as well, individuals who demand legal respect for their individual feminist fundamentalist commitments are not limited to making such demands only in their capacity as citizens or only of the nations in which they are citizens. And any constitutional culture in which feminist fundamentalism is entrenched applies its protections and its strictures to more than simply its citizens.

Where I see questions of feminist fundamentalism and of citizenship in the strict sense most clearly intersecting is in the immigration and naturalization decisions made by nation-states committed to feminist fundamentalism, that is to say, those for whom the equality of the sexes is a core constitutional value. One of the most prominent recent such cases involves, yet again, a veiled Muslim woman in Europe: born in Morocco, Faisa Silmi moved to France eight years ago upon her marriage to a French national of Moroccan descent, with whom she subsequently had three children. Wanting, she said, to have the same nationality as her husband and children, Silmi applied for French citizenship, but despite her fluency in the French language and her continued legal residency in France, she was turned down on

[19] See, e.g., *Plyler v. Doe*, 457 U.S. 202 (1982) (mandating that Texas admit illegal alien children to its public schools).

[20] See, e.g., *Sugarman v. Dougall*, 413 U.S. 634 (1973) (striking down categorical state ban on aliens in civil service).

[21] Some conservatives have, however, lamented the Supreme Court's historic turn away from Amendment XIV's textual guarantee of the "privileges or immunities of citizens" toward the equal protection clause as a source of constitutional rights. See, e.g., John Harrison, "Reconstructing the Privileges or Immunities Clause," 101 *Yale L. J.* 1385 (1992).

grounds of "insufficient assimilation," a decision that was ultimately affirmed in July 2008 by France's highest administrative court, the Conseil D'Etat.[22]

Press reports of the decision against Silmi focused on the fact that since arriving in France, Silmi had, at her husband's request, habitually worn a *niqab*, or face veil, as part of a very strict form of *hijab* associated more with the Arabian peninsula than with Morocco. But the record does not support her claim to the press that she had been excluded from citizenship "simply because of what [she] choose[s] to wear."[23] Nor does it support her lawyers' attempt to frame her rejection as based on the threat her religious practices were seen to present to the French value of *laïcité*; rather, the record highlights "in particular the equality of the sexes" as one of "the essential values of the French community" she had failed to "make her own." [24] And the record goes far beyond her veil, to describe her as "living in total submission to the men of her family, which is manifest, not only in her clothing, but in the whole of her daily life" as well as in the statements she made to officials indicating that she finds such submission "normal and that the very idea of challenging this submission never even crossed her mind." (As to *laïcité*, the official report indicates that Silmi "spontaneously admitted [to government authorities] that she had no idea whatsoever about laïcité or about the right to vote.")

According to the *New York Times*, the "ruling on Ms. Silmi has received almost unequivocal support across the [French] political spectrum, including among many Muslims."[25] Among the supporters was minister for urban affairs Fedela Amara, a practicing Muslim of Algerian descent and a founder of the movement Ni Putes, Ni Soumises (Neither Whores, nor Doormats), which works to improve the treatment of Muslim women in France by, among others, the men in their own community.[26] According to Amara, Silmi's *niqab*, which Silmi herself had told authorities she wore "more out of custom than religious conviction," was "not a religious insignia but the insignia of a totalitarian political project that promotes inequality between the sexes and is totally lacking in democracy."[27]

While I might not go so far in my condemnation of the *niqab*, I am in full support of the general approach France took to the question of Silmi's citizenship application. In my view, a liberal culture should be at least as free as a traditional one to defend and preserve its fundamental values by denying an application for citizenship from someone who has not "ma[d]e [his or] her own" those fundamental

[22] Conseil d'Etat Decision in the case of Mme M, 286798, delivered June 27, 2008, available at http://www.conseil-etat.fr/ ce/jurispd/index_ac_ld0820.shtml (accessed April 8, 2009).

[23] See, e.g., Karen Bennhold, "A Veil Closes France's Door to Citizenship," *New York Times*, July 19, 2008, at A1.

[24] This and all other direct quotations from the record are my translation from the official French version of the conclusions of Government Commissioner Mme Prada Bordenave, adopted by the Conseil d'Etat, available at http://www.conseil-etat.fr/ce/jurispd/conclusions/conclusions_286798.pdf.

[25] Bennhold, "A Veil Closes France's Door to Citizenship."

[26] See Fadela Amara and Sylvia Zappi, *Breaking the Silence: French Women's Voices from the Ghetto* (Berkeley: University of California Press, 2006).

[27] Bennhold, "A Veil Closes France's Door to Citizenship."

values. Answering the many objections that can be raised to this view would far exceed the scope of this chapter, but I will at least acknowledge a few of them: first, I acknowledge it to be unfortunate that just as women who are visibly pregnant have historically been more readily subject to policing of sexual prohibitions than the men who got them pregnant, a woman like Silmi, who veils, is more readily made the target of objections to the gender norms her veiling can be seen to embody than are the men who may have imposed that veiling on her or, at the very least, share her views as to its desirability. Of course, every effort should be made to examine the citizenship applications of men, no less than of women, veiled or not, to determine the extent to which they have adopted values such as sex equality as their own. In Silmi's case, her husband already had French citizenship, which only leads to a series of further objections. Yes, I must acknowledge that there are already French citizens who have not internalized their nation's commitment to sex equality, but this does not seem to me a reason for France to exercise its discretion to increase their number. To the contrary, precisely because citizens have the right to shape and change their nation's fundamental commitments, nations are entitled to be cautious about those to whom they extend this right, especially nations like France, that would have far more contenders for residence and citizenship than they could possibly accommodate were they to open their borders, and that must perforce be choosey. As it happens, Silmi is already a resident of France; no one is proposing to separate her from her husband and children, and perhaps, in time, the opportunity for greater exposure to the values of her country of residence will lead her, indeed, to make those values her own.

Feminist Fundamentalism in the U.S. Constitutional Order

I happen to be contingently lucky that my own personal feminist fundamentalist commitments are pretty close to those embodied by the constitutional order under which I live, although I am just old enough to have developed them as my personal commitments before the U.S. Supreme Court enshrined them in constitutional jurisprudence.[28] Through a consistent line of Supreme Court cases over my lifetime, we in the United States have developed an orthodoxy with respect to sex equality. Central to this orthodoxy is that "fixed notions concerning the roles and abilities of males and females" are anathema when embodied in law.[29]

Even Chief Justice Rehnquist, a latecomer to sex equality as a constitutional priority and ordinarily an opponent of expanding federal power over the states, reaffirmed in *Nevada Department of Human Resources v. Hibbs* that we in the United States have so strong and well established a constitutional orthodoxy on matters of

[28] See Mary Anne Case, "No Male or Female, but All Are One," in Martha Fineman, ed., *Transcending the Boundaries of the Law: Generations of Feminism and Legal Theory* (New York: Routledge, 2009).

[29] *Miss. Univ. for Women v. Hogan*, at 725. For an explication of the development of this orthodoxy, see Mary Anne Case, " 'The Very Stereotype the Law Condemns': Constitutional Sex Discrimination Law as a Quest for Perfect Proxies," 85 *Cornell L. Rev.* 1447, 1473 (2000).

sex and gender – an orthodoxy, not simply of sex equality, but of no governmentally endorsed sex-role differentiation in all matters, including those related to family and child rearing – that Congress has prophylactic Section 5 power to enforce it on the states. Thus, to fight the long-standing, now heretical, "pervasive sex-role stereotype that caring for family members is women's work,"[30] Congress can impose on the states as employers the Family and Medical Leave Act, which says that persons of both sexes can get leave for what Martha Fineman[31] would call their inevitable or derivative dependency, that is, for their own illness and that of close family members as well as to care for their young children.

My use of religiously inflected terms such as *orthodoxy*, *heresy*, and *anathema* in this context is deliberately intended to press a further analogy to the discourses of religion: just as, for example, the new constitution of Iraq provides that "no law that contradicts the established provisions of Islam may be established,"[32] so in the United States, no law that contradicts the equality of the sexes may be established. It is this which causes me to call sex equality a fundamentalist (in my sense of the term), and not just a fundamental, commitment of the U.S. constitutional order. Together with racial equality and the nonestablishment of religion, the equality of the sexes is among the very few commitments the existing U.S. constitutional order makes fundamentally binding on government whenever it acts or speaks. This is an orthodoxy that it is incumbent on government to follow through on in all fields – in its hortatory pronouncements, in its funding decisions, and in its necessary interventions into the private sphere such as its custody and adoption decisions. Thus, while government as speaker and dispenser of subsidies is free to take a variety of positions, among the positions it may now no longer take or promote is, for example, that of Justice Bradley in *Bradwell v. Illinois* to the effect that "the natural and proper timidity and delicacy which belong to the female sex evidently unfits it for many of the occupations of civil life,"[33] notwithstanding that such a position may still be fervently held by many people of faith. Moreover, government as decision maker must also act consistently with its commitment to sex equality.

What might this mean in practice? Consider a few examples, some more hypothetical than others. First, at one extreme of the hortatory axis, what constitutional limits might there be on mere government pronouncements of principle unmoored from direct, binding connection to policy? In 1993, the commissioners of Cobb County, Georgia, adopted resolutions proclaiming, inter alia, "that 'the traditional family structure' is in accord with community standards, . . . that 'lifestyles advocated by the gay community' are incompatible with those standards . . . and that Cobb County would not fund 'activities which seek to contravene these existing

[30] *Nev. Dep't of Human Res. v Hibbs*, 538 U.S. 721 (2003).

[31] See generally Martha Fineman, *The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies* (New York: Routledge, 1995).

[32] Section I, Article 2, First, A.

[33] *Bradwell v. State*, 83 U.S. 130, 141 (1892) (Bradley, J., concurring).

community standards.'"[34] If, by "traditional family structure," the commissioners had explicitly indicated that they meant, not just a heterosexual couple, but a patriarchal one, with wives submissive to husbands and confined to the domestic sphere, as Justice Bradley urged, the resolution would violate existing U.S. constitutional equality norms. "Lifestyles advocated by the [feminist] community" can no longer be "incompatible with the" official community standards of any unit of government in the United States. "Welcome to Cobb County, Where a Woman's Place Is in the Home" would be a combination welcome mat/no-trespassing sign with serious constitutional problems.

The problems only intensify when government seeks to use its powers to fund or regulate to promote such a problematic message. Attention to such problems is particularly urgent at times such as the present, when the federal government is increasingly interested in sending messages about appropriate family structure and sexual behavior backed by carrots and sticks. For example, assuming arguendo that "promoting marriage" through subsidies, hortatory, and regulatory means is an appropriate activity for the federal government, it is still constitutionally constrained to promote only egalitarian marriage.

Justice Souter, in dissent from his colleagues' decision upholding a program of government-funded vouchers parents could use to pay for religious schools, wrote that not "every secular taxpayer [will] be content to support Muslim views on differential treatment of the sexes, or, for that matter, to fund the espousal of a wife's obligation of obedience to her husband, presumably taught in any schools adopting the articles of faith of the Southern Baptist Convention."[35] I would go a step further than Souter did and say that it would already be unconstitutional for the government to fund this sort of teaching, in the same way as it has been held unconstitutional for the government to fund racial segregation.

Implicated as well are limits on the messages state-sponsored schools can offer – today, such schools are required to refrain from promoting a message of inequality between men and women. Unfortunately, when one moves beyond those institutions bound directly by the Constitution or by Title IX, there has to date been comparatively little in the way of regulatory attention paid in the United States to ensuring that the education provided to students through state-regulated private and home schooling even minimally communicates or comports with norms of sex equality.

What it might mean in practice for sex equality norms to operate as a necessary constraint on state action is particularly tricky when that state action involves children.[36] But, as has been clear for some time when it comes to state laws governing

34 Joel Achenbach, "A Report From the Front Line of the 'Culture War,'" *Washington Post*, Sept. 26, 1993, at G1.

35 *Zelman v. Simmons-Harris*, 536 U.S. 639, 716 (2002) (Souter, J., dissenting).

36 I discuss this in greater detail in Mary Anne Case, "Feminist Fundamentalism and the Baby Markets," in Michele Goodwin, ed., *Baby Markets: Money, Morals and the Neopolitics of Choice* (New York: Cambridge University Press, 2009), and Mary Anne Case, "Feminist Fundamentalism on the Frontier between Government and Family Responsibility for Children," in Martha Albertson Fineman and

matters such as alimony and child support, sex equality norms also should constrain government on those occasions when it necessarily adjudicates concerning the family. For example, the state should no more select as appropriate adoptive parents for a girl those who believe and will teach their children that females are inferior to and ought to be subservient to males than it would select for a black child adoptive parents who believe nonwhites are inferior to and should be subservient to whites. That such beliefs are sometimes justified with reference to religious faith should not immunize them from scrutiny. And evidence of commitment to sex equality should be at least as assiduously enquired into and at least as positively weighted as a prospective adoptive or custodial parent's commitment to providing a child with religious training, something many decision makers in adoption and custody cases seem to enquire into and weigh favorably, often without much apparent attention to the substance of the religious beliefs.

As things now seem to stand, however, when repressive religious beliefs are pitted against secular feminist ones, the religious beliefs often begin with a presumption to respect I want to insist is even more deserved, but I realize is often not granted to, the feminist ones. Even courts that do, in the end, rule against parents who claim religious authority for the sexist beliefs and practices those parents seek to impose on their children often do so without giving any explicit consideration to the role constitutional norms of sex equality should play in their decision making. For example, a Virginia judge did terminate a father's visitation with his son and daughter after hearing (1) testimony by a clinical psychologist that the daughter "is particularly at risk of psychological damage because of [her father's] telling her that women should not strive to accomplish what men accomplish and that they are supposed to be subservient to men"; (2) evidence that the daughter, an "excellent student," did "better in school this academic year, during which no visitation has occurred, than she did last academic year, when there was visitation"; and (3) evidence that the father had told both children that they and their mother, whom he called "a sinner" and "of the devil," would all go to hell.[37] The judge concluded that visitation with the father was causing "serious psychological and emotional damage to the children" in no small part because "the values being taught to the children by [their father] are different from the values being taught to the children by [their mother]." Among these conflicting sets of values were that the mother "encourages the children to be whatever they want to be. [The father] tells [his daughter] women cannot do what men do." But, even with respect to these values, the judge insisted only, "Whichever set of values is right, and the court makes no judgment on which set of values is right, they are irreconcilably at odds." It may well be true that, as between "tolerance" and "fire and brimstone" – another of the enumerated conflicts in values between these parents – a court can make no judgment, but I would argue that a court is

Karen Worthington, ed., *What Is Right for Children? The Competing Paradigms of Religion and Human Rights* (Aldershot, UK: Ashgate Press, 2009).

37 *Roberts v. Roberts*, 60 Va. Cir. 49 (2002).

constitutionally compelled to choose encouragement of a daughter's unrestricted choice of occupation over a fixed and subordinating message that "women should not strive to accomplish what men accomplish and . . . are supposed to be subservient to men." That is not to say that the parent who most favors sex equality should always prevail, but simply that a court must not remain viewpoint-neutral as between sex equality and its opposite; it must put a thumb on the scales in favor of the parent who would give a daughter the same encouragement, liberty, and opportunity as a son.

Before readers protest that I am proposing massive government intervention into constitutionally protected family choices, they should recall that I am focusing my attention here on situations where there is already of necessity governmental intervention such as necessary government adjudication of custody disputes between two recognized parents in the best interests of the child. Although difficult and controversial borderline questions will arise, to limit analysis of what Kathleen Sullivan has called "constitutional immunity for a private sphere [that] fosters normative pluralism"[38] to adult women's choices – including the choice to accept sex-role differentiation or even subordination to men – rather than attending as well to the choices imposed on young girls, tends to oversimplify the divide between private and state action and to underestimate the United States' constitutional obligation to carry through on its own fundamentalist commitment to sex equality, even as it stops short of perfectionism when it comes to opposing the choices consenting adult women may make to accept traditional sex roles or their own subordination to the men in their lives.

Defending an Integrationist Vision of Sex Equality

Unfortunately, the fundamental U.S. commitment to an integrationist vision of the sexes may already be under threat even in the public sphere and more fragile than it appears from a reading of the canonical case law. Part of the reason is the change in personnel on the current Supreme Court. Replacing Chief Justice Rehnquist with Roberts was, I think, a real loss for sex equality; the replacement of Justice O'Connor with Justice Alito was more generally conceded to be such. The Bush administration, in addition to supporting federal government funding of sex education that reinforces conventional gender roles,[39] has publicized guidelines saying that public schools can have single-sex components, not even separate but equal, but just separate,[40] and in recent state constitutional same-sex marriage decisions, there is the threat of reintroduction of a concept of state-approved sex roles, as I will discuss further

[38] See Kathleen Sullivan, "Constitutionalizing Women's Equality," 90 *Cal. L. Rev.* 735, 755 (2002).

[39] See Cornelia T. L. Pillard, "Our Other Reproductive Choices: Equality in Sex Education, Contraceptive Access, and Work-Family Policy," 56 *Emory L. J.* 941, 957 (2007).

[40] See Joanna Grossman, "The Bush Administration's Push for Single-Sex Education: An Attempt to Erode Federal Gender Equality Guarantees?," Findlaw.com, available at http://writ.news.findlaw.com/ (accessed Sept. 10, 2008).

later. This is particularly troubling for one with my feminist fundamentalist commitments.

In much of Western Europe, different, but in my view quite serious, threats to an integrationist vision of sex equality are presented, inter alia, by the demands of some Muslims for governmental accommodation of their desire to separate the sexes physically as well as in their roles and behaviors. I do not want to suggest that veiling or that physical segregation of the sexes is per se incompatible with the equality of the sexes. Indeed, in earlier work, I argued that

> among the important questions posed by a serious and detailed inquiry into the comparative constitutionalism of women's equality (one, presented, if not squarely in the Afghan case, in other Islamic countries) is how possible it might be to imagine a satisfactory constitutionalism of equality in separate spheres. Can one imagine, for example, workable constitutional guarantees of women's learning, exercising, working, competing, speaking, trading, politicking, and governing in a world of women parallel to and equal with the world of men, with women doctors treating women patients, women spectators cheering on women athletes, and women judges deciding women's cases? This would be a radically different form of separate spheres than that familiar to us (and thus far rejected by our constitutional law), which tends to feature men and women in complementary roles rather than in parallel universes.[41]

However, I see no way around the conclusion that both veiling and sex segregation may be incompatible with certain instantiations of sex equality norms. For example, I can see no way around the conclusion that segregation, separate spheres, and fixed sex roles simply cannot be made compatible with integration and a lack of fixed notions. Moreover, a mélange, as Jeremy Waldron would call it, of the two may be deeply unsatisfying to both integrationists and separationists,[42] even assuming arguendo that it were practically sustainable. It may be easier to see in the case of the Virginia Military Institute[43] (VMI) or Saudi Arabia why one woman or one scantily clad woman could destroy the system, but I also see the risk of the one woman in a *niqab* or one public, sex-segregated, role-differentiated institutional space like VMI for a no-fixed-notions society or an integrationist one. One might argue in response that categorical opposition to veiling itself is an impermissible fixed notion. That seems to be the line taken by German Constitutional Court judge Bertold Summer, author of the majority opinion in the Ludin case, who stressed that a teacher in a

[41] Mary Anne Case, "Reflections on Constitutionalizing Women's Equality," 90 *Cal. L. Rev.* 765, 774 (2002).

[42] See Jeremy Waldron, "Raz on Culture and Autonomy," at 21 (unpublished paper presented at the Princeton University Conference on the Twentieth Anniversary of Joesph Raz *The Morality of Freedom*, *October 19, 2006*). I see at the heart of this problem the paradox of diversity – both a variety of uniformity and a uniformity of variety deny diversity as much as they affirm it. See Mary Anne Case, "Molecular Constitutionalism and Community Standards," 25 *Hum. Rts. L. J.* 10 (2005).

[43] See *United States v. Virginia*, 518 U.S. 515 (1996) (mandating the admission of women to a previously all-male state-sponsored military academy).

veil could open up to her students the liberatory possibility of full participation by devout Muslim women in public life.[44] But, especially in a world in which modesty norms are not imposed equally on both sexes, veiling does seem itself to embody a fixed notion about women's place and behavior as well as of sexual difference, and arguably, of sexual subordination, as the German dissenters and the judges of the ECHR observed.

Like the dissenters in the German veil case, I also do not mean to essentialize the veil or to take any position at all as to what the veil means to its wearers, rather to stress that the question presented when representatives of the state, in their representative capacity, wish to wear it is about what the veil reasonably can be interpreted to mean by people both within and without the Muslim community, who must deal with the state through this representative. Consider an American analogy: I accept that the Confederate flag, to some of the people who display it, is not meant as a statement of racism or white supremacy or anything of the kind, but just a statement of heritage. I nevertheless would think it reasonable if governments in the former Confederacy disavowed that flag as a symbol of their state and prevented civil servants from wearing it on duty or displaying it at their desks because one might reasonably interpret it as having among its possible meanings a view about slavery, white supremacy, or nostalgia for pre–Civil War or pre-*Brown v. Board of Education* race relations inconsistent with the fundamental commitments of the government these civil servants serve. The analogy is, I admit, imperfect for many reasons, not least of which is that no one I know of claims to be under a fundamentalist compulsion to display the Confederate flag.

Veiling may get the bulk of the attention in Europe to date, but, more worrisomely, it often functions as a combination stalking horse and Trojan horse for the far more serious threat that other attempts to use the legal order to reimpose sex roles and separate spheres are to the fragile integration and equality in liberty of the sexes in Europe. These include, for example, demands to excuse schoolgirls from everything from swim class to field trips to contact with boys; to create public sex-segregated spaces for adult males and females; to excuse adult men from physical contact with female business colleagues; and to limit professionals, such as physicians and nurses, from serving both sexes.[45]

Justice Ruth Bader Ginsburg may have had a similar creeping danger in mind when, responding in *United States v. Virginia* to claims that one public university from which women were excluded did not threaten the United States Constitutional guarantee of equal protection by sex, she observed that

> Thomas Jefferson stated the view prevailing when the Constitution was new: "Were our State a pure democracy . . . there would yet be excluded from their

[44] Personal communication, May 26, 2004, at dinner following a presentation on the *Ludin* case at Freie Universiät, Berlin.

[45] See, e.g., Ian Johnson, "A Course in Islamology: Everyday Dilemmas of Muslim Life in Berlin," *Berlin Journal*, fall 2005, at 47; Sylvia Poggioli, "In Europe, Muslim Women Face Multiple Issues," National Public Radio, Jan. 20, 2008.

> deliberations . . . [w]omen, who, to prevent depravation of morals and ambiguity of issue, could not mix promiscuously in the public meetings of men."[46]

Because I am so committed to, and so alive to the fragility of, an integrationist vision of the sexes, I am in sympathy with efforts by European countries to put brakes on the possibilities for reintroduction of norms of sex segregation and sex-role differentiation. Like the Muslim governors and head of Begum's British school, and legislators and school officials in France and Turkey, as well as a substantial percentage of their constituencies, Muslim and non-Muslim, I fear that accommodation of demands by some Muslims for more sex segregation or dress and role differentiation of girls and women will only increase, perhaps to a breaking point, the pressure on other Muslim girls and women to conform to such restrictions. In this regard, I think it has not been stressed enough that a majority of French Muslims supported the ban on headscarves in French public schools;[47] that the overwhelming majority of Turks, at all times since a ban on headscarves first was imposed by the Turkish constitutional order, are Muslims; and that not only the school's Muslim head and Muslim majority board of governors, but Muslim fellow students of Begum, supported her school's ban on *jilbabs*. In short, it would be wrong to see the *hijab* debates as simply pitting secular Western fundamentalist opponents of the veil against Muslims. I also understand the real danger that oppression makes any faith grow stronger, that there is a risk that women and girls will wear or feel compelled to wear the veil much more when it is forbidden, but this is a practical problem dependent on specific circumstance, as to which I am willing to take local assessments of comparative risk quite seriously.

While I see many practical problems with recent attempts by Britain and Baden-Wuerttemberg to introduce examinations to ensure that immigrants understand and accept, inter alia, local constitutional and cultural norms of sex equality,[48] I do not find it objectionable in theory for a polity to take steps to ensure that those who wish to enter it as citizens or permanent residents not only agree to abide by, but also truly accept, its fundamental values. As noted previously, a liberal culture should be at least as free as a traditional one to defend and preserve its core values by exclusion from its territory and regulation within its territory of those who threaten its fundamental commitments.

And just as I do in U.S. debates around issues for which participants on one side use the connection of their position with their religious faith to claim, not only authority for their position, but a righteous sense of grievance when challenged, I

[46] *Virginia*, at 532 n. 5 (quoting a letter from Thomas Jefferson to Samuel Kercheval [Sept. 5, 1816], in P. Ford, ed., *10 Writings of Thomas Jefferson* [1899], at 45–46, n. 1).

[47] See, e.g., Dominic McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (Oxford: UK Hart, 2006), at 99.

[48] See, e.g., Jeffrey Fleishman, "German Muslims Object to Citizenship Tests on Political, Religious Issues," *New York Sun*, April 13, 2006, at 6 ("Baden-Wuerttemberg requires an education course and a 30-question oral test to determine whether an immigrant supports issues such as women's rights and religious diversity. The test is graded at the discretion of the interviewer").

want to vindicate those, such as Tony Blair and Jack Straw in Britain,[49] who are not silenced in their articulation of disapproval by an unjustified demand for polite deference on the part of their religious opponents.

I am quite alive to the analogies between the arguments I am making here and those made by opponents of legal recognition of same-sex marriage and other legal protections for gay men and lesbians. There are many reasons, however, why I do not think I can fairly be taxed with a charge of inconsistency in my approach to these issues. Let me just mention what is perhaps the most controversial of these reasons here: one thing the most virulent of the opponents of same-sex civil marriage and I agree on is that, in the end, compromise or a *cuius regio eius religio* solution on these issues in the United States is not possible, and a permanent state of tolerance, as opposed to endorsement by government of one side or the other, will be very difficult, although perhaps not as difficult as maintaining the nation half slave and half free.[50] The preceding discussion about necessary state intervention concerning children suggests some of the reasons why. In particular, there will be conflict and a resulting need to take sides so long as public schools do any education at all that in any way concerns matters such as the structures of family life – and even with a radical revision of public education, this might not be possible to eliminate.

I want now to move very briefly to considering some individuals whose feminist fundamentalist commitments ought to be, I think, more recognized in the American legal order. Let me discuss further heterosexual marriage resisters; Darlene Jespersen, whose commitment not to wear makeup was disrespected by a majority en banc of the Ninth Circuit;[51] and Colonel Martha McSally, who engaged in a multiyear campaign ending in litigation followed by congressional action against the U.S. military's requirement that she wear an *abaya*, the all-encompassing black cloak that is the Saudi Arabian instantiation of *hijab*.

Heterosexual Marriage Resisters

The ongoing debates concerning the extension of civil marriage to same-sex couples bring together a number of different fundamentalist as well as perfectionist perspectives, including a variety from within both the gay rights and religious conservative movements. I have long been of the view that one underrepresented and undervalued set of perspectives in these debates was that of feminists, including those who resist marriage from a feminist perspective. Among the big losers in the recent spate of decisions concerning same-sex couples are heterosexual feminist couples, whether living in a state like New York, whose high court has said that marriage

[49] See, e.g., Alan Cowell, "Blair Criticizes Full Islamic Veils as 'Mark of Separation,'" *New York Times*, Oct. 18, 2006, at A3.

[50] Note that for purposes of this chapter, I bracket the question of which side of the current debates should be analogized to slavery and Jim Crow. My point here is about the impracticalities of continued coexistence. It is not (at least not here and now) to analogize gay and black civil rights.

[51] See *Jespersen v. Harrah's Operating Co., Inc.*, 444 F.3d 1104 (9th Cir. 2006) (*en banc*).

is going to be reserved for them because of traditional sex roles,[52] or even, perhaps especially, living in states or nations that have recognized the claims of gay and lesbian couples for recognition but allowed marriage to be (p)reserved – or at least the name of "marriage" to be (p)reserved – for heterosexual couples " 'because of,' not merely 'in spite of,'"[53] its traditions. The traditions of marriage, including its legal traditions, are anything but free of "fixed notions concerning the roles and abilities of males and females" and are also anything but free of female subordination.[54]

Only in a handful of states and nations is marriage now open on the same terms to all couples regardless of sex. The California Supreme Court, in its decision opening marriage to same-sex couples (a result the majority of California voters rejected by passing Proposition 8), went out of its way to reject the claim that sex discrimination was at issue in the state's prior exclusion of same-sex couples.[55] Other states that offer some formal legal recognition to same-sex couples have set up separate regimes for them and generally put those regimes off limits to the mine run of male-female couples. New Jersey, for example, has decided to reserve civil marriage for male-female couples and to offer same-sex couples a similar package of legal benefits if they enter into a new status, denominated "civil union." Although civil union offers, to the extent the law of New Jersey allows, "all the same benefits, protections and responsibilities under [state] law . . . as are granted to spouses in a marriage,"[56] only same-sex couples may form civil unions. Such bifurcated regimes send a message of subordination to both gays and lesbians, on the one hand, and heterosexual women, on the other, while reaffirming patriarchy. Withholding from same-sex couples the opportunity to marry devalues their unions both symbolically and practically, while restricting marriage to male-female couples and male-female couples to marriage forces women who wish to unite themselves to men under state law to do so in an institution whose all too recent legal history is one of subordinating wives both practically and symbolically, an institution reserved for them alone because of, and not in spite of, its "traditional" (i.e., patriarchal) significance. While civil union and domestic partnership may have gone a long way toward constitutionalizing the equality of gay men and lesbians in the states and nations that offer them, to the

[52] See *Hernandez v. Robles*, 7 N.Y.3d 338, 349 (2006).

[53] I take this language, of course, from *Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (requiring discriminatory intent as well as disparate impact for claims of violation of equal protection on grounds of sex).

[54] This is not to say that civil marriage today need be a prisoner of its traditions, only that, by explicitly seeking to limit it to heterosexual couples because of its traditions, the law so imprisons it and the couples who enter it. As I have been arguing since 1993, but for the lingering cloud of repressive history hanging over marriage, it would be clear that marriage today provides far more license and has the potential to be far more flexible, liberatory, and egalitarian than most available alternatives such as most existing domestic partnership schemes or ascriptive schemes. See Mary Anne Case, "Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights," 79 *Va. L. Rev.* 1643 (1993); Mary Anne Case, "Marriage Licenses," 89 *Minn. L. Rev.* 1758 (2005).

[55] *In re Marriage Cases*, 43 Cal. 4th 757, 837 (2008).

[56] N.J. Stat. § 37:1–31 (2009).

extent these institutions are not open to all couples, they are, in my view a step backward for constitutionalizing the equality of straight women.

Note that if states open either marriage to same-sex couples or civil union to male-female couples, I myself, unlike some other feminist fundamentalists, would not complain about an affront to women's equality, because if marriage were opened to all couples, it could continue its development away from its patriarchal past, rather than be preserved in the tradition of that past. And if civil union were open to all couples, women who wished to receive state recognition of their union with a man, together with the associated bundle of legal benefits, could do so without being forced to submit to entry into a form of union that traditionally has subordinated them.

In some ways, marriage is like the *abaya* in the McSally case, discussed later. Among other similarities, they both historically involve the "covering" of women in circumstances where men are not similarly covered: an *abaya* physically, through its cumbersome, enveloping folds; marriage legally, through the encumbrance of coverture, which subsumed a wife's identity in her husband's. Some women who voluntarily enter the one or put on the other do so without feeling or intending to "communicate . . . a belief that women are subservient to men."[57] Others by such acts embrace and announce their adherence to such a belief, as is their personal right. But a government committed to constitutionalizing women's equality in the way that U.S. law now demands should not condition important privileges, including membership in the armed forces and in a legally recognized union, on a woman's willingness to accept trappings whose social meaning she reasonably associates with a message of subordination she (and this nation) rejects.

There have been heterosexual feminist fundamentalist marriage resisters, male and female, in the Unites States for centuries, but they have never gotten much respect from the law. In recent years, a wide variety of challenges by them to benefits extended by employers and units of government only to those unmarried couples whose members were of the same sex have been met with the judicial response that because heterosexual couples can legally marry, they suffer no impermissible discrimination.[58] No weight at all is given to their fundamentalist objections to civil marriage. Moreover, a side effect of recent successful opposition to recognition of same-sex relationships, including the so-called mini-DOMA, or Defense of Marriage Acts, is that their ability to order their relations by enforceable contract has suffered setbacks in many states.

Darlene Jespersen

A standard gambit of proponents of veiling or of the right to veil of Muslim women such as students and schoolteachers in Europe is to note that the West also imposes

[57] *McSally v. Rumsfeld*, 1,01CVO2481 (D.D.C. 2001) (Plaintiff's Complaint, at para. 11).
[58] See, e.g., *Irizarry v. Bd. of Educ.*, 251 F.3d 604 (7th Cir. 2001).

what can be seen as role-differentiating, subordinating attire on women, but instead of freeing them from sexual threat and sexualization, such attire makes them sex objects; instead of covering them, it exposes them.[59] From the time the Supreme Court decided *Price Waterhouse v. Hopkins* in 1989 until very recently, I would have claimed that in accord with its and my feminist fundamentalist commitments, the U.S. legal order offered women who wished to resist the demand to "dress more femininely, wear make up, have [their] hair styled, [and] wear jewelry" its strong support.[60] In 2006, however, the Ninth Circuit en banc decided that Darlene Jespersen could be fired after two successful decades as a bartender for Harrah's Casino simply because she would not wear makeup. Jespersen's account of her reasons for refusing to do so sounds to me like a feminist fundamentalist parallel to the cases of Muslim women who will not unveil, and a feminist fundamentalist twin of the case of Colonel McSally, who would not veil, discussed later. As the majority that ruled against her summarized it,

> Jespersen described the personal indignity she felt as a result of attempting to comply with the makeup policy. Jespersen testified that when she wore the makeup she "felt very degraded and very demeaned." In addition, Jespersen testified that "it prohibited [her] from doing [her] job" because "[i]t affected [her] self-dignity . . . [and] took away [her] credibility as an individual and as a person.[61]

Although the majority disrespected Jespersen's commitments, describing her as idiosyncratic and Harrah's rules as neither rooted in sex stereotypes nor posing an undue burden on women, dissenting Judge Kosinski observed,

> If you are used to wearing makeup – as most American women are – this may seem like no big deal. But those of us not used to wearing makeup would find a requirement that we do so highly intrusive. Imagine, for example, a rule that all judges wear face powder, blush, mascara and lipstick while on the bench. Like Jespersen, I would find such a regime burdensome and demeaning; it would interfere with my job performance. I suspect many of my colleagues would feel the same way. Everyone accepts this as a reasonable reaction from a man, but why should it be different for a woman? It is not because of anatomical

[59] I should note that my resistance to my own forced veiling extends to forced imposition on me of Western garb reserved for females, especially that which, like the *abaya*, hampers freedom of movement. Although warned by other lawyers that I might be denied admission to the seating reserved for the Supreme Court bar for the oral argument of the VMI case if I wore a pantsuit, I wore one, relishing the irony if the case for which I were to be excluded was precisely that one. I made sure the suit was one a male would be admitted in and kept a borrowed tie in my pocket so I could bring my legal challenge cleanly if I had to. I also knew that I'd have to wait hours outside the Court in the freezing dawn before I could take my seat, and that pants were warmer than pantyhose, so something more practical than a taste for androgyny or nondiscrimination was at stake.

[60] For an extended discussion of the *Hopkins* case and its implications, see Mary Anne Case, "Disaggregating Gender From Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence," 105 *Yale L. J.* 1 (1995).

[61] *Jespersen*, at 1107–08.

differences, such as a requirement that women wear bathing suits that cover their breasts. Women's faces, just like those of men, can be perfectly presentable without makeup; it is a cultural artifact that most women raised in the United States learn to put on – and presumably enjoy wearing – cosmetics. But cultural norms change; not so long ago a man wearing an earring was a gypsy, a pirate or an oddity. Today, a man wearing body piercing jewelry is hardly noticed. So, too, a large (and perhaps growing) number of women choose to present themselves to the world without makeup. I see no justification for forcing them to conform to Harrah's quaint notion of what a "real woman" looks like.[62]

Martha McSally

While a U.S. Air Force fighter pilot stationed in Saudi Arabia, Colonel Martha McSally brought a court challenge[63] to regulations requiring all female U.S. military personnel on all trips off base in Saudi Arabia to be accompanied by a male companion and to wear an *abaya*, the full body covering that is the Saudi Arabian instantiation of the Islamic requirement of *hijab*. Before bringing suit, she had tried unsuccessfully but vigorously for a number of years to get these regulations changed within the military hierarchy. McSally's complaint said that these regulations violated her constitutional rights for several reasons, among them by forcing her, as a Christian woman, to portray herself as a Muslim in Muslim garb and "by forcing her to communicate the false and coerced message that she adheres to the belief that women are subservient to men, by according her different treatment and status based solely upon her gender, and by undermining her authority as an officer."[64]

Her complaint made several things clear. First, these requirements were imposed by the U.S. military, not by Saudi law. Other female U.S. government personnel, such as State Department employees, were not required or encouraged to, nor did they, abide by them; rather, they complied with Saudi veiling requirements by donning only a headscarf. Second, male U.S. military personnel were not only not required, but were categorically prohibited, from wearing local dress. McSally gave practical examples of how the rules undermined her authority and also of how the rules were actually counterproductive to their intended purpose, given that the local religious police, who might have left her in peace had she been lightly veiled and obviously a Westerner, treated women in *abayas* as coming more fully under their jurisdiction and hence eligible for punishment for minor transgressions such as letting the *abaya* slip.

Of the people I am calling feminist fundamentalists I've listed in this last portion of the chapter, Martha McSally is the only one to have achieved victory, but I think it is instructive to note how and why she won. She did not win in the courts. Her case is also one of the Constitution outside the courts. McSally won by a unanimous

[62] Ibid., at 1117–18 (Kozinski, J., dissenting).
[63] *McSally v. Rumsfeld*, 1,01CVO2481 (D.D.C. 2001).
[64] Ibid., Plaintiff's Complaint, at para. 11.

vote of the Congress, which directed the U.S. military not to enforce or even suggest such a thing as veiling to female military personnel in Saudi Arabia. During the congressional debate on the matter, as much attention was given to how this poor Christian woman should not be forced to portray herself as a Muslim as was given to her claim for equal protection on grounds of sex.

Focusing attention on McSally's free exercise of religion claim is interesting on several levels. First, it reveals a much broader and more serious problem with the "heads we win, tails you lose" formulation that so often works wonderfully well for Muslim fundamentalist proponents of veiling, who simultaneously demand that Muslim women in the West be fully accommodated in their desire to veil and be segregated and that non-Muslim women fully accommodate themselves to local norms of veiling and sex segregation in Muslim countries. The problem is this: either *hijab* is a requirement only of Muslim women, in which case McSally is right that imposing it on her forces on her the false claim that she is a Muslim, or it is seen as a requirement of women generally, in which case its proponents are making a claim that is far more universalist and perfectionist than any typically made by their feminist opponents, and one that it is therefore perfectly appropriate, indeed necessary, for these opponents to resist vigorously.

Second, it is important to be clear that, judging by her subsequent conduct, the sex equality claim was at least as important to McSally herself as the free exercise claim. McSally was subsequently promoted, unusually for a resister to military policy, to a position no female before her had held and showed up for the inauguration ceremony in the male version of the United States Air Force cap, even though to wear the male cap had been forbidden to women.[65] She subsequently published a law review article making clear that her choice of cap was no accident, but a continuation of her struggle to eliminate all unnecessary distinctions between male and female soldiers, especially, but not exclusively, those that "demean or degrade servicewomen."[66] So it seems that she took her feminist fundamentalist claim at least as seriously as her free exercise claim, and I hope the time soon comes when it is perfectly clear that the American legal system does as well.

[65] Carol Ann Alaimo, "Aviator's Choice of Headgear Causes a Stir Within Air Force," *Arizona Daily Star*, Aug. 24, 2004.

[66] Martha McSally, "Women in Combat: Is the Current Policy Obsolete?," 14 *Duke J. Gender L. and Pol'y* 1090 (2007).

PART

II

POLITICAL CITIZENSHIP AND GENDER

6

Women and Antiwar Protest: Rearticulating Gender and Citizenship

Kathryn Abrams

Introduction

Law, like many other disciplines, has seen a recent rekindling of interest in questions of citizenship.[1] Debates about immigration, about the meaning and obligations of American citizenship post-9/11, and about the domain of citizenship in a world shaped by both ethnic nationalism and the forces of globalization have given this familiar topic new salience. Yet paradoxically, protest – a dimension of citizenship that these debates have inspired – has not been systematically revisited. In this chapter, I consider protest as an activity of citizenship by analyzing its practice in a particular context: the waging of war. I also analyze such protest, as it has been undertaken by women, acting as women. This focus holds intrinsic interest to me, as a feminist scholar. However, focusing on the activity of a specific group of citizens – particularly one that has historically sustained a vexed relationship to citizenship – is consistent with the emerging theoretical framing of citizenship as a status and activity that is both differentiated and differentiating.[2]

I will examine these questions through the lens of three recent antiwar movements led by women: Cindy Sheehan's Camp Casey vigil and related activism, CODEPINK for Peace, and Women in Black. Each of these groups has mobilized aspects of gender that have historically been offered as justifications for resisting war. Yet they have rearticulated these dimensions of gender to respond to a context in which the stakes are simultaneously lower and higher than in previous periods and few women subscribe to simple, unitary conceptions of motherhood or the relationship between women and peace. After exploring these rearticulations, and the innovative modes of political action they have produced, I ask how they have served the goals of women's antiwar protest and women's acceptance as full and legitimate participants in public life.

[1] See, e.g., "A Tribute to the Work of Kim Barry: The Construction of Citizenship in an Emigration Context," 81 *N.Y.U. L. Rev.* 1 (2006); "Eighth Annual LatCrit Conference City & The Citizen: Operations of Power, Strategies of Resistance," 52 *Clev. St. L. Rev.* 1 (2005).

[2] See generally Ruth Lister, *Citizenship: Feminist Perspectives* (New York: Palgrave Macmillan, 2003); Linda Bosniak, "Universal Citizenship and the Problem of Alienage," 94 *Nw. U. L. Rev.* 963 (2000).

Protest and Wartime Citizenship

The Ambivalent Status of Protest

Protest fits ambivalently within theoretical typologies of political citizenship, although it is an activity in which citizens of democracies frequently engage. Within typologies framing the meaning of citizenship by reference to rights, on the one hand, and obligations, on the other, protest may be understood as falling on both sides of the divide.[3] Protest is often protected by the First Amendment, placing it squarely within a liberal, rights-based understanding of citizenship. Yet critiquing what one views as unjust or misguided governmental policies would seem to be one of the obligations of an "active" form of citizenship, drawing on quasi-republican understandings or Foucaultian notions of a diffused sphere of the political.[4]

Historically, the realm of political critique and protest has also been gendered. Only men, and mostly men of privilege, have been able to claim the authority and the comprehensiveness of vision to mount a systematic political critique. When women, who have historically been sequestered from the public realm,[5] have entered the sphere of protest and political critique, they have had to rely on those gendered characteristics that constitute their more limited sources of authority. These characteristics include motherhood, the capacity for care and order that stems from domestic responsibility, and a particular kind of conformist moral virtue traditionally associated with these gendered roles. Although this discourse may have contributed to women's marginalization, women have employed it effectively to influence public debate. Particularly when mounting critiques of exclusion,[6] or calling attention to failures of social welfare provision,[7] women making these traditional, gender-based claims have sometimes been successful in garnering attention or soliciting responses from mainstream political actors.

Wartime Citizenship

Wartime transforms the meaning of citizenship in important ways. During a time of armed conflict, when a state is fighting for its continued existence or for values central to its self-definition, the obligations of citizenship rise to the forefront, increasing in seriousness and magnitude. The rights of the citizen – understood as claims that

3 See, e.g., Lister, *Citizenship*, at 13–42.

4 See, e.g., Kirstie McClure, "On the Subject of Rights: Pluralism, Plurality and Political Identity," in Chantal Mouffe, ed., *Dimensions of Radical Democracy: Pluralism, Citizenship, Community* (London: Verson, 1992), at 108.

5 See Lister, *Citizenship*, at 68–73, 119–30.

6 See Ellen Carol DuBois, *Feminism and Suffrage: The Emergence of an Independent Women's Movement in America, 1848–1869* (Ithaca, NY: Cornell University Press, 1978), at 37, 44–47.

7 See Seth Koven and Sonya Michel, Introduction to *Mothers of a New World: Maternalist Politics and the Origins of Welfare States* (New York: Routledge, 1993), at 1–2.

the citizen can make against the state – are deemed either secondary or subject to atypical circumscription.

The most important wartime obligation of citizenship is that of bearing arms on behalf of the state and risking one's life in that effort. This may be a formal obligation in nations that have a draft. In nations, such as the United States, that do not have a draft, it may be a responsibility that is not obligatory but is perceived as normative for citizenship. In virtually all countries, bearing arms on behalf of the state is a gendered obligation. Men are the paradigmatic citizens whose obligation extends to dying for their country, whereas women are almost never subject to mandatory military service. In nearly all contexts in which women serve, they carry out gender-differentiated responsibilities,[8] which are supposed to position them outside or farther from the lines of combat.[9] Women's historic obligation of citizenship during wartime has been to support the war effort through the resolute and patriotic surrendering of their family members to military service. Women may also be asked to provide ancillary support for the war effort, whether through work in military industries[10] or maintenance of "moral virtue" in the realms of sexuality, hearth, and home.[11] In virtually all contexts, women's service to the state is indirect and mediated by their familial roles.[12]

The act of protesting a particular war is a distinctively vexed activity of citizenship for citizens of any gender. It declares a right to criticize the government (or to resist its imposition of political obligation) at a time when one's obligations to the government, rather than one's rights against it, are deemed paramount. Consequently, protesters feel compelled to invoke characteristics that give them legitimacy in the eyes of the government and the public. One effective claim to legitimacy is individual sacrifice in the war effort. A speaker's sacrifice reflects performance of civic obligation; it also reflects sufficient knowledge of the war effort to permit the speaker

[8] Even in Israel, where military service is mandatory for women, it has been subject to a wider range of exclusions and is distinct both in duration and in the responsibilities assigned. See "Noya Rimalt, Women in the Sphere of Masculinity: The Double-Edged Sword of Women's Integration in the Military," 14 *Duke J. Gender L. and Pol'y* 1097, 1113–15 (2007).

[9] In the conflict in Iraq, because there is no front line in the "360-degree war," women are actually on the ground "by the thousands" and have in fact died in these ostensibly support-oriented roles. See, e.g., Lizette Alvarez, "Jane, We Hardly Knew Ye Died," *New York Times*, Sept. 24, 2004, at 1; Sara Corbett, "The Women's War," *New York Times Magazine*, March 18, 2007, at 42. This sacrifice and ongoing exposure give them a claim in antiwar protest that is new but not deployed in the movements on which I focus.

[10] See, e.g., Doris Weatherford, *American Women and World War II* (New York: Facts on File, 1990), at 128–39; Emily Yellin, *Our Mothers' War: American Women at Home and at the Front During World War II* (New York: Free Press, 2004), at 48–65.

[11] Sonya O. Rose, "Sex, Citizenship, and the Nation in World War II Britain," 103 *Am. Hist. Rev.* 1147, 1166–73 (1998).

[12] This arrangement has some resonances with the common law concept of coverture, whereby a woman was assimilated into the legal personhood of her husband upon marriage. See Lister, *Citizenship*, at 69. In Chapter 2, Kerry Abrams discusses how contemporary U.S. immigration and naturalization law uses marriage and the U.S alien spouse to negate an immigrant women's citizenship.

to speak with authority. Thus a group like Vietnam Vets Against the War acquired the requisite legitimacy to criticize that conflict. Access to this highly credible kind of claim is usually gendered, meaning that it is most frequently and effectively made by men. Women have never been drafted for military service in the United States, and when they have served, it has not been in formal combat roles, even though the nonlinear nature of current warfare effectively puts women in combat.[13] Even when support roles have placed them near the front lines, women's hard-fought battle for access to these opportunities has made many reluctant to confront government over war.

For women to critique war during wartime, they have generally needed to invoke their own gendered experience as a source of legitimacy or knowledge. This kind of appeal has historically taken one of two forms. First, women have invoked their roles as mothers of men who have been or could be conscripted to fight a particular war.[14] Women have relied on their personal sacrifice – in facing the loss or injury of their sons – to make the costs of war more tangible to those more distant from the experience on the ground. In the second type of appeal, women claim that their role as mothers – actual or metaphorical, by virtue of their sex or gender – gives them an orientation toward caregiving and preserving life that provides a ground from which to expose the error of war.[15]

Although these gendered claims may be the most effective means for women to conduct wartime protest, even they are not always successful in relation to the state or uncontroversial among feminists or women in general. The claims of mothers that are based on their personal sacrifice in being asked to surrender their sons are vulnerable to official government strategies of cooptation or discipline. The "moral mother's" claim to resist war as a function of her innate or socialized preservationist instinct[16] has been a more consistent and enduring one. Furthermore, it is consistent with the range of cultural-feminist claims that have legitimated women's involvement in active, participatory forms of citizenship.[17] But such views have hardly been uncontested among feminists. As Micaela di Leonardo argued two decades ago, the "moral mother" image neglects the many, complicated ways that militarism uses,

[13] Kenneth L. Karst, "The Pursuit of Manhood and the Desegregation of the Armed Forces," 38 *UCLA L. Rev.* 499, 523–45 (1991). For an account of the opening up of many more military positions to women since the 1990s and a critique of the "no women in combat" rule, in light of women's demonstrated performance in recent wars, and their vulnerability under the rule, given the nonlinear nature of current warfare, see Colonel Martha McSally, "Women in Combat: Is the Current Policy Obsolete?," 14 *Duke J. Gender L. and Pol'y* 1011 (2007). Mary Anne Case discusses Mcsally's feminist "fundamentalist" commitment in Chapter 5.

[14] See, e.g., Susan Zeiger, "She Didn't Raise Her Boy to Be a Slacker: Motherhood, Conscription, and the Culture of the First World War," 22 *Feminist Stud.* 7, 10 (1996).

[15] See ibid.

[16] One of the most fully theorized and sophisticated accounts of this position may be found in Sara Ruddick, *Maternal Thinking: Toward a Politics of Peace* (Boston: Beacon Press, 1989), at 185–251.

[17] The late stages of the women's suffrage movement embodied similar maternalist aspirations to clean up, or support high moral standards in government. See, e.g., DuBois, *Feminism and Suffrage*, at 173.

marginalizes, and attracts women; moreover, it venerates an image of women that has been, and can be, used to constrain and disadvantage them.[18]

This complexity raises a related point: the imagery and substance of women's antiwar protests inevitably operate in specific social and political contexts. Women protesting their governments' war making must face the paradigmatic complications of antiwar protest but must also confront features of their particularized context that influence their strategies and shape the efficacy of their efforts. In the following section, I examine the determinative features of the present context of women's antiwar protest – particularly in the United States following the 2003 invasion of Iraq.

The Contemporary Context of Women's Antiwar Protest

Three dimensions of the current social and political context have particular salience in shaping the antiwar efforts of women-led groups. First, in some contexts in which women have mobilized, war efforts are broadly unpopular and seriously contested by groups apart from those led by women. The war in Iraq, for example, is neither widely supported nor viewed by most Americans as placing the nation's survival or values in the balance.[19] This has made the task of legitimizing dissent less onerous than, say, during the runup to either of World Wars I or II. However, this advantage has been mitigated by other obstacles that have made gender-based justifications for protest a matter of greater urgency: protesters have confronted a government resistant to acknowledging voices of dissent and a message-saturated political environment, in which the continuing salience of gender in American culture has lent women-led antiwar efforts particular promise as attention-claiming vehicles.

Second, contemporary antiwar protests are taking place at a time when women are beginning to enter the political mainstream and play an influential role in the processes of democratic self-government, from assuming positions of leadership (e.g., Supreme Court Justice, secretary of state, speaker of the House) to assuming less visible but nonetheless politically salient roles as legislators, policy makers, and participants in nongovernmental organizations. This breadth of participation is sufficiently new as to be unfamiliar, controversial, and potentially precarious – as the exciting yet ultimately unsuccessful campaign of the first mainstream woman candidate for president made clear. In this environment – where women have entered but have yet to achieve "critical mass" in most of these political contexts – women's activities in any visible setting, including the volatile realm of political protest, may be taken as emblematic in ways that men's activities would not. They

[18] See Micaela di Leonardo, "Morals, Mothers, and Militarism: Antimilitarism and Feminist Theory," 11 *Feminist Stud.* 599, 615 (1985).

[19] Opinion polling data from September 2007 indicate that 70 percent of Americans disapproved of then-President Bush's handling of the war in Iraq and that a majority believed that the United States should not have involved itself in that country. See PollingReport.com, "Iraq," available at http://www.pollingreport.com/ (accessed Sept. 22, 2007).

may therefore bear not only on the success of a larger antiwar movement, but on women's ability to win acceptance as legitimate political actors.

Finally, women are mobilizing these protests at a time when imagery related to gender is both more plural and more perilous. Women can draw on a wider repertoire of images and narratives to describe their "gendered lives,"[20] but at the same time, both participants and the public recognize that generalizations about women (particularly those that draw on nineteenth-century separate spheres ideology) can be a dangerously double-edged sword.

I will now discuss three recent mobilizations of women against war that have emerged in this broadly sketched political context: the Camp Casey protest mounted by Cindy Sheehan (and the related work of her organization, Gold Star Families for Peace); CODEPINK for Peace, a women's protest movement founded in the runup to the Iraq war; and Women in Black, a movement for peace initiated by women in Israel, which has now expanded to the former Yugoslavia, Western Europe, and the United States. In each of these cases, I examine the understandings of gender and gender's relation to antimilitarism that each group advances. I also consider the forms of political engagement each group has adopted and ask how these methods communicate the group's substantive message. In concluding, I consider whether these rearticulations of gender have served antiwar goals and whether they have helped to legitimate women's participation in active forms of citizenship.

Three Women's Antiwar Movements

Cindy Sheehan and the Camp Casey Vigil

Cindy Sheehan's highly visible campaign against the war in Iraq reflects the first strategy in pairing gender with antimilitarism: basing one's protest on literal motherhood. Sheehan emerged on the political stage after founding an organization of parents of deceased and endangered soldiers called Gold Star Families for Peace following the death of her eldest son, Casey, in Iraq in spring 2004. Her protest, which highlighted the lack of meaning or direction in the war effort for which her son had died, first came to public attention with a letter to then-President George W. Bush following his reelection in 2004.[21] But Sheehan gained national prominence when she camped out in a ditch (and later on adjoining private property)[22] across from Bush's ranch in Crawford, Texas, and declared that she would not leave until Bush met with her, to explain to her the "noble cause" for which her son's

[20] The plural yet broadly evocative notion of "gendered lives" comes from Martha Albertson Fineman, *The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies* (New York: Routledge, 1995).

[21] See Cindy Sheehan, *Peace Mom: A Mother's Journey Through Heartache to Activism* (New York: Atria Books, 2006), at 106–09.

[22] Both these sites were referred to by Sheehan and members of her group as "Camp Casey," in memory of her late son. See ibid., at 153.

life had been sacrificed.[23] This month-long vigil, which was joined by hundreds of other soldiers' families and antiwar protesters, commanded unprecedented media attention and was credited with reenergizing an antiwar effort that seemed to have lost steam after its failure to halt the march to violence in Iraq.[24] Sheehan describes this series of events as having produced a transformation in her own identity, from "private mother" into "public peace mom."[25]

Sheehan makes implicit reference to the claim of the "moral mother": her descriptions of what women learn about the value of life, through their day-to-day experience with children,[26] plays some role in her commitment to resisting war. This claim is particularly conspicuous in her later invocations of the term *matriotism*.[27] But her earliest and most compelling claims did not invoke the "moral mother" so much as the "suffering mother."[28] Sheehan's claim to knowledge about this war, and her claim to the attention of the nation's leaders, does not arise simply from her motherhood, but from the loss of her son in an ill-conceived war effort.[29] In an interesting epistemological twist, Sheehan asserts that she is capable of understanding the war effort in a way that the government cannot. She argues that she is entitled to have a voice in policy making regarding the war because she has "skin in the game" – something at stake – which no one in the government has.[30] She also argues that her experience gives her a distinctive kind of knowledge of the costs of war that needs to be better represented in the policy debate.[31]

Setting aside these claims to epistemic privilege, Sheehan's invocation of gender is similar in some respects to two other visible protest efforts mounted by mothers: the vigils of the Madres of the Plaza de Mayo in Argentina[32] and the political activism

[23] Ibid., at 136.

[24] See ibid., at 153–201.

[25] Ibid., at 55–60.

[26] Representative examples can be found in several essays of Sheehan's first book. See generally Cindy Sheehan, *Not One More Mother's Child* (Maui, HI: Koa Books, 2005).

[27] See Sheehan, *Peace Mom*, at 212–16.

[28] See, e.g., Cindy Sheehan, "An Open Letter to George Bush," in Sheehan, *Not One More Mother's Child*, at 3, 3–6.

[29] See ibid. Sheehan's appeal to sacrifice as a basis for participation and knowledge is gendered because she understands herself as a mother and sees the rhetorical appeal of saying "not one more mother's child"; yet, as the founder of the organization Gold Star Families for Peace, Sheehan makes a similar, gender-neutral claim based on having "skin in the game" (i.e., having sacrificed). See Gold Star Families for Peace, Home page, available at http://www.gsfp.org/ (accessed May 27, 2007).

[30] See Sheehan, *Peace Mom*, at 83 (reporting an encounter Sheehan had with Bush, in which she reminded him that his two daughters lived, while her son was killed).

[31] See, e.g., Cindy Sheehan, "Your Policies Have Created a Hole in My Heart That Can Never Be Filled: Letter to Donald Rumsfeld," in Sheehan, *Not One More Mother's Child*, at 43–46. This kind of argument – about lack of "skin in the game" – is made rhetorically credible by a war effort in which sacrifice is not equalized through the instrument of a draft and which is being prosecuted by a set of policy makers whose draft evasion has equipped them with little firsthand knowledge of combat.

[32] For a thoughtful account of the Madres' campaign, see Jean Bethke Elshtain, "Mothers of the Disappeared," in Donna Bassin et al., eds., *Representations of Motherhood* (New Haven, CT: Yale University Press, 1994), at 74–91.

of the "mothers of martyrs" from the Palestinian refugee camps.[33] In both cases, the authority gained through the protesters' loss of their children creates the platform from which they speak to the government.[34] The similarities between the Madres and Sheehan's Camp Casey occupation also go to the form of the protest action.[35] In both cases, the protesters claimed a highly visible space and refused to surrender it, until they received an explanation from the government about the death of their children.[36] Although the Madres' silent, physically perilous occupation of the Plaza de Maya had more of the character of witness, and the Camp Casey occupation combined aspects of carnival with a grinding persistence, the two protests were similar in analytic structure and the physical dimension of their demonstration. They differed in the relation of the protesters' arguments to claims of citizenship. The Madres confronted one regime that had made war on their children through acts of torture and disappearance and a successor regime that viewed them as unfortunate victims of atrocities for which they were not directly responsible.[37] Their children were not lost through any obligation of citizenship that might have buttressed their claim in relation to the government – at most, they were members of the polity whose children's safety should have been secured, rather than imperiled, by the state's leaders. By contrast, Sheehan addressed the government as a mother who had made the ultimate sacrifice in the crucible of intensified wartime commitment: the life of her son. In that sense, Sheehan's claim to her government's attention bears more similarity to the "mothers of martyrs" of the Palestinian camps.[38]

As with Sheehan, the sacrifice made by the "mothers of martyrs" – the loss of one, and often many, of their children – authorizes them to speak to the state.[39] But the nature of the speech these mothers employed renders them somewhat less controversial subjects than Sheehan: they speak from the position of citizens who, notwithstanding their sacrifice, continue to subscribe ardently to the government's goals – in this case, the waging of a humanly costly, asymmetrical war to secure the creation of a Palestinian state.[40] Their argument is that their sacrifice entitles them to make a claim on certain resources of the state, including claims for basic support when they have lost the male members of their families, and, sometimes, for inclusion in the policy-making deliberations on questions such as welfare and social service provisions.[41] The "mothers of martyrs" approach the state with a claim that their sacrifice entitles them to greater political inclusion, but they approach the state as obedient citizens.[42] Sheehan, on the other hand, uses her sacrifice as a ground for

[33] See generally Julie Peteet, "Icons and Militants: Mothering in the Danger Zone," 23 *Signs* 103 (1997).
[34] See Elshtain, "Mothers of the Disappeared," at 84–90; Peteet, "Icons," at 104.
[35] See Elshtain, "Mothers of the Disappeared," at 77–78.
[36] See ibid.; see also Sheehan, *Peace Mom*, 153–89.
[37] See generally Elshtain, "Mothers of the Disappeared."
[38] See generally Peteet, "Icons."
[39] See ibid., at 104.
[40] See ibid., at 108–17.
[41] See ibid., at 125.
[42] See ibid., at 104.

questioning the entire mission for which her son died and for implicitly challenging the broader claims to knowledge that those who conceived and orchestrated that mission make. Although her appeal seeks inclusion in a baseline sense, that is, she wanted President Bush to acknowledge her loss and recognize her potential for participation by meeting with her, Sheehan invokes her sacrifice as a call to the government to reverse its policy in a controversial area. She approaches the state not as an obedient citizen, but as a dissenter in frank resistance to the direction of state policy. Although neither Sheehan's claim nor that of the "mothers of martyrs" may subject them to the dangers facing the Madres of the Plaza de Mayo (several of whom were themselves "disappeared" soon after their vigils began),[43] Sheehan's claim faces greater challenges in achieving recognition by the government. While governments ostensibly venerate maternal sacrifice, that sacrifice may be subject to elaborate strategies of cooptation, discipline, or purposeful neglect when it becomes a basis for protest, rather than an offering of the obedient subject to the government during wartime.

CODEPINK for Peace

CODEPINK for Peace was formed in November 2002, by longtime peace, feminist, and human rights activists.[44] These women staged a four-month vigil in Lafayette Park, across from the White House, hoping to avert the impending war in Iraq.[45] Of the movements examined here, CODEPINK draws most directly on the image of women as "moral mothers" or "peacemakers."[46] Yet CODEPINK's particular articulation of the connection between women and peace, and perhaps more important, its irreverent spirit and direct-action strategies, mark a departure from the sober moralism frequently associated with women's peace activism.[47]

CODEPINK's claim that gender provides a basis for antiwar action wavers between the experiential or practice based and the innate or biologically essentialist. According to CODEPINK founder Starhawk, "women have been the guardians of life – not because we are better or purer or more innately nurturing than men, but because the men have busied themselves making war."[48] This statement appears to take a purposeful step away from the "moral mother" posture by eschewing a biological or necessary connection between women and antimilitarism and pointing instead toward socialization. But on discussion boards and other spaces in which CODEPINK has constituted its identity, participants in the organization more readily equate it with the "moral mother" claim.[49] In some contexts, however, the maternal

43 Elshtain, "Mothers of the Disappeared," at 82.
44 See CODEPINK, "About Us," available at http://www.codepink4peace.org/ (accessed May 28, 2007).
45 Maria Simone, "CODEPINK Alert: Mediated Citizenship in the Public Sphere," 16 *Soc. Semiotics* 345, 348 (2006).
46 See CODEPINK, "About Us."
47 See ibid.
48 CODEPINK, "Call to Action," available at http://www.codepink4peace.org/ (accessed May 28, 2007).
49 See Simone, "CODEPINK Alert," at 351. But cf. CODEPINK, "Call to Action."

knowledge CODEPINK claims yields not so much moral insight as practical politics. CODEPINK argues for the redirection of resources into domestic welfare-type policies – or, as their mission statement puts it, "into healthcare, education and other life-affirming activities."[50] CODEPINK activists have also militated for the human rights of those in proximity to the Iraq conflict. They helped to establish the Iraq Occupation Watch to monitor abuses by Americans in Iraq and demonstrated on the steps of Walter Reed Army Medical Center to demand enhanced veterans' benefits.[51] CODEPINK has, in addition, undertaken a range of actions designed to foster human bonds between American and Iraqi citizens.[52]

More important in the divergence of CODEPINK from the "moral mother" claim has been the updating of that image through CODEPINK's association with the diffused public sphere of the Internet, its "girlie" feminist effort to reclaim femininity, and its culture of consumption and commodification. CODEPINK's Web site – which contains useful downloadable tool kits for organizing chapters and protests[53] – not only instructs its members to identify themselves through the wearing of pink accessories, but offers to sell them pink t-shirts, underwear, makeup bags, and other accoutrements of the twenty-first-century consumer-citizen.[54] In another departure from the solemnity of the "moral mother" brand of pacifism, CODEPINK takes conventional protest formats (e.g., rallies, demonstrations at political locations like Lafayette Park, etc.) and infuses them with a spirit of direct-action disruption, parody, and guerrilla theater.[55] Members have dropped their pants on cue to reveal dove-emblazoned undergarments[56] and given "pink slips" (oversized items of lingerie) to officials who have violated the public trust through war-related actions.[57] In a strategy that borrows liberally from the innovations of groups such as ACT-UP, CODEPINK's public interventions may be aimed as much at mobilizing civil society as at persuading specific political actors.

[50] CODEPINK, "About Us."

[51] See CODEPINK, "CODEPINK Statement on Vigil Outside of Walter Reed Hospital," available at http://www.codepink4peace.org/ (accessed Sept. 22, 2007).

[52] See ibid.; see also CODEPINK, "Support Iraqi Women," available at http://www.codepink4peace.org/ (accessed Aug. 6, 2007).

[53] CODEPINK, "Local Group Resources," available at http://www.codepink4peace.org/ (accessed May 28, 2007).

[54] CODEPINK, "CODEPINK Store," available at http://www.codepinkalert.org/ (accessed May 28, 2007).

[55] On the subject of CODEPINK's direct-action, ACT-UP-style mode of operation, the mission statement proclaims: "With an emphasis on joy and humor, CODEPINK women and men seek to activate, amplify and inspire a community of peacemakers through creative campaigns and a commitment to non-violence." CODEPINK, "About Us." For an example of work connecting CODEPINK to the direct-action innovations of ACT-UP, see Lucas Hilderbrand, "Retroactivism," 12 *Gender L. Q. J. Lesbian and Gay Stud.* 303, 312 (2006).

[56] Starhawk, "A Code Pink Diary," available at http://www.starhawk.org/ (accessed Aug. 7, 2007).

[57] See CODEPINK, "Description of Code Pink for Peace," available at http://www.codepink4peace.org/ (accessed April 8, 2009).

Women in Black

Women in Black formed in Israel in 1988 to protest the Israeli occupation of the West Bank and Gaza.[58] Its minimalist, symbolic mode of protest has been taken up by women in the former Yugoslavia, Western Europe, and the United States.[59] Like CODEPINK, Women in Black is a network of loosely related mobilizations. Like both of the previous movements, it deploys gender to resist various forms of militarism. But Women in Black is also distinct from these examples because of the radical way that it invokes gender in its reconstruction of citizenship.

Women in Black's first vigil, which has since been repeated every Friday afternoon in a public square in Jerusalem, created and epitomized its strategy. A group of women, ranging in number from several dozen to more than a hundred, dressed in black and carrying signs with the simple message "Stop the Occupation," stood together quietly for one hour each week, at the same time and place, for six years.[60] The demonstration's "minimalism" was a central, purposive feature of its mode of protest. The women stood persistently behind their one-sentence message, supplemented occasionally by an "identity card," which explained,

> The protest vigil is an expression of Israeli society and expresses our need to actively and strongly oppose the occupation. We are women of different political convictions, but the call to "Stop the Occupation" unites us. We all demand that our government take immediate action to begin negotiations for a peace settlement. Many of us are of the opinion that the PLO is the partner for peace negotiations based on the principle of two states for two peoples, while others are of the opinion that it is not for us to decide who the Palestinian partner for negotiations is nor the exact solution on which peace should be based. We are unified in our belief that our message is powerful and just and will eventually bring peace.[61]

This minimalist message, which participants consistently declined to elaborate, permitted each woman to maintain her own reasons for opposing the occupation without disturbing the unanimity and legibility of the group's message. It also obviated the need to invest time and energy in a deliberative process aimed at clarifying and articulating the group's ideological framework.[62] This unusual absence of deliberation made sense within a strategy that was aimed less at negotiating understandings among participants and more at challenging the assumptions of those who

[58] See Sara Helman and Tamar Rapoport, "Women in Black: Challenging Israel's Gender and Socio-Political Orders," 48 *Brit. J. Soc.* 681, 683 (1997).

[59] Women in Black, "History of Women in Black," available at http://www.womeninblack.org/ (accessed May 28, 2007).

[60] Helman and Rapoport, "Women in Black," at 683–84.

[61] Ibid., at 684.

[62] See ibid., at 687–89.

observed the vigils. Central among these assumptions, of course, was the morality and the political value of the continued occupation of the territories.[63] But Women in Black also took aim at the meaning of gender in Israeli society and its relation to conventional understandings of citizenship.[64]

The protesters stood together as women, and their silent wearing of black reflected the mourning function frequently assigned to women in war-torn societies. While these attributes inevitably produced what Joan Scott has called "reverberations"[65] of the conventional image of the "moral mother" or the "mourning mother," the most salient elements of the movement's symbolism confront, rather than reinforce, traditional Israeli understandings of gender. First, in a culture in which women are strongly identified with their familial roles, the Women in Black did not invoke any familial connection. They did not present themselves as mothers, sisters, or daughters of warriors or potential warriors – though some of them doubtless understood their own participation in relation to such roles. While their dress reflected mourning for the Israeli dead, the group's professed mourning for the tragedy of Palestinian loss dispelled that conventional interpretation; indeed, it made these women's claims to citizenship contentious for some observers. In addition, the women's decision to stand in public protest at a time when women are expected to be at home preparing the family for the Sabbath conspicuously detached them from familial and religious gender roles.[66]

Women in other war zones, such as Kosovo, as well as antimilitarist movements in many Western democracies have adopted this same strategy of protest: silent, weekly vigils by women in dark clothing offering a simple message of dissent. In some cases, the resistance has targeted a slightly different object or has been articulated in brief, collective statements, while in other cases, joint vigils held by women from opposing sides of a conflict have challenged entrenched antipathies and offered a view of citizenship only loosely bound to state or nation. The shared symbolism and mode of protest, and the minimal elaboration of the substantive message, have made Women in Black a flexible vehicle for addressing a range of militarized conflicts.[67] They have also produced, as Scott argues, a gendered challenge that is variable in its content and responsive to context – a mobile, nonunitary political performance that eludes reductive characterizations and renders gender, as a category, perpetually under construction.[68] Yet the same minimalism that permits strategic adaptation and resists stereotyping may render Women in Black's message opaque or ambiguous, or clearer in some contexts than others, a point to which I will return.

[63] See ibid., at 683.
[64] See ibid., at 694–96.
[65] Joan Wallach Scott, "Feminist Reverberations," 3 *Differences* 13 (2002).
[66] Helman and Rapoport, "Women in Black," at 691. Many of those jeering at the Women in Black in Jerusalem assailed them as traitors, or as agents – or sexual partners – of the Palestinians. See ibid., at 690.
[67] See Scott, "Feminist Reverberations," at 16–19.
[68] Ibid., at 17.

Rearticulating Gender, Recreating Citizenship

What do these movements suggest about the renegotiation of gender, at this vexed political moment, and its potential for forging new claims of citizenship for women? Each of these movements reflects, to greater or lesser degrees, a politics of articulation: they highlight, and strive to employ to advantage, conventional attributes of gender that might justify a claim to oppose the government's war. Yet each movement combines these conventional elements with less familiar and more discordant ways of articulating gender, to create new political roles and new kinds of gendered images or subjectivities. In so doing, each uses nonviolent, direct-action techniques – including deployments of their participants' physical bodies – in ways that innovate, even as they resonate with more familiar protest strategies. These disparate practices provide a basis for assessing women's ability to mobilize – from an explicitly gendered position – an antiwar protest. They also shed light on the inevitable subtext of any political effort involving women: women's effort to demonstrate their potential as full citizens by participating actively and substantively in the varied processes of self-government.

Gender and the Body Politic

Each of these efforts reflects a depiction of gender: a subtle mixture of the conventional – on which an appeal to leaders might be made – and the dissonant, conveying the participants' own, more complex sense of gendered political identity. These combinations, or rearticulations, produce particular images of the resistant, gendered citizen – images that are different for each of the protest movements discussed previously. Part of this imagery arises from the subtle and creative deployment of the bodies of the women involved. Direct-action, protest politics is often a bodily affair: participants choose to put their bodies "on the line" in some way, rather than (or as well as) engaging in more conventional, verbal forms of protest. But the bodily aspect of these particular direct-action strategies is noteworthy for the use it makes of the gendered body – the way that it deploys, challenges, or attempts to rearticulate images of the body that are distinctly associated with women and femininity. Given the salience of women's bodies in our culture, this dimension of gendered protest presents a unique – if inevitably complicated – opportunity to seize public attention and to project images that may contribute to women's claims as dissenters and, more broadly, as citizens.

The angry mother

Cindy Sheehan's appeal to President Bush linked maternal suffering not with patriotic obedience, but with indignation and anger. If, as some analysts have suggested,[69] one knows a protester by the terms in which she is derided by her critics, it should

[69] See Helman and Rapoport, "Women in Black," at 689–94.

not be surprising that Sheehan is targeted for the immoderacy and profanity of her language. Sheehan has remained largely unrepentant in her colorful vehemence, arguing that no one has better reason for extreme language than a mother who has lost her son in a meaningless assertion of political will.[70] But the repeated critique of Sheehan's intemperate speech testifies to the public's discomfort with the angry mother – and to the potential of this image to claim the attention of a media- and message-saturated citizenry. The angry mother is startling and unseemly, yet also forceful. Her bluntness and vehemence are striking in their discord with traditional conceptions of maternal virtue, yet at the same time, the strength and perseverance in the angry mother's stance resonate with more traditional images of maternal protection and care.

Sheehan brings power and gravity to her assertion of maternal anger through her use of her physical body. In some ways, this use is consistent with earlier, gender-neutral forms of nonviolent protest: she sits, she strikes, and she subjects herself to arrest. But in other ways, Sheehan's methods of protest seem to challenge gendered assumptions about the presentation or deployment of women's bodies, in politics and elsewhere. Women in American culture do not traditionally occupy land – particularly private and quasi-public property that is not theirs – immediately adjacent to the homestead of the leader of the free world. Sheehan did this, riveting the nation's attention to her effort. There is also something subtly unconventional about Sheehan's presentation of her own body – her own physical form – in these protests. Sheehan is a large, plain, and rather awkward woman: she repeatedly delivers up this unadorned physical form as a kind of symbol of her cause. Her apparent lack of self-consciousness about her physical appearance, as she stands next to Charlie Sheen, Susan Sarandon, and a host of other celebrities, politicians, and protesters, is at first unremarkable. But her lack of pretense, or of (ostensibly) feminine vanity, in serving up her unadorned physical form – which directly parallels her lack of self-consciousness in sharing her most intimate grief with the nation's leaders and citizens – comes, through repetition, to feel like a pure assertion of political will.

Sheehan was also resolute in her willingness to sacrifice virtually all forms of physical comfort in her occupation at Camp Casey. Her journals, perhaps not coincidentally, read a bit like the wartime journals of a new recruit: they are full of the discomforts and privations of a life lived in the heat and dirt, in constant, uneasy readiness for the next confrontation.[71] They also tell of the laryngitis and fevers she suffers[72] as she mobilizes her allies, negotiates with state troopers, and undertakes dozens of interviews a day. Yet Sheehan is absolutely undeterred from her path, finding hope in this chaos and privation, rather than discomfort or despair.[73] In one sense, this posture may make Sheehan the paradigmatic mother, instinctively

[70] Sheehan, *Not One More Mother's Child*, at 63.
[71] See, e.g., Sheehan, *Peace Mom*, at 155.
[72] See ibid., at 174.
[73] Cindy Sheehan, "From Despair to Hope," in Sheehan, *Not One More Mother's Child*, at 193, 196.

denying her own bodily comfort to achieve a larger goal. But the contexts in which she performs this bodily self-effacement are so distinct from the more familiar contexts of motherhood – the night feedings or the ministrations to the sick – as to render this self-denial at once more powerful and more oriented toward public goals.

The gendered direct-action performer

As a large, diffuse network of organizations, CODEPINK may have less capacity to project a coherent image, gendered or otherwise. Yet this group – which is most conspicuously the product of an Internet-assisted, mass-mediatized culture – seems most concerned with projecting a gendered image, or experimenting with gendered representation, as it communicates its antiwar message. CODEPINK draws on the familiar image of the "moral mother," who protects life against the ravages of war, but it articulates this image using less familiar and apparently incongruous elements of gendered identity. The semiparodic embrace of the color pink and elements of consumer culture reflects elements of "third-wave" or "girlie" feminism: the effort to reclaim the stereotyped elements of conventional femininity, in a spirited and conspicuously agentic manner. The panty-baring, traffic-stopping, pink-slipping tactics of the movement also mirror the irreverent and intentionally "outrageous" direct-action performances of groups such as ACT-UP.

The incongruities that CODEPINK avidly cultivates are made tangible on the bodies of participants. Pink, paraphernalia, and purchasing may evoke the stereotype of the pampered, physically adorned woman. Yet this woman subjects her body to physical dangers, whether by hunger strikes or by crossing the Golden Gate Bridge during rush-hour traffic.[74] And amidst her pink attire, she flaunts traditional feminine modesty by dropping her pants and carrying oversized lingerie through the streets. These incongruities exceed – even as they evoke – the cheerful, purposive contradictions of "girlie" feminists.[75] They project a paradoxical yet vehement image of citizenship: one in which improvisation aims at maximizing impact and reanimating politics; proliferation, of activities and of personae, signals singularity of political will; and exaggerated femininity – long read as the sign of apolitical triviality – is married to daring and committed public engagement.

The woman as witness

Women in Black constitute themselves as a gathering of women yet persistently refuse the conventional associations that gender invokes. They decouple themselves

74 See Mark Prado, "Code Pink's War Protest Jams Bridge Traffic," *Marin Independent Journal*, Sept. 22, 2006.

75 For representative third-wave works, see Jennifer Baumgardner and Amy Richards, *Manifesta: Young Women, Feminism, and the Future* (New York: Farrar, Straus and Giroux, 2000); Rebecca Walker, ed., *To Be Real: Telling the Truth and Changing the Face of Feminism* (New York: Anchor Books, 1995). For works drawing on the pro-(hetero) sex, power-claiming dimensions of "girlie" feminism, see Katie Roiphe, *The Morning After: Sex, Fear, and Feminism on Campus* (Boston, Back Bay Books, 1993); Naomi Wolf, *Fire With Fire: The New Female Power and How to Use It* (Boston: Book Bay, 1994).

stringently from familial associations, declining also the validating aura that religious practice confers upon women in Israeli society. Even their failure to elaborate their message refuses the communicative skills and interpersonal engagement that women have claimed as their distinctive terrain. Moreover, by appearing in public shorn of validating affiliations, Women in Black also refuse the subsidiary or indirect role that has been accorded them in Israeli politics: in departure from long tradition, they participate neither as wives, nor as mothers, nor as supporters of combatants. In their well-orchestrated silence, they speak prominently, and audibly, for themselves.

The politics of refusal performed by Women in Black extends also to their physical self-presentation. In one sense, their strategy is the denial of the body: in concealing, monochrome black clothing, the distinctiveness of the protesters' bodies, as women, and as individuals, is erased. There is not a hint of sexuality in this gendered presentation; the hecklers' jeer, that they are "whores of the Palestinians," seems to stem more from an impoverishment of political vocabulary[76] than from any invocation of gendered sexuality. Yet this protest is, nonetheless, enacted by women, and through it, they have chosen to place their bodies in a highly visible public forum. Without a detailed message, the simple presence of their stark and simply clad bodies becomes more conspicuous. The austerity of their plain black clothing, coupled with the confrontation of their silent, bodily presence, creates a powerful and demanding image of witness, one whose strangeness and intensity of focus demand an answer. The appearance of women without words, family connections, or the comfortingly familiar, compliant, gendered presentations of the body taps into an unsettling image of undomesticated female power. This image illustrates what women might become if they could hold themselves apart from dominant, feminizing influences and call the world to account.

Gendered Antiwar Protest and Political Efficacy

Do these movements' novel rearticulations of gender achieve the authority for, and success in, antiwar protest that they seek? In some respects, the answer is equivocal. These movements have suffered a significant degree of backlash: Cindy Sheehan has been excoriated for neglecting her surviving children[77] and for her alternately blunt and profane modes of public address; the Women in Black have been publicly heckled and reviled as prostitutes.

Perhaps more important, these rearticulations have not always communicated their proponents' messages or even helped to constitute the authority to which they aspire. As Sheehan's example suggests, the same maternal role that may authorize protesters may also make them vulnerable to the disciplinary tactics of their critics.

[76] Unable to assimilate them to the mold of the Madonna, hecklers turn immediately to that of the Whore. See Helman and Rapoport, "Women in Black," at 690.

[77] See Sheehan, *Peace Mom*, at 124–25.

Although the role of the mother may be culturally associated with determination and even ferocity in the protection of her young, it also entails an acute awareness of the demands of convention and hierarchy that can militate against this fierce defensive impulse. Mothers perform their roles within an institution that has been hierarchized from within[78] and disciplined from without,[79] and many mothers accommodate the demands of that hierarchy, rather than subvert or contest it. Moreover, as philosopher Sara Ruddick argues, a central object of mothering is the preparation of one's children to conform to conventional norms through interpersonal, social, and professional interactions.[80] These attributes can make mothers (as incipient political protesters) subject, and particularly vulnerable, to governmental manipulation or public criticism that associates resistance with bad mothering and acquiescence with good mothering.[81] Cindy Sheehan's critics attempted to curtail her Camp Casey protest by highlighting her husband's filing for divorce and suggesting that she was neglecting her living children by maintaining her vigil. Sheehan, through resolute candor about her family situation,[82] was largely able to surmount such criticism, but it remains a potent means of disciplining the dissenting activities of mothers.

Less conventional, or more hybrid, maternal images also have their perils, as CODEPINK's experience suggests. One study of CODEPINK notes that the public perceives the organization as foregrounding women's femininity but is otherwise uncertain about its substantive position. One can question, as this study seems to, the success of CODEPINK's paradoxical strategy and whether its performance will be read in the way that its ambitious proponents hope.[83]

The problem, as I see it, does not lie in the performance-oriented, direct-action strategy in and of itself. Parody and guerrilla theater as responses to the meaningless sacrifice of human life were staples of Vietnam War protest.[84] And ACT-UP, the protest movement whose strategies CODEPINK most conspicuously borrows, pioneered the use of parody and outrage to protest meaningless, unnecessary deaths born of misguided governmental policy.[85] Yet context in such rearticulations is everything, and there may be important differences between ACT-UP and CODEPINK in this regard. The strategy of confronting tragedy with irreverence or parody may work best when one has, as Cindy Sheehan puts it, "skin in the game." Many of ACT-UP's activists were facing painful and imminent death as a result of governmental policies.[86] Distributing oversize pink slips and "dropping trou" in public settings

[78] See Susan Moller Okin, *Justice, Gender, and the Family* (New York: Basic Books, 1989), at 4.
[79] See Fineman, *Neutered Mother*, at 101–06.
[80] Ruddick, *Maternal Thinking*, at 103–23.
[81] See, e.g., Zeiger, "She Didn't Raise Her Boy," at 7–8.
[82] See Sheehan, "Day Ten: Leave My Family Alone," in Sheehan, *Not One More Mother's Child*, at 99, 99–100.
[83] See Simone, "CODEPINK Alert," at 357–60.
[84] See, e.g., Gerald Nicosia, *Home to War: A History of the Vietnam Veterans' Movement* (New York: Carroll and Graf, 2001), at 56–67.
[85] See Hilderbrand, "Retroactivism," at 303–04.
[86] See ibid., at 312.

may resonate differently when the protesters' own lives are not immediately placed in danger by the government's persistence in misguided action. These protests may also have a different resonance when they are combined with pink accessories and consumerism. There is a precarious, unstable line between self-parody as rearticulation and the reinscription or reinforcement of dominant, stigmatizing discourses. It is hard to know where the activities and imagery of CODEPINK lie in relation to this line. This problem is complicated by the fact that the organization is a loose alliance of hundreds of local groups, each running its own events and performing its own version of CODEPINK gender and citizenship.

A strategy that involves minimalist invocations of gender, such as that deployed by Women in Black, permits its adaptation to a range of political contexts,[87] but seems likely to be more effective in some settings than in others. In Jerusalem, the abrupt departure from gender roles implicit in standing in a public square shortly before the Sabbath marked these women as gender outlaws and contributed a weight born of strangeness and unfamiliarity to their efforts, even as it outraged some passers-by. In my hometown of Berkeley, California, where a group of Women in Black also assembles every Friday, the message is different. There is little that is surprising about seeing a group of women assembled in a public space there: given the secularity of the surrounding culture, there is nowhere else one would expect women to be at that time. Although they are dressed similarly in black, the protesters' appearance offers a monochrome take on the usual sartorial choices of middle-aged women in Berkeley. Moreover, they stand with banners that are not decisively different from those of other protesters. And far from commanding the public space, they share the campus space with an extraordinarily heterogeneous group of protesters – campus Republicans, pro-immigration activists, animal rights advocates, and a number of persons with mental illness who have set up soapboxes and struggle publicly with their demons. Women in Black has projected a potentially useful image of women as witnesses – women whose distance from the socialization and current discourses that support war permits them to offer a critique. But it is worth asking whether this minimalist performance may be lost in a message-saturated culture such as the United States. One might also wonder whether rejecting the traditional indices of gender in claiming citizenship – a strategy that was highly effective in Israel – will be as salient in cultures where gender expectations have become less rigid and singular, where women regularly claim citizenship without presenting themselves as mothers, sisters, daughters, or other supporters of men.

Gendered Antiwar Protest and the Paradoxes of Women's Citizenship

A second question for analysts of women-led protest movements concerns women's longer-term political aspirations. Movement toward the political mainstream entails perils for many protest movements; even modest efforts in this direction may diffuse

[87] See Scott, "Feminist Reverberations," at 17–18.

or compromise resistant politics.[88] Yet for women, who remain in important ways at the threshold as political actors, the implications of protest activity for broader acceptance as citizens is a question that demands awareness and careful reflection, even if it does not conclusively shape activists' priorities.[89] A form of protest that is equivocal for purposes of antiwar resistance may be more problematic if it impedes women's efforts to gain legitimacy as active citizens.

The instances of resistance, neglect, and devaluation that have confronted many women-led antiwar groups may give reason for doubt. They suggest that many of the central images of citizenship, civic participation, and dissent remain indicatively masculine: from the freedom from the quotidian tasks of bodily care that Athenian (or early American) citizens enjoyed, to the individualism and independence of the Emersonian dissenter, to the particular forms of gravitas associated with historical icons of civil disobedience.[90] They suggest that these same roles, when women perform them, might not have the same immediate cultural resonance, as the mixed public response to Cindy Sheehan's indignation and anger suggests.[91] However, these difficulties do not, in my view, suggest that the self-conscious invocation of gender is inevitably damaging to women's long-term prospects as citizens. Each of these strategies for asserting gendered citizenship has distinctive dangers, but each may also have something to offer women over the long run, particularly if deployed with care and admixed with other, nongendered forms of civic imagery and participation.

Conventional maternal claims to knowledge have cultural resonance, but also distinctive risks. The public/private divide invoked by women's claims to maternal knowledge has had extraordinary salience in the history of women's equality, and it is an obstacle on which even legal efforts to enact women's equality have often foundered. Martha Fineman and Joan Williams have argued, for example, that the failure to negotiate the public/private divide has circumscribed legal change in the context of employment.[92] Laws such as Title VII have been successful in

[88] For a thoughtful discussion of these tensions in the pro-choice movement, see Myra Marx Ferree, "Resonance and Radicalism: Feminist Framing of the Abortion Debates of the United States and Germany," 109 *Am. J. Soc.* 304 (2003).

[89] Many supporters of Cindy Sheehan, for example, believe that she made a crucial miscalculation when she proposed to move from protest to electoral politics by challenging the seat held by House Speaker Nancy Pelosi. See, e.g., Katha Pollitt, "Dear Cindy: Please Don't Run," "The Nation" blog, available at http://www.thenation.com/ (accessed Aug. 11, 2007).

[90] It is noteworthy that these icons – including Thoreau, Gandhi, and Martin Luther King – are almost exclusively male, considering that women, too – in movements from suffrage to civil rights to breast cancer activism – have practiced civil disobedience.

[91] Philosophers have often described the emotions of anger and indignation as particularly suited to the public realm. See Marilyn Frye, "A Note on Anger," in *The Politics of Reality: Essays in Feminist Theory* (Freedom, CA: Crossing Press, 1983), at 84, 93; Martha Nussbaum, "Secret Sewers of Vice: Disgust, Bodies, and the Law," in Susan A. Bandes, ed., *The Passions of Law* (New York: New York University Press, 1999), at 19, 26. Yet when this anger is manifested by women as protesters, it prompts a more equivocal response.

[92] See Fineman, *Neutered Mother*, at 161–64; Joan C. Williams, "Deconstructing Gender," 87 *Mich. L. Rev.* 797, 822–36 (1989).

incorporating women into most workplaces, but their failure to reallocate, restructure, or subsidize familial labor has limited their effects on gender integration in the workplace.[93] The persistent limiting force of this divide may be a factor to be weighed in assessing the prospects of conventional maternal appeals.

But to acknowledge these complications is not to reject maternal claims across the board. Attempting to legitimize one's participation in antiwar politics – or one's broad engagement in a range of political topics – through generalized invocations of maternal knowledge is inevitably precarious: the less particularized and concretely experiential a group's (or individual participant's) maternal claim, the more likely it is to evoke privatizing, delegitimizing stereotypes. Yet invoking this role in policy debates directly related to mothering, or to the education or security of children, may be a powerful tool, as the efficacy of Mothers Against Drunk Driving, the Million Mom March, and maternal intervention in the formulation of European social welfare policy has suggested.[94] Specific maternal experience may be a useful source of knowledge on which to base a particular proposal for political action.

The strategy of combining maternalism with other salient, gendered images may also be either self-defeating or promising. It is not clear, for example, that CODEPINK's articulation of maternalism with "girlie" feminism and direct-action performance has worked successfully in the antiwar context. Its proliferation of images – particularly within such a large, diffuse organization – may have been too much; in a campaign that seeks to confront the public with a potent message, less may be more. But the strategy of rearticulating maternalism, or gender, more broadly, through its combination with ostensibly dissonant elements, may also contribute to women's assertions of citizenship over the long run. Over time, the unfamiliar or discordant character of the claim may revise conventional understandings, rather than delegitimize the protest.

The examples of women-led antiwar protest movements I have examined here suggest two strategies of protest that may hold particular promise for such revision. First, articulating motherhood together with an attribute having strong affirmative political valence – such as indignation or anger – may, over time, have transformative effects. Cindy Sheehan's maternal anger may at first have been unsettling, but as she continued to air her sense of injury and indignation, members of the public had the opportunity to discover that she was not, in fact, a vengeful harpy intent on devastation. She was, and is, a woman who has suffered a painful loss and who demands that the government account to her for that loss. Over time, exposure to such political personae may make women's maternal anger more familiar and intelligible.

93 See, e.g., Williams, "Deconstructing Gender," at 813–21.

94 See generally Koven and Michel, *Mothers of a New World*. Yet even in these successful interventions, mothers appear not as paradigmatic political participants, but as ambassadors from another domain, whose very appearance in the political realm signifies the importance of the issue to the familial sphere.

Second, women's projection of a variety of images of gender in connection with citizenship may contribute to an effective long-term strategy. CODEPINK may have offered too wide or too improbably combined a range of images for its single, time-limited campaign. However, when women articulate their gender together with identities based on race, class, religion, or work – and when they combine these hybrid images with a range of nongendered roles – it may break down stereotypes and help male participants see women, individually and collectively, as plural in their orientations and self-understandings.

Women in Black's style of protest, which draws on women's position as "Other" to bear witness to the failings in governmental action, also reflects distinctive liabilities and opportunities. Women's ability to bear witness to injustice draws on their marginality in the political sphere and their ostensibly superior moral sense – both vestiges of a separate-spheres ideology that women should be hesitant to deploy. Yet it may be possible for women to frame their "outsider" status more narrowly and ascribe it not to some inherent, gendered condition, but to a gender-based (or more specific group-based) insulation from specific forms of socialization. Women in Black's refusal of the familiar claims of family and religion may, for example, reflect an effort to position their members at some distance from the forces of socialization that contribute to group-based hatreds, militarization, and war. Such explicit positioning may permit women to serve as a kind of witness, challenging those operating within frames from whose influence they enjoy greater freedom to reconsider the inevitability of their position.

Such imagery may help to pluralize the images we hold of citizenship, and of dissent; it may even call into question the naturalness of male styles of political leadership or dissent – in the way that, as queer theorists have argued, dressing in drag not only enlarges the intelligible range of gender performances, but challenges the naturalness of the male-female binary.[95] Admittedly, the stakes are high in such efforts, and context is everything. A masterful direct-action strategy or deep political commitment may be necessary to counter and recast the impression created by the pink-slip-toting, sneaker-purchasing dissenter. But images that confront stereotypes instead of stumbling onto the political-legal fault line of the generalized maternal claim may hold more promise in claiming public attention and in reconstructing gendered understandings of citizenship.

Conclusion: Antiwar Protest and the Present Moment in Women's Citizenship

If the tensions involved in asserting gender in political protests suggest that the glass of women's citizenship remains half empty, there are other features of these three efforts that may nonetheless depict it as half full. First, women are now claiming

[95] See, e.g., Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1999), at 136–38.

leadership of a political movement that entails one of the most difficult roles a citizen can play: offering dissent over the waging of war, where the state faces a threat and there is a reflexive demand, by the government and many of its citizens, not for contestation, but for obedience. This significant development, like Nancy Pelosi's recent election as speaker of the House or Hillary Clinton's campaign for the 2008 Democratic nomination for president, suggests a broadening of women's horizons or aspirations as citizens. Women may still be experiencing equivocal results (as indeed men often do), but they are experiencing them in a wider and more ambitious range of political contexts. These protest roles connote the same aspirations to leadership and visible authority, yet the demands of civil disobedience or direct-action protest also entail an assumption of physical risk that has not traditionally been thought to inhere in women's citizenship.

Second, in the precarious task of demanding governmental accountability during wartime, women are playing an agentic part in managing the culturally constructed contradictions of their role. They are negotiating the balance between the gendered and the gender-neutral in interesting and creative ways. As dissenters, they are wrapping themselves in the explicitly gender-neutral protections of the First Amendment to make a claim that invokes gendered knowledge and involves explicitly gendered performances.[96] They are also balancing the reductive character and potential political liabilities of the maternal role by rearticulating this traditional claim with other attributes of gender, including unconventional and unfamiliar depictions of women's bodies, emotions, and relation to the political sphere. It is not surprising that these depictions have prompted a backlash from government officials or members of the public. In their unfamiliarity, and their potential to expand or disrupt conventional assumptions about both gender and citizenship, they may be genuinely unsettling. In the short run, they may be as much a liability as an asset to women objecting to government war making, but they enlarge the range of representations from which women draw in performing their roles as citizens and have the potential to revalue now-stigmatized images.

Third, in embracing this challenging role, women are making a claim, not for themselves in particular, but for the entire polity. Women have historically lacked the political authority to call governments to account; their efforts have more frequently been aimed at achieving the formal indicia of citizenship or securing a place at the policy-making table. In these examples, however, women stake their ground as citizens by demanding, not equality for themselves, but accountability to the nation as a whole. Cindy Sheehan seeks an explanation of the "cause" for which her son died; she wants, from the government and for the nation, a discussion of what goals could justify the kind of suffering the war has produced, on both sides. Although her manner is noisy and clamorous, rather than silent and austere, Sheehan, like the Madres of the Plaza de Mayo, challenges her government and her fellow citizens to introspection and dialogue regarding the choices and the costs embodied in the war

[96] I thank Hila Keren for this insight.

effort. The demand for accountability is also implicit in the strategies of Women in Black and CODEPINK: the austerity, or the outrageousness, of the demand that the government stop its militaristic aggression challenges the state to explain its actions and justify its plans for continuation. This choice seems significant in a number of ways: it suggests that women can see themselves as sufficiently included to make demands of another sort and can see the universalizing as well as the "minoritizing" dimensions of their own political efforts.[97]

Finally, even in the politically vexed present, these women-led antiwar movements have enjoyed some valuable forms of success. They have claimed the attention of a media-saturated public, and even if they haven't stopped the war, or wholly transformed public discourse, they have contributed to a palpable escalation of protest. They have confronted the public with novel images of gendered citizenship, and only in extreme cases have they been told to get back in the kitchen and stop their protests. They have affirmed the ability of women to engage in highly visible confrontation with governmental actors at the highest levels, to initiate innovative strategies of direct-action protest or civil disobedience, and to act, even if temporarily, as the de facto leaders of the nation's antiwar movement. Although they may be contested, and their effects may be equivocal, these are no small accomplishments. These protesters reflect and create a larger repertoire of roles for women as they engage in more ambitious political contexts.

97 Eve Kosofsky Sedgwick, *Epistemology of the Closet* (Berkeley: University of California Press, 1990), at 1 (the "minoritizing" dimension of a representation directs attention to the specific circumstances of a particular group; the "universalizing" dimension evokes the way that attributes or problematics associated with a particular group have resonance in a society more generally).

7

Stem Cells, Disability, and Abortion: A Feminist Approach to Equal Citizenship

Nancy J. Hirschmann*

Stem cell research is one of the most exciting scientific developments of the twenty-first century. Stem cells are unspecialized cells that generate all the more specialized cells in the body such as brain cells, muscle cells, and cells for specific organs: stem cells are the building blocks for tissues that make up the human body. Scientists have discovered that these cells can be actively coached in the laboratory to develop into a wide variety of more specialized cells such as insulin-producing islet cells that could be transplanted into diabetics to end their dependency on insulin injections, brain tissue for Alzheimer's patients, or heart tissue for damaged hearts. Stem cell research could thus lead to remedies for paralysis arising from spinal cord injuries, Parkinson's, osteoporosis, a number of autoimmune diseases and birth defects – in all, ailments that affect over 125 million people in the United States alone – which would enable many of the sick and disabled to regain control over their bodies and their lives.

Stem cells used in research can come from sources like bone marrow and cord blood from afterbirth placentas, but they can also come from tissue from aborted fetuses or from embryos created through in vitro fertilization. It is this last source that holds the greatest promise, scientists believe, and is the source of the most exciting research; embryos, only five to seven days old, offer the most undifferentiated stem cells with the greatest *pluripotential*, or ability to transform into a variety of different kinds of cells and circumvent immune system rejection. Although other parts of the body, such as hair follicles and skin cells, may be less controversial sources of stem cells,[1] the extra steps involved in inducing pluripotency makes the ability to transform them into specialized cells more time-consuming, costly, and subject to failure. Embryonic stem cells are omnipotent by nature. But this research has raised serious moral questions. Much like the rhetoric utilized by abortion opponents, opponents of stem cell research claim that embryos are human beings and that destroying them to produce medical cures is morally wrong.

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[1] Gina Kolata, "Scientists Bypass Need for Embryo to Get Stem Cells," *New York Times*, Nov. 21, 2007, at A1.

Feminists have been mostly silent on this issue, despite the fact that "most disabled people with a physical impairment are women, are over the age of 60, [and] have a chronic or progressive condition such as arthritis or multiple sclerosis," thus making women a primary group likely to benefit from stem cell therapies.[2] Addressing the needs of the disabled is important not only because women, "in greater numbers than disabled men, have been incarcerated in prisons, hospitals, nursing homes and a multitude of institutions,"[3] but also because women have been primarily responsible for caring for the sick and disabled.

In this chapter, I develop a feminist perspective on the stem cell debate by considering the parallels between women's equal citizenship claims in the abortion debate and claims of equal citizenship for the disabled in the stem cell debate. I first consider the links between feminist theory and disability theory, with particular attention to the thematic overlaps between the issues surrounding abortion and stem cells. I consider efforts to claim personhood for fetuses and embryos, which implicitly, and inconsistently, deny personhood to pregnant women and the disabled by giving precedence to fetuses and embryos. I then suggest that personhood arguments are at least tacit efforts to establish citizenship for embryos and fetuses, and I explore the problematic implications of such efforts and the political potential of pursuing claims for women and the disabled in response. I thus maintain that feminists have a vested interest in fighting such arguments against stem cell research, for if embryos are considered human beings, then fetuses are as well, with wide-ranging implications for abortion rights. My position is that issues of women's autonomy and bodily integrity are at stake in the stem cell debate, as they are in abortion. But also at stake is the issue of women's citizenship.

Feminism and Disability: Problems With Personhood

The link between feminism and disability is not obvious, though feminist theories of disability have established various connections. Helen Meekosha and Leanne Dowse note that "disability is not only gendered, but feminized" because it depends on sexist imagery of weakness and infirmity, with the disabled, like gay men, being feminized as a means of denigration.[4] Like gender, disability is a social construction that encodes and perpetuates existing power hierarchies. In the specific context of citizenship, feminists usefully critique and expand the so-called mainstream theories of citizenship for ignoring the ways in which their arguments only compass white, male, heterosexual bodies. The same arguments can easily be extended to the nonimpaired body. What Rosemary Thomson calls the "normate" body is white,

[2] Jenny Morris, "Impairment and Disability: Constructing an Ethics of Care That Promotes Human Rights," 16 *Hypatia* 1, 9 (2001).

[3] Helen Meekosha, "Body Battles: Bodies, Gender and Disability," in Tom Shakespeare, ed., *The Disability Reader: Social Science Perspectives* (London: Continuum, 1998), at 177.

[4] Helen Meekosha and Leanne Dowse, "Enabling Citizenship: Gender, Disability and Citizenship in Australia," 57 *Feminist Rev.* 49, 62 (1997).

male, middle class, and in perfect health and biological functionality – even though few human beings live up to such an ideal. That ideal shapes the public discourses of ethics and politics that underwrite the stem cell debate.

Arguments about abortion are conceptually and morally linked to the embryonic stem cell debate. Both center on women's specific relation to reproduction; to be viable, embryos and fetuses must reside in a woman's body. Indeed, for an embryo to *become* a fetus, it must access the resources of a woman's body. Pro-life arguments that unwanted embryos produced for in vitro fertilization should be "adopted" by other women not biologically related to the embryos implies a dark future reminiscent of *The Handmaid's Tale*, for there are not nearly enough women to take on the task of gestating these embryos.[5] Hence the controversy over stem cells is cast in terms all too familiar to feminists, as a moral debate over when life begins.

This debate has ostensibly, as for abortion, focused on the issue of personhood. In both, the fetus/embryo is constructed as a person in public debate, with the same status as a living child. Because it could be born, it is born. The only response to that is to deny its human status. But that traps feminists in a dichotomy: as Sam Brownback, a Republican senator from Kansas who introduced a bill banning stem cell research, said in typically overstated terms, "Is it a young human, a person, or a piece of property?"[6] His answer, of course, was self-evident, if those are our only two choices; even if embryos do not constitute human life, we cringe at calling them "property," things to which we can do anything we like. But as any good social scientist will tell you, answers can always be manipulated by the way you ask your questions. Brownback's question effectively captured the terms of the debate: those in support of embryonic stem cell research, like those supporting abortion rights, are portrayed as monsters who treat helpless infants as property that can be discarded. Such imagery is particularly relevant given that the major source of stem cells is the surplus embryos produced through in vitro fertilization, which would otherwise be discarded.

The personhood argument has involved undermining the reasoning of *Roe v. Wade* by challenging the supposed faultiness of its assumptions about viability.[7] Now, with stem cell research, the move is made to establish personhood at conception. This idea has always been a story line of the Roman Catholic narrative[8] but now seems to be gaining a scientific story line as well: cells extracted from men and

[5] The bizarre notion of "adopting embryos" ignores the stringent rigors of in vitro fertilization and the high rate of rejection that results in "killing" the embryo.

[6] Chris Mooney, "Idea Log: Sam Brownback, Anti-corporatist Leftist," *American Prospect Online*, available at http://www.prospect.org/ (accessed Oct. 5, 2008).

[7] See, e.g., Lauren Berlant, *Queen of America Goes to Washington City: Essays on Sex and Citizenship* (Durham, NC: Duke University Press, 1997).

[8] There is a dissident view within Roman Catholicism that life begins – the soul manifests itself – not at conception, but at "individuation," which generally occurs fourteen days past conception. See Margaret Farley, "Roman Catholic Views on Research Involving Human Embryonic Stem Cells," *in* Suzanne Holland et al., *The Human Embryonic Stem Cell Debate: Science, Ethics and Public Policy* (Cambridge, MA: The MIT Press, 2001).

women, mixed in a Petri dish, and formed into an embryo, the "miracle of life" made transparent, moved from the bedroom to the laboratory, from private to public space. And this creates a public policy story line in turn, with then-President George W. Bush severely limiting federally funded research on embryonic stem cells to lines that had already been developed as of 2002, an inadequate compromise that fueled private and state-funded initiatives to fund embryonic stem cell research.[9] Though President Obama has lifted those limits, it remains uncertain how much effect this will have in resolving the ethical controversies raised not only by the research itself, but by these new initiatives as well, which are not subject to federal oversight.[10]

On ethical and philosophical grounds, of course, as Judith Jarvis Thomson showed us even before *Roe* was decided, the possible personhood of the fetus should not get the pro-life position as far as it imagines. Thomson's *A Defense of Abortion* asks, if we granted the pro-life premise that life begins at conception, would it necessarily result in forbidding abortion?[11] In asking this question, she developed a now-famous scenario: imagine that you wake up one day with a world-famous violinist hooked up to your vital organs. If you insist on being unhooked, the violinist will die, but if you remain attached for nine months, the violinist will recover and you can each go your separate ways. You were not asked about being "volunteered" to keep the violinist alive, but now that it is a fait accompli, the result of detachment is the death of the violinist. Despite that death, however, Thomson asserts, I think correctly, that most people would object to being so connected and having their bodies sacrificed to the welfare of another without consent.

Means and Ends: Inverting the Picture

Despite myriad plausible objections to Thomson's argument, it brilliantly provides male philosophers a way to understand the demands of pregnancy on women's bodies and selves. But even more significantly, it inverts the means-end argument. What do I mean by that? The right to life argument explicitly draws on religious beliefs, particularly fueled in the United States by the Roman Catholic Church and Christian fundamentalism, that life is sacred, a gift from God, and is therefore not something that humans should destroy. But underneath this argument – indeed, some might argue, emerging out of it – is the more secular, Kantian, means-end distinction: the idea that the individual is always an end in himself or herself and should never be treated as merely a means. In his *Groundwork for a Metaphysics of*

[9] See, e.g., California Stem Cell Research and Cures Act, adopted by voters at the 2004 general election, codified at Cal. Health and Safety Code 125290.10 et seq. (2008)(allocating bond funds to support stem cell research).

[10] See Press Release, White House Office of the Press Secretary, Removing Barriers to Responsible Scientific Research Involving Human Stem Cells (Mar. 9, 2009), available at http://www.whitehouse.gov/ (accessed May 21, 2009).

[11] Judith Jarvis Thomson, "A Defense of Abortion," 1 *Phil. and Pub. Aff.* 47 (1971).

Morals, Immanuel Kant maintained that "every rational being, exists as an end in himself, not merely as a means for arbitrary use by this or that will: he must in all his actions, whether they are directed to himself or to other rational beings, always be viewed *at the same time as an end*."[12] Kant's exact meaning has been the subject of debate in philosophical and legal circles,[13] but it boils down to a duty to demonstrate fundamental respect for other people. As he elaborated more fully toward the end of *The Metaphysics of Morals*,

> Every human being has a legitimate claim to respect from his fellow human beings and is in turn bound to respect every other. Humanity itself is a dignity; for a human being cannot be used merely as a means by any human being (either by others or even by himself) but must always be used at the same time as an end. . . . Hence there rests on him a duty regarding the respect that must be shown to every other human being.[14]

Abortion opponents overtly adopt this thinking, arguing that fetuses are treated as means by selfish women who want to kill babies so that they can pursue their careers (or even less worthy interests). But Thomson's scenario clearly suggests that the fetus (and those who would outlaw abortion) treat the woman in whose body it resides as a means to the end for its own life, just as the violinist treats his host as a means to preserve his life. Moreover, the fetus treats the woman as *merely* a means; it cannot even comprehend the existence of the woman as an individual, let alone treat her as an end in herself.[15] (By contrast, the woman obtaining an abortion may treat the fetus as a means *as well as* an end by mourning its loss and agonizing over the decision.)

Such treatment is acceptable in pregnancy when voluntary. If a woman wants to give birth to a child, then treating her as an end is compatible with, even inseparable from, treating her as a means to the end of preserving the fetus's life. If a woman desires *not* to be pregnant, however, then we have an irreducible conflict between ends. The pro-life position simply sidesteps the woman's desires, and therefore her status as an end-in-herself. As Thomson's violinist scenario reveals, antiabortion arguments downgrade or dismiss the woman's own humanity in favor of the sacredness of the fetus's life. She – like you in relation to the violinist – simply does not count as much; she is not treated as an end in herself.

How does this relate to stem cell research? The most obvious connection is the assertion that embryos are treated as means to the end of research that will save someone else's life. This is plausible, of course, only if the embryo is a human being.

[12] Immanuel Kant, *Groundwork for a Metaphysics of Morals* (New York: Harper Torchbooks, 1964), at 95.

[13] See, e.g., Allen W. Wood, *Kant's Ethical Thought* (New York: Cambridge University Press, 1999); Thomas E. Hill, "Humanity as an End in Itself," 91 *Ethics* 84, 101 (1980).

[14] Immanuel Kant, *The Metaphysics of Morals* (Cambridge: Cambridge University Press, 1996), at 209.

[15] See Eileen McDonagh, *Breaking the Abortion Deadlock: From Choice to Consent* (New York: Oxford University Press, 1996) (asserting the right of the pregnant woman to self-defense).

In other words, just as Thomson forces us to recognize that pro-life arguments generally ignore or downgrade the humanity of the pregnant woman, I maintain that the sick and disabled are also treated as means by those who oppose stem cell research. This is so in two senses. First, they must die – not immediately, perhaps (though many will), but certainly prematurely, after relatively and often severely shortened lives full of pain and suffering – to preserve the lives of nonsentient, nonconscious embryos. The concern for the immorality of killing embryos tends to mask the incompatible truth that the seriously ill and disabled people who would be helped by stem cell research – many of whom are children – are humans, too, entitled to be treated as ends in themselves, which may well involve curing their afflictions when doing so is within our reach. So at the very least, we have a zero sum: either we kill embryos to cure the sick, or we let the sick suffer and die to let the embryos exist. In setting policy, whether we outlaw the use of embryos for stem cell research or allow it, one party will be treated as a means to the other's existence.

In this sense, a better scenario than Thomson's violinist might be imagining your twin toddlers as victims of a serious car crash. One of them, Susan, will never awaken from her vegetative coma but might live like that for decades; the other, Sarah, will die an agonizing death without an immediate organ transplant. With no suitable donor, Sarah's only hope is if you decide to take Susan off life support. Which would you choose? Many considerations will enter into this choice, such as the quality of life for the comatose Susan and Sarah's suffering – and you may seek to treat them both as ends in themselves (what would Susan or Sarah want if she could choose?). But the fact remains that one of your daughters will inevitably be treated as a means to the life of the other: one must die to let the other live. (And you're too smart to let yourself off the hook by "refusing" to choose because that is a de facto choice in favor of Susan.)

At the least, the reframing afforded by this hypothetical permits an ethical justification for the distinction between destroying embryos that have been produced for in vitro fertilization and will otherwise be discarded and actively producing embryos, either through cloning or fertilization, for the explicit purpose of being able to destroy them. After all, it would not be acceptable to force a healthy child to donate a vital organ to her sister and give up her own life, any more than an illegal immigrant could be forced to donate a kidney to a citizen. By contrast, the cloning of stem cells *derived from* an embryo that has been produced for other purposes, and which will not be implanted in a woman's uterus, would be analogous, if one declared the embryo to be a person, to taking the heart and pancreas from your vegetative daughter and giving them to her twin. More important, this reframing forces us to see that *if* one wants to claim that the embryo has human status, then we must grant the sick and disabled at least equal human status and recognize that preventing stem cell research prevents them from receiving treatments that could alleviate their suffering. This trade-off between embryos and the sick may not seem as immediate as organ transplantation, or even abortion, but the reason it is not immediate is that we unduly restrict the research; once developed, the zero sum

might be very immediate, as when an embryo's stem cells would be used to produce beta cells for transplant into a dying diabetic.

Seeing the Sick

My argument may encounter some resistance from the start because most able-bodied people fail to admit that the sick and disabled are not treated as ends in themselves and that their human status is routinely discounted and degraded. Most disability theorists consider that refusal dishonest. As Rosemary Thomson argues, the disabled are the ultimate Other because the able-bodied know that they could become disabled at any time, and they fear that possibility:

> Cast as one of society's ultimate "not me" figures, the disabled other absorbs disavowed elements of this cultural self, becoming an icon of all human vulnerability and enabling the "American Ideal" to appear as master of both destiny and self. At once familiarly human but definitively other, the disabled figure in cultural discourse assures the rest of the citizenry of who they are not while arousing their suspicions about who they could become.[16]

This othering of the disabled reflects a psychic and social investment in the denial of their humanity: if their humanity was recognized, then the recognition of the possibility of becoming disabled oneself becomes more immediate, more real. Hence "disability's indisputably random and unpredictable character translates as appalling disorder and persistent menace in a social order predicated on self-government. . . . The disabled body stands for the self gone out of control."[17] The disabled are often viewed with repulsion, emblemizing "the rejected body" in Susan Wendell's phrase; the disabled serve as a material reminder of human weakness, of the inevitability of the decay of the flesh, of the illusoriness of the media fantasy of the controlled and perfect body.[18] Accordingly, Nicholas Watson notes that "disabled people face a daily barrage of images of themselves as other, as unworthy, as something to be feared."[19] Even pity is often couched in terms of repulsion, rather than willingness to give aid; it does not cause "us" to want to help "them," but rather to feel grateful that "we" are not "them."

In more prosaic terms, healthy people do not want to admit the fine line between themselves and the ill. Illness is somebody else's hard luck, and we can dismiss

[16] Rosemary Garland Thomson, *Extraordinary Bodies: Figuring Physical Disability in American Culture and Literature* (New York: Columbia University Press, 1996), at 41.

[17] Ibid., 43; see also Mairian Corker, "Sensing Disability," 16 *Hypatia* 34, 52 (2001).

[18] Susan Wendell, *The Rejected Body: Feminist Philosophical Reflections on Disability* (New York: Routledge, 1996). Similar analyses are offered in John Hockenberry, "Public Transit," in Ruth O'Brien, ed., *Voices From the Edge: Narratives About the Americans With Disabilities Act* (New York: Oxford University Press, 2004), and Tom Shakespeare et al., *The Sexual Politics of Disability: Untold Desires* (London: Continuum, 1997).

[19] Nicholas Watson, "Enabling Identity, Disability, Self and Citizenship," in Shakespeare, *Disability Reader*, at 161.

the idea that we might have a social responsibility to provide better care and more research. Indeed, ironically, that is the thinking that gives Judith Thomson's argument such persuasive force: it is a shame that the violinist must die, but why should you be the one to pay the price for saving his life? The healthy do not want to imagine the pain and suffering the sick and disabled endure, which is necessary to seeing them as whole human beings and treating them as ends in themselves. Hence, despite the (admittedly modest)[20] advances in handicap access achieved over the past decade, people in wheelchairs and other physically disabled people commonly talk about the ways in which the able-bodied fail to see them, or view them only as objects of pity or repulsion, rather than as equal human beings. Those with cancer are avoided, and those with AIDS are often treated as pariahs.[21]

People who make their living caring for the sick, disabled, and frail similarly often fail to see their charges as human beings, but only as means to the bottom line end of a paycheck, or worse; consider, for instance, the relatively high rates of theft, sexual abuse, and physical abuse in nursing homes. Overworked and underpaid staff are likely to dehumanize their charges, viewing them as another stressful burden to manage quickly so they can move on to the next one.[22] Consider the humiliation that the average hospital patient endures, ranging from lack of privacy to being ignored by overworked nurses or treated as teaching material by doctors making rounds with their medical students. Consider the relatively slow pace of medical progress, and the suffering that endures, due to shamefully low levels of funding for medical research compared to military expenditures. Consider the horrifying inadequacy of pain treatment, not only because doctors and hospitals are so concerned about being sued,[23] but more deeply because pain, as Elaine Scarry has detailed, is the most difficult – because it is the most frightening – sensation for others to imagine.[24] And of course, the typically low pay reflects the low value our society places on care work, and hence on the people who need care.

Feminists should recognize the dishonesty of refusing to see the disabled as truly human. Like the man who says "I'm not a sexist, she's just really difficult to get along with," such a response reveals a fundamental acceptance of women's inferiority and subordination as constitutive of female humanity. What it means to be a human being, if you are female, is to be subordinated and inferior to men. Without that inferiority and subordination – without being the Other – she would not be a woman,

[20] See Ruth O'Brien, *Crippled Justice: The History of Modern Disability Policy in the Workplace* (Chicago: University of Chicago Press, 2001), for an explanation of how the Americans With Disabilities Act is interpreted by the courts to consistently fail to address the needs of the disabled.

[21] Sharon L. Snyder and David T. Mitchell, *Cultural Locations of Disability* (Chicago: University of Chicago Press, 2006).

[22] Allyson Robichaud, "Disrespecting Our Elders: Attitudes and Practises of Care(lessness)," in James M. Humber and Robert F. Almeder, eds., *Care of the Aged* (Totowa, NJ: Humana Press, 2003), at 27.

[23] Marshall B. Kapp, "The Ethics of Pain Management in Older Adults," in Humber and Almeder, eds., *Care of the Aged*, at 129.

[24] Elaine Scarry, *The Body in Pain: The Making and Unmaking of the World* (New York: Oxford University Press, 1987).

and therefore she could not be a human. Such responses betray a certain contempt for women as a class.

The same goes for the disabled: it is their inferiority that constitutes their identity. As Mairian Corker says, "the concept of disability" is primarily "a form of social oppression."[25] Marcia Rioux notes that "being unequal is one of the inherent premises of the concept of . . . disability."[26] Rosemary Thomson points out that "the social history of disabled people has generally remained consistently one of stigmatization and low status."[27] Certainly, as philosophy of language and poststructualist scholars have shown, how the disabled see themselves is significantly constituted by how others see them; but even Charles Taylor argues that the self is defined and constituted through "webs of interlocution," namely, that language and social interaction are the necessary tools that all humans must use to define the self: "we cannot develop a sense of self on our own. Our sense of self has a past and also an anticipated future."[28] The disabled are constituted, even to themselves, by how others see them: as beings who remind us of the horrific possibility of what we could be, but are not. They make the rest of us feel better about ourselves.[29] This is a form of dehumanization, even if subtle, because what one is grateful for is not just that one is not blind, or crippled, but that one's humanity is not diminished.

Again, it is difficult for many able-bodied people to acknowledge this anxiety about the disabled, just as it is difficult to get whites to admit that they are racist and men to see, much less acknowledge, their sexism. We are all invested in *not* seeing the way that we dehumanize others, whether it is women, racial minorities, the poor, or the disabled. What Charles Mills calls the "epistemology of ignorance" means that "people do not like to view their activities as exploitative toward others," so they "remain willfully ignorant of the damage that one is doing to others." Mills theorizes a "contract" among whites "not to recognize blacks as equal persons," an idea that clearly applies to men's views of women, and the able-bodied of the disabled.[30] Such epistemological framing is part of the dominant background landscape: it is "normal" behavior; it is "the way things are." As is the case with gender, how disability is conceptually constructed determines how disabled individuals are seen.

Indeed, in calling disability "a form of social oppression," Corker invokes the central issue of how disability is conceptualized. The dominant model used to understand and express disability is medical, conceptualizing disability as a unique and discrete problem of particular individuals. Just as domestic violence is often seen

[25] Mairian Corker, "Differences, Conflations and Foundations: The Limits to 'Accurate' Theoretical Representations of Disabled People's Experience?," 14 *Disability and Soc'y* 627, 631 (1999).

[26] Marcia H. Rioux, "Towards a Concept of Equality as Well Being: Overcoming the Social and Legal Construction of Inequality," 7 *Can. J. L. and Juris.* 131 (1994).

[27] Thomson, *Extraordinary Bodies*, at 49.

[28] Ibid., at 148; Charles Taylor, *Sources of the Self: The Making of the Modern Identity* (Cambridge, MA: Harvard University Press, 1989), at 36.

[29] Shakespeare, introduction to *Disability Reader*, at 1.

[30] Charles Mills, *The Racial Contract* (Ithaca, NY: Cornell University Press, 1997), at 18, 97.

as a pathology of a particular couple, better remedied through individual therapy than social policy, the medical model of disability sees the problem as internal and specific to the individual who cannot walk, or see, or hold a pen. In this model, the individual is politically and socially disempowered.[31] By contrast, the social model of disability locates the problem in a society that is physically structured to favor certain bodies and disfavor others. It views disability as a problem created *by* society. That is, a body may have a particular impairment – a paraplegic, for instance, is unable to walk – but the impairment *becomes* a disability only if society is structured to make wheelchairs prohibitively expensive, to make sidewalks impossible because of curbs, or building access difficult because the buildings lack ramps. One could analogize impairment and disability to the sex/gender relationship: if impairment is an accounting of a particular body with certain features, capacities, and incapacities, like sex, disability is like gender, a system of social relations defined by particular conceptual parameters that encode hierarchies of power and privilege.[32]

Deploying the concept of citizenship in a social model of disability clearly undermines the "it's your problem" response: if the disabled are citizens, then they are entitled to the resources necessary to overcome their disability, or rather, to counteract the social forces that turn their impairments *into* disabilities. That was, indeed, the idea behind the Americans With Disabilities Act (ADA). The ADA takes a political approach to law, demanding that employers address particular needs of specific employees who are situated differently from others; a deaf person, for instance, who would otherwise be denied a position because she was unable to communicate with clients over the phone could demand a text telephone (TTY) to enable her to so communicate. The ADA thereby implicitly rejects the so-called deviance of hearing impairment when contrasted to hearing people's ability to use the telephone and identifies the phone as a piece of technology that was designed for particular kinds of bodies. The problem, then, lies not in the person, but in the technology. The social model of disability, however, does not have wide acceptance in public policy; Ruth O'Brien has shown that courts have routinely interpreted the ADA to make it virtually impossible for the disabled to gain access to basic rights of citizenship such as public transportation, emergency medical care, and other services that the able-bodied, white middle class take for granted.[33] The medical model makes it easier to keep the other at a distance; it is cheaper not to respond. As Rioux puts it, "when the source of inequality is located in the individual . . . there is a ready rationale for social inequality and limiting social entitlements."[34] When that individual is seen as less than fully human, it becomes even easier. Cutting costs often requires that we maintain strict controls on who "counts" as a "person."

[31] On domestic violence, see Nancy J. Hirschmann, *The Subject of Liberty: Toward a Feminist Theory of Freedom* (Princeton, NJ: Princeton University Press, 2003).

[32] Although I am also sympathetic to the argument that sex itself is a social construction; see ibid., at 75–98.

[33] Hockenberry, "Public Transit." In 2008, the ADA Amendments Act, intended to counteract the juridical weakening of the original act, became law. See ADA Amendments Act of 2008, Pub. L. No. 110–325, 122 stat. 3553.

[34] Rioux, "Toward a Concept of Equality," at 131.

Persons and Citizens

But such denials also deny citizenship. Indeed, the argument for citizenship and for recognition of full humanity for the disabled are intimately related. The late feminist philosopher Iris Young argued,

> Respecting individuals as full citizens means granting and fostering in them liberties and capacities to be autonomous – to choose their own ends and develop their own opinions. It also means protecting them from the tyranny of those who might try to determine those choices and opinions because they control resources on which citizens depend for their living.[35]

Although she acknowledges that "in contemporary society . . . most people experience this kind of dependence," the ideal she holds out, of citizenship as an entitlement to autonomy, and of the state as owing citizens not only the "negative" good of protection from harm but the "positive" good of fostering autonomy, deploys Kantian notions of treating people as ends in themselves.[36] Similarly, Jenny Morris argues,

> Unless we have entitlements to action and resources to tackle these disabling barriers, we cannot achieve equality. . . . All of this is tied up with our right to exist. . . . If non-disabled people do accept our right to exist then they should also accept our common humanity and therefore our right to equality – as citizens and as human beings. We can't get equality or a good quality of life unless we are given entitlements to different treatment – to changes and resources which enable us to get equal access – to jobs, to housing, to leisure and political activities, and so on.[37]

For Morris, rights of citizenship are connected to one's status as a person, to one's very right to exist. Indeed, humanity is *based*, in part, on citizenship.

Citizenship is a matter of entitlement, obligation, and belonging: a citizen is someone who belongs to a particular polity and has certain entitlements and obligations thereby. The entitlements, though, are both a function and a sign of the belonging. Thus denying those entitlements produces a twofold harm. First, it involves a denial of the immediate good that the entitlement provides such as voting or protection against sexual discrimination. Second, it involves a denial of the belonging itself: the denial of the entitlement is a signal of exclusion, an indication that you are not just different from others, but an outsider, inferior, less than a citizen, and less than human. The "man without a country" comes to feel himself less than fully human because he lacks citizenship.[38]

35 Iris Marion Young, *Intersecting Voices: Dilemmas of Gender, Political Philosophy, and Policy* (Princeton, NJ: Princeton University Press, 1997), at 126.

36 Ibid.; see Hirschmann, *Subject of Liberty*, on negative and positive liberty and how these relate to the concept of autonomy.

37 Morris, "Impairment and Disability," at 12.

38 Edward E. Hale, "The Man Without a Country," *Atlantic Monthly*, Dec. 1863, at 665–80.

With respect to the stem cell issue, abortion again provides a good model for understanding the importance of citizenship, for the pro-life position is not just an ethical argument, but an explicitly political argument aimed at, and encoding an active hostility to, women. The so-called pro-life position elevates the human status of the fetus in terms that denigrate the human status and lives of women. As feminist psychoanalytic, social, legal, and political theorists have argued, women's status as fully recognized human beings has always been compromised by their maternal role.[39]

These efforts are intimately tied up with efforts to compromise women's citizenship status, legal status, and status as bearers of rights. As Lauren Berlant puts it, the "nationwide competition between the mother and the fetus" is one "that the fetus, framed as a helpless, choiceless victim, will always lose – at least without the installation of surrogate legal and technological systems to substitute for the mother's dangerous body and fallen will."[40] Such legal and technological systems retain the fetus's image as helpless victim, while giving it powers and rights that supercede, even destroy, those granted to the woman who bears it.[41]

In a parallel vein, the attempt to establish personhood for the fetus should be seen as an attempt to set the foundations for citizenship. One might think that focusing on citizenship and evacuating the personhood debate would be an easy way for feminists and the disabled to win this issue given that the Constitution explicitly links citizenship with birth. Under the Fourteenth Amendment of the U.S. Constitution, "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." Title 8 of the *United States Code* elaborates on this basic definition to include children born outside of the United States whose parents are U.S. citizens as well as foundlings for whom there is no proof that they were not born in the United States.[42] They key term here, of course, is *born*, which embryos and fetuses are not, by definition. Disabled people, by definition, are. Therefore, in this simple logic, disabled people are citizens, embryos are not, and the rights of the former outweigh the latter.

[39] I have elsewhere explored this issue as it pertains to women; I used psychoanalytic theory and work in moral psychology to understand the "structural sexism" of Western political theory. Nancy J. Hirschmann, *Rethinking Obligation: A Feminist Method for Political Theory* (Ithaca, NY: Cornell University Press, 1992); see also Nancy Chodorow, *The Reproduction of Mothering* (Berkeley: University of California Press, 1978).

[40] Berlant, *Queen of America*, at 98.

[41] Daniels shows how women's humanity and citizenship rights have been eroded by the pro-life claims of fetal personhood. Cynthia R. Daniels, *At Women's Expense: State Power and the Politics of Fetal Rights* (Cambridge, MA: Harvard University Press, 1993). Gretchen Ritter similarly shows the ways in which women's citizenship has been so difficult to claim and establish because of women's traditional reproductive role. Gretchen Ritter, *The Constitution as Social Design: Gender and Civic Membership in the American Constitutional Order* (Palo Alto, CA: Stanford University Press, 2006); see also Chapter 3.

[42] If only one parent is a U.S. citizen, that parent must meet certain residency requirements. See Legal Information Institute, *United States Code*, Cornell Law School, http://www.law.cornell.edu/ (accessed Jan. 14, 2008).

But to understand the relationship between fetuses or embryos, women, and citizenship, we must attend to the distinction between *being* and *treating*. *Being* a citizen is based on factual and objective criteria, such as where you were born; disabled people who fit those criteria *are* citizens. But they are not *treated as if* they are. That is, the way that others interact, perceive, and respond to them reflects a fundamental contradiction to their existential status as citizens. Rosemary Thomson notes that "people deemed disabled are barred from full citizenship because their bodies do not conform with architectural, attitudinal, educational, occupational, and legal conventions based on assumptions that bodies appear and perform in certain ways."[43] As Meekosha and Dowse note in terms similar to Thomson's contrast between the normate and the disabled *human*, "the good citizen is embodied as male, white, active, fit and able, in complete contrast to the unvalued 'inactive' disabled Other. . . . The concept of a disabled citizen could be described as a contradiction in terms."[44]

Marcia Rioux points out that "citizenship presumes equality between citizens, as well as equality in the way in which the state operates in relation to individuals." However, "the disabled status has almost universally been a condition that has been used as a rationale for disentitling people from citizenship." Identifying the circular logic of most judicial reasoning, she notes that "rights and citizenship have often been restricted for disabled persons by the argument that rights are extended to people only to the extent to which they can show a capacity to exercise them," which completely ignores that this capacity is precisely what the disabled demand that the state provide for them as citizens. Thus the United Nations Declaration on the Rights of Disabled Persons qualifies its assertion of disability rights with the phrase "to the extent possible," which gives states wide latitude to ignore them. At best, the disabled are "non-rights-bearing citizens," a meaningless term because the very notion of *citizen* is meaningless without rights.[45] As Joan Tronto notes, the concept of partial citizenship is itself a conceptual paradox.[46] That is, even though citizenship rights are regularly denied in practice, citizenship *as a concept* cannot encode such gradations and retain theoretical consistency. Thus, feminist and disability theorists and activists should use the *concept* of citizenship to point out the inconsistency of such denials and to fight for those rights and entitlements of citizenship.

The problems that the able-bodied have with *treating* the disabled as citizens are parallel to the familiar problems that patriarchy has with *treating* women as citizens pointed out in many other chapters in this volume: the disabled, like women, are

43 Thomson, *Extraordinary Bodies*, at 42, 47.

44 Meekosha and Dowse, "Enabling Citizenship," at 50.

45 Marcia H. Rioux, "Disability, Citizenship and Rights in a Changing World," in Colin Barnes et al., *Disability Studies Today* (Cambridge, MA: Polity Press and Blackwell, 2002), at 217, 220.

46 Joan Tronto, "Care as the Work of Citizens: A Modest Proposal," in Marilyn Friedman, ed., *Women and Citizenship* (New York: Oxford University Press, 2005), at 136.

often not workers, which is key to T. H. Marshall's reformulation of citizenship; they are not independent, a key notion of liberal citizenship; they often lack property, which is key to historical liberals like John Locke because disability, like femininity, often determines that one will live in poverty; and they are protectees, not protectors, as Young puts it.[47]

The disabled suffer from an additional liability in feminist terms: they seem to be, in essence, not *women*. Feminists have highlighted the social importance of women's care work as a basis for citizenship, but the disabled are generally cast as the people for whom such women supposedly care: care receivers rather than caregivers. The disabled thus provide useful material for feminist claims about the importance of the work able-bodied women do and that caregiving runs throughout a woman's lifetime, not just the first eighteen years of her children's lives. But in the process, by virtue of their position as beneficiaries of this work, the disabled are not themselves recognized by feminists as citizens. The "disabled and older women" are "excluded from the category of 'women' and classed as 'dependents' whose existence was a threat to non-disabled women's economic opportunities." Some feminists have even "suggested that disabled and older women should . . . be consigned to residential care" to alleviate the caretaking burdens of "women."[48] If, as the famous book title goes, "all the women are white," they would also seem to be able-bodied.[49]

So do citizens. Tronto's important work on the politics of care locates care work "as a ground for conferring citizenship." Although she says that "we would define citizens as people engaged in relationships of care with one another,"[50] ostensibly including those receiving care, there is only a brief reference to them, and their relationship to citizenship is never explained. In her powerful book *Moral Boundaries: A Political Argument for an Ethic of Care*, Tronto pays more attention to care receipt but again undertheorizes the place and role of care receivers, and does not identify receipt of care as a qualification for citizenship. If she did, of course, care receipt would become a somewhat empty qualification because everyone, including those living in other countries, would become citizens of the United States by virtue of the fact that they are human beings and need care. If a universal, cosmopolitan citizenship equates "citizen" with "human," then why not just talk about humanity and jettison the concept of citizen? As much as feminists rightly criticize the fetishization of borders and boundaries, they are essential to the concept of citizenship. Indeed, Tronto recognizes this dilemma; despite her criticism of "a kind of barrier that

47 T. H. Marshall, "Citizenship and Social Class," in *Class, Citizenship, and Social Development* (Garden City, NY: Doubleday, 1964); John Locke, *Two Treatises of Civil Government* (Cambridge: Cambridge University Press, 1964) (originally published 1690); Young, *Intersecting Voices*. See also Gretchen Ritter, Chapter 3; Eileen McDonagh, Chapter 9; Martha McCluskey, Chapter 12.

48 Morris, "Impairment and Disability," at 6–7.

49 Gloria T. Hull et al., eds., *All the Women Are White, All the Blacks Are Men, But Some of Us Are Brave: Black Women's Studies* (New York: Feminist Press at the City University of New York, 1982).

50 Joan Tronto, "Care as the Work of Citizens," at 131; see also 138–39

reflects and protects the political power of those who are already insiders," she maintains that "discussions about citizenship must always be local and political, and cannot only be made in universal and moral terms." Furthermore, without such borders and boundaries, distinctions between necessary and unnecessary care become impossible to sustain.[51]

Such criticisms should not be interpreted as an attack on her argument, but rather as identifying a systemic problem with the concept of care, despite its key importance to many feminist arguments, including my own.[52] This denial of citizenship, womanhood, and humanity to disabled women that ironically results from a feminist linkage of care to citizenship has an inverted logic that suggests why the personhood argument has worked so well for opponents of abortion and embryonic stem cell research. While women and the disabled *are* citizens who are routinely denied the rights and resources of citizenship, fetuses and embryos are *noncitizens* who are increasingly *treated as if* they were citizens. Such efforts began shortly after *Roe v. Wade*, when Senator Jesse Helms and Representative Lawrence Hogan proposed a constitutional amendment explicitly extending Fourteenth Amendment protection to "any human being from the moment of conception."[53] Although this effort failed, a creative revival occurred in the 1990s when the Republican Congress established "rights" to prenatal care for *fetuses* (not women) at the same time that poor women were penalized with caps on welfare benefits if they had additional children and were pressured to undergo temporary sterilization via Norplant.[54] And in 2004, President George W. Bush signed into law the Unborn Victims of Violence Act, which makes the killing or injury of an unborn fetus during a crime a distinct, punishable crime, a policy that elevates fetuses above the women who carry them. This granting of personhood to fetuses could be the opening wedge to citizenship claims: once fetuses are legally recognized, could explicit claims to citizenship be far behind? These legal measures to recognize fetal personhood, in Berlant's words, constitute attempts "to establish the autonomy of the fetal individual; and, paradoxically . . . to show that the fetus is a contingent being, dependent on the capacity of Americans to hear *as citizens* its cries *as a citizen* for dignity of the body, its complaints at national injustice."[55]

Questions about the citizenship of women versus fetus are apparent in the Supreme Court's decision in *Gonzales v. Carhart* to uphold the federal Partial-Birth

[51] Joan Tronto, *Moral Boundaries: A Political Argument for and Ethic of Care* (New York: Routledge, 1998).

[52] Nancy J. Hirschmann, "A Question of Freedom, A Question of Rights? Women and Welfare," in Nancy J. Hirschmann and Ulrike Liebert, eds., *Women and Welfare: Theory and Practice in the United States and Europe* (Piscataway, NJ: Rutgers University Press, 2001).

[53] Harriet F. Pilpel, "The Fetus as Person: Possible Legal Consequences of the Hogan-Helms Amendment," *6 Fam. Plan. Persp.* 6, 7 (1974).

[54] Judith Hennesy and Alison Grace-Claith, "You've Come a Long Way Baby: Citizens at Conception? Prenatal Personhood and SCHIP Eligibility," 47 *Am. Behav. Scientist* 1428, 1428–47 (2004); Hirschmann, "A Question of Freedom."

[55] Berlant, *Queen of America*, at 98.

Abortion Ban Act. This act banned a specific late-term abortion procedure called intact dilation and extraction (D&E), where the fetus is killed after it has partially emerged from the birth canal. The Court based its reasoning primarily on the third of the "essential holdings" from *Planned Parenthood of Southeastern Pennsylvania v. Casey*, namely, that "the State has legitimate interests from the pregnancy's outset in protecting the health of the woman and the life of the fetus that may become a child."[56] However, it did so inconsistently, for the act allowed no exception for when the health of the pregnant woman was at stake, only when her life was. It thus virtually ignored *Casey*'s second holding, that the State has "the power to restrict abortions after viability, if the law contains exceptions for pregnancies endangering the woman's life *or health*."[57] The Court, moreover, deployed reasoning that implicitly granted living human status to the fetus, claiming that late-term abortion is similar "to the killing of a newborn infant. . . . The government may use its voice and its regulatory authority to show its profound respect for the life within the woman."[58]

Feminists will note here that "life *within* the woman" supercedes "life *of* the woman," effectively demoting women to second-class status as both humans and citizens vis-à-vis their fetuses. Given its horror at the intact D&E, the Court's complacency about standard D&E, where the fetus is dismembered in utero, thoughtlessly dismisses disability conditions brought on by standard D&E – not to mention by pregnancy.[59] The fact that the Court labels intact D&E as more "gruesome" than its counterpart is not only inconsistent, but sexist, complementing the Court's patronizing remarks that women often regret their abortions and consequently suffer from "severe depression and loss of esteem."[60]

Justice Ruth Bader Ginsburg's dissent notes the willful misrepresentation of the facts by both Congress and the Court in this case, including the denial of evidence offered by the American College of Obstetricians and Gynecologists and other experts about the greater safety as well as occasional necessity of the banned procedure, instead relying on the testimony of doctors who had never performed the procedure. Such distortions of the facts are, Ginsburg implies, ideologically driven to the end of demoting women's status in society and under the law. They thus run contrary to the Court's finding in *Casey* that women "have the talent, capacity, and right 'to participate equally in the economic and social life of the Nation.'"[61]

Carhart's demotion of women's humanity and citizenship does not explicitly assert fetal citizenship, but attempts have been made to do so in the immigration context.

[56] *Gonzales v. Carhart*, 550 U.S. 124, 145 (2007).
[57] Ibid. (emphasis added).
[58] Ibid., at 158.
[59] The repeated reinsertion of surgical instruments into the womb poses serious risks of perforation and injury. Eileen McDonagh details a wide variety of serious disabling conditions that can arise from pregnancy. See McDonagh, *Breaking the Abortion Deadlock*.
[60] *Gonzales*, at 159.
[61] Ibid., at 171 (Ginsburg, J., dissenting) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 [1992]).

Myrna Dick, née Ochoa-Carrillo, is a Mexican who entered the United States as a child some twenty years ago and allegedly lied about being a U.S. citizen when reentering the United States after a visit to Mexico in 1998. She married Brady Dick, a U.S. citizen, in 2001, and when she applied to change her status to permanent legal resident, the 1998 incident was uncovered. In 2004, her deportation was ordered. Because she was three months pregnant by her husband, a district judge granted Ochoa-Carrillo a stay of her deportation on the basis that her fetus was "in essence" an American citizen. She was eventually deported in 2006, after the Supreme Court declined to hear her case.[62]

The optimist will point out that the fetus was considered "essentially" a citizen – not an *actual* citizen – because of its father's citizenship; if Ochoa-Carrillo had been deported before the birth and delivered the baby in Mexico, it still would have been a U.S. citizen. The support that Ochoa-Carrillo subsequently received from pro-immigrationists was not based on the citizenship of her fetus, but on humanitarian considerations of separating a child from its mother as well as fairness considerations involved in deporting a twenty-year resident of the United States who is married to a U.S. citizen, while hundreds of illegal immigrants cross the border every day. The pessimist will point out that the fetus's virtual citizenship trumped the woman's illegal status. Once the fetus was born, the woman could be discarded.

The cynic, of which I consider myself one, will point out the irony that immigration is the terrain on which this battle is fought, for those on the Right, who normally urge recognition of the fetus as a person, are those who are most hostile to immigration. This is even more apparent in the case of Maria Christina Rubio, an illegal Mexican immigrant who was deported while eight months pregnant. She argued that because her fetus was viable, it was a citizen. And indeed, Rubio's husband cited Dick's deportation stay as a precedent. He also cited the "rights" of fetuses to due process protection as elaborated in the Unborn Victims of Violence Act. "The child was conceived in the United States and would have been born in the United States except that the mother was deported. Through no part of his own, the unborn baby is in Mexico," as he put it. U.S. Immigration and Customs Enforcement did not buy that argument, noting that the constitutional definition of citizenship refers to "all persons born. . . . It doesn't say all persons who were conceived in the United States."[63] Indeed, the way that Rubio's husband described the argument, any pregnant woman could seek legal entry to the United States on the theory that her baby would be a U.S. citizen but for not being allowed in. The Ninth Circuit Court of Appeals dismissed *Rubio v. Gonzales*, though its reasoning was not based on any

[62] *Ochoa-Carrillo v. Gonzales*, 437 F.3d 842, 846 n. 5 (8th Cir.), cert. denied, 549 U.S. 952 (2006); Garance Burke, "U.S. Supreme Court Denies Stay of Deportation for Kansas City-Area Mother," *Associated Press*, June 9, 2006.

[63] Laura Wides, "Pregnant Woman Wants Re-entry to U.S., Lawyers Say Fetus Is Citizen," *Associated Press*, LA102, July 27, 2004 (quoting Virginia Kice, United States Customs Enforcement spokesperson).

issues of fetal citizenship. Even the dissenting opinion, by Judge Pregerson, held that,

> when a parent is denied cancellation of removal, the government effectively deports the United States-born children of that parent . . . circumstances will force children to suffer de facto expulsion from the country of their birth or forego their constitutionally protected right to remain in this country with their family intact.[64]

Rubio's infant, however, was not born in the United States. Whether Judge Pregerson was taking an opportunity to push a tangential point, noting potential implications for children who were born in the United States, or simply engaging in sloppy reasoning is difficult to assess, but it does not challenge, implicitly or explicitly, the connection between birth and citizenship.

Unlike the Dick case, in which the issue would have been moot once the child was born – it would have been a U.S. citizen wherever it was born because of its father's citizenship and residence – the Rubio case "has legs" because the now-born child could claim that he or she was, in fact, denied U.S. citizenship. The case, however, seems to have faded away. But I cannot say whether feminists should be sanguine about this situation. Advocates of so-called birthright citizenship, who are anti-immigration, have been trying to amend the Fourteenth Amendment to tie citizenship to parentage, rather than location of birth; that is, children born in the United States to parents who are not citizens would no longer be granted citizenship.[65] It could be argued that such a position would weaken an argument for fetal citizenship; if you do not wish to grant citizenship to babies of immigrants or other noncitizens, you clearly would not grant citizenship to fetuses of noncitizens.

But the implications of this are potentially dire for feminist and disability theorists and activists. In the first place, birthright citizenship invokes an earlier era of sexist thinking that deemed women who were U.S. citizens by birth to have voluntarily given up their citizenship by marriage to a foreign national: for such women, where they were born had little bearing on their status as citizens, as the patriarchal institution of marriage superceded the express language of the Fourteenth Amendment.[66] In the contemporary context, if a child's citizenship is based on parentage, rather than birth, then being born would not really matter, thus opening the door to claims that the fetuses of U.S. citizens are themselves citizens. This thinking could logically extend to embryos created through in vitro fertilization from the egg and sperm of adult U.S. citizens. Such an embryo could be implanted in a female who was not

[64] *Vasquez Rubio v. Gonzales*, 188 Fed. Appx. 582 (9th Cir. 2006).

[65] Charles Wood, "Losing Control of America's Future: The Census, Birthright Citizenship and Illegal Aliens," 22 *Harv. J. L. and Pub. Pol'y* 465 (1999). Thanks to Kris Collins for pointing me to the literature on birthright citizenship.

[66] Ritter, *Constitution as Social Design*, at 306; *Mackenzie v. Hare*, 239 U.S. 299 (1915).

a U.S. citizen and still itself be a citizen because of its genetic "parents," creating a potentially huge market for U.S.-created embryos among non-U.S. nationals in the hope that the resulting child might produce an entry for the delivering mother's citizenship claims.

Conclusion: Reframing Citizenship

I would like to think that this possible outcome of birthright citizenship might be too convoluted even for most pro-life ideologues to support, for we could just as easily say that by freezing the embryos, in vitro medical personnel are *denying* them citizenship. In other words, the practical result of declaring that embryos produced by U.S. citizens are themselves citizens would be to outlaw in vitro fertilization altogether because it would inevitably result in the denial of citizenship rights to *some* rightful citizens.[67]

Certainly, given the ardor of pro-life conservatives, anything is possible, and the new conservative balance of the Supreme Court increases its likelihood of success. As Justice Ginsburg noted in her *Carhart* dissent, both Congress and the Court relied on claims diametrically opposed to the facts. But the boomerang effect on immigration of making citizenship claims for fetuses and embryos is probably the strongest retardant. The Constitution's stipulation of *birth* as the foundation of citizenship is something feminist and disability theorists should continue to stress, pointing out the hypocrisy and inconsistency of treating fetuses as citizens when they are not, while treating the disabled and women as noncitizens.

Reframing the issue in terms of citizenship has another advantage: it is easier to claim, and to understand, that women and the disabled are currently not seen as equal citizens than it is to see women and the disabled as less than human. The former "merely" requires changes in the law. As difficult as that is, the latter requires a complete reorientation of our psychic worlds. The social inferiority of women and the disabled is so normalized as to have become part of the definition of *female human* and *disabled human*. Thus, even though citizenship rights are frequently denied to women and the disabled, citizenship *as a concept* cannot permit such a hierarchy. Humanity, by contrast, can, as the historical canon of political theory attests.[68]

Focusing on equal citizenship would also allow supporters of embryonic stem cell research and abortion rights to participate in framing the debate, rather than simply reacting to the pro-life lobby's arguments. Indeed, switching the focus to citizenship could help disarm the rhetorical efforts to define the embryo and fetus as a human. Claims for women's citizenship, for instance, could have been used to claim rights

[67] See Mary Lyndon Shanley, Chapter 15, on the relationship between in vitro fertilization and women's citizenship.

[68] See Susan Moller Okin, *Women in Western Political Thought* (Princeton, NJ: Princeton University Press, 1979); Nancy J. Hirschmann, *Gender, Class, and Freedom in Modern Political Theory* (Princeton, NJ: Princeton University Press, 2008).

to prenatal care for women as citizens of the state entitled to social welfare, rather than the rights of fetuses as persons. They could have pointed out the obnoxiousness of the Unborn Victims of Violence Act by forcing us to recognize that pregnant women are no less valuable than other citizens of either gender, let alone "unborn persons." Similarly, focusing on citizenship of the disabled requires that we think through the full implications of *denying* stem cell research for the human status of the sick and disabled.

Citizenship thus explicitly brings the *politics* of stem cell research and abortion into the ethical debate. Under the rubric of morality, the current debate has tried to hide the politics and power that are at work in the issue of stem cell research. But in the process, opponents of the research, like opponents of abortion, distort and hide the central questions I have identified here. If citizenship frames the discussion, an entirely different set of issues comes to the fore such as distributive issues over whether funding should be directed to intensive care or to cures, determination of property rights, ranging from intellectual property to the patenting of cell lines to parental ownership of embryos, and rationing health care and freedom of choice in medical treatment. Decisions about resource allocation, and about who will live and who will die, reflect political values and arguments, not just moral ones. They are a function of power and of the political struggle of various groups to access power. That in turn provides another basis for understanding the consequences of declaring that embryos constitute human life fully equivalent to a born person. Indeed, it facilitates the recognition of the development of an embryo *into* a human life, rather than viewing it as an either/or proposition.

Recognizing gradations in embryonic and fetal development, so key to the concept of viability that underwrites most constitutional law on abortion since *Roe*, would permit us more complexity and subtlety in making distinctions between embryos that are two or three days old and those that are several weeks old, an important distinction even in certain theological circles, or between surplus embryos created for in vitro fertilization and those explicitly created for research purposes. As long as research opponents hang on to the blind ideological claim that life begins at conception, even when there is theological disagreement over that issue, there is little hope for a rational public policy that treats women as well as the disabled as equal citizens. Feminist and disability theorists, by turning their attention to equal citizenship, can change the debate and its consequential outcomes for law and public policy.

8

Representation, Discrimination, and Democracy: A Legal Assessment of Gender Quotas in Politics

Anne Peters and Stefan Suter

Introduction: Scenes of Switzerland

In Switzerland, women were not enfranchised on the federal level until 1971. Of twenty-six cantons, the last to allow women to vote in cantonal elections was Appenzell-Innerrhoden in 1990. This reform was not made through legislative processes, but only after female citizens complained to the Swiss Federal Supreme Court.[1]

Despite late enfranchisement, citizens in Swiss cantons actively campaigned for delegate quotas, particularly during the 1990s. Although ultimately unsuccessful, campaigns aimed at delegate quotas for women for federal political offices[2] and in two cantons, Solothurn and Uri. In the Swiss system of direct democracy, cantonal initiatives are scrutinized for their compatibility with the federal constitution before they are submitted to the people for a popular vote. Regarding the two cantonal quota initiatives, the Swiss Federal Supreme Court issued decisions in 1996 and 1998.[3] In its first decision, the Federal Supreme Court considered a far-reaching proposal to reserve 50 percent of the seats of all elected offices in the legislative, executive, and judicial branches in Solothurn for women. The proposal requested that all open positions be earmarked for the underrepresented sex until men and women were represented "according to their proportion in the canton's population." The Court found this bill manifestly unconstitutional due to its "obvious disproportionality" in curtailing active and passive voting rights.[4]

[1] Bundesgericht (BGer, Federal Court), Nov. 27, 1990, 116 Entscheidungen des Schweizerischen Bundesgerichts (BGE) Ia 359 (Switzerland).

[2] Three federal popular initiatives (proposals for constitutional amendments) proposing gender quotas have been launched, but unsuccessfully. Two did not receive enough signatures to be put to a vote, and the third was rejected by 82 percent of the voters and by all cantons.

[3] See Swiss scholarship on this matter: Kathrin Arioli, ed., *Frauenförderung durch Quoten* (Basel, Switzerland: Helbing and Lichtenhahn, 1997); Denise Buser and Tomas Poledna, "Politische Quoten auf dem Schafott – Reflexionen zum Bundesgerichtsurteil zur 'Solothurner Verfassungsinitiative'," 6 *Aktuelle juristische Praxis* 981 (1997).

[4] BGer, March 19, 1997, 123 Entscheidungen des Schweizerischen Bundesgerichts (BGE) I 152 (Switzerland).

In its second judgment, the Federal Supreme Court partly upheld a more moderate initiative in Uri. The Court found unconstitutional a proposal in which "nearly half," but "*at least one third*" of members of public boards and institutions elected by the people must be women because this would unduly infringe on voters' rights. However, the Court upheld in part a similar proposal relating to political offices elected by the canton's legislature. It found that a "one-third minimal quota" was a proportionate and temporary measure and was thus consistent with the anti-discrimination clause of the Swiss Constitution and Article 25 of the International Covenant on Civil and Political Rights (ICCPR).[5] However, the proposal failed by a large majority in a popular referendum in Uri.[6] Similar local initiatives were also defeated.[7]

These appear to be the sole instances worldwide in which the entire affected voting-age population was directly asked to decide on gender quotas in politics. The result is clear: Swiss citizens disapprove of electoral gender quotas. We suspect that people in other Western democracies would agree.

What is at stake here? Electoral gender quotas are designed to increase women's presence in politics and, eventually, to transform the political landscape. To meet this goal, quota policies worldwide are spreading, despite the risks of discrimination and disruption of democracy.

Women in Democratic Politics: Some Facts

Although women were enfranchised in most democratic countries during the twentieth century, most recently in Samoa, in 1990,[8] they are underrepresented in all national parliaments. In recent decades, there has been gradual but extremely slow progress. In February 2009, 18.4 percent of all members of parliaments (MPs) worldwide were women.[9] Although this is a low figure, it constitutes an increase by more than 50 percent over the last thirty years.[10]

[5] BGer, Oct. 7, 1998, 125 Entscheidungen des Schweizerischen Bundesgerichts (BGE) I 21 (Switzerland).

[6] Rejected by 84 percent of the popular vote on June 13, 1999.

[7] In the city of Lucerne, an initiative for enacting a 40 percent quota for municipal authorities and commissions was rejected with a 71 percent vote on March 12, 1995. In the city of Berne, an amendment of the community statute sought to introduce a 40 percent quota for the city council. This was rejected by a 68 percent vote on Sept. 10, 1995.

[8] More recently, several Arab Gulf states introduced or expanded women's suffrage in their popular assemblies (Bahrain in 2002, Oman in 2003, Kuwait and Qatar in 2005, and the United Arab Emirates in 2006). However, elected officials hold little or no real power in these authoritarian regimes. Despite universal suffrage, women are currently not represented in the parliaments of Belize and of various oceanic microstates because no women were elected (Federated States of Micronesia, Nauru, Palau, the Solomon Islands, Tuvalu, status as of February 2009: see "Women in National Parliaments," Inter-Parliamentary Union, available at http://www.ipu.org/ [accessed March 11, 2009]).

[9] All figures are as of February 2009, if not indicated otherwise. This figure aggregates the membership of upper and lower houses. "World Average," Inter-Parliamentary Union, available at http://www.ipu.org/ (accessed March 11, 2009).

[10] "Women in Politics: 60 Years in Retrospect," Inter-Parliamentary Union, available at http://www.ipu.org/ (accessed March 11, 2009).

As of this writing, the highest proportion of female delegates sits in the Rwandan Parliament (56.3 percent). Apart from this special case, Nordic countries have the most female parliamentarians (41.4 percent). In the Americas, female delegates make up 21.8 percent. In Europe, female representation in parliaments amounts to 19.3 percent, with a decisive drop in the parliaments of postsocialist/Communist countries after the political transformation and the abandonment of the Communist quota schemes. The lowest proportion of female parliamentarians is in the Arab states (9.7 percent).[11]

Electoral gender quotas are rules or agreements aimed at changing the composition of the pool of potential candidates (notably officeholders within political parties), candidates who stand for election, or those elected. Quotas may be voluntary (prescribed by internal party regulations) or prescribed by law. Gender quotas were first introduced in the 1980s and have dramatically increased since then. The trend toward quotas has been incited by international norms and supported by the mobilization of women and the recognition by political elites that gender quotas convey strategic advantages.[12]

Electoral gender quotas exist in 100 states in one of the mentioned forms.[13] In fifteen states, quotas are constitutionally entrenched. Quota provisions for national parliament elections are in force in forty-five states. In thirty-three states, there is regulation of quotas on the subnational level. Voluntary political party quotas exist in at least 169 political parties in sixty-nine states. Current quota types vary in different world regions.[14] Parliamentary seats are reserved mainly in Africa, Asia, and the Middle East. Voluntary party quotas are most common in Western Europe, and electoral candidate quotas are found primarily in Latin America.

Quota regulation also depends on the electoral system. Quotas exist mostly in countries with a system of proportional voting in multimember constituencies. Conversely, electoral systems relying on single-member constituencies and a majoritarian (winner takes all) system (e.g., the elections to the U.S. Congress or the British House of Commons) can hardly accommodate quota schemes.

Legally imposed quotas can be divided into two subgroups: reserved seats and candidate quotas. The former scheme exists, for example, in Afghanistan, Uganda, Rwanda, and India (at the local level). In those countries, the national constitution reserves parliamentary seats for women.[15] Candidate quotas, which prescribe

[11] For more figures, see Table 9.1 in this volume.

[12] Mona Lena Krook, "Reforming Representation: The Diffusion of Candidate Gender Quotas Worldwide," 2 *Pol. and Gender* 303 (2006).

[13] All figures on quotas are from the International Institute for Democracy and Electoral Assistance (International IDEA) (Stockholm, Sweden), "Global Database of Quotas for Women," available at http://www.quotaproject.org/ (accessed March 11, 2009).

[14] For international and transnational influences on the regional spread of quotas see Krook, "Reforming Representation," at 310–11.

[15] See Constitution of Afghanistan, Article 83(6), adopted on Jan. 4, 2004; Constitution of the Republic of Uganda, Article 78(1)(b), adopted on Sept. 22, 1995; Constitution of the Republic of Rwanda, Article 76(2), adopted on May 26, 2003; and Constitution of India, Article 243T(2), adopted on Nov. 26, 1949.

a minimum number of female party candidates on the ballot, without necessarily guaranteeing the election of women, are far more widespread. The most effective form of candidate quotas with placement mandates and enforcement mechanisms exists in four European states: France,[16] Belgium,[17] Portugal,[18] and Spain.[19] In contrast, in Italy, whose parliament has the lowest number of female MPs in Europe, a delegate quota bill was defeated in 2006.[20]

The most frequent type of political gender quota is one with voluntary internal party rules, which apply to internal processes of candidate selection, the staffing of internal decision-making bodies, or the nomination of electoral aspirants. In majoritarian election systems, internal party quotas are the only realistic gender quota option. The first gender quota in the world was a party quota introduced in Argentina in the early 1950s by the Peronist Party for congressional elections. On a large scale since the 1980s, party quotas have been adopted by leftist, socialist, green, and radical parties, which write women's empowerment on their agenda, favor interventionist policies, and often have more female party officials demanding quotas.

In the United States, the Democratic Party introduced soft gender targets and recommendations in its charter in 2005, but no hard quotas.[21] The American Republican Party Rules state that "each state shall *endeavor to have equal representation* of men and women in its delegation to the Republican National Convention."[22] In Switzerland, the Federal Social Democrat Party has had a 40 percent quota for women on party lists since 1986, and the Green Party (Grüne Partei) adopted a 50 percent quota for women in 1987. In Germany, the Green Party (now Bündnis 90/Die Grünen) started in 1986 with a 50 percent quota for all ballot lists to party-internal and parliamentary elections. The same scheme has been endorsed by the Linkspartei. The

[16] Fifty percent quota, zipping mechanism, noncompliant lists result in a reduction of public subsidies for the party. Article L264 Code Électoral, as modified by the Loi no. 2007-128 of Jan. 31, 2007, Journal Officiel de la République Française (J.O.) (Official Gazette of France) of Feb. 1, 2007, at 1941 (tightening the quota regulation of 2000).

[17] Fifty percent quota, the candidates on the first two list positions may not be of the same sex, noncompliant lists are rejected. Article 117bis Code Électoral, as modified by the Loi portant diverses modifications en matière de législation électorale of Dec. 13, 2002, Moniteur Belge (Official Gazette of Belgium) of Jan. 10, 2003, at 809.

[18] Thirty-three percent quota, no more than two successive candidates may be of the same sex, noncompliant lists result in a reduction of public subsidies for the party. Lei Orgânica 3/2006 of Aug. 21, 2006, Diário da República (Official Gazette of Portugal) of Aug. 21, 2006, at 5896.

[19] Forty percent quota, each sex must be represented by at least 40 percent in each tranche of five posts on a list, noncompliant lists are rejected. Article 44bis Régimen Electoral General, as modified by Ley Orgánica 3/2007 of March 22, 2007, Boletín Oficial del Estado (Official Gazette of Spain) of March 23, 2007, at 12611. See, on the constitutionality of this scheme, Spanish Constitutional Court (STC 12/2008) (Jan. 29, 2008).

[20] The proposed legislation was defeated in the Senate on Jan. 24, 2006, by 41 to 34 votes, with 240 lawmakers absent. Antonella Rampino, "Le votazioni in un'aula quasi deserta rendono sempre piu' difficile l'approvazione della legge," *La Stampa*, Jan. 25, 2006, at 5.

[21] Charter and bylaws as amended by the Democratic National Committee on Dec. 3, 2005.

[22] Rules of the Republican Party of Aug. 30, 2004, Rule 14, Sections (d) and (e) (emphasis added).

German Social Democrats introduced a quota for women for all party offices and ballot lists in 1988.[23]

Meanwhile, these party policies have induced more conservative parties to sponsor and nominate women candidates. Liberal parties that oppose quota regulations are hard-pressed to demonstrate that equal representation can be achieved without a straightjacket. Overall, voluntary party quotas are widespread, but in many cases, the quota targets are not met.

In countries undergoing complete constitutional and legal reform, there is a greater window of opportunity for the introduction of quota laws than in established regimes. Moreover, contemporary transition processes are tightly embedded in international law. In this context, it appears that gender balance in decision making is regarded as an important component of the regime's legitimacy, particularly in transitional and postconflict states. Gender quotas are used as a means to reach this balance.[24]

Some new state constitutions, which were framed under supervision of the international community and in cooperation with international bodies, such as in Afghanistan (Constitution of 2004) and Iraq (Constitution of 2005), foresee gender quotas for the national parliament.[25] In Kosovo, the United Nations Interim Administration Mission in Kosovo (UNMIK) Regulation 39 of 2000 established a 30 percent quota for women among the first fifteen candidates on party lists for all local and national elections.[26] The latter rule provoked both international and local resistance. These reactions reflect the doubts about the sustainability of gender-balanced representation in previously authoritarian states that lack a liberal democratic tradition and, until recently, did not even allow women to participate in public affairs.

Despite their adoption, electoral gender quotas are still controversial. It is not coincidental that the word *quota* has been largely eliminated in our political vocabulary. International documents and countless national statutes generally avoid the word, even when advocating and endorsing measures that amount to numerical apportionments.

[23] Since 1998, under the 40 percent rule, it is required that the ballot lists should be zipped, with the option of allocating every fifth place to someone of either sex. Both quotas (for party offices and for ballot lists) shall be temporary until 2013.

[24] In Afghanistan, Bosnia and Herzegovina, East Timor, Kosovo, Mozambique, Rwanda, and South Africa. In a recent resolution relating to postconflict regimes, the United Nations Security Council "urge[d] Member States to ensure increased representation of women at all decision-making levels in national, regional and international institutions and mechanisms for the prevention, management, and resolution of conflicts," SC Resolution S/RES/1325 (2000), at para. 1.

[25] Constitution of Afghanistan, Article 83(6), adopted on Jan. 4, 2004; Constitution of Iraq, Article 47(4), adopted on Oct. 15, 2005.

[26] Section 4.2 of UNMIK Regulation no. 2000/39 on the municipal elections in Kosovo of July 8, 2000.

Legal Bases and Legal Limits of Political Gender Quotas

Both voluntary party quotas and mandatory delegate quotas create a number of legal problems. These problems have attracted far less legal scrutiny than gender or racial quotas in business and education.[27] Gender quotas *in politics* have only been the subject of discrete litigation in judicial and arbitral bodies in Europe and the Americas, whose awards are in part inaccessible.[28] Our analysis concentrates on the specific features of the democratic process that suggest a different assessment of electoral gender quotas than of quotas in the professional sphere.

There is no hard international legal obligation to introduce quotas in domestic political systems. International conventions oblige state parties to enfranchise their female citizens. The most important provisions are Article 25 of the ICCPR of 1966,[29] Article 7 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) of 1979,[30] and Articles I to III of the Convention on the Political Rights of Women of 1953.[31] However, none of these conventions requires gender-based numerical goals or quotas.

Several instruments allow, or even encourage, states to take temporary special measures to promote gender equality. The rationale of these clauses is that the general principle of formal gender equality must be partly and temporarily set

[27] For employment quotas in the EU: ECJ, ECR 1995, I-3051 – *Kalanke*; ECR 1997, I-6363 – *Marschall*; ECR 2000, I-1875 – *Badeck*; ECJ, ECR 2000, I-5539 – *Abrahamsson*. On quotas in education and procurement in the United States: *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Adarand Constructors v. Pena*, 515 U.S. 200 (1995). In scholarship, Anne Peters, *Women, Quotas, and Constitutions* (Dordrecht, Netherlands: Kluwer, 1999).

[28] United States: *Bachur v. Nat'l. Democratic Party*, 836 F.2d 837 (4th Cir. 1987); Italy: Racc. Uff. corte cost., decision 422 of Sept. 6, 1995, Gazz. Uff., 1a Serie speciale, 39, 1995, 15; United Kingdom: Industrial Tribunal Leeds, *Jepson v. The Labour Party*, decision of Jan. 19, 1996, IRLR 116 (1996); Switzerland: See sup. n. 4–5; Germany: Federal Arbitral Tribunal of the Political Party, *Bündnis 90/Die Grünen*, arbitral decision of Nov. 7, 1998, Neue Verwaltungsrechtszeitschrift-Rechtsprechungsreport 1999, 546; France: CC decision 98-407, Jan. 14, 1999, J.O. of Jan. 20, 1999, at 1028; CC decision 2006-533, March 16, 2006, J.O. of March 24, 2006, at 4446; Costa Rica: Supreme Election Tribunal, decision 1863 of Sept. 23, 1999; Columbia: Corte Constitucional de Colombia, decision (*sentencia*) C-371/00 of March 29, 2000; Spain: Spanish Constitutional Court (STC 12/2008) of Jan. 29, 2008.

[29] ICCPR, Dec. 16, 1966, 999 UNTS 171, entered into force on March 23, 1976, see the relevant text of Article 25, discussed in the section "The Gender-Neutral Right to Run for Elections."

[30] CEDAW, Dec. 18, 1979, 1249 UNTS 13, entered into force on Sept. 3, 1981, Article 7: "States Parties shall take all appropriate measures to eliminate discrimination against women *in the political and public life* of the country and, in particular, shall ensure to women, on equal terms with men, the right: (a) To vote in all elections and public referenda and *to be eligible* for election to all publicly elected bodies; (b) To *participate* in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government" (emphasis added).

[31] Convention on the Political Rights of Women, March 31, 1953, 193 UNTS 135, entered into force on July 7, 1954, Article I (entitlement to vote without any discrimination); Article II (eligibility for election without any discrimination); Article III (entitlement to hold public office without any discrimination).

aside to achieve substantive equality.[32] In international practice, a consensus has emerged that gender-based quotas are, in principle, covered by these authorizations. The most important international clause on temporary special measures in favor of women is Article 4 of CEDAW.[33] The CEDAW Committee views numerical goals connected with time frames and quota systems as a "measure" in the sense of Article 4.[34] Both in General Recommendations and when discussing states parties' reports, the CEDAW Committee has recommended that states parties make more use of temporary special measures, including "positive action, preferential treatment or quota systems . . . to advance women's integration into . . . politics."[35] Numerous other international institutions, including the Human Rights Committee[36] and the Inter-Parliamentary Union,[37] have formulated similar recommendations.

The Beijing Platform for Action asked for "positive measures" to combat the low proportion of women among political decision makers, including setting "specific targets" to increase substantially the number of women "in all governmental and public administration positions."[38] It also endorsed a 30 percent target for women in decision-making positions.[39] The General Assembly's Beijing + Five Resolution asked member states to "set and encourage the use of explicit short- and long-term time-bound targets or measurable goals, including, where appropriate, quotas, to promote progress towards gender balance, . . . especially in decision- and policy-making positions, in political parties and political activities" and to encourage the nomination of more women candidates, inter alia, through quotas.[40]

On the regional level, additional Protocol No. 12 to the European Convention of Human Rights[41] (ECHR) and numerous soft documents of the Council of Europe allow for, but do not mandate, temporary special measures or positive action to

[32] Cf. CEDAW Committee, General Recommendation no. 25 (2004), paras. 8 and 27.

[33] CEDAW, Article 4: "Temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved."

[34] CEDAW Committee, General Recommendations no. 5 (1988); no. 23 (1997), paras. 15 and 29; no. 25 (2004), at para. 22.

[35] CEDAW Committee, General Recommendation no. 5 (1988). See CEDAW Committee, General Recommendation no. 23 (1997), at para. 15, on "setting numerical goals and quotas."

[36] HR Committee, General Comment no. 28 (2000), at para. 29.

[37] Inter-Parliamentary Union, "Plan of Action to Correct Present Imbalances in the Participation of Men and Women in the Political Life," March 26, 1994, Section C, III.4; Inter-Parliamentary Union Assembly, "Beijing +10: An Evaluation From a Parliamentary Perspective," Resolution of Oct. 1, 2004, at para. 16.

[38] The United Nations Fourth World Conference on Women, Beijing, China, Sept. 1995, Platform for Action, Chapter G, "Women in Power and Decision-Making," paras. 186 and 190.

[39] Beijing Platform for Action, at para. 182, refers to this target as established by the United Nations Economic and Social Council (ECOSOC) in 1990.

[40] GA Resolution A/RES/S-23/3 of June 10, 2000, paras. 66a) and 81b).

[41] Protocol no. 12 of Nov. 4, 2000 (entered into force on April 1, 2005), preamble: "The principle of non-discrimination does not prevent States Parties from taking measures in order to promote full and effective equality, provided that there is an objective and reasonable justification for those measures."

enhance female participation in political life.[42] Within the European Union (EU), the Council recommended that the EU member states "promote a balanced participation by women and men at all levels in governmental bodies and committees."[43] Acting upon that recommendation, the European Commission endorsed a 40 percent quota for its expert groups and commissions.[44] Finally, several international organizations in recent years embraced gender quotas in their staffing policies.

The introduction of domestic gender quotas has been influenced by these clauses and recommendations. It is no coincidence that the majority of Latin American countries that instituted legal quotas did so after the 1995 Fourth World Conference on Women in Beijing.

Legal problems with electoral gender quotas exist in basically two dimensions: they may be discriminatory, and they may be undemocratic. In the first dimension, gender-based electoral quotas restrict competing male candidates' right to stand for elections on equal footing. The CEDAW Committee acknowledged this conflict when it emphasized that "States parties have an obligation to ensure that temporary special measures are clearly designed to support the principle of equality and therefore comply with constitutional principles which guarantee equality to all citizens."[45] In the second dimension, gender-based electoral quotas may interfere with the party members' rights to elect their officeholders in internal elections and (in general elections) with the voters' constitutional right to elect candidates in free suffrage. Furthermore, quotas imposed by the legislature on the parties to some extent conflict with the political parties' autonomy and may therefore be undemocratic.

Discrimination

In this section, we will demonstrate that narrowly tailored electoral gender quotas do not unfairly discriminate against men, although they are in tension with the principle of nondiscrimination.

The Explanatory Report on Protocol no. 12, at para. 16, does not mention quotas and emphasizes that the protocol does not impose any obligation to adopt special measures.

42 On temporary special measures for enhancing female participation in political life, see the Council of Europe (CoE) Declaration on the Equality of Women and Men of Nov. 16, 1988, at para. 11; Recommendation (2003) 3 on balanced participation of women and men in political and public decision making, adopted by the CoE Committee of Ministers on March 12, 2003, recommending that the governments of member states "consider setting targets to a time scale with a view to reaching a balanced participation of women and men in political and public decision-making" and "positive action measures, which would facilitate a more balanced participation of women and men in political and public decision-making" (recommendation V and appendix A.1, with "balanced participation of women and men" meaning "that the representation of either women or men in any decision-making body in political or public life should not fall below 40 percent," ibid., at 7; see also 22 and 24).

43 96/694/EC: Council Recommendation of Dec. 2, 1996, on the balanced participation of women and men in the decision-making process, OJ 2000 L 319, 11–15, Section I.4(a). The Council also called on the EU institutions to "design a strategy for achieving balanced participation" (Section II).

44 2000/407/EC: Commission decision of June 19, 2000, relating to gender balance within the committees and expert groups established by it. OJ 2000 L 154, 34–35.

45 CEDAW Committee, General Recommendation no. 23 (1997), at para. 15.

The Gender-Neutral Right to Run for Elections

Technically speaking, different (national, international, subnational, or European) anti-discrimination, equal protection, or equal opportunity norms are applicable to different cases, depending on the jurisdiction and the type of elections at issue. Some legal systems have special provisions on electoral rights[46] or acknowledge unwritten voting rights. Male candidates' political right to stand for elections encompasses their entitlement to remain free from sex discrimination in this process. This entitlement is a *lex specialis* of the more general right not to be discriminated against on account of gender. General anti-discrimination law thus supports the claim that no political aspirant or candidate should be given preference on the basis of gender, even without a specific guarantee of equal voting rights. Article 25 of the ICCPR expresses the core idea as follows: "Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 [which comprises, inter alia, sex] . . . to vote and to be elected at genuine periodical elections."

Limitations and Balancing

The prohibition on gender discrimination is not absolute, however. The Human Rights Committee, for example, acknowledged that state parties may restrict the right to stand for election (as enshrined in Article 25 of the Covenant), provided that such restrictions are established by law and are justifiable by "objective and reasonable criteria."[47] Similarly, the ECHR requires positive measures in favor of women to have an "objective and reasonable justification."[48]

Under U.S. constitutional equal protection analysis, gender-based distinctions must be narrowly tailored to serve an important governmental objective.[49] Although the right to be a candidate in elections is not regarded as a fundamental right,[50] gender quotas must reasonably promote important ends, without unreasonably restricting the electoral rights of men.

Thus reasonable measures of positive gender discrimination may lawfully restrict male passive electoral rights. Realizing genuine gender equality and broader female participation in politics, which is in many legal orders even constitutionally

[46] See, e.g., ICCPR, Article 25; Protocol no. 1 to the ECHR, Article 3; U.S. Constitution, Amendment XV; German Basic Law, Article 38; Swiss Constitution, Article 34.

[47] Human Rights Committee, General Comment 25 (57), UN Doc. CCPR/C/21/Rev.1/Add.7 (1996), paras. 4 and 15. See also Manfred Nowak, *U.N. Covenant on Civil and Political Rights – CCPR Commentary*, 2nd ed. (Kehl, Germany: N.P. Engel, 2005), para. 22.35.

[48] See Preamble of Additional Protocol no. 12; see also Explanatory Report, at para. 16.

[49] *Craig v. Boren*, 429 U.S. 456 (1976).

[50] The Court need not employ strict scrutiny and the "compelling interest" test to all laws restricting candidate access to the ballot. See John E. Nowak and Ronald D. Rotunda, *Constitutional Law*, 7th ed. (St. Paul, MN: Thomson, 2004), at 1019–20. The Supreme Court has so far scrutinized the regulation of elections only with a view to their compatibility with First Amendment rights of the states' citizens and the rights of parties to political association.

entrenched, is an objective and reasonable purpose. Judicial decisions have espoused that view.[51] A German arbitral tribunal found that curtailment of male candidates' rights, who were prevented by a political party's zipping scheme from figuring on reserved listing slots, was justified by the German Constitution's *mandate to realize substantial equality of the sexes* (Article 3, Section 2, German Basic Law).[52] A slightly different angle was taken by a U.S. Court of Appeals, which upheld a gender limitation on eligible candidates as a means to broaden public participation in party affairs, protected by the right of association.[53]

Gender equality objectives must be balanced against men's fundamental right not to be discriminated against in the competition for political positions. The starting point should be the analysis of specific factors that impede the emergence of more females in the multistage political recruitment process.[54] Women must join the pool of eligibles, decide to become candidates, be nominated by their political parties, and then win elections. In all stages, women face socioeconomic, political, psychological, and ideological obstacles. Women are far less likely than men to emerge from the pool of eligible candidates and to run.[55] Although women have gained access to power through alternative structures, particularly in nongovernmental organizations, this is not a substitute for governmental and political party participation.

Overall, the political sphere, being concerned with public affairs, seems to be – more than the private sector – male coded. Political life is organized according to norms, values, and lifestyles that connote a certain type of masculinity. Politics implies competition and confrontation, winners and losers. Political action requires self-promotion, marketing, demagoguery, ruthlessness, and aggression – qualities that are culturally accepted in men but not in women.[56] Consequently, women politicians are typically relegated to education, family affairs, health, and social policy, which rank low in the hierarchy of government functions.

The overall masculine image of politics may influence voters' attitudes. In the 1990s, voters still considered female candidates less competent to handle the military,

[51] See, e.g., the Columbian Constitutional Court, decision (*sentencia*) C-371/00 of March 29, 2000, paras. 20–21.

[52] Federal Arbitral Tribunal of the Political Party, *Bündnis 90/Die Grünen* (1998) (Germany) (sup. n. 28) in a lawsuit between a local party association and a state association of the party. See sup. n. 4–5 for the case law of the Swiss Federal Court.

[53] *Bachur*, at 837.

[54] See for the following, besides the literature in the ensuing notes, Leonie Huddy and Nayda Terkildsen, "The Consequences of Gender Stereotypes for Women Candidates at Different Levels and Types of Office," 46 *Pol. Res. Q.* 503 (1993); Andrew Reynolds, "Women in the Legislatures and Executives of the World: Knocking at the Highest Glass Ceiling," 51 *World Pol.* 547 (1999); Pamela Paxton and Sheri Kunovich, "Women's Political Representation: The Importance of Ideology," 82 *Soc. Forces* 87 (2003); Richard L. Fox and Jennifer L. Lawless, "Entering the Arena? Gender and the Decision to Run for Office," 48 *Am. J. Pol. Sci.* 264 (2004); Joni Lovenduski, *Feminizing Politics* (Cambridge: Polity Press, 2005), at 45–82; Nadezhda Shvedova, "Obstacles to Women's Participation in Parliament," in Julie Ballington and Azza Karam, eds., *Women in Parliament: Beyond Numbers*, *International Institute for Democracy and Electoral Assistance* (Stockholm: IDEA, 2005), at 33–50.

[55] Fox and Lawless, "Entering the Arena," at 275.

[56] Lovenduski, *Feminizing Politics*, at 54.

war, and the economy.[57] Today, voters may have grown more accustomed to women in powerful positions, and stereotypes may be weakening. Motherhood and a focus on children may become a political asset, a method of humanizing a candidate and connecting with voters. However, even recent empirical research notes a persisting public belief that men make better political leaders.[58]

In addition, there are supply-side factors. Women come forward in the political arena in smaller numbers than men, due to candidate resources (such as time, money, political connections, educational qualifications, experience, skills, and career flexibility) and motivational factors,[59] limited party support, lower self-confidence,[60] and less media attention to women's contributions.

Socioeconomic conditions also matter. Except in high offices, political engagement is a pro bono activity. Many women who already shoulder a double burden do not wish to triple it by balancing family life, a professional career, and parliamentary work with its family-unfriendly schedule. Women are found in smaller proportions in influential brokerage professions from which national politicians are drawn. The lesser wealth and income of women creates gender-typical financial constraints and constitutes at least a psychological barrier against expensive political campaigning (even if empirical analysis suggests that a candidate's gender has only a minimal effect on his or her ability to raise funds).

Finally, the electoral system has an impact on female participation in parliaments. Majority systems have a disproportionately negative impact on women, whereas systems of proportionate representation tend to produce more gender-neutral outcomes.[61] Another factor is the listing system. In closed list systems, where electors vote for parties, rather than candidates, the crucial stage is nomination by the party. If a sufficient number of women are nominated as candidates and placed in electable positions on party lists, female candidates have good chances. In contrast, open list systems, where the voter can alter the composition of the list, tend to contribute to the elimination of women candidates.[62]

57 Huddy and Terkildsen, "The Consequences of Gender Stereotypes for Women Candidates at Different Levels of Office," at 519–20.

58 For current societal attitudes toward women across the globe, see the World Values Survey available at http://www.worldvaluessurvey.org/ (accessed March 11, 2009). See also Eileen McDonagh, Chapter 9.

59 Fiona Mackay, *Love and Politics: Women Politicians and the Ethics of Care* (London: Continuum, 2001), at 28; Jessica D. Nordell, "Positions of Power – How Female Ambition Is Shaped," *Slate*, available at http://www.slate.com/ (accessed Nov. 23, 2006); Shelley J. Correll, "Constraints into Preferences: Gender, Status, and Emerging Career Aspirations," 69 *Am. Soc. Rev.* 93 (2004).

60 For self-fulfilling prophecies of female incapacity, see Ilan Dar-Nimrod and Steven J. Heine, "Exposure to Scientific Theories Affects Women's Math Performance," 314 *Sci.* 435 (2006).

61 Richard E. Matland, "Enhancing Women's Political Participation: Legislative Recruitment and Electoral Systems," in Ballington and Karam, *Women in Parliament*, at 93–111.

62 Julie Ballington and Richard Matland, "Political Parties and Special Measures: Enhancing Women's Participation in Electoral Processes," paper presented at the UN Office of the Special Adviser on Gender Issues and Advancement of Women (OSAGI) Expert Group Meeting on Enhancing Women's Participation in Electoral Processes in Post-conflict Countries, Jan. 19–22, 2004, EGM/ELEC/2004/EP.8, at 4–5.

In sum, women's political activity faces structural barriers. While all institutional, social, economic, and cultural factors are in flux, and some causes of female underrepresentation in politics are also likely changing, the barriers for women are, for the time being, arguably higher and more entrenched than in professional life.

On the other side of the balance, the nature of democratic elections limits male legitimate expectations and lessens the material burden for men. In politics, the nomination and election of a candidate as a party representative or officeholder results primarily from the personal and political choices of party comrades and citizens. Principles of fair recruitment, based on education, university diplomas, and professional qualification, are of minor importance. Being a politician is not just another kind of job. Voters are not obliged to strive for objectivity and neutrality, but instead are free to vote for candidates according to their personal preferences. Ideally, voters should decide rationally, but the voters' right to decide in secret, and even arbitrarily, is part of the democratic process. In this context, the gender factor is no more illegitimate than a candidate's personality or his or her ability to gain sympathy.

Even without gender-conscious listing, male candidates cannot count on being nominated, let alone being elected.[63] Therefore male candidates do not build up legitimate expectations and are thus less burdened by delegate quotas than by employment quotas. They are also less burdened for material reasons. Being excluded from a job because of one's gender may seriously affect the discarded candidate's life, his status, wealth, and eventually, the subsistence of his family. In contrast, political engagement is, in most cases, not a professional activity. Discrimination in this field has fewer material consequences.

Political Parties' Internal Quotas

Special considerations come into play for quotas that have not been introduced by law, but are entrenched only in statutes or charters of political parties. The Beijing Platform for Action specifically addressed political parties as well as governments and asked them to take measures to ensure women's equal access to and full participation in power structures and decision making.[64] Likewise, the CEDAW Committee encouraged political parties to "ensure that women have an equal opportunity in practice to serve as party officials and to be nominated as candidates for election" and mentioned "setting aside for women a certain minimum or percentage of positions on Party executive bodies."[65]

Political parties are private associations. While they are an indispensable part of the political process and perform a quasi-public function, the gist of a liberal party

[63] The Spanish Constitutional Court (STC 12/2008), on Jan. 29, 2008, stressed that men do not have any constitutional right to be a candidate (Part B II 9).

[64] Beijing Platform for Action, sup. n. 38, at Chapter G, "Women in Power and Decision-Making," paras. 191 and 192.

[65] CEDAW Committee, General Recommendation no. 23 (1997), paras. 28, 32, and 33.

democracy is that the parties are independent from government. This independence affects the determination of whether there is unfair discrimination against male candidates.

First, political parties themselves enjoy the right of association and of free speech. By introducing an internal quota system, the party seeks to testify about its political attitude and implement a program that will lend credibility to its organization. Increasing the number of female participants in decision making is a legitimate political objective. This objective is not an arbitrary or anti-democratic element in party politics, but pertains to the exercise of the right of association. The parties' rights of autonomy and association give them the right to use quotas to select delegates.[66] Because the parties' delegate selection methods also constitute free speech, the courts may not interfere on the ground that they view a particular expression as unwise or irrational.

On the other hand, in the absence of a horizontal effect on fundamental rights, private associations are not directly bound to observe the constitutional fundamental rights of burdened male members. In most legal systems, constitutional equal protection or nondiscrimination clauses do not directly govern parties' personnel and candidate management.[67] Although the principles of equal protection and nondiscrimination normally apply indirectly to the political parties' internal structure and to their listing policy via laws and statutes,[68] the standards to be observed by the party as a private actor may be less strict than those governing state action.[69]

Finally, the burden placed on men by internal party quotas can be justified by their consent. Internal party quotas are the result of democratic decision making within the party itself. Male party members are part of this process and are free to initiate a renegotiation of quotas. By joining and staying in a political party that endorses quotas, male party members explicitly or implicitly accept the party's listing system.

Formality, Temporariness, and Proportionality

Gender quotas for internal party offices and for the nomination of candidates for general elections do not invariably violate male candidates' right to be free from gender discrimination in the political nomination and election process. The greater need for political quotas and the relatively light burdens they impose distinguish

[66] *Bachur*, at 837.

[67] In the United States, it is disputed whether parties' delegate quotas constitute state action. If we qualify as state action all matters "integral to the electoral process" (*Seergy v. Kings County Republican Comm.*, 459 F.2d 308 [2d Cir. 1972]), the selection of party nominees is state action. But see Lisa Schnall, "Party Parity: A Defense of the Democratic Party Equal Division Rule," 13 *J. Gender Soc. Pol'y and L.* 381, 400–04 (2005).

[68] E.g., the German Constitution requires political parties to observe a "democratic party structure" (Article 21(1) of the Basic Law). This provision obliges the parties to comply with basic democratic principles, such as the equality of members, in particular to grant equal suffrage and equal eligibility.

[69] Federal Arbitral Tribunal of the Political Party, *Bündnis 90/Die Grünen* (1998) (Germany).

electoral quotas from employment quotas. However, there is a difference between reserved parliamentary seats and electoral quotas. Because reserved seats guarantee fixed results and eclipse a male occupation of those seats, they infringe on male candidates' rights more intensely. These quotas therefore need a stronger legal basis and should be written in constitutions. The few countries that do reserve seats for women in their national parliaments have constitutionally enshrined this measure.[70]

Electoral quotas constitute an admissible restriction upon formal gender neutrality and nondiscrimination if they are based in a formal law, are narrowly framed, and are temporary. Temporariness does not mean that time limits have to be established from the outset, as long as it is ensured that the measures will be lifted when their goals are reached.[71] The duration of a quota scheme may be determined by its functional result in response to a concrete problem and not by a predetermined passage of time.[72]

Ultimately, the assessment turns on the size of the quota. For instance, the Swiss Federal Supreme Court struck down a 50 percent quota for women but upheld a one-third quota.[73] Too high quotas appear as an excessive curtailment of male candidates' rights. We leave open the question of how high is too high, which should be answered in light of the fact that existing quota laws have nowhere led to an increase in women's presence up to the height of the quota. Overall, formally entrenched, reasonably high, temporary political quotas do not unfairly discriminate against men.

Democracy

The more interesting question is whether gender-based electoral quotas are compatible with democratic principles. Do quotas improve the democratic process because they increase the presence of women in politics, and – equally important – lead to more women-friendly policy outcomes? Numerous legal and political documents imply a positive answer. For instance, the CEDAW Committee asserted that "the concept of democracy will have real and dynamic meaning and lasting effect only when political decision-making is shared by women and men and takes equal account of the interests of both."[74] On a regional level, the 1992 Athens Declaration, issued by a European Summit convened on the initiative of the EU Commission, proclaimed "the need to achieve a balanced distribution of public and political power between women and men" and asserted that "a democratic system

[70] See Constitution of Afghanistan, Article 83(6), adopted on Jan. 4, 2004; Constitution of the Republic of Uganda, Article 78(1)(b), adopted on Sept. 22, 1995; Constitution of the Republic of Rwanda, Article 76(2), adopted on May 26, 2003; and Constitution of India, Article 243T(2), adopted on Nov. 26, 1949.

[71] BGer, Oct. 7, 1998, 125 Entscheidungen des Schweizerischen Bundesgerichts (BGE) I 21, at 43 (Switzerland).

[72] CEDAW Committee, General Recommendation no. 25 (2004), at para. 20.

[73] See the section "Introduction: Scenes of Switzerland."

[74] CEDAW Committee, General Recommendation no. 23 (1997), at para. 14.

should entail equal participation in public and political life;" it also asserted that "a balance between women and men" contributes "to building a meaningful and lasting democracy."[75] The 1996 Charter of Rome stated that women contribute to changing politics in terms of priorities, content, and decision-making practices; that the equal participation of women would reinvigorate democracy; and that democracy would "acquire a true and dynamic sense when women and men together define the values they wish to uphold in their political, economic, social and cultural life, and together take the relevant decisions."[76] A European Council Recommendation of 2003 considered that "the realization of balanced participation of women and men in political and public decision making would lead to better and more efficient policy making through the redefinition of political priorities and the placing of new issues on the political agenda as well as to the improvement of quality of life for all."[77]

Contrary to these statements, electoral quotas might actually be undemocratic because they erroneously focus on numbers and on purely descriptive, as opposed to substantive, representation. The assessment depends on the underlying model of democracy and representation.

Voters' Choices and Political Parties' Autonomy

It has been asserted that quotas on ballot lists unduly restrict the formation of the peoples' political will and conflict with constitutional and international guarantees of free suffrage. Similarly, quotas for party offices may unduly restrict the party members' right to choose candidates freely.[78] However, the right to free suffrage only requires that the voters can elect candidates without being subject to external pressure. It does not guarantee that specific candidates (male or female) will be presented. Citizens must accept the gamut of candidates offered by the political party. If a candidate has been put on the list because of her gender, this may simply provide an additional reason for the citizen not to give his or her vote to that candidate. The process of electing is not substantially modified by the quota. As long as the voter has the right to choose between competing candidates, his or her fundamental right to freely express his or her political will is not impaired.

For the same reason, a party statute reserving certain list positions for female party members in internal elections does not infringe on the party members' internal voting rights. The members remain free to decide which man or woman will

75 Athens Declaration, issued at the European summit of Women in Power on Nov. 3, 1992.

76 Charter of Rome, adopted at the European summit "Women for the Renewal of Politics and Society" on May 18, 1996.

77 Recommendation Rec (2003) 3 on balanced participation of women and men in political and public decision making, adopted by the Council of Europe Committee of Ministers on March 12, 2003, preamble. See also CoE Recommendation 1269 (1995), "Achieving Real Progress in Women's Rights as From 1995," paras. 1–2; EU Council Recommendation of Dec. 2, 1996, on the balanced participation of women and men in the decision-making process (96/694/EC), OJ L 1996, 319, 11–15, at para. 9.

78 Cf. *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217, 222 (1986).

receive a vote. Party quotas thus do not unduly restrict the voters' (or party fellows') fundamental right to free elections. A different matter would be a legal obligation imposed on voters to prefer female candidates, which would unduly infringe popular sovereignty.[79]

Quotas imposed by law on political parties prima facie interfere with the political party's autonomy. However, party autonomy is not unlimited. Various legal requirements for election procedures restrict the political parties' freedom to propose candidates, and these are generally considered legitimate.[80] But ballot quotas differ from those traditional limitations because quotas imply that the government takes side with a particular political agenda. Therefore quota laws could be considered an interference with the parties' program. However, this partiality is tempered by state laws that prescribe listing or ballot quotas for *all* parties. This intervention is admissible if it is endorsed by law or by the state constitution because it then forms part of the legal framework under which all political parties are bound to operate.[81] To conclude, quotas endorsed by law (preferably in a formal, parliamentary statute) do not infringe the political parties' legally protected autonomy.

Quotas and Representation

Electoral gender quotas are frequently thought to improve democratic representation. The merit of this argument depends on one's understanding of political representation.[82] Three relevant conceptions are descriptive, substantive, and symbolic representation. *Descriptive representation* is representation of one's kind, suggesting that a democratic parliament should be an exact portrait, in miniature, of the people. Descriptive representation has rarely been advocated as an end in itself, but instead rests on the assumption that the representative's characteristics are a guide to the actions he or she will take. Put differently, descriptive representation may

[79] This had been foreseen by Article 6 of the 1998 Columbian statute on adequate and effective participation of women in decision making (*proyecto de ley estatutaria* N°62/98 Senado y N°158/98 Cámara) and was struck down as unconstitutional by the Columbian Constitutional Court, decision (*sentencia*) C-371/00 of March 29, 2000, paras. 58–59.

[80] Under American constitutional law, "a State may enact laws that interfere with a party's internal affairs when necessary to ensure that elections are fair and honest." *Storer v. Brown*, 415 U.S. 724, 730 (1974). For an American litigation concerning reserved seats, see *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214 (1989), on a California law requiring that the chair rotate between residents of northern and southern California. The Court held that the regulations over the internal affairs of the political parties violated the political parties' free association rights because they directly affected who would represent the parties.

[81] See, e.g., Spanish Constitutional Court (STC 12/2008) of Jan. 29, 2008, Part B II 5–7. But see Columbian Constitutional Court, decision (*sentencia*) C-371/00 of March 29, 2000, at para. 69, holding as unconstitutional a legal provision prescribing a 30 percent quota for positions that may lead to popular elections because it constitutes a governmental intrusion into the internal organization of political parties and violates their autonomy.

[82] See Andrew Revee, "Representation, Political," in Edward Craig, ed., *Routledge Encyclopedia of Philosophy*, vol. 8 (London: Routledge, 1998), at 270–72; Hanna Fenichel Pitkin, *The Concept of Representation* (Berkeley: University of California Press, 1972); Anne Phillips, *The Politics of Presence* (Oxford: Clarendon Press, 1995), at 57–83.

matter because it enhances substantive representation. *Substantive representation* is the representation of interests. Finally, parliamentarians may represent the citizens, or a nation, in a *symbolic sense*. This concept highlights that the composition of the political elite has a social significance and affects people's self-image in politics. Symbolic representation matters because a pattern of representation that gives no recognition to the communal attachments through which people live their lives is (in psychological and cultural terms) hardly tolerable, even when changing the pattern of representation would have no discernible impact on the kind of politics. A democratically elected parliament can probably best be understood as a mix of different kinds of representation, which are all relevant for the quota debate.

Quotas and substantive representation

The principal democratic argument in favor of political gender quotas is that they enhance the substantive representation of women's interests, concerns, and needs and, in the long run, transform the entire political process and its outcomes (beyond narrow women's issues). Along these lines, the Beijing Platform for Action stated that "women in politics and decision-making positions in governments and legislative bodies contribute to redefining political priorities, placing new items on the political agenda that reflect and address women's gender-specific concerns, values and experiences, and providing new perspectives on mainstream political issues."[83] A European Council Recommendation claimed that women's presence in politics "is likely to give rise to different ideas, values and behavior which will result in more justice and equality in the world for both men and women."[84] The CEDAW preamble voices the states parties' conviction "that the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women on equal terms with men in all fields." Ultimately, the argument is that "taking into account gendered perspectives and involving both women and men in decision-making processes are a *sine qua non* of any democratic framework. Hence democracy, by definition, cannot afford to be gender-blind."[85] The CEDAW Committee also claimed that a female proportion of 30 to 35 percent would suffice to constitute a critical mass within political bodies, which would change the style, the procedures, and the results of the political process.[86]

All these claims rest on the premise that women as a group have specific interests and needs and that female politicians have, based on their specific social experience, different views, values, and skills. Female lawmakers and women in key political positions thus might bring about a different style of leadership and debate (less competitive and adversarial; more consultative and cooperative; more caring, open, and flexible; more ready to listen) and might raise the moral tenor of politics. Women politicians are believed to be more altruistic than men, more concerned

[83] Beijing Platform for Action, at Chapter G, "Women in Power and Decision-Making," at para. 182.
[84] EU Council Recommendation of Dec. 2, 1996, at para. 12.
[85] Julie Ballington, Introduction to Ballington and Karam, *Women in Parliament*, at 24.
[86] CEDAW Committee, General Recommendation no. 23 (1997), at para. 16.

with human consequences of policy, and more apt to pursue a politics of care. It is also assumed that women's presence will have a civilizing effect on parliamentary culture because male parliamentarians will behave differently in the presence of women.[87] On this basis, it is postulated that female politicians will redefine political priorities, place new issues on the political agenda, and implement different politics, not only in women- and family-related social and labor issues, but in all policy areas, ranging from child care facilities to flexible working hours, education, environmental protection, disarmament, and peacekeeping.

However, these claims imply that strong gender differences and polarities exist. They carry the danger of resurrecting dormant gender stereotypes and backfiring in contemporary conditions, as long as softness is considered to be nice for the ordinary political soldier but inappropriate at the very top of the political hierarchy. Moreover, pointing to distinct, authentic women's interests means to reproach deviant women as having false consciousness. Finally, the idea of a female advantage is irreconcilable with democracy because it posits as a starting point exactly what democrats must deny, namely, that one citizen group's voice is intrinsically better, more deserving of attention, more moral, than another group's voice.[88]

Therefore a more defensible claim is that even in the absence of a definable female collective angle on politics, the simple fact that women still are, as a group, relative newcomers in politics means that they do not know the codes and have not yet been socialized to the conventional art of doing politics. For this reason alone, women might import new styles and practices of decision making.[89] Overall, rather than relying on stereotypical assumptions, we should consider empirical research demonstrating that an increased presence of women in parliaments does *not* necessarily improve the substantive representation of women's interests and needs (see, on the empirical evidence, below).

However, the focus on substantive representation may be too narrow. Indeed, substantive representation cannot explain fully all meanings and functions of political representation. In a strictly antipaternalist perspective, substantive representation of interests is impossible because every autonomous individual must determine his or her own interests. From that perspective, the possibility of substantively acting for others breaks down. In any case, the constituency will, on many issues, not have an interest, or its members may have several conflicting interests. The representatives know of the voters' ignorance, apathy, and irrationality and of the diversity of their views and interests, so there is nothing (or nothing clear) for the representative to represent in substance.[90]

If *the* interests of women could be objectively defined, we would not need female representatives. In fact, we would then not need chosen representatives at all. Virtual

[87] Marian Sawer et al., eds., *Representing Women in Parliament – A Comparative Study* (London: Routledge, 2006), at 17.

[88] Phillips, *Politics of Presence*, at 75.

[89] Mercedes Mateo Diaz, *Representing Women? Female Legislators in West European Parliaments* (Essex, UK: ECPR Press, 2005), at 118.

[90] Pitkin, *Concept of Representation*, at 220.

representation (even by a benevolent dictator) would suffice. However, as soon as we admit that interests and needs (even if they may be gendered) cannot be precisely delineated, the emphasis shifts from an objectively defined set of interests and needs to a more exploratory notion. Then there is little to do but turn to the people who carry the interests.[91]

Quotas and descriptive representation

The second argument for electoral quotas draws on descriptive representation. Virtually all political actors acknowledge the serious underrepresentation of women in political institutions as a problem and desire membership of women in parliament in proportion to their number in the citizenry to create a proper composition of the legislature. For instance, the Athens Declaration stated that "equality requires parity in the representation and administration of Nations."[92]

The short formula for this idea is *parity democracy*. *Parity* is "the political expression of the fact that humanity is composed of two gendered halves and, therefore, its representative bodies must be analogously composed to be democratically legitimate."[93] Recently, Blanca Rodríguez Ruiz and Ruth Rubio-Marín have made a strong argument for parity democracy. Their point is that the liberal state and the social contract are based on a fiction of the independence of (male) individuals, which must be stripped away. In reality – so the argument goes – all human beings depend on at least some others, and this weight of dependency has been shifted onto women. Women are thus excluded from the social contract, conceived of as a "sexual contract," and remain outsiders who enable it. "If democracy properly conceived must transcend the premises of the sexual contract, then parity – the equal presence of both genders in politics – is a democratic must."[94] In order for the transition from the liberal to the democratic state "to be fully achieved, the presence of men and women in parliament must be comparable, and if this does not happen spontaneously, it can and must be enforced."[95]

However, this argument for descriptive representation is based on the premise that women stand for dependence (as opposed to male independence) and that only "a parliament composed of a similar number of men and women encompasses independence and the management of dependence in an equal manner."[96] This premise is problematic but cannot be fully discussed here.

[91] Phillips, *Politics of Presence*, at 70. This is what Anne Phillips seminally called the *politics of presence*, as opposed to the *politics of ideas*.

[92] Athens Declaration, issued at the European summit "Women in Power" on Nov. 3, 1992. See also the CoE Recommendation 1269 (1995), "Achieving Real Progress in Women's Rights as From 1995," paras. 1–2; EU Council Recommendation of Dec. 2, 1996, on the balanced participation of women and men in the decision-making process (96/694/EC), OJ L 1996, 319, 11–15, at para. 9.

[93] Blanca Rodríguez Ruiz and Ruth Rubio-Marín, "The Gender of Representation: On Democracy, Equality, and Parity," 6 *I.Con: Int'l J. Const. L.* 287, 302 (2008).

[94] Ibid., at 314.

[95] Ibid., at 289.

[96] Ibid., at 311.

In any case, to consider proportionate shares for the two genders in political institutions as a goal in itself (or as a vehicle for managing dependence) would be irreconcilable with individualist liberalism – even if we admit that gender differs from other societal divisions. A guarantee of proportional representation of (interest) groups is incompatible with free elections whose outcomes are, by definition, not predetermined. It is no coincidence that the nondemocratic political systems in the former socialist or Communist systems abused parliamentary quotas and policies of reserved seats to feign a fair, substantial representation of society in their parliaments, which had nothing to say anyway. Due to this undemocratic experience, the governments of postsocialist countries are reluctant to reintroduce quotas.[97] So descriptive representation, and quotas as its vehicle, must be justified in different terms, notably as a vehicle for the better representation of diverse interests. It is not the underrepresentation of women that is unjust in itself, but the (assumed) resulting neglect of women's interests and needs.

Admittedly, men are not per se precluded from representing the interests of women because one does not necessarily have to be personally affected to represent interests in the political process. But common sense and experience show that both the political ideals and actions of the representatives and the interests, needs, and beliefs of the represented are coshaped by personal and social experience, and are, to that extent, *gendered*. This claim is not refuted by the variety and contradictoriness of women's interests or by their overlap with interests of certain groups of men. Despite variations, there are still issues that affect and interest women more than men. For example, more women than men are exposed to sexual harassment and violence, and as a group, women work in less prestigious and lower-paid or unpaid positions. The fact that voters' and legislators' political value judgments, interests, and needs are – because they stem from personal experience – to some extent gendered supports the call for descriptive representation.

However, descriptive representation is in tension with the idea of democratic accountability. Generally, a woman cannot be held accountable for what she is, but for what she does. But how can elected women carry an additional responsibility to represent women? Is there a mandate of difference attached to women politicians, even in the absence of mechanisms to establish special accountability? Such a mechanism would run counter to the principle of the representatives' accountability to *all* citizens and would appear, in that sense, undemocratic.[98]

Despite these important objections, descriptive representation constitutes one of several components of political representation. Descriptive representation of the genders is not entirely irrelevant because the democratic process does not only consist of realizing particular programs or ideals (or executing binding mandates). Politics consists not just of implementing the choices the electorate has made or

[97] Cécile Gréboval, "Introducing Parity Democracy: The Role of the International Community and the European Women's Lobby," in Francesca Binda and Julie Ballington, *The Implementation of Quotas: European Experiences* (Stockholm: IDEA, 2005), at 156.

[98] Ibid., at 71.

of realizing a coherent package of interests and beliefs neatly embodied in party programs. Because so much independent activity is required, it (generally) matters *who* the representatives are.

Quotas and symbolic representation

Finally, electoral quotas might improve the symbolic representation of women as a group. Because the absence of women reinforces strong, albeit subconscious, assumptions about inferiority, changing the composition of the elected assemblies involves a more powerful and more visible assertion of women's equality with men than changing the composition of the professions.[99] Already the mere debate and media coverage accompanying the introduction of such a law makes gender parity in decision making and women's political leadership a national issue. By introducing quota bills in the national legislature, male legislators are forced to formulate and defend opinions about gender equality.

Moreover, the visibility of women politicians potentially has a multiplier effect for the rights and the position of all women in society. Women politicians serve as role models, and the heightened presence of women in parliament is an important form of recognition of the equal status of women. The visible presence of women in public life might raise female aspirations, induce other women to engage in politics, and contribute to the broadening of career and life choices for women.

In the context of political representation, quotas are hardly defensible as an efficient tool to increase numbers or to represent stereotypically conceived interests, but rather as a symbol. Underneath the deceptive simplicity of the arrangements for parity democracy lies the much more complex function of representation. Because politics is not only about self-interest, but also about self-image, the symbolic appeal for gender parity has a powerful political pull.

The Real Effects of Political Gender Quotas

"Female" Political Preferences and Performance?

Empirical research only partly confirms the premise that underlies the quest for substantive representation of women, namely, the assumption that women, as a group, have distinct interests, needs, and outlooks and, consequently, specific political preferences. A slight gender gap in political attitudes and voting behavior has been demonstrated.[100] For instance, female voters in the United States tend to hold more egalitarian attitudes.[101] A gender-focused Swiss analysis of voting behavior in popular referendums of the last decade revealed no gender gap on most policy issues. Small but statistically significant differences were found only in select policy areas:

[99] Phillips, *Politics of Presence*, at 81.

[100] John D. Griffin and Brian Newman, "Does Descriptive Representation Produce Political Equality?," paper presented at the annual meeting of the Midwest Political Science Association, Chicago, April 2005.

[101] Susan E. Howell and Christine L. Day, "Complexities of the Gender Gap," 62 *J. Pol.* 858 (2000).

women tended to be slightly more supportive of environmental protection, tended to support disadvantaged groups, and supported tax raising more readily than men.[102] These findings can probably be extrapolated to other Western democracies.

A different question is whether female representatives really perform different politics. According to the critical mass theory, the mode of interaction in groups depends on their size. As long as a subgroup forms a small minority within a larger group, its members, for example, women, are only token and adapt to the rules of the game of the dominant subgroup. Only when the subgroup has reached a certain size, so the argument runs, will its members behave differently.[103] The critical mass theory is not supported by empirical research. The behavior of women in political bodies is apparently not crucially influenced by their number, but depends on institutions.[104] For instance, the high percentage of women in Scandinavian politics has not resulted in different politics on the federal level but seems to have changed local politics.[105]

There is anecdotal evidence for a better accommodation of women's concerns by female politicians. Many empirical studies on American,[106] Argentinean,[107]

[102] Claude Longchamp and Lukas Golder, *Die Entscheidungen von Frauen schützen Umwelt, Service Public und Benachteiligte*, Bericht zur Vox-Trend-Berichterstattung für das Jahr 2006 (Bern, Switzerland: gfs.bern, 2007). Findings are based on votes from 1999 to 2006 in sixty-seven federal initiatives and referendums covering the entire policy spectrum.

[103] Seminally, Rosabeth Kanter Moss, "Some Effects of Proportions on Group Life: Skewed Sex Ratios and Responses to Token Women," 82 *Am. J. Soc.* 965 (1977). For political life, Drude Dahlerup, "From a Small to a Large Minority: Women in Scandinavian Politics," 2 *Scandinavian Pol. Stud.* 275 (1988).

[104] Leading critique by Janice D. Yoder, "Rethinking Tokenism: Looking Beyond Numbers," 5 *Gender and Soc.* 178 (1991). See also Donley T. Studlar and Ian McAllister, "Does a Critical Mass Exist? A Comparative Analysis of Women's Legislative Representation Since 1950," 41 *Eur. J. Pol. Res.* 233 (2002); Kathleen A. Bratton, "Critical Mass Theory Revisited: The Behavior and Success of Token Women in State Legislatures," 1 *Pol. and Gender* 97 (2005).

[105] Kathleen A. Bratton and Leonard P. Ray, "Descriptive Representation, Policy Outcomes, and Municipal Day-Care Coverage in Norway," 46 *Am. J. Pol. Sci.* 428 (2002).

[106] See, on the impact of the sex of members of Congress on U.S. legislation, Karin L. Tamerius, "Sex, Gender, and Leadership in the Representation of Women," in Georgia Duerst-Lahti and Rita Mae Kelly, eds., *Gender, Power, Leadership, and Governance* (Ann Arbor: University of Michigan Press, 1997), at 93–112 (small gender difference with regard to the support of female agenda items). See, on gender-specific debate and leadership style in the parliament of Colorado, Lyn Kathlene, "Power and Influence in State Legislative Policymaking: The Interaction of Gender and Position in Committee Hearing Debates," 88 *Am. Pol. Sci. Rev.* 560 (1994); Lyn Kathlene, "Position Power Versus Gender Power: Who Holds the Floor," in Duerst-Lahti and Kelly, *Gender, Power*, at 167–93; Lyn Kathlene, "In a Different Voice," in Sue Thomas and Clyde Wilcox, eds., *Women and Elective Office – Past, Present, and Future* (New York: Oxford University Press, 1998), at 188–202; John M. Carey et al., "Are Women State Legislators Different?," in Thomas and Wilcox, *Women and Elective Office*, at 87–102 (finding significant gender differences); Sarah Poggione, "Exploring Gender Differences in State Legislator's Policy Preferences," 57 *Pol. Res. Q.* 305 (2004) (finding that women hold more "liberal" preferences).

[107] Mala N. Htun and Mark P. Jones, "Engendering the Right to Participate in Decision-Making: Electoral Quotas and Women's Leadership in Latin America," in Nikki Craske and Maxine Molyneux, eds., *Gender and the Politics of Rights and Democracy in Latin America* (Houndmills, UK: Palgrave, 2002), at 32–56 (no significant priority differences between male and female legislators for categories often identified as of traditional interest to women, i.e., health care/public health, education, welfare/social security, environment).

British,[108] and EU politics[109] conclude that male and female decision makers espouse slightly different positions and that they lead in a slightly different style. Finally, female politicians seem to promote honest government. The greater the representation of women in parliament, the lower is the level of corruption.[110]

However, the existence of female positions and styles does not yet guarantee tangibly different political outcomes. Some research even suggests that precisely the female (more cooperative, more contextual) approach has tended to *prevent* the translation of distinct political objectives into results. At the same time, when lengths of tenure and institutional positions are taken into account, the gender differences in legislative accomplishments of parliamentarians appear narrow and subtle. Legislative effectiveness is primarily a function of seniority and of the representative's specific institutional position. Membership in important parliamentary institutions, such as influential committees or the majority party, matters more than gender.[111]

These findings support the hypothesis that greater participation of women in parliaments and powerful committees will modify law and politics in favor of women. However, the measurable gender-typical political attitudes and competencies are in flux. It is therefore unsurprising that the increase of female parliamentarians and members of government has led to a *convergence* of both genders' political attitudes, though the cause is unclear. Some assert that women still tend to assimilate to men,[112] while others report the contrary.[113] The expectation of a *backlash* when female presence oversteps a certain size, with male members of institutions resisting a female discussion style and women's agendas, has been confirmed by some studies,[114] but not by others.[115]

These empirical findings warn against an overestimation of the role of gender in policy making. Nonetheless, the current openness of the empirical question whether female parliamentarians do change political style and substance does not warrant dropping the claim for gender parity. Proponents of increased female presence in parliaments are not bound to prove that women politicians would make a difference because no argument from justice can be made in favor of the male dominance

[108] Pippa Norris, "Women Politicians: Transforming Westminster?," 49 *Parliamentary Aff.* 89 (1996) (small gender difference).

[109] Hilary Footitt, *Women, Europe, and the New Languages of Politics* (London: Continuum, 2002).

[110] David Dollar et al., "Are Women Really the 'Fairer' Sex? Corruption and Women in Government," 46 *J. Econ. Behav. and Org.* 423 (2001).

[111] Alana Jeydel and Andrew J. Taylor, "Are Women Legislators Less Effective? Evidence From the U.S. House in the 103rd–105th Congress," 56 *Pol. Res. Q.* 19 (2003), at 26. In this sense, see also Noelle Norton, "Women, It's Not Enough to Be Elected," in Duerst-Lahti and Kelly, *Gender, Power*, at 115, 116, 124.

[112] Lovenduski, *Feminizing Politics*, at 174–75.

[113] Marcia Lynn Whicker and Malcolm Jewell, "The Feminization of Leadership in State Legislatures," in Thomas and Wilcox, *Women and Elective Office*, at 163–74. On convergence, see also Jay Barth, "Gender and Gubernatorial Personality," 24 *Women and Pol.* 63 (2002).

[114] Cf., e.g., Kathlene, "Position Power Versus Gender Power," at 189; Kathlene, "In a Different Voice," at 196.

[115] Bratton and Ray, "Descriptive Representation," at 435.

in political representation. The burden of proof rests on the defenders of the status quo.[116]

Political Gender Quotas as a Means to Increase Female Presence

Having established descriptive and symbolic representation of the genders as a legitimate objective, and working on the rebuttable assumption that female politicians do make some difference (which supports the case for substantive representation), it remains to be seen whether gender quotas in fact contribute to increasing the presence of women in legislative bodies. Empirical studies have yielded contradictory results. At least some case studies revealed a positive relationship between the implementation of a quota and the achievement of higher numbers of women in parliament.[117] To date, twelve of the fifteen democratic countries in which female representation in parliament is highest possess delegate quotas.[118]

However, while quotas apparently boosted women's presence by some percentage points, the quotas were not met. The average level of representation for women in political bodies in countries with electoral quotas is only slightly higher than the worldwide average of 18.4 percent of female parliamentarians. Notably, in France, the tangible success of the constitutionally imposed electoral gender quota was at first modest. The original parity law of 2000, a 50 percent quota without a robust placement mandate,[119] produced little change in the first elections to the French National Assembly under the parity regime.[120]

In sum, no straightforward correspondence exists between the specific quota requirements that political parties or national legislation have imposed and the sex balance in legislatures. Current quota schemes have achieved only limited success because they often lack crucial elements, to which we will turn now.

Necessary Components of Effective Quota Schemes

The modest results of gender quotas can be attributed to inadequate legislation. To be fully effective, political gender quota legislation must comprise the following

[116] Phillips, *Politics of Presence*, at 65.

[117] See, on Bangladesh Shvedova, Ballington and Karam, *Women in Parliament*, at 34; Medha Nanivadekar, "Are Quotas a Good Idea? The Indian Experience With Reserved Seats for Women," 2 *Pol. and Gender* 119 (2006), at 119–20.

[118] In five of those fifteen states, only party-internal quotas exist. Three states' constitutions mandate quotas; four have legislative quotas. Three states have no quotas of any kind (see Inter-Parliamentary Union, Home page, available at http://www.ipu.org/ [accessed March 11, 2009]; International IDEA, "Global Database of Quotas for Women," available at http://www.quotaproject.org/ [accessed March 11, 2009]). We leave out Cuba (third in the world, with 43.2 percent female delegates) because this state does not meet the minimum standards of an electoral democracy.

[119] Article 2 of the Loi no. 2000-493 of June 6, 2000, J.O. of June 7, 2000, at 8560, amending Article 264 of the French Electoral Code.

[120] The number of female deputies in the French National Assembly increased from 10.9 percent (1997) to just 12.3 percent (2002).

elements. First, the size of the minimum percentage of women to be included on the list is important. Second, quotas work only if they are complemented by a placement mandate in a closed list system, prescribing that women must be placed in electable positions, not at the bottom of the ballot lists or in other purely ornamental positions. Electable positions can be created by the requirement that every third or even second ballot list position must be filled with a female candidate (zipping mechanism). A case in point is the previously discussed female representation in the French National Assembly, which, only after the introduction of a zipping mechanism, rose from 12.3 percent in 2002 to 18.5 percent in the 2007 elections.[121]

Third, monitoring and regulatory mechanisms must be installed to ensure party compliance. Noncompliance sanctions on political parties may include financial penalties or the denial of electoral registration of political parties that do not comply with the law. Compliance can also be fostered by incentives. Offering additional media time or additional public funding[122] to parties that place women in high positions on party lists is a promising strategy. Narrowly tailored, these instruments are constitutionally admissible deviations from the government's obligation to treat political parties equally because they serve a legitimate purpose.

Additionally, quotas need to be accompanied by a series of other measures. Crucial complements are both capacity building, for example, through mentoring by experienced women, and the removal of structural barriers to the political representation of women. Such measures should concentrate on the root causes that prevent female candidates from standing for elections. Organizations focusing on women's issues can help increase the number of women considering entering politics. A woman who can draw on resources and support from a women's organization is more likely to run and will also be more readily accepted by the party apparatus as a viable candidate.[123]

Beyond capacity building, the removal of structural barriers includes campaigns directed at raising awareness of the importance of equal participation of both genders in political life, targeting women for appointment to ballot lists, and the creation of infrastructure that relieves women from household and child care burdens. Specifically, financial constraints could be eliminated by financial assistance for female political aspirants.

[121] Article 2 of the Loi no. 2007-128 of Jan. 31, 2007, J.O. of Feb. 1, 2007, at 1941, amended Article 2 as follows: "La liste est composée alternativement d'un candidat de chaque sexe."

[122] The CoE Committee of Ministers Recommendation 3 (2003) urged member states to "consider action through the public funding of political parties in order to encourage them to promote gender equality" (Appendix, proposed legislative measure A.4). In France, Article 9-1 of the Act on Financial Transparency of Political Life links the allocation of public funding to the number of women candidates a party nominates for election (Loi no. 88-227 of March 11, 1988, J.O. of March 12, 1988, at 3290, as modified by Loi no. 2003-327 of April 11, 2003, J.O. of April 12, 2003, at 6488). In Costa Rica, the statute on the promotion of social equality of women (Ley no. 7142 of March 2, 1990) obliges political parties to employ a portion of governmental funding for electoral campaigns for measures to promote the political education and participation of women (see, on this obligation, Part IX of the decision of the Supreme Election Tribunal, Costa Rica: Supreme Election Tribunal, decision 1863 of Sept. 23, 1999).

[123] Ballington and Matland, "Political Parties and Special Measures," at 3.

Without all these supporting measures, quotas work badly and have been a relatively painless way to pay lip service to women's rights without male politicians suffering the consequences. The general perspective suggests that quotas are not the decisive factor for increasing women's access to legislatures. Other structural components may matter more.

This assessment does not render political gender quotas per se legally inadmissible. However, it gives rise to a presumption of the unconstitutionality of isolated quotas because those are doomed to be ineffective. Overall, only properly embedded quotas might – if at all – slightly improve symbolic representation, and possibly improve descriptive and substantive representation of women.

Conclusion

Electoral gender quotas have recently boomed in democratic states. This proliferation was catalyzed through international and transnational law and politics. Quotas for women in politics are, compared to employment quotas, not very problematic under the angle of discrimination. However, they crucially affect democratic representation.

The purely numerical results of quota laws, and thus their effects on descriptive representation, have been modest. Electoral quotas have barely increased the female presence in parliaments when introduced as a single measure. They only seem to work when accompanied by placement requirements, compliance incentives, strict enforcement, and complementary policies. Because in liberal parliamentary multiparty democracies, the political parties remain the most important actors to promote or impede women's empowerment, the political will of party leadership remains decisive. Governments can only regulate the internal party structure to a limited extent, but they may impose legal requirements for the parties' listing schemes.

A different question is whether women's descriptive representation, as improved by quotas, actually translates into the substantive representation of their interests. Empirical studies have demonstrated that the gender impact on political activity is small. This is unsurprising, given the fact that political actors' convictions are determined by their parties' program and that delegates are tied into party discipline and institutions. Moreover, subgroups among men and women have diverging interests and values. Changing the composition of the elected parliaments does not guarantee that women's needs or interests will be addressed. The only guarantee would be one grounded in an essential identity of women, which is not plausible. Besides, there is no institutional mechanism to secure the accountability to women organized as a separate group. In sum, quotas are not operative for improving substantive representation.

Separate from the uncertainty as to whether a more gender-balanced legislature will address a new set of concerns, the presence of women in parliaments has an important symbolic value. Because representation is, to some extent, a myth, the

pure visibility of women, and thus their place in this myth, may help to overcome gender stereotypes. On the other hand, the focus on quotas and numbers risks losing sight of the real mechanisms of political power. Women need to be in the backrooms where deals are struck. They must be opinion leaders among the party elites, where party policy programs are formulated and priorities are assigned, and hold seats on influential committees and in party caucuses.

Overall, it is not even clear whether the presence of women in greater numbers on the parliamentary floor, supported by quotas, is a necessary, far from being a sufficient, condition for women's voices to be heard. Quotas might, to some extent, even be counterproductive. There is the danger that quotas breed complacency and overshadow, and thereby stall, other necessary measures for the advancement of women. They allow political parties to make seeming concessions to women without addressing structural problems.

Ultimately, we need to shift our attention away from the quantitative aspect to the qualitative changes in our political culture and institutions. The regulatory ideal remains that laws and policies should reflect and reconcile many diverse needs and concerns, and, if necessary, eclipse some. Electoral gender quotas should mark the beginning of the road to gender equity and not the end. As temporary special measures, political gender quotas should not become permanent. They may (if at all) be an enabling tool for a transformation of the democratic culture, but only an auxiliary one.

9

Citizenship and Women's Election to Political Office: The Power of Gendered Public Policies

Eileen McDonagh*

Introduction

The United States lags far behind most comparable democracies when it comes to women's election to national political office. This research explains that deficiency as resulting from the failure of the American state to adopt public policies representing maternal traits voters associate with women, in contrast to most other democracies that do. Such policies teach voters that the maternal characteristics associated with women signify a location not only in the home, but also in the public sphere of political governance. When such policies are in place, public attitudes about the suitability of women as political leaders improve, and women's election to political office increases.

Defining Citizenship

Citizenship

One of the most fundamental precepts of democratic theory and practice is citizenship. An enduring definition of citizenship dates back to the work of British sociologist T. H. Marshall. In his view, "citizenship is a status bestowed on those who are full members of a community. All who possess the status are equal with respect to the rights and duties with which the status is endowed."[1] Thus, the idea behind citizenship is *inclusion*. Marshall is noted for developing a typology based on three principles of inclusion: civil citizenship, political citizenship, and social citizenship.

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[1] T. H. Marshall, *Citizenship and Social Class* (Cambridge: Cambridge University Press, 1950), at 24.

By *civil citizenship*, Marshall meant that individuals are included in the community by virtue of having the legal rights necessary to exercise "individual freedom – liberty of the person, freedom of speech, thought and faith, the right to own property and to conclude valid contracts and the right to justice . . . [which] is the right to defend and assert one's rights on terms of equality with others and by due process of law."[2] By *political citizenship*, he meant that individuals are included in the community by virtue of having the right "to participate in the exercise of political power, as a member of a body invested with political authority or as an elector of the members of such a body," for example, by being a voter who will choose who will be the officeholders in the state or as an officeholder.[3] The third definition of citizenship he termed *social citizenship*, meaning that individuals are included in a community by virtue of having their basic economic needs met by the state, which entail the "whole range from the right to a modicum of economic welfare and security to the right to share fully in the social heritage and to live the life of a civilized being according to the standards prevailing in the society."[4]

Political Representation

Women have formal rights of political citizenship in most countries in the world. With the exception of a few holdouts, women today have the formal right to vote as well as the formal right to hold office. Even more significant, however, when it comes to the *right to vote*, women are noted not only for their formal, but also for their substantive, political citizenship. Women actually do vote. In the United States, for example, women currently turn out to vote in greater percentages than men. In the 2004 presidential election, 60.1 percent of women of voting age participated, as compared to 56.3 percent of men, which translates to roughly 8.8 million more women voters.[5]

With respect to women's political representation as elected officeholders, however, the patterns are more varied. Among democracies with comparable wealth and industrialization, for example, some do elect sizeable percentages of women to their national legislatures, such as Sweden, the Netherlands, Belgium, Austria, and Germany, where the percentage of women elected to the lower house of the national legislature in 2006 was 45.3 percent, 36.7 percent, 34.7 percent, 33.3 percent, and 31.8 percent, respectively, as noted in Table 9.1. In the United States, however, only 15.2 percent women were elected to the House of Representatives in 2006. What is more, not only does the American state trail behind most comparable democracies, but it is also a laggard worldwide, as is evidenced by its lowly rank of eighty-third (see Table 9.1).

[2] Ibid., at 8.
[3] Ibid.
[4] Ibid.
[5] Center for American Women and Politics, Home page, available at http://www.cawp.rutgers.edu/ (accessed Oct. 13, 2008).

Table 9.1. *Percentage Women Elected, National Legislature, 2006*

Rank	%	Rank	%	Rank	%
1st Rwanda	48.80	42nd Bulgaria	22.10	**83rd United States**	**15.20**
2nd Sweden	45.30	43rd Eritrea	22.00	84th Angola	15.00
3rd Costa Rica	38.60	44th Lithuania	22.00	84th Chile	15.00
4th Norway	37.90	45th Ethiopia	21.90	86th Bangladesh	14.80
5th Finland	37.50	46th Moldova	21.80	87th Sudan	14.70
6th Denmark	36.90	47th Croatia	21.70	88th Sierra Leon	14.50
7th Netherlands	36.70	48th Pakistan	21.30	89th Cyprus	14.30
8th Cuba	36.00	48th Portugal	21.30	90th Israel	14.20
9th Spain	36.00	50th Singapore	21.20	91st Guinea Bissau	14.00
10th Argentina	35.00	51st Latvia	21.00	92nd Malawi	13.60
11th Mozambique	34.80	52nd Canada	20.80	93rd Korea South Rep	13.40
12th Belgium	34.70	53rd Monaco	20.80		
13th Austria	33.90	54th Nicaragua	20.70	94th St. Kitts and Nevis	13.33
14th Iceland	33.30	55th Poland	20.40		
15th South Africa	32.80	56th China	20.30	95th Barbados	13.30
16th New Zealand	32.20	57th KorNoDemPe	20.10	96th Ireland	13.30
17th Germany	31.80	58th Bahamas	20.00	96th Gambia	13.20
18th Guyana	30.80	59th Dominican Rep	19.70	98th Greece	13.00
19th Burundi	30.50	59th United Kingdom	19.70	99th Dominica	12.90
20th Tanzania	30.40			100th Zambia	12.70
22nd Seychelles	29.40	61st Trinidad and Tobago	19.40	101st Liberia	12.50
22nd Peru	29.20			102nd Niger	12.40
23rd Belarus	29.10	62nd Guinea	19.30	103rd France	12.20
24th Andorra	28.60	63rd Senegal	19.20	103rd Slovenia	12.20
25th Uganda	27.60	64th Estonia	18.80	105th Colombia	12.05
26th Afghanistan	27.30	65th Macedonia	18.33	106th Congo, Dm Rep	12.00
26th Vietnam	27.30	66th St. Vincent	18.20		
28th Namibia	26.90	66th Equatorial Afr	18.00	107th Maldives	12.00
29th Grenada	26.70	68th Venezuela	18.00	108th Serbia and Montg	12.00
30th Iraq	25.50	69th Tajikitstan	17.50		
31st Suriname	25.50	69th Uzbekistan	17.50	109th Syria	12.00
32nd Timor Leste	25.30	71st Italy	17.30	110th Burkina Faso	11.70
33rd Laos	25.20	72nd Mauritius	17.10	110th Jamaica	11.70
34th Switzerland	25.00	73rd Bolivia	16.90	110th Lesotho	11.70
35th Australia	24.70	74th Bosnia-Herzeg	16.70	110th San Marino	11.70
36th Liechtenstein	24.00	75th El Salvador	16.70	114th Azerbaijan	11.30
37th Honduras	23.40	76th Panama	16.70	114th Fiji	11.30
38th Luxembourg	23.30	76th Ecuador	16.00	114th Indonesia	11.30
39th Tunisia	22.80	80th Philippines	15.70	117th Romania	11.20
40th Mexico	22.60	81st Czech Republic	15.50	118th Botswana	11.10
41st Taiwan	22.20	82nd Cape Verde	15.30	118th Uruguay	11.10

Hence, women's political representation poses a problem: not only does it vary among the world's democracies, but it is exceptionally low in the United States. This, despite the way women are so well represented in other areas of achievement in American society. For example, the percentage of women represented in the professions and in business is higher in America than in other comparable democracies. Female professional and technical workers[6] in the United States comprise 54 percent of their professions, while other comparable democracies, including Sweden (49 percent), Australia (48 percent), Italy (44 percent), the Netherlands (46 percent), and the United Kingdom (45 percent), are below 50 percent women in this category.[7]

Explaining Women's Political Officeholding Patterns

Political Structures

In terms of women's political representation, as defined by officeholding, the question is, why is the United States such a laggard compared to comparable democracies? Or to put it another way, what does the American state lack when compared with other democracies? Some scholars fruitfully examine the psychological dimensions of running for political office, arguing that women have lower levels of confidence about their capacities for winning political office than men.[8] Others focus on sociological roles characteristic of women, pointing out that women's disproportionate association with the care of children and others can ill equip them to take on the rigors of campaigns.[9]

From a comparative politics perspective, however, the most powerful explanations point to the difference between the political structures of the American state and comparable democracies. In particular, scholars cite the lack in the United States of proportional representation, parliamentary systems, and multiple parties as an explanation for what accounts for its relatively poor record on women's political citizenship.[10]

[6] Professional and technical workers, as categorized by the International Labour Organization, have occupations whose main tasks require a high level of professional knowledge and experience in the fields of physical and life sciences or social sciences and humanities. "Female Professionals (Most Recent) by Country," NationMaster, available at http://www.nationmaster.com/ (accessed Feb. 6, 2008).

[7] Ibid.

[8] See Jennifer L. Lawless and Richard L. Fox, *It Takes a Candidate: Why Women Don't Run for Office* (New York: Cambridge University Press, 2005).

[9] Ibid.

[10] See, e.g., Pippa Norris, ed., *Passages to Power: Legislative Recruitment in Advanced Democracies* (New York: Cambridge University Press, 1997); Richard E. Matland and Michelle M. Taylor, "Electoral System Effects on Women's Representation: Theoretical Arguments and Evidence From Costa Rica," 30 *Comp. Pol. Stud.* 186 (1997); Ian McAllister, "Australia," in Norris, *Passages to Power*; Susan Welch and Donley T. Studlar, "Multi-member Districts and the Representation of Women: Evidence From Britain and the United States," 52 *J. Pol.* 391 (1990).

Public Policies

This research adds to the literature explaining women's election to political office by focusing on yet another feature of a political system: its public policies. The argument is that when the state acts in ways the public associates with women vis-à-vis its public policies, voters associate women with the public sphere of political governance and subsequently elect more women to political office. What accounts for the dismal political representation of women in the United States, as this study illuminates, is its comparative failure to adopt public policies that impart to the state attributes associated with women.[11] To analyze this perspective, let us first establish what attributes the public associates with women.

Women as Maternalists

Social Maternalism: Care Work

Study after study establishes that the public associates women with nurturing and care, what some term *social maternalism* or *social reproductive labor*. Social reproductive labor refers to "the activities and attitudes, behaviors and emotions, responsibilities and relationships directly involved in the maintenance of life on a daily basis . . . how food, clothing and shelter are made available for immediate consumption, how the care and socialization of children is accomplished . . . [how the] care for the elderly and infirm is organized."[12] Care work includes provision of health care, education, food, clothing, and shelter.

Care work itself, of course, in terms of its *recipients*, is gender-neutral. However, the identity of *caregivers* is *not* gender-neutral. To the contrary, the public associates *care workers* – social maternalism – with women, including female candidates, not with men. As Herrnson, Lay, and Stokes note, generally, "voters view women as better able to handle 'feminine' [social maternalist] issues, such as child care and education, but less able to handle 'masculine' issues, including the economy and war."[13] In this way, "voters use gender to assess a candidate's policy positions and potential performance in office in much the same way they use party identification and other traditional voting cues."[14] What is more, as researcher Monica McDermott notes, "candidate gender, unlike other demographic cues, can usually be determined by the candidate's first name. For this reason, even in the lowest possible information context, when a voter knows nothing about the candidate except what the ballot

[11] For a more complete analysis of this perspective, see Eileen McDonagh, *The Motherless State: Women's Political Leadership and American Democracy* (Chicago: University of Chicago Press, 2009).

[12] Johanna Brenner and Barbara Laslett, "Gender, Social Reproduction and Women's Political Self-Organization," 5 *Gender and Soc'y* 314 (1991).

[13] Paul S. Herrnson et al., "Women Running 'as Women': Candidate Gender, Campaign Issues, and Voter-Targeting Strategies," 65 *J. Pol.* 244, 245 (2003).

[14] Ibid., at 245.

says on election day, candidate gender can be a source of information about a candidate's views. As such, candidate gender has significant potential to influence voting behavior."[15]

When the state itself engages in care work by means of *welfare provision*, therefore, it is engaging in social reproductive labor, that is, social maternalism, whether or not the beneficiaries of public welfare provision are women. Significantly, when the government does so, it "acts like a woman" by exercising a trait the public associates with women, as social maternalists, not with men.

Biological Maternalism

Scholars have long noted how the state can take on the social maternalist traits the public associates with women by providing care work to those in need. Much less recognized, however, is the way the state can also take on the biological maternalist traits the public also associates with women. Biological maternalism refers to the biological generation of a new human being. Of course, men are necessarily involved in biological reproductive labor as well as women. To generate a fertilized ovum as the first step in biological reproductive labor, there must be sperm from a man and ova from a woman. The difference, however, is that once a fertilized ovum exists, whether in a Petri dish as part of in vitro fertilization processes or in a woman's body, some individuals from the group women – and none from the group men – must activate their capacity to be pregnant and to give birth, if a new human being is to join the human community.

There are two components to biological maternalism, therefore, that the public associates with women: first, a *sex classification as female*, which is the sex the public associates with the capacity to be pregnant and to give birth, and second, actual individuals (women) from the group classified as female who become pregnant and who do give birth, that is, *actual biological motherhood*. The public's association of women with biological maternalism as a sex classification as female or as actual biological motherhood is reinforced every time abortion rights get on the political agenda, for example. Abortion rights directly involve the lives of more individuals who are classified as female than as male because all the individuals with the potential to be pregnant or actually give birth are female, not male.

The question is, how can the state adopt public policies based on the dual components of biological maternalism, namely, women's sex classification as female and women's actual biological motherhood, thereby imparting to the state maternal attributes the public associates with women? The answer is gender quotas and hereditary monarchies, respectively.

[15] Monika McDermott, "Candidate Occupations and Voting Shortcuts in Low-Information Elections," paper presented at the annual meeting of the American Political Science Association, Philadelphia, Aug. 27, 2003 (on file with author).

Sex Classification as Female: Gender Quotas

Gender quotas, which are really female sex quotas, are public policies that designate a minimum percentage of women to serve in national legislatures simply because of their sex classification as female, either by means of a constitutional amendment, legislative statute, or voluntary party quota. Today, nearly 90 percent of the world's nations have adopted some form of gender quota, and scholars are documenting the causes and consequences of gender quotas.[16] Miki Caul, for example, has examined how adopting gender quotas appears to have directly raised women's descriptive representation.[17] Mala Htun alternately analyzes how some feel that group-differentiated rights weaken the idea of common citizenship that quotas aim to accomplish.[18]

What is missing from the analysis of gender quotas, however, is the way these public policies represent biological maternal attributes the public associates with women. Gender quotas, by connecting the state to women's biological maternalism, inform the public that to be female merely in terms of one's sex classification signifies association with the state, rather than disassociation. Hence, in this study, I use the state's adoption of gender quotas as a measure of biological maternalism.

Actual Biological Motherhood: Hereditary Monarchies

When women bear a child, they necessarily are generating family-kinship networks. This is because no child can be born unless its biological mother and father had biological parents, who in turn had biological parents, and so on. Hence actual biological motherhood constitutes the establishment of family-kinship networks. Hereditary monarchies represent a public policy that connects the government to women's biological motherhood, defined in terms of women's generation of family-kinship networks.

As Vernon Bagdanor notes, in its essence, a monarchy as a hereditary institution is the archetypal fusion of the family with the state, albeit only one family, the dynastic family.[19] Thus, the political viability of any particular dynastic family and of hereditary monarchical rule in general is utterly dependent upon and ultimately determined by women, who must be pregnant and give birth to replenish the pool

[16] The literature is vast, but important examples are Drude Dahlerup, "Gender Quotas: Controversial but Trendy," 10:3 *Int'l Feminist J. Pol.* 322 (2008); Mona Krook, "Candidate Gender Quotas: A Framework for Analysis," 46:3 *Eur. J. Pol. Res.* 367 (2007); Pamela Paxton et al., "Gender in Politics," 33 *Annu. Rev. Sociol.* 263 (2007). In this volume, see Anne Peters and Stefan Suter's analysis in Chapter 8.

[17] Miki Caul, "Political Parties and the Adoption of Candidate Gender Quotas: A Cross-National Analysis," 63 *J. Pol.* 1214 (2001).

[18] Mala Htun, "Is Gender Like Ethnicity? The Political Representation of Identity Groups," 2 *Persps. Pol.* 439 (2004).

[19] Vernon Bogdanor, *The Monarchy and the Constitution* (New York: Oxford University Press, 1995).

of those eligible to be sovereigns. A monarchy, therefore, is a form of political governance based upon women's biological maternalism. When a woman is connected to a dynasty by giving birth, she is doing *political work*, so to speak. In this study, therefore, I use the state's adoption of a hereditary monarchy open to women as a measure of biological maternalism.[20]

Types of Citizenship as Gendered

Citizenship as Gendered Public Policies

As noted previously, Marshall identified three different types of citizenship: civil, political, and social. Equally important as their differences, however, is their commonality, namely, how each is centered on *particular types of public policies*. Citizenship, therefore, according to Marshall, is defined by what the state does and must do by means of its public policies to create an inclusive community. As discussed earlier, public policies can embody traits associated with women as well as with men. When we consider the public policies that define each type of citizenship, we see that Marshall's typology rests upon a gendered edifice. We can expand our analysis of the impact of gendered public policies on women's election to political office, therefore, to include the very principle of citizenship itself. Let us consider the gendered character of types of citizenship prior to analyzing their impact on women's election to political office.

Liberal Citizenship: Civil and Political Rights as Male

As Marshall noted, "civil rights were in origin intensely individual."[21] In addition, political rights, as Marshall contends, were gradually extended from the few to the many as "new sections of the population" were incorporated into the electorate. In both cases, therefore, the key point about civil and political citizenship is that they comprise negative individual rights – guarantees about what the state will *not* do in relation to individuals. Specifically, the state will not interfere with the right of individuals to get married, to sign contracts, or to exercise their own religious preferences, for example, in the case of civil citizenship, nor will it interfere with an individual's right to vote because of that individual's ascriptive group membership, in the case of political citizenship. Thus, for example, in the case of the latter, the

[20] Some might object to classifying hereditary monarchies as a form of state maternalism on the grounds that generally, men are given preference in the selection process for sovereign. While true, this does not mean that women are excluded. Of the democracies that have a hereditary monarchy open to women, 75 percent (eighteen political systems) in the twentieth century have chosen at least one woman to be the sovereign, while the percentage of democracies that have elected a woman to be prime minister, deputy prime minister, president, or vice president is only 53 percent (forty-eight political systems). Hence it would appear that democratic electoral systems have a greater bias against female elected political executives than do democratic hereditary ones.

[21] Marshall, *Citizenship*, at 26.

Fifteenth and Nineteenth Amendments to the U.S. Constitution – classic examples of negative individual rights – guarantee that neither the state nor federal government can bar an individual from voting on the basis of race or sex. For this reason, I group Marshall's civil and political citizenship into the single category *liberal citizenship*.

Negative individual rights as the basis for liberal citizenship may appear to be gender-neutral. Not so, however, say many feminist scholars who contend that the label "individualism" is merely a cloak for masculine "patriarchy." One of the most forceful critics of the liberal state as based upon principles of negative individual rights is Catharine MacKinnon. In her analysis, the liberal state's protection from governmental interference becomes for women the right of men to impose sexual violence upon women without interference from the state.[22]

Similarly, as political theorist Nancy Hirschmann notes, the very principles of liberal theory are founded upon men's experience of autonomy, consent, and freedom, experiences that differ dramatically from most women's lives. As she analyzes, the very structure of voluntarism upon which liberal principles depend evidences a deep cultural bias that privileges men on the grounds that what defines obligation for most women is anything but a freedom of choice. Rather, obligation for most women is rooted in the needs of others that "stem from the history and character of human relationships."[23] Hence, as Hirschmann argues, a "fully consistent consent theory would have to include (perhaps paradoxically) the recognition that not all obligations are self-assumed."[24]

Others, however, see in liberal theory a way to reconcile the relational realities that define the lives of most women with the abstract principles of self-sovereignty that characterize the liberal principles that are the foundation of civil and political citizenship. Linda McClain, for example, persuasively argues that the ideal of "relational autonomy" captures the idea that people are shaped by their environment in ways beyond their control, including the way they are connected to others, even while preserving the idea that within restricted realms, there are still ways the self can find expression and affirmation of autonomy.[25] Such a view rescues liberal precepts from hopeless masculine constructions that would exclude women altogether. However, even these perspectives render liberal citizenship as gender-neutral, but certainly not as female.

Social Citizenship: Care Work as Female

When we turn to social citizenship, however, as based on social maternalist public policies, we see a different gender pattern in relation to the state's identity. Social

[22] Catherine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge, MA: Harvard University Press, 1988).

[23] Nancy J. Hirschmann, "Freedom, Recognition, and Obligation: A Feminist Approach to Political Theory," 83 *Am. Pol. Sci. Rev.* 1227, 1229 (1989).

[24] Ibid., at 1229.

[25] Linda McClain, *The Place of Families: Fostering Capacity, Equality, and Responsibility* (Cambridge, MA: Harvard University Press, 2006).

citizenship is a *positive group right*, not a negative individual right. This is because the whole point of social citizenship is to target a particular group, the group of people who are in need of economic assistance, not just anybody or everybody. While it is true, of course, that positive group rights could include everyone, Marshall very explicitly viewed social citizenship as targeting the needs of the economically disadvantaged. He believed social citizenship was an important mechanism for reducing the class inequality that he saw developing in democracies based on a capitalist economy. As Marshall noted, "social class . . . is a system of inequality" and the point of social citizenship is "class-abatement," which is the "diminution of inequality . . . at least with regard to the essentials of social welfare."[26]

In the short term, Marshall conceived the goal of social citizenship as ameliorating the class inequalities created by capitalism. Social citizenship is thus explicitly based on the notion that the state will step in to assist people because of their economic group inequality. Social citizenship as a positive group right, therefore, is designed to help people deal with their economic needs by engaging the state in care work, that is, social reproductive labor or social maternalism. As such, social citizenship is a type of citizenship that imparts to the state a gendered, female identity. Hence, while liberal citizenship may be male, social citizenship is decidedly gendered as maternal, that is, as female.

Biological Citizenship: Gender Quotas and Hereditary Monarchies as Female

It is quite usual for scholars to define social citizenship in terms of state welfare provision and to recognize how such public policies as a type of citizenship impart to the state a social maternalist identity. Not so, however, when we turn to public policies based on biological maternalism such as gender quotas and hereditary monarchies. When we turn to public policies based on biological classifications and capacities, we also see how these types of public policies generate principles of inclusion – that is, principles of citizenship – based on a gendered understanding of what it is biologically to be female and/or a biological mother.

The idea that a person's inclusion in a community is based on a biological status, of course, runs counter to the very basic principle of a liberal state that all individuals are born equal and that the government treats them the same in spite of their biological accidents of birth. Political scientist Rogers Smith and legal scholar Peter Schuck, therefore, complain about public policies that base national citizenship on accidents of birth such as where one was born or the national citizenship of one's parents, rather than upon a principle of consent.[27]

Others, however, argue that it is a liberal blindness not to recognize the reality and political significance of biological attributes of the body that impinge necessarily

[26] Marshall, *Citizenship*, at 18, 25, 28.

[27] Peter H. Schuck and Rogers M. Smith, *Citizenship Without Consent: Illegal Aliens in the American Polity* (New Haven, CT: Yale University Press, 1985).

upon the way individuals are included, or not included, in communities. As Nancy Hirschmann argues in this volume, citizenship norms are embodied, literally, in assumptions about equality that exclude the disabled on the basis of their physical, bodily difference.[28] Similarly, political scientist Ruth O'Brien argues that the liberal, equal rights tradition is wholly inadequate for dealing with the concept of physical disability, something that all individuals, at some point in their lives, encounter, whether beginning with birth or not.[29] What is significant about recognizing the way biological difference sets the parameters for inclusion in communities is that biological factors can be outside the range of the economic ones identified by Marshall. Individuals, for example, can have many economic advantages, yet still have physical disabilities that require care and special accommodations in the workplace and in society in general.

While O'Brien does not invoke explicitly a citizenship model when explicating the radical potential of the Americans With Disabilities Act (ADA) as passed by Congress in 1990, we can draw upon her analysis about the way this legislation ideologically stands in opposition to basic tenets of liberal democracy to argue that public policies that require *inclusion* of people based upon their biological difference from others are a type of citizenship, namely, biological citizenship. Like the ADA, gender quotas and hereditary monarchies are forms of biological citizenship. And while the ADA is gender-neutral, gender quotas and hereditary monarchies are public policies that are gendered as forms of biological maternalism. Hence inclusion based on the latter imparts to biological citizenship attributes the public associates with women.

Types of Citizenship and Women's Political Officeholding

Let us now assess how gendered public policies that are the bases of types of citizenship affect women's access to electoral political office. To do so, let me define more completely the measurements used in this study.

Liberal Citizenship: Civil and Political Rights

For over sixty years, Freedom House has assessed and measured the degree of democratic practice, defined as the guarantee of civil and political rights, characterizing political systems around the world. Founded by Eleanor Roosevelt, Wendell Willkie, and others interested in the international prospects for democratic governance,[30] over the years, this organization has measured how adequately the practices of a political system protect the political rights and civil liberties guaranteed to individuals in spite of ascriptive group differences such as race, class, sex, religious orientation, language, and/or sexual orientation. Thus, Freedom House measures democratic

[28] See Chapter 7.

[29] Ruth O'Brien, *Bodies in Revolt: Gender, Disability and a Workplace Ethic of Care* (New York: Routledge, 2005).

[30] Freedom House, "About Us," available at http://www.freedomhouse.org/ (accessed Feb. 7, 2008).

practice as the degree to which a government guarantees *negative individual rights*. Hence I consider political systems that score as "free" on Freedom House scales as ones that guarantee liberal citizenship, defined as civil and political rights.

Social Citizenship: Welfare Provision

For the purposes of analyzing the impact of social citizenship on women's election to political office, I define a welfare provision in two ways: first, by theoretically drawing attention to the *constitutional standing of care work* in a political system, and second, by the degree to which a political system *funds* welfare provision.

Constitutions

The vast literature on the welfare state notably lacks a sustained focus on the constitutions of the countries analyzed. This is striking because welfare provision is a prototypical form of social citizenship, as noted previously. It is not merely whether a political system funds programs for those in need; it is also whether a political system embraces a concept of the state as an entity whose affirmative duty it is to do so. That is to say, the crucial point about government welfare provision is its normative as well as practical dimension. Conceptualizing the modern, democratic state as an entity that is not merely supposed to guarantee law and order, national security, and the safeguarding of individuals' civil and political rights, but also as an entity that is supposed to guarantee the provision of basic social, economic needs of people, is the entire point of what is meant by social citizenship, as articulated by Marshall. Thus, in this research, one criterion of social citizenship is whether a political system constitutionalizes welfare provision as an affirmative duty of the state.

Funding

In addition, however, I am interested in whether a political system actually does provide care work for people in need. To evaluate this, I looked for an index of welfare provision that addressed basic needs of all people and that was available for a cross-national study. The welfare provision I chose is the provision of health care by the state, data that are available from the World Health Organization. Under the parameters of this study, a state is considered to guarantee social citizenship only if the nation's constitution imposes an affirmative obligation on the state to provide for the welfare needs of its population, *and* the government must provide at least 50 percent of the cost of health care.

Biological Citizenship: Gender Quotas and Hereditary Monarchies

As discussed previously, biological citizenship includes two public policies: gender quotas and hereditary monarchies.

Gender quotas

When measuring gender quotas, the first thing to establish is that it is legitimate to view gender quotas as an independent variable distinct from their effect on the dependent variable, women's election to national legislatures. As we would expect, gender quotas do have a positive impact on women's political representation. The point, however, is that gender quotas by no means guarantee that women will be elected in sizeable percentages to national legislatures given the inconsistencies in enforcement and the variability in the designated percentages in the first place. Among nations with gender quotas, for example, only 35 percent employ sanctions for violations, and often, these sanctions are not enforced. Of the thirty-one nations with legislatively imposed gender quotas, only twelve impose sanctions to enforce the quotas, and of the fifteen nations that use constitutional provisions to establish gender quotas, only two impose sanctions. Even when sanctions are imposed and enforced, the punishment is often negligible. Additionally, in most political systems, the designated percentage for the election of women to national legislatures is very low, sometimes – such as in India, Jordan, Nepal, and Niger – below 10 percent. In Kenya, the constitutionally prescribed gender quota is as low as 2.68 percent.

In this study, therefore, I contend that it is permissible to designate gender quotas as an independent cause of women's election to public office. Specifically, I operationalize the use of gender quotas as a measurement of state maternalism on the basis of the following criteria: (1) constitutional and legislative gender quotas for women as members of a parliament or legislature must be at least 15 percent; (2) voluntary political party gender quotas for women as candidates must be at least 30 percent for at least two political parties, or at least 40 percent for one political party; (3) the political party must be represented in the parliament or legislature in 1999 and 2003; (4) the political party has to meet its target in terms of women as candidates on the ballot; and (5) the rationale for establishing gender quotas must be to represent women's group difference from men.

Hereditary monarchies

In this project, I consider a hereditary monarchy to be a mode of biological citizenship if a political system has a hereditary monarchy in which women are eligible to become sovereign.[31]

Public Attitudes

To find an attitudinal measure of the mass public's view of women's suitability as political leaders, we need only to turn to the World Values Survey (WVS), an

[31] Male-only monarchies are not coded as performing state maternalism on the grounds that by omitting women from political rule, they undercut the maternalistic principle of a monarchy that would have a positive impact on public attitudes about women's suitability as political leaders.

enterprise that has engaged an international network of social scientists for decades. The fourth wave of these surveys was conducted between 1999 and 2002 and included respondents from sixty-six countries representing all six inhabited continents and nearly 80 percent of the world's population.[32] In addition to recording demographic characteristics, such as age, sex, and marital status, the WVS measures an individual's attitudes toward work, religion, and morality as well as perceptions of life, family, national identity, the environment, politics, and society. To take stock of an individual's attitude toward the subject at hand, the surveyor reads a statement and asks the respondent to indicate the degree to which he or she agrees or disagrees with the sentiment conveyed in the statement. An individual may strongly agree, agree, disagree, or strongly disagree.

For my purposes, the question in the WVS most crucial for assessing public attitudes toward the capabilities of women as political leaders compared to men is as follows: "Do you agree strongly, agree, disagree, or disagree strongly with the following statement: 'Men make better political leaders than women do.'"[33] A total of 68,498 respondents from forty-eight nations answered this question. More specifically, 10,401 people (15.6 percent) indicated that they "disagree strongly" with the statement, with the implication that they believe women to be at least as capable as men are of political leadership, while 14,845 people (22.3 percent) said they "agree strongly" that men make better political leaders. As one might expect, there is a great deal of variation in public attitudes among political systems. One measure of that variation is to consider the ratio of the percentage of respondents who strongly support women as political leaders compared to the percentage who do not. When we look at that ratio, we see that it varies from 0.005 in Algeria to 12.7 in Norway, as reported in Table 9.2. What this means is that in Algeria, for every 1,000 people who strongly oppose women as political leaders, there are only 5 people who strongly support women as political leaders. By contrast, in Norway, for every 1,000 people who strongly oppose women as political leaders, there are as many as 12,700 people who strongly support women as political leaders (see Table 9.3).

Explaining Public Attitudes

The question is, what accounts for the variability in public attitudes about women's suitability as political leaders? Of course, there are undoubtedly many determinants such as the percentage of women already in political office; the age, sex, educational background, occupation, and income level of the individual surveyed; and his or her beliefs about the equality of men and women and about women's proper social roles. Yet I maintain that how the state acts is also an important, yet to date unexplored, determinant of public attitudes about women's political leadership.

[32] World Values Survey, available at http://www.worldvaluessurvey.org/ (accessed Feb. 7, 2008).
[33] Ibid., at Variable D059.

Table 9.2. *Ratio of Respondents Strongly Supporting Women as Political Leaders Compared to Those Strongly Opposed, World Values Survey, 2000*

Political System	Ratio[a] (*n*)[b]	Political System	Ratio (*n*)
Algeria	0.005 (1282)	Uruguay	1.022 (1000)
Egypt	0.041 (3000)	Rep. of Korea	1.077 (1200)
Georgia	0.054 (2008)	Rep. of Tanzania	1.138 (1171)
Jordan	0.60 (1223)	El Salvador	1.154 (1254)
Armenia	0.065 (2000)	Brazil	1.164 (1149)
Nigeria	0.113 (2022)	South Africa	1.233 (3000)
Morocco	0.212 (2264)	Rep. of Macedonia	1.491 (1055)
Vietnam	0.231 (995)	Chile	1.518 (1200)
Bangladesh	0.311 (1499)	Japan	1.608 (1362)
Iran	0.342 (2532)	Columbia	1.615 (6025)
Philippines	0.351 (1200)	Mexico	1.721 (1535)
Taiwan	0.354 (780)	Venezuela	1.746 (1200)
Uganda	0.443 (1002)	Bosnia and Herzegovina	1.957 (1200)
Rep. of Moldova	0.467 (1008)	Dominican Republic	2.000 (417)
Indonesia	0.469 (1004)	New Zealand	3.540 (1201)
Turkey	0.528 (4607)	United States	4.204 (1200)
China	0.567 (1000)	Australia	5.371 (2048)
India	0.569 (2002)	Canada	6.386 (1931)
Pakistan	0.585 (2000)	Spain	8.681 (2409)
Zimbabwe	0.656 (1002)	Sweden	12.286 (1014)
Albania	0.915 (1000)	Norway	12.700 (1127)

[a] Ratio of respondents strongly supporting women leaders compared to those strongly opposed.
[b] Number of respondents in parentheses.

Scholars have established that people in general view men as suited for political leadership.[34] In addition, all democracies endorse public policies affirming the individual equality of men and women. Hence, to the degree that women can be defined as being the same as men, people in democracies should be inclined to view both men and women as suited for political office. However, as also discussed, some democracies – in addition to guaranteeing negative individual rights – *also* guarantee positive group rights associated with women's maternal group difference from men. When a democratic state not only acts like an individual, if not a man (as do all democracies), but also acts like a woman by adopting public policies representing attributes associated with women, that is, with social and biological maternalism attributes, then the interpretative, policy feedback impact of social and biological maternalist public policies should generate more favorable public attitudes about women's suitability for political leadership positions – not just because women are the same as men, but also because they are maternally different from men.

34 Georgia Duerst-Lahti and Rita Mae Kelly, eds., *Gender, Power, Leadership and Governance* (Ann Arbor: University of Michigan Press, 1996); Sue Tolleson-Rinehart and Jyl J. Josephson, eds., *Gender and American Politics: Women, Men, and the Political Process* (Armonk, NY: M. E. Sharpe, 2000).

Table 9.3. *Public Attitudes: Regression Analysis Assessing the Effects of Types of Citizenship on Public Attitudes About Women as Political Leaders, Controlling for Percentage of Women Elected to Political Office, Psychological Orientations, Sociological Roles, and Economic Status, World Values Survey, 2000*

	Public Attitudes[a]: Support for Women as Political Leaders
TYPES OF CITIZENSHIP	
Liberal citizenship: Democracy[b]	0.179 (0.033)*
Social citizenship: Welfare provision[c]	1.384 (0.229)*
Biological citizenship: Gender quotas[d]	−0.878 (−0.161)*
Biological citizenship: Hereditary monarchies[e]	–
Interaction: Social * Liberal citizenship (Welfare Provision * Democracy)	**2.321 (0.284)** *
Interaction: Biological * Liberal citizenship (Gender Quotas * Democracy)	**2.436 (0.448)***
Interaction: Biological * Liberal citizenship (Hereditary Monarchies * Democracy)	**4.125 (0.522)***
PERCENTAGE WOMEN	
Percentage of women elected to national legislature	−0.006 (−0.021)*
PSYCHOLOGICAL ORIENTATIONS	
Women's independence, D072	–
Wife's obedience, D077	–
Children's independence, A029	0.157 (0.029)*
Children's imagination, A034	0.027 (0.010)**
SOCIOLOGICAL ROLES	
Scarce jobs, only men work	
Women working, D056	−0.089 (−0.028)*
Children suffer with working mother, D061	−0.067 (−0.021)*
Women should be educated, D071	–
Women having work outside the home, D073	–
ECONOMIC STATUS	
Professional occupation	0.032 (0.005)
Education	0.158 (0.043)*
Income	−0.063 (−0.019)*
SEX	−0.215 (−0.039)*
AGE	0.027 (0.019)*
SEX * AGE	0.123 (0.052)*
Constant	−0.207**
R^2	0.975

[a] Ratio of the number of people who "strongly agree" that women are not suitable as political leaders compared to the number of people who "strongly disagree" that women are not suitable as political leaders, predicted values, as determined by the attitudinal, policy feedback model.

[b] Scored as "free," Freedom House scores, 2006.

[c] Measured as a constitutional affirmation that it is the duty of the state to provide care work to people in need and state provision of at least 50 percent of the funds spent on health care.

[d] Measured as a constitutional or legislated gender quota that represents women's group difference from men of at least more than 15 percent, or a voluntary party quota for at least two parties of more than 30 percent, or at least one party for more than 40 percent. The political parties must have been represented in parliament in 1999 and 2003 and must have met their targets. "All women" political parties are not included in this measure. South Africa is included in this measure.

[e] Monarchy open to women: 0, no monarchy open to women; 1, monarchy open to women.

* $p = 0.000$. ** $p = 0.05$.

Types of Citizenship: The Power of Gendered Public Policies

To ascertain the policy feedback impact of gendered public policies on public attitudes about the suitability of women as political leaders, I added variables to the most recent WVS data (2000) measuring how political systems do, or do not, affirm different types of citizenship as defined by gendered public policies. Specifically, I added information about whether a political system affirms liberal citizenship (civil and political rights as male), social citizenship (constitutional and legislative health care as female), and biological citizenship (gender quotas and/or hereditary monarchies as female). When we control for types of citizenship, we do find that gendered public policies have a powerful impact on the public's attitudes about the suitability of women as political leaders. In political systems where there is only liberal citizenship, only social citizenship, or only biological citizenship, the percentage who strongly support women as political leaders is 16.2 percent, 11.9 percent, and 18.1 percent, respectively, as diagrammed in Figure 9.1. However, in a political system that has all three types of citizenship, we find that 32.4 percent of the respondents strongly support women as political leaders, as noted in Figure 9.1.

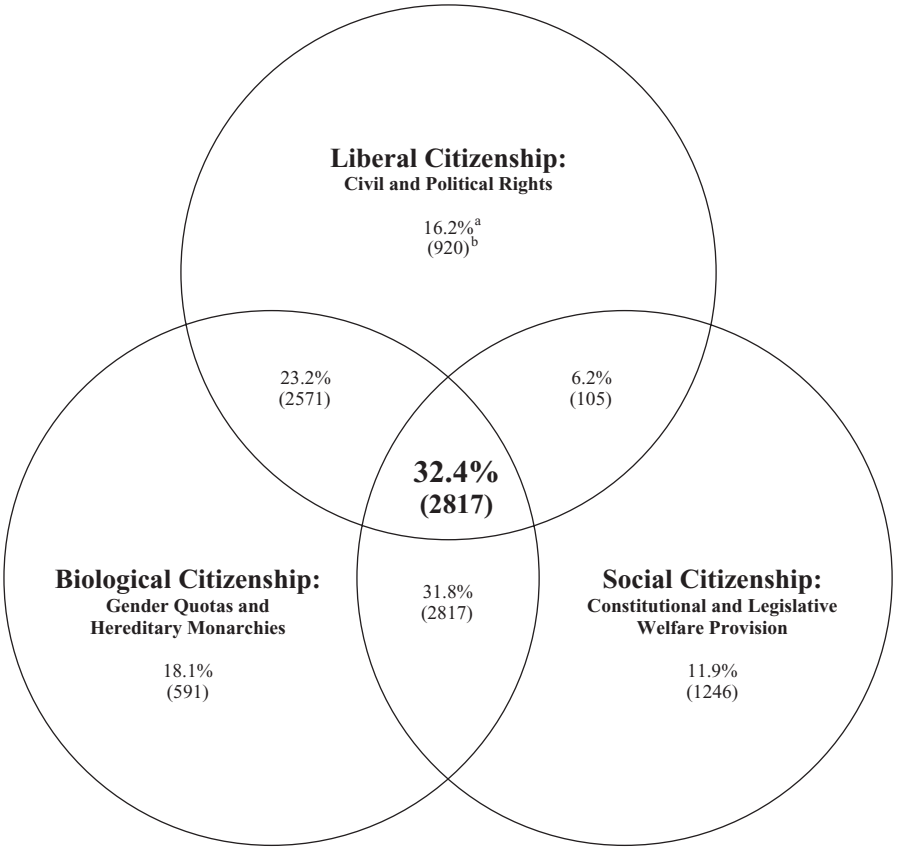
The same pattern holds when we look at how gendered public policies connect to the ratio of those who strongly support women as political leaders to those who strongly oppose women as political leaders. In political systems that only have one type of citizenship, we find that the ratio for liberal citizenship, social citizenship, and biological citizenship is 1.41, 0.98, and 1.23, respectively, as diagrammed in Figure 9.2. However, for a political system with all three types of citizenship, the ratio jumps to 8.37, meaning that for every 100 people who strongly oppose women as political leaders, there are 837 who strongly support women as political leaders. Thus, combining liberal citizenship with social and biological citizenship imparts a strong boost in public attitudes about the suitability of women as political leaders, whether measured as the percentage of respondents who strongly support women as political leaders or as the ratio of those who strongly support compared to those who strongly oppose (Figure 9.2).

Controlling for Other Variables

It is undoubtedly the case, of course, that other variables are also important for producing positive attitudes about women's suitability as political leaders such as (1) the percentage of women already elected to national legislature in a political system, (2) respondents' psychological orientations, (3) respondents' sociological attitudes about the proper roles for women, (4) respondents' economic status, and (5) respondents' sex and age. Let us consider each in turn.

Percentage of women elected to national legislature

When considering how state performance of maternalism and individualism affects the public's support of women as political leaders, it makes sense to take into account



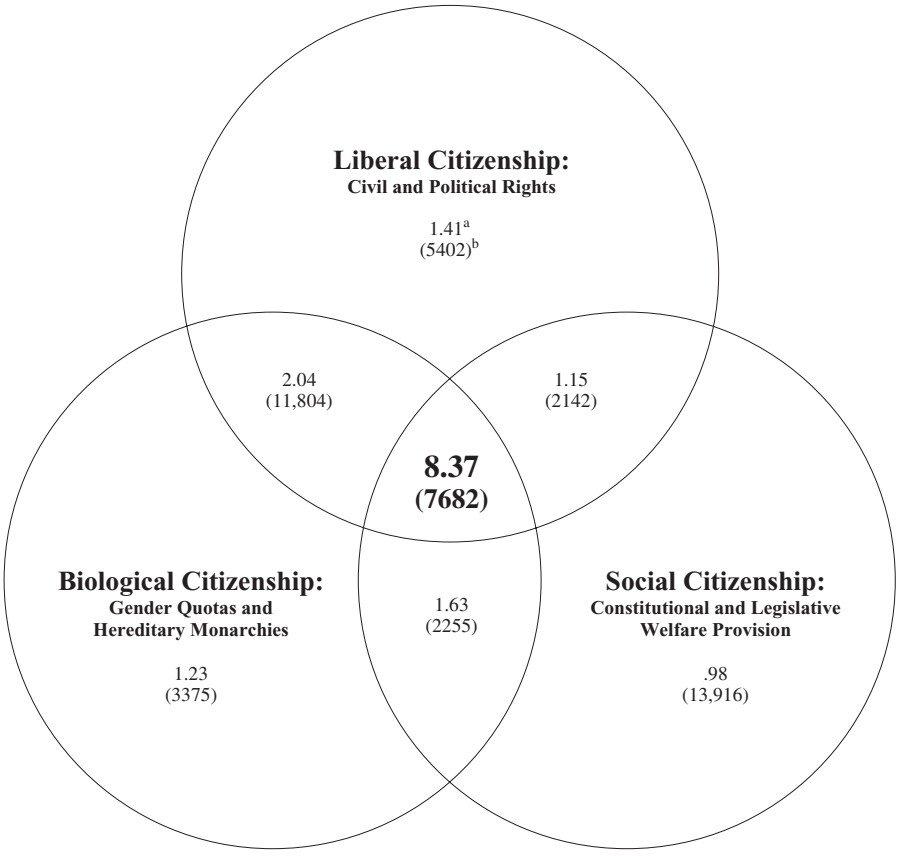
[a]) Percent strongly supporting women as political leaders.
[b]) Number of respondents in parentheses.

Figure 9.1. Percentage respondents strongly supporting women as political leaders, World Values Survey, 2000, controlling for types of citizenship.

the percentage of women already elected to the national legislature. As Nancy Burns, Kay Schlozman, and Sidney Verba have demonstrated, even the increased visibility of women's political presence when women are running for political office registers a concomitant increase in women's engagement in politics and, by extension, their political participation as voters.[35] We would expect the increased political visibility of women when they are actually elected to political office to have a similar, if not greater, effect on women's political participation.

Consequently, when examining the policy feedback effects of state action on public attitudes about women as political leaders, I control for the percentage of women already elected to the national legislature. The WVS attitudinal data are from the year 2000, so I compare them against the percentage of women elected

[35] Nancy Burns et al., *The Private Roots of Public Action: Gender, Equality, and Political Participation* (Cambridge, MA: Harvard University Press, 2001).



[a]) Ratio of respondents strongly supporting women as political leaders.
[b]) Number of respondents in parentheses.

Figure 9.2. Ratio of respondents strongly supporting women as political leaders compared to those strongly opposed, World Values Survey, 2000, controlling for types of citizenship.

to the national legislature for the year 1997, on the assumption that the full impact of women's political officeholding on public attitudes about women's leadership would not be felt until at least a few years after women's election.

Psychological orientations

As discussed, political leadership is associated with masculine attributes such as independent thinking and high self-esteem. Thus, we would expect respondents who possess these attributes themselves to be more likely to believe that others also do, including women. Such respondents then would be more likely to view women as suited for political leadership positions. To assess the psychological predisposition of respondents in relation to their attitudes about women's political leadership, I have chosen a set of questions from the WVS that purport to measure "perceptions of life" and "family," in particular, the questions for which respondents are asked to

indicate the degree with which they agree or disagree with the following statements about the value of independence: "A woman should be independent"; "Children should be encouraged to be independent"; and "Children should be encouraged to be imaginative."[36]

Sociological roles

Scholars have established how sociological roles as associated with gender affect people's attitudes about the appropriateness of women's activity and participation in nontraditional roles outside the home such as political leadership roles. Because the characteristics of political leadership entail engaging in nontraditional roles for women outside the home in the arena of work and job independence, I argue that respondents who view themselves favorably as engaging in work-related activities will be more likely to identify with others who do the same, including women in political leadership positions. Attitudinal identification with women who run for political office, I argue, will predispose respondents to view women favorably as political leaders.

To assess the impact of sociological roles upon attitudes about women as political leaders, I use questions from the WVS that assess the degree to which respondents affirm the following statements: "The wife must obey her husband;" "Women want home and children;" "Children suffer with a working mother;" "When jobs are scarce, men should have more right to a job than women;"[37] "Women should be educated;" and "Women should have the right to work outside the home."[38] I am assuming that respondents who disagree with the first three and agree with the last two will have more positive attitudes about women as political leaders.

Economic status

Others emphasize economic factors as crucial to women's political citizenship as officeholders. There is general agreement that women's election to office is promoted by a high percentage of women in the labor force, high education levels, high literacy rates (especially high literacy rates for women), high urbanization, and high gross national product.[39] I examine how these characteristics of respondents affect their attitudes toward women as political leaders. I assume that respondents who are employed in professional jobs, rather than agricultural ones, will have more positive attitudes about women as political leaders, as will respondents who are educated, have high incomes, and/or live in urban areas. To measure these attributes, I use the following questions from the WVS: type of job, education, income, and size of town.[40]

[36] World Values Survey, 2000.
[37] Ibid.
[38] Ibid.
[39] Ann Phillips, *Democracy and Difference* (University Park: Pennsylvania State University Press, 1993), at 106.
[40] World Values Survey, 2000.

Other characteristics: Sex and age

In addition, I take into account respondents' sex and age as characteristics also likely to influence their attitudes about the suitability of women as political leaders. I assume that younger respondents who are female will be more favorably disposed toward viewing women as suitable for political leadership positions than will older respondents and/or male respondents.

Public Attitudes: Putting It All Together

I am interested in how types of citizenship affect the public's view of women as suitable for political leadership positions, controlling for other relevant variables. When we compare the relative impact of all the variables, we see, indeed, that combining liberal citizenship with social and/or biological citizenship is by far the most important determinant of public opinion about women as political leaders. In political systems that affirm liberal citizenship *and* where the state affirms social citizenship in the form of welfare provision, even when all other variables are controlled, the increase in the number of people who support women as political leaders is a ratio increase of 2.321, meaning that for every 2,321 people who support women as political leaders, there will be 1,000 who do not, as indicated in Table 9.3.

When we turn to political systems that guarantee liberal citizenship and that also endorse biological citizenship in the form of gender quotas, we see that the ratio increases even more, to 2.436, meaning that for every 2,436 people who do support women as political leaders, there will be 1,000 who do not, as reported in Table 9.3. Finally, when we turn to the combination of liberal citizenship and biological citizenship in the form of hereditary monarchies, we find that the ratio increases even more, to 4.125, meaning that for every 4,125 people who do support women as political leaders, there will be only 1,000 who do not, as noted in Table 9.3. If we consider political systems that have all three types of citizenship – liberal, social, and biological – the net ratio increase is 8.882. Thus, even when other relevant variables are controlled, the *interpretative effects* on public attitudes about the suitability of women as political leaders of gendered public policies are dramatic. Now we can ask, how does the impact of types of citizenship transfer to the election of women to national legislatures?

Citizenship and Women's Election to Political Office

Instrumental Impacts

In addition to interpretative effects on public attitudes, we should expect types of citizenship to have instrumental effects on voting behavior. When a democratic state that affirms liberal citizenship, for example, also adopts public policies affirming social and biological citizenship by providing welfare benefits and/or endorsing gender quotas, as scholars have established, such public policies instrumentally

make it easier for women and others to participate as voters in the political system, if not also as candidates in the political system. As Frances Rosenbluth, Rob Salmond, and Michael Thies explain, for example, the reason women are underrepresented around the world in national legislatures is because of the lack of welfare policies. As they argue, welfare policies are crucial for women's political empowerment because such public policies stimulate an important chain of events that then predisposes political parties to compete for women's votes, which has the effect of increasing women's presence in legislative bodies.[41]

When it comes to hereditary monarchies, however, it is difficult to hypothesize their instrumental effect on women's election to national legislative office. Yes, when a democratic state incorporates hereditary monarchies into its system of political governance, this fusion of the state with the family, however symbolic, should – and, as we found, does – have interpretative impacts upon the public in terms of viewing women as more suitable for political leadership positions. However, I do not propose here that there are additional instrumental effects of hereditary monarchies upon women's election to national office. Hence, in the following analysis, I will limit my consideration of the instrumental effects of maternalist policies to welfare provision and gender quotas, while controlling for other variables.

Controlling for Other Variables

The research on women's political recruitment – that is, women's election to national public office – is vast. However, we can group the findings of scholars into several major categories of characteristics such as psychological orientations;[42] sociological roles;[43] political structures, including political parties;[44] and economic status.[45] Given the focus of this project on the attributes of the political system as a determinant of women's political representation, I limit my study to the impact of political structure and economic variables on women's election to national legislatures in relation to the impact of democratic maternal state action.

[41] Frances Rosenbluth et al., "Welfare Works: Explaining Female Legislative Representation," 2 *Pol. and Gender* 165 (2006).

[42] See, e.g., Lawless and Fox, *It Takes a Candidate*.

[43] See, e.g., Linda Witt et al., *Running as a Woman: Gender and Power in American Politics* (New York, NY: The Free Press, 1995); Janet Clark, "Getting There: Women in Political Office," in Marianne Githens et al., (eds), *Different Roles, Different Voices* (New York: Harper Collins, 1994), at 105–6; Anne Phillips, "Dealing With Difference: A Politics of Ideas, or a Politics of Difference?," in Seyla Benhabib, ed., *Democracy and Difference* (Princeton, NJ: Princeton University Press, 1993); Ronald D. Hedlund et al., "The Electability of Women Candidates: The Effects of Sex Role Stereotypes," 41 *J. Pol.* 513 (1979).

[44] Christina Wolbrecht, *The Politics of Women's Rights: Parties, Positions, and Change* (Princeton, NJ: Princeton University Press, 2000); Kira Sanbonmatsu, "Political Parties and the Recruitment of Women to State Legislatures," 64 *J. Pol.* 791 (2002); Susan J. Carroll, *Women as Candidates in American Politics* (Bloomington: Indiana University Press, 1985); Barbara C. Burrell, *A Woman's Place Is in the House* (Ann Arbor: University of Michigan Press, 1994).

[45] See, e.g., Phillips, "Dealing With Difference."

Political Structures

Researchers have found that women do better in multimembered districts than in single-member districts when there is a system of proportional representation and when elections are highly competitive, with multiple parties running for office.[46] Some have also found that women do better in parliamentary, rather than presidential, systems. The power of political structure to enhance or dampen women's access to political office has led to some notable solutions such as quotas for women. Quotas have been adopted by Sweden, Taiwan, India, Venezuela, France, Norway, Denmark, Germany, Luxembourg, Portugal, Italy, the Netherlands, and Britain at the party level. Even though some contend that quotas create a glass ceiling by defining a limit to the percentage of women to be elected,[47] thereby depressing women's election to national office, others find that gender quotas benefit women's access to national office.[48]

Here, however, I distinguish between political structures that are gender-neutral, such as proportional representation, electoral systems, and presidential or parliamentary systems, and ones that are gendered, such as gender quotas. In the case of the latter, I categorize gender quotas as a type of biological citizenship, rather than as a political structure variable.

Economic Characteristics

Others point to economic factors as crucial to women's political citizenship as officeholders. There is general agreement that women's election to office is promoted by a high percentage of women in the labor force, high education levels, high literacy rates (especially high literacy rates for women), high urbanization, and high gross national product.[49] Thus, I add economic characteristics of a political system as a control when assessing the instrumental impacts on women's election to national legislatures: size of population, percentage employed in manufacturing, percentage urban, gross domestic product, and percentage of women in the labor force.

[46] R. Darcy et al., *Women, Elections and Representation* (Lincoln: University of Nebraska Press, 1996), at 92–93; Linda K. Richter, "Exploring Theories of Female Leadership in South and Southeast Asia," 63 *Pac. Aff.* 524, 532–33 (1990); Norris, *Passages to Power*, at 114; S. Laurel Weldon, "Beyond Bodies: Institutional Sources of Representation for Women in Democratic Policymaking," 64 *J. Pol.* 1153 (2002); Richard Vengroff et al., "Electoral System and Gender Representation in Sub-national Legislatures: Is There a National Gender Gap?," 56 *Pol. Res. Q.* 163 (2003); Kira Sanbonmatsu, "Political Parties and the Recruitment of Women to State Legislatures."

[47] Chou Bih-Er et al., *Women in Taiwan Politics: Overcoming Barriers to Women's Participation in a Modernizing Society* (Boulder, CO: Lynne Rienner, 1990), at 96, 153.

[48] Mona Lena Krook, "Reforming Representation: The Diffusion of Candidate Gender Quotas Worldwide," 2 *Pol. and Gender* 303 (2006).

[49] Joni Lovenduski, *Women and European Politics* (Amherst: University of Massachusetts Press, 1986); Pamela Paxton, "Women in National Legislatures: A Cross-National Analysis," 26 *Soc. Sci. Res.* 442 (1997).

Types of Citizenship: Liberal, Social, and Biological

To this list, I add types of citizenship, measured as discussed earlier.

Putting It All Together

When we consider all types of variables together – types of citizenship, political structures, economic characteristics, and public attitudes – we see the power of types of citizenship for increasing the percentage of women elected to national legislatures. Not surprisingly, the political structure variables remain statistically significant. When a political system has closed proportional representation, for example, the predicted increase in women's election to national legislatures is 5.587 percent, as reported in Table 9.4. However, even when controlling for other types of variables, the maternal citizenship variables are powerful. When democracy is combined with welfare provision, for example, we see a big jump of 11.852 percent in the percentage of women elected to national legislatures, as reported in Table 9.4. In the case of the United States, what this means is that if the American state were to combine a maternalist policy based on positive group rights, such as welfare provision, with its public policies based on individualism, that is, negative individual rights, we could expect the number of women elected to the House of Representatives to increase by about fifty-two women.

Gender quotas, on the other hand, do not combine with democratic practice so simply. In and of themselves, gender quotas enhance the percentage of women elected to national legislatures by a whopping 12.429 percent, as reported in Table 9.4. However, there is actually a decline of 8.506 in the percentage of women elected to national legislatures when democratic states adopt gender quotas. Thus, the net gain of gender quotas for democracies is a percentage increase of 3.929 percent. Gender quotas for democracies remain positive but are not as instrumentally positive as they are for nondemocratic systems.

What's Wrong With the United States

It is true that the United States lacks proportional representation systems, which this research confirms promotes the election of women to political officeholding. However, equally telling is the way gendered public policies interact with liberal principles of individual equality to bolster women's political representation. Thus, it is the combination of liberal citizenship defined in terms of civil and political rights based on individual sameness with social and biological citizenship defined in terms of welfare provision, on one hand, and gender quotas and/or hereditary monarchies, on the other, that produces the most receptive political context for electing women to national legislatures.

These findings yield new insights for explaining the laggard status of the American state when it comes to women's political citizenship in the form of political

Table 9.4. *Percentage of Women Elected to National Legislatures: Regression Analysis of the Percentage of Women Elected to National Legislatures as Predicted by Types of Citizenship, Public Attitudes, Political Structures, and Economic Characteristics, 2006*

	Percentage Women Elected
TYPES OF CITIZENSHIP	
Liberal citizenship: Democracy[a]	2.200 (0.104)
Social citizenship: Welfare provision[b]	−8.158 (−0.417)*
Biological citizenship: Gender quotas[c]	12.429 (0.659)*
Interaction: Social * Liberal citizenship	11.852 (0.628)*
Interaction: Biological * Liberal citizenship	−8.506 (−0.443)**
PUBLIC ATTITUDES	
Public attitudes[d]	1.983 (0.275)*
POLITICAL STRUCTURES	
Closed PR	5.587 (0.285)*
Plurality	4.111 (0.214)
Parliamentary system	5.713 (0.301)
Presidential system	5.002 (0.252)
Electoral system	2.851 (0.223)
ECONOMIC CHARACTERISTICS	
Population	−0.000 (−0.071)
Manufacturing	−0.224 (−119)
Urbanization	−0.034 (−0.068)
GDP	0.000 (0.010)
Labor force, percentage women	0.244 (0.146)
CONSTANT	−5.279
R^2	0.682

[a] Scored as "free," Freedom House scores, 2006.

[b] Measured as a constitutional affirmation that it is the duty of the state to provide care work to people in need and state provision of at least 50 percent of the funds spent on health care.

[c] Measured as a constitutional or legislated gender quota that represents women's group difference from men of at least more than 15 percent, or a voluntary party quota for at least two parties of more than 30 percent, or at least one party for more than 40 percent. The political parties must have been represented in parliament in 1999 and 2003 and must have met their targets. "All women" political parties are not included in this measure. South Africa is included in this measure.

[d] Ratio of the number of people who "strongly agree" that women are not suitable as political leaders compared to the number of people who "strongly disagree" that women are not suitable as political leaders, predicted values, as determined by the attitudinal, policy feedback model.

*$p = 0.05$. **$p = 0.100$.

officeholding. As is well known, the United States lacks the proportional representation structures that are relatively common elsewhere. However, what the United States also lacks that most comparable democracies have is a set of gendered public policies that define citizenship, that is, inclusion in a political community, not only on the basis of negative individual rights, but also on the basis of gendered positive group rights. The latter, as discussed previously, can be institutionalized in the

form of welfare provision, gender quotas, and/or hereditary monarchies. When we consider the world's democracies that are comparable in wealth and industrialization, it is striking that the United States is one of only three such democracies that has failed to adopt any form of social or biological citizenship, as indicated in Table 9.5. As has been discussed, it is precisely these forms of citizenship, when combined with liberal citizenship, that boost women's election to national legislatures. Hence, when explaining why the United States fails to elect women to political office, we have a new view: the failure of the American state to adopt gendered public policies that associate the government with traits the public associates with women's maternal group difference from men.

Conclusion: Gendered Public Policies Matter

For decades, arguments have continued about the value of liberal citizenship for securing women's inclusion in the political community. Some, as noted previously, see negative individual rights as doing nothing more than justifying the imposition of masculine norms and practices upon women. Others, such as the late political theorist Susan Okin, however, argue forcefully that it is exactly such rights upon which women's political prospects depend. Still others, such as political theorists Selya Benhabib, Amy Guttman, and Jean Cohen and constitutional law scholars Linda McClain, Jennifer Nedelsky, and Martha Minow, contend that the problem with public policies based on liberal principles is that while necessary, they are not sufficient. What must be done is to add norms and practices based on relational connection to others to those based on liberal precepts affirming the autonomy of rights-bearing individuals.

This study adds empirical verification that liberal citizenship, as defined by civil and political rights, is necessary, but not sufficient, for securing women's political representation. Yes, women as political candidates benefit from a political context that guarantees their rights as individuals who are the same as men. However, so, too, do women candidates benefit from a political context that connects the public's attribution to women of a maternal group difference from men to the public sphere of political governance. When a democratic government – which by definition affirms negative individual rights – also acts to affirm positive group rights by way of policies representing maternal traits, then the latter gendered public policies teach the public that women's maternal group difference from men signifies connection with the state, not disconnection. The result is that the public's view of women as suitable for political leadership increases, and subsequently, so, too, does the election of women to political office.

Taking Marshall's cue that the key dimension of citizenship is *inclusion*, I have adapted his typology to look at the way gendered public policies signify inclusion as individuals (or, as some would argue, as males) or inclusion as social or biological maternalists. Liberal citizenship, which includes people in the political community

Table 9.5. *Western Democracies*[a] *and Gendered Public Policies: Welfare Provision, Gender Quotas, and Hereditary Monarchies*

Political System	Types of Maternal Citizenship: Gendered Public Policies			Total: Gendered Public Policies
	Social Citizenship: Welfare Provision[b]	Biological Citizenship: Gender Quotas[c]	Biological Citizenship: Hereditary Monarchy[d]	
Australia	YES	YES	YES	3
Austria	YES	YES	no	2
The Bahamas	no	no	YES	1
Belgium	YES	YES	YES	3
Canada	YES	YES	YES	3
Denmark	YES	YES	YES	3
Finland	YES	no	no	1
France	**no**	**no**[b]	**no**	0
Germany	YES	YES	no	2
Greece	no	YES	no	1
Iceland	YES	YES	no	2
Ireland	YES	YES	no	2
Israel	no	YES	no	1
Italy	YES	YES	no	2
Japan	**no**	**no**	**no**	0
Luxembourg	YES	YES	YES	3
Monaco	no	no	YES	1
The Netherlands	YES	YES	YES	3
New Zealand	no	no	YES	1
Norway	YES	YES	YES	3

(*continued*)

Table 9.5 *(continued)*

Political System	Types of Maternal Citizenship: Gendered Public Policies			
	Social Citizenship: Welfare Provision[b]	Biological Citizenship: Gender Quotas[c]	Biological Citizenship: Hereditary Monarchy[d]	Total: Gendered Public Policies
Portugal	YES	YES	no	2
San Marino	YES	no	no	1
Spain	YES	YES	YES	3
Sweden	YES	YES	YES	3
Switzerland	no	YES	no	1
United Kingdom	YES	YES	YES	3
United States	**no**	**no**	**no**	0
PERCENTAGE YES≅	67%	70%	48%	$N = 27$ **All three: 37%** **Two: 22.2%** **One: 29.7%** **None: 11%**

[a] Democratic political systems with a per capita income of at least $11,000/year and at least 60 percent urban.

[b] There is a constitutional provision establishing that it is an affirmative obligation of the state to provide for the welfare needs of people, and the government provides at least 50 percent of the funds spent on health care; health care funds are calculated on the basis of data provided by the World Health Organization for the year 2000 (http://www3.who.int/whosis/core/core_select_process.cfm?country).

[c] Measured as a constitutional or legislated gender quota that represents women's group difference from men of at least more than 15 percent, or a voluntary party quota for at least two parties of more than 30 percent, or at least one party for more than 40 percent. The political parties must have been represented in parliament in 1999 and 2003 and must have met their targets. "All women" political parties are not included in this measure. South Africa is included in this measure. France is not included in this measure because its legislated principle of gender quotas, *parité*, is premised on the universality of human beings, not their sex difference. See Joan Wallach Scott, *Parité! Sexual Equality and the Crisis of French Universalism* (Chicago: University of Chicago Press, 2005).

[d] Open to women.

on the basis of individual sameness, does promote women's election to political office. However, it is not enough. Also needed are public policies that guarantee some form of maternal citizenship, social and/or biological. When the state affirms all three forms of citizenship – liberal, social, and biological – the scene is most advantageously set for women's election to national political office.

PART

III

SOCIAL CITIZENSHIP AND GENDER

10

Pregnancy and Social Citizenship

Joanna L. Grossman*

Pregnant workers and workers who are new mothers are, fundamentally, workers. They should not be relegated to second class citizenship in employee rights or benefits.[1]

The Pregnancy Discrimination Act does not . . . require employers to offer maternity leave or take other steps to make it easier for pregnant women to work.[2]

Introduction

Can pregnant working women capture the benefits of equal citizenship? Or do the physical effects of pregnancy, combined with the law's general failure to insist that they be accommodated, make that an elusive goal? This chapter takes up those questions by reconsidering pregnancy discrimination law through the lens of social citizenship.[3]

Despite vital legislative and judicial victories that together had established a broad-based federal right of sex equality by the early 1970s,[4] pregnant women continued to face myriad forms of discrimination in the workplace. During the campaign for and debate over the Pregnancy Discrimination Act (PDA) of 1978, advocates and legislators bandied about the familiar fear of second-class citizenship to argue for greater protection for pregnant women in the workplace. Like other important legislative enactments and of the same era,[5] the central goal of the PDA was to

* My sincere thanks to Linda McClain, Grant Hayden, and Deborah Brake for editing suggestions and to John DiNapoli for his assistance with research and citations.

1 "Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy: Hearings on H.R. 5055 and H.R. 6075 Before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor," 95th Cong., Sess. 1 (1977) (testimony of Odessa Komer, Vice President, United Auto Workers).

2 *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994) (Posner, J.).

3 See 42 U.S.C. § 2000e(k) (2000).

4 See, e.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (2000) (making it an unlawful employment practice for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to . . . compensation, terms, conditions, or privileges of employment because of . . . sex."); *Craig v. Boren*, 429 U.S. 190 (1976) (establishing intermediate scrutiny for sex-based classifications).

5 The Equal Pay Act of 1963, Title VII of the Civil Rights Act of 1964, and Title IX of the Education Amendments of 1972, all passed within a decade, provide the core federal statutory protections against sex discrimination.

promote women's equality by breaking down formal barriers to participation. At its core, this movement was a quest for equal social citizenship – access to paid work and economic security – for women. But while second-wave feminists logged tremendous successes in opening workplace doors for women, the aspiration of the PDA – that pregnant workers would cease being second-class citizens – has not come to pass.

This chapter develops a citizenship-based model for evaluating pregnancy discrimination law, offering it as a substitute to the conventional gender equality framework. Because modern law takes a capacity-based approach to defining discrimination, it ultimately fails to promote sufficient integration of women into workplaces and occupations in which the physical effects of pregnancy are most likely to clash with job performance. The chapter concludes by urging greater accommodations for pregnant workers as a means of promoting their equal social citizenship.

Women's Equal Citizenship

Pregnancy, with its real, if temporary, physical effects, presents a challenge to women's claims to full citizenship because it can impair a woman's ability to draw on her natural talents and capacities in the workplace, causing repeated setbacks for women individually and as a class that systematically dampen women's workforce participation. In this section, I resituate the conventional debate about workplace accommodations for pregnancy within the citizenship framework, arguing, ultimately, that the social citizenship tradition demands some protection for a pregnant woman's right to work despite the potential physical limitations of pregnancy.

Defining Equal Citizenship

This chapter, like many others in this volume, uses "citizenship" as a proxy for inclusion or participation and as a benchmark for assessing progress toward gender equality. *Equal citizenship* is often used more broadly than simply to connote technical legal status;[6] it is, in sociologist T. H. Marshall's words, "a status bestowed on those who are full members of a community. All who possess the status are equal with respect to the rights and duties with which the status is endowed."[7] This broader notion of citizenship is not merely descriptive, but also normative – used

[6] See Judith N. Shklar, *American Citizenship: The Quest for Inclusion* (Cambridge, MA: Harvard University Press, 1991), at 4 ("Citizenship as nationality is the legal recognition, both domestic and international, that a person is a member, native-born or naturalized, of a state").

[7] See T. H. Marshall, *Class, Citizenship, and Social Development: Essays by T. H. Marshall* (Garden City, NY: Doubleday, 1964), at 84; see also Linda Bosniak, "Citizenship and Work," 27 *N.C. J. Int'l L. and Com. Reg.* 497, 500 (2001) ("Equal citizenship is understood to entail enjoyment of various kinds of rights – civil rights, political rights, social rights, and cultural rights – but all of these rights are described in the language of citizenship"); Jennifer Gordon and Robin Lenhardt, "Rethinking Work and Citizenship," 55 *UCLA L. Rev.* 1161, 1185 (2008).

as an expression of our shared desire to achieve "the highest fulfillment of democratic and egalitarian aspiration."[8] The rhetorical "second-class citizen" – someone "who is denied full rights and recognition of membership in society," despite having citizenship status – illustrates this substantive notion of citizenship.[9]

Though the citizenship framework has become a staple of anti-discrimination theory and legal rhetoric, it has also been criticized as unnecessarily, perhaps even inherently, exclusionary.[10] If rights are tethered to citizenship, then, so the claim goes, we abandon those without formal citizenship status.[11] The usefulness of the citizenship framework in the gender context outweighs its detriments, however. As Linda McClain and I argue in the introduction to this volume, women's rights advocates have long pitched their arguments in citizenship terms. The birth of the women's movement in Seneca Falls in 1848 revolved around the demand for "immediate admission to all the rights and privileges which belong to them as citizens of the United States."[12] Later feminist struggles – for the right to serve on juries and the right to pursue a livelihood, to take just two examples – would also root themselves deeply in the concept of citizenship-based rights.[13] Though these claims were often rejected,[14] the aspiration of equal citizenship remained central to women's march toward equality. And even in modern struggles, where citizen/non-citizen is not obviously a useful distinction, the concept of second-class citizenship retains rhetorical power and is often invoked. We should thus not be too quick to abandon the citizenship framework.

Moreover, the exclusionary bias of the citizenship framework can be overcome, at least in large part, by un-tethering the concept of citizenship from formal legal status altogether. Perhaps new terminology would help,[15] but many scholars continue to talk about "citizenship" while using a definition that has little if anything to do with one's legal status. And regardless of terminology, we can apply the aspiration

[8] See Linda Bosniak, *The Citizen and the Alien* (Princeton, NJ: Princeton University Press, 2006), at 1.

[9] Bosniak, "Citizenship and Work," at 500.

[10] See Gordon and Lenhardt, "Rethinking Work and Citizenship," at 1188–89 (discussing, and rejecting, critiques of "citizenship" as a framework for assessing societal inclusion).

[11] Ibid.

[12] "Declaration of Sentiments, Adopted by the First Women's Rights Convention Seneca Falls, N.Y., July 19, 1848," in *History of Woman Suffrage* (Salem, NH: Ayer, 1985), at 71–72.

[13] See, e.g., Joanna Grossman, "Women's Jury Service: Right of Citizenship of Privilege of Difference?," 46 *Stan. L. Rev.* 1115 (1994) (noting the centrality of "citizenship" arguments in women's long suffering fight for equal service on juries); *Bradwell v. State*, 83 U.S. 130 (1872) (plaintiff unsuccessfully challenging exclusion of women from state bar relied on a citizenship-based claim to the right to earn a livelihood).

[14] As Judith Resnik notes, the Supreme Court's rationale for upholding a Missouri law denying women suffrage was that they "were citizens but citizens of a special sort, possessing not all of the attributes of citizenship that men had." Judith Resnik, *"Naturally" Without Gender: Women, Jurisdiction, and the Federal Courts*, 66 N.Y.U. L. Rev. 1682 (1991).

[15] Many scholars have settled on other terms to capture the substantive aspects of citizenship. See, e.g., Kenneth L. Karst, *Belonging to America: Equal Citizenship and the Constitution* (New Haven, CT: Yale University Press, 1989) ("belonging"); Gretchen Ritter, *The Constitution as Social Design: Gender and Civic Membership in the American Constitutional Order* (Palo Alto, CA: Stanford University Press, 2006), at 6 ("civic membership"); Shklar, *American Citizenship*, at 2–3 ("standing").

of "equal citizenship" to all members of a community, regardless of their technical status. This approach is consistent with the most important components of federal anti-discrimination and workers' rights laws, which do not limit their protections to "citizens."[16] Whether we adhere to the citizenship language, or substitute an alternative designed to capture the same value of inclusion, the citizenship framework has great potential as both yardstick and ideal when assessing women's progress.

Social Citizenship

Within T. H. Marshall's classic formulation of citizenship – divided into civil, political, and social dimensions – issues related to pregnancy and work fall squarely into the last category. He defined "social citizenship" to include "the whole range from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilized being according to the standards prevailing in the society."[17]

Marshall posited that these dimensions naturally occur sequentially – civil, then political, then social rights. Whether or not this order is inevitable, the experience of American women bears out both the non-unitary nature of citizenship-based rights and their sequential development.[18] While earlier struggles focused on civil and political rights, the quest for equal social citizenship has been a late-twentieth-century struggle.

The "social citizenship tradition" in the United States, as William Forbath has described it, "centers on decent work and livelihoods, social provision, and a measure of economic independence and democracy."[19] Social citizenship has animated the debate over constitutional welfare rights[20] as well as a number of movements and debates about work.[21] Although access to paid work is not the only component of

[16] See, e.g., *Plyler v. Doe*, 457 U.S. 202 (1982) (holding that the Equal Protection Clause applies to legal and illegal aliens); *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 93 (1973) ("We agree that aliens are protected from discrimination under the Act."); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984) (holding that "employees" includes documented and undocumented aliens for purposes of applying the National Labor Relations Act).

[17] See Marshall, *Class, Citizenship, and Social Development*, at 71–72.

[18] See Gordon and Lenhardt, "Rethinking Work and Citizenship," at 1185 ("These aspects of citizenship can and do operate independently of each other"); cf. *Muller v. Oregon*, 208 U.S. 412 (1908) (observing that the "lack of political equality" demonstrated by the denial of suffrage to women "was not of itself decisive" on the question whether the state could impose restrictive hours legislation on the basis of sex).

[19] William E. Forbath, "Caste, Class and Equal Citizenship," 98 *Mich. L. Rev.* 1, 1 (1999); see also Kenneth Karst, "The Supreme Court 1976 Term – Foreword: Equal Citizenship Under the Fourteenth Amendment," 91 *Harv. L. Rev.* 1, 9 (1977).

[20] See generally Forbath, "Caste, Class and Equal Citizenship"; Karst, "Supreme Court 1976 Term."

[21] See Vicki Schultz, "Life's Work," 100 *Colum. L. Rev.* 1881, 1888 (2000) ("At crucial times in our history, including the New Deal, the labor movement, the civil rights movement, and strands of the women's movement have championed an affirmative conception of the right to work as the basis for a robust, equal social citizenship").

social citizenship, it is central to it. The breadth of access to decent, paid work is one measure of a society's commitment to equality and its success in integrating all citizens as full participants in society.[22]

The connection between work and citizenship is multifaceted.[23] Work relates directly to political participation by providing individuals with the independence necessary to exercise those rights and the forum to discuss political ideas.[24] Increasingly, workplaces are the sites "where we learn about each other, work together, and exchange social and political views."[25] Judith Shklar argued that voting and earning are the two most important aspects – indeed, "pillars" – of citizenship. As she sums it up, "We are citizens only if we 'earn.'"[26]

Work in our society is also deeply connected to self-identity and dignity. Vicki Schultz has argued that "jobs create people" because they shape individuals' behavior and self-conception.[27] Sociologists have long made a similar claim about the relationship between work and self-identification.[28] But work clearly also shapes the conceptions of others, relationships, and standing in the community.[29] Finally, and perhaps most important, work provides the most direct means to economic security. This enables individuals to reduce public and private dependencies and to provide for their own families.[30] Along these multiple channels, paid work has thus served as a link to social citizenship. Women have utilized a variety of measures to capture these many and varied benefits of paid work.

As a normative goal, equal social citizenship confronts greater barriers. Both civil and political citizenship, to draw on Marshall's framework, fit comfortably within

[22] See Pamela S. Karlan and George Rutherglen, "Disabilities, Discrimination, and Reasonable Accommodation," 46 *Duke L. J.* 1, 25 (1996) (noting that the ADA was premised on the goal of "equality of opportunity," which "encompasses the opportunity to lead as valuable and satisfying a life as the rest of the population").

[23] See Gordon and Lenhardt, "Rethinking work and Citizenship," at 1191–95 (considering various theories of "work and citizenship"). There is also a connection between citizenship as a legal status and work. See, e.g., Bosniak, "Citizenship and Work," at 499.

[24] See, e.g., Cynthia Estlund, "Working Together: The Workplace, Civil Society, and the Law," 89 *Geo. L. J.* 1, 53 (2000) (arguing that work provides "a significant deliberative forum" that facilitates individuals' participation as citizens).

[25] Eddie A. Jauregui, "The Citizenship Harms of Workplace Discrimination," 40 *Colum. J. L. and Soc. Probs.* 347, 348 (2006) (summarizing literature on the connection between citizenship and democratic or political citizenship); see also Linda C. McClain, *The Place of Families: Fostering Capacity, Equality, and Responsibility* (Cambridge, MA: Harvard University Press, 2006), at 93 (an "appeal to 'social citizenship' would accept the premise of the important link between work and citizenship, and would argue for a right to decent, satisfying work as a component of responsible self-government").

[26] Shklar, *American Citizenship*, at 67; see also Marshall, *Class, Citizenship, and Social Development*, at 80 (arguing that those who needed the protection of the state were by definition not citizens; the poor were entitled to public subsidy as an *alternative* to citizenship, rather than an incident of it).

[27] See Schultz, "Life's Work," at 1890.

[28] See, e.g., Rosabeth Moss Kanter, *Men and Women of the Corporation* (New York: Basic Books, 1977).

[29] See Shklar, *American Citizenship*, 63 ("In the marketplace, in production and commerce, in the world of work in all its forms, and in voluntary associations that the American citizen finds his social place, his standing, the approbation of his fellows, and possibly some of his self-respect").

[30] See Karst, "Supreme Court 1976 Term"; Forbath, "Caste, Class and Equal Citizenship"; Schultz, "Life's Work."

the liberal theory tradition of "negative rights."[31] Though courts did not immediately give in to rights-based claims by women – even after, in many cases, they granted comparable rights to African Americans or other disadvantaged groups – the nature of the claims was consistent with the American constitutional and political structure. Women were prevented from voting or serving on juries by formal governmental barriers. Social citizenship, in contrast, entails not only the removal of state-sponsored barriers to participation, but also a change in private behavior and, more incongruent still, the state's affirmative assistance to disadvantaged individuals or groups.[32]

Feminist Conceptions of Social Citizenship

A central goal of the second-wave women's movement was to achieve greater economic opportunity for women. Yet, feminists have not been of a single mind on matters of social citizenship. On the one hand, feminists critique the conventional account of social citizenship for its failure to account for the valuable and disproportionate contributions women make through care and domestic work. Linda McClain identifies an "important limitation in the social citizenship tradition: its inattention to the gendered economy of care, that is, women's disproportionate responsibility for caregiving, and how this responsibility limited their full participation in the labor market and their access to forms of economic security tied to employment."[33] Martha Fineman has similarly cautioned against defining citizenship by reference only to paid work given the importance of unpaid caregiving,[34] and a gendered pattern that persists regardless of whether women also engage in paid work.[35]

These concerns have led feminists to challenge courts and policy makers to acknowledge "the importance of caregiving as a form of social contribution"[36] and to equate reproductive and unpaid domestic work with paid labor in a variety of legal and policy settings.[37] Joan Tronto, for example, calls for care work as a "ground for conferring citizenship."[38] This critique also justifies calls for greater governmental

[31] Eileen McDonagh groups these two types of citizenship into a single category, "liberal citizenship," because they share this characteristic. See Chapter 9.

[32] Nancy Hirschmann makes a parallel claim for the disabled. See Chapter 7.

[33] McClain, *Place of Families*, at 94.

[34] See Martha Albertson Fineman, *The Autonomy Myth: A Theory of Dependency* (New York: New Press, 2004), at 280.

[35] For the original coining of the term "second shift" to describe this pattern, see Arlie Hochschild, *The Second Shift: Working Parents and the Revolution at Home* (New York: Viking Penguin, Inc., 1989). For more recent data, see http://mothersandmore.org/press_room/statistics.shtml (last visited April 6, 2009).

[36] McClain, *Place of Families*, at 94.

[37] See, e.g., Ann Crittenden, *The Price of Motherhood: Why the Most Important Job in the World Is Still the Least Valued* (New York: Metropolitan Books, 2002); Katharine Silbaugh, "Turning Labor into Love: Housework and the Law," 91 *Nw. L. Rev.* 1 (1996). Supporters of this approach have advocated for, among other things, permitting family caregivers to accrue social security benefits. See, e.g., *State v. Bachmann*, 521 N.W.2d 886 (Minn. Ct. App. 1994) (rejecting homemaker's claim for "work release" on grounds that "homemaking is not generally considered employment").

[38] Joan Tronto, "Care as the Work of Citizens: A Modest Proposal," in Marilyn Friedman, ed., *Women and Citizenship* (Oxford: Oxford University Press, 2005), at 131.

support for the work undertaken when families (mostly women) care for children and other dependents.[39]

On the other hand, feminists have also sought to enhance women's access to paid work to capture the conventional benefits of social citizenship. The wide-ranging and effective efforts to open educational and workplace doors were taken in this vein, resulting in important enactments like the Equal Pay Act of 1963, Title VII of the Civil Rights Act of 1964, and the Pregnancy Discrimination Act of 1978, as well as key litigation victories establishing a robust federal right of sex equality in the workplace.[40] These victories dovetailed with an emerging constitutional right of sex equality.[41]

These feminist conceptions of social citizenship are not necessarily inconsistent with one another, but there can be costs to seeking to access and reform the notion of social citizenship simultaneously. Efforts to equate unpaid work with paid work run the risk of embracing a modern version of separate spheres ideology, which essentializes care work as women's work, and reinforces gender role stereotypes and gender inequality at home and at work. The perception of women as *inauthentic workers*, to borrow a term coined by Vicki Schultz, is fed by arguments that contemplate men and women with different levels of caregiving responsibility and, concomitantly, different levels of labor force attachment and participation.[42] Schultz and other scholars have urged feminists to reconsider the importance of paid work to women's full participation in society. Paid work, historically, has been associated with independence, and independence with citizenship.[43] Paid work also has proven tangible benefits for the individual, including greater psychological well-being and economic security, and to society. Recent popular press books, like Linda Hirshman's *Get to Work* or Leslie Bennett's *The Feminine Mistake*, have tried to remind women directly of the value of paid work – and the costs of giving it up, not the least of which is economic dependency.[44]

The notion of social citizenship informs the feminist debate over work in two ways. First, it reminds us of the centrality of paid work, at least historically, to societal and democratic inclusion, and thus suggests that efforts to equate the value

[39] McClain, *Place of Families*, at 94 (refocusing the historical tradition of social citizenship would "posit governmental responsibility to facilitate women's and men's participation in paid employment *and family work*") (emphasis added); see also Fineman, *Autonomy Myth*.

[40] See, e.g., *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (establishing that sexual harassment is an actionable form of intentional sex discrimination); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (invalidating an employer's policy of excluding women with school-age children from employment); *Price-Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (interpreting Title VII to prohibit employment decisions shaped by sex role stereotyping).

[41] See *Boren* (establishing intermediate scrutiny for sex-based classifications).

[42] Schultz, "Life's Work," at 1900–18.

[43] See, e.g., Alice Kessler-Harris, *A Woman's Wage: Historical Meanings and Social Consequences* (Lexington: University Press of Kentucky, 1990), at 31–32.

[44] See Leslie Bennetts, *The Feminine Mistake: Are We Giving Up Too Much?* (New York: Voice/Hyperion, 2007); Linda R. Hirshman, *Get to Work: A Manifesto for Women of the World* (New York: Viking, 2006), at 2 ("Bounding home is not good for women and it's not good for the society. The women aren't using their capacities fully; their so-called choice makes them unfree dependents on their husbands").

of nonpaid work with paid work should not be undertaken to the exclusion of efforts to increase women's access to paid work. Second, when considering how best to enhance women's access to paid work, it militates in favor of a theory that defines equality as inclusion or integration into workplaces across the occupational spectrum.

Pregnancy Discrimination: A Problem of Social Citizenship

An assessment of, or claim to, equal social citizenship requires us to account for pregnant women in the workplace. Pregnancy challenges both feminist accounts of social citizenship because it often renders women temporarily incapable (or less capable) of performing their jobs – and thus unable to maintain paid work without employer accommodation – but not necessarily interested in opting for unpaid labor during or after pregnancy, even if such work was equally valued.

The earliest claims of equal citizenship did not address rights related to pregnancy, even though the Seneca Falls advocates demanded the immediate removal of obstacles to a broad spectrum of political, personal, and civil rights. Elizabeth Cady Stanton, one of the main architects of the platform and the mother of eight children, would certainly have understood the centrality of pregnancy to women's lives. As she once wrote, she "fully understood the practical difficulties most women had to contend with in the isolated household, and the impossibility of woman's best development if in contact, the chief part of her life, with servants and children."[45] But for Stanton, as for most nineteenth-century women, pregnancy and childbirth were not perceived as inconsistent with women's aspirations to equal citizenship. Pregnancy was not a formal obstacle to the exercise of the basic personal, civil, and political rights they sought.

Pregnancy began to operate more systematically to undermine women's claim to equal citizenship when they entered the work force in large numbers during the second half of the twentieth century and as they began to enter traditionally male-dominated occupations later still. The pregnant worker was an anomaly who faced open hostility from employers, protectionist impulses, and job structures designed around an ideal, non-pregnant worker. These forces converged to undermine women's equal access to paid work. Pregnancy is thus properly conceived as a problem of social citizenship. Indeed, the unfair treatment of women in the workplace ultimately triggered an antidiscrimination movement that resulted in, among other things, an important piece of federal legislation: the Pregnancy Discrimination Act (PDA) of 1978. The PDA was part of a broader access-to-work movement that expressly drew on notions of equal *social* citizenship for women, rather than on the political and civil forms of citizenship that occupied earlier equality movements.

45 Eleanor Flexner, *Century of Struggle: The Woman's Rights Movement in the United States* (New York: Atheneum, 1972), at 73.

Pregnant Women at Work: A Brief History

The 1970s marked an abrupt reversal of course in the treatment of pregnant women at work. Before the adoption of Title VII of the Civil Rights Act of 1964[46] and the establishment of heightened scrutiny under the equal protection clause for sex-based classifications,[47] states and private employers were essentially free to engage in intentional sex-based or pregnancy-based discrimination, regardless of motive. Pregnant and potentially pregnant women were primarily accounted for by laws designed to exclude or protect them from various forms of work. Sex-based protectionist labor legislation received the blessing of the U.S. Supreme Court in *Muller v. Oregon*,[48] in which the Court upheld a 1903 Oregon law prohibiting women from working more than ten hours per day in a factory or laundry. Despite having recently struck down a similar gender-neutral law,[49] the Court opined that woman's "physical structure, and the functions she performs . . . justify special legislation restricting or qualifying the conditions under which she should be permitted to toil."[50] At its core, this ruling reflected the belief in an inherent conflict between work and a woman's reproductive function. The Court in *Muller* specifically disassociated women's claims to citizenship and suffrage from the right to work on equal terms, concluding that "political, personal and contractual" equality would not change the protection required by "her physical structure and a proper discharge of her maternal functions."[51]

This ruling left the door open for more than half a century to exclusionary or restrictive policies that were expressly based on physical differences, including maternal function. At the time *Muller* was decided, nearly half of the states imposed some restrictions on women's hours of labor,[52] many of which still were in place when Title VII was enacted in 1964.[53] Employers also relied on sex-differentiated policies regarding hiring and working conditions, policies that were particularly common for jobs desirable to men.[54]

Against this backdrop of gender-based employment policies and laws, second-wave feminists united in their aim to break down barriers to workplace participation.

46 See 42 U.S.C. §§ 2000e to 2000e-17 (2000).

47 *Boren*.

48 *Muller*, at 420.

49 *Lochner v. New York*, 198 U.S. 45 (1905).

50 *Muller*, at 420.

51 Ibid., at 422.

52 See ibid., at 419 n. 1.

53 Ann O'Leary, "How Family Leave Laws Left Out Low-Income Workers," 28 *Berkeley J. Emp. and Lab. L.* 1, 22 (2007).

54 Deborah Rhode, *Speaking of Sex: The Denial of Gender Inequality* (Cambridge, MA: Harvard University Press, 1997), at 34; see also Alice Kessler-Harris, *Out to Work: A History of Wage-Earning Women in the United States* (New York: Oxford University Press, 1982), at 181 ("Protective legislation divided workers into those who could and could not perform certain roles. It therefore bears some of the responsibility for successfully institutionalizing women's secondary labor force position.").

Their efforts resulted in a significant array of legislative enactments and judicial interpretations that combined to ensure formal equality for working women. Despite these sex equality successes, however, pregnant workers continue to have difficulty navigating the workplace. Despite the tremendous influx of women into the work force,[55] it was still common into the 1970s for employers to refuse to hire pregnant women, to force them to stop work early in pregnancy, and to deny them important fringe benefits like leave, medical insurance, or disability coverage. And despite the establishment of federal guarantees of sex equality, the differential treatment of pregnant workers earned the Supreme Court's imprimatur twice during the 1970s, as the Supreme Court ruled that neither the equal protection clause (*Geduldig v. Aiello*)[56] nor Title VII (*General Electric Co. v. Gilbert*)[57] prohibited discrimination on the basis of pregnancy.

The Development of Pregnancy Discrimination Law

The modern era of pregnancy discrimination law began in the 1970s. Although the Supreme Court rejected an equality-based right against pregnancy discrimination in 1974, in *Geduldig*, earlier the same year, it had invoked the due process clause in *Cleveland Board of Education v. LaFleur* to invalidate school district policies requiring pregnant teachers to leave work early in their pregnancies and permitting them to return to work only three months after childbirth. The Court ruled such irrebuttable presumptions of incapacity, touching on long-established protected rights related to reproduction and work, were sufficiently arbitrary so as to be unconstitutional.[58] This ruling, in effect, created a constitutional right against stereotyping, though it was rooted in notions of due process rather than equal protection.

Because of *Geduldig*, however, constitutional rights figured only marginally in the development of pregnancy discrimination law. After *Gilbert* was decided, the Campaign to End Discrimination Against Pregnant Workers worked furiously to lobby for a federal law to protect pregnant workers from discrimination. The passage of the PDA in 1978 was a quick and direct result of their efforts.[59] The first clause of the PDA specifically overrules *Gilbert*'s interpretation of Title VII by redefining *sex* to include "pregnancy, childbirth, or related medical conditions." This clause, which prohibits treating a pregnant employee adversely, put an end to employment policies and practices that had explicitly or implicitly barred women from working

[55] See Kessler-Harris, *Out to Work*; Nancy Cott, *The Bonds of Womanhood: "Woman's Sphere" in New England, 1780–1835* (New Haven, CT: Yale University Press, 1977); Barbara F. Reskin and Heidi I. Hartmann, eds., *Women's Work, Men's Work: Sex Segregation on the Job* (Washington, DC: National Academy Press, 1986).

[56] 417 U.S. 484, 497 (1974).

[57] 429 U.S. 125 (1976).

[58] *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974); see also *Turner v. Dep't of Employment Sec.*, 423 U.S. 44 (1975) (invalidating Utah's unemployment compensation rules, which deemed pregnant women ineligible for benefits at certain fixed times).

[59] See 42 U.S.C. § 2000e(k) (2000).

through pregnancy, despite their individual capacity to do so. These types of policies were a direct target of Congress, which noted that they "have long-term effects upon the careers of women and account in large part for the fact that women remain today primarily in low-paying, dead-end jobs."[60] Congress revealed the same concern with capacity-based stereotyping as did the Supreme Court in *LaFleur*, but the PDA would ultimately protect a much larger group of women.[61]

The PDA's second clause guarantees pregnant workers the right to be treated the same "as other persons not so affected but similar in their ability or inability to work. . . ."[62] In other words, pregnant women were to be compared to temporarily disabled employees when making employment-related decisions. The correct interpretation of this clause, however, was not immediately obvious. While feminists converged on the principle that women have the right to be assessed individually, rather than on the basis of group characteristics, thus embracing the formal equality notion around which modern sex discrimination law has been built, they diverged over how to conceptualize equality in areas where men and women had real physical differences.[63] So-called equal treatment feminists urged adherence to formal equality principles – likes should be treated alike, even where such treatment might lead to an unequal result because of underlying physical differences[64] – in order to avoid reinforcing gender-based stereotypes and to align women's rights with workers' rights. Pregnant women, in other words, could be treated no better, no worse than comparably disabled employees. So-called special treatment feminists, in contrast, urged a substantive equality model that might insist on or at least permit accommodation of pregnancy and childbirth, whether or not provided for other temporary disabilities, if necessary to produce more equal outcomes for men and women trying to balance reproductive behavior with the obligations of paid work.[65]

This conflict among feminists came to a head in the 1980s, as litigation raised the question whether states or employers could accommodate pregnancy without doing so for other temporary disabilities. In *California Federal Savings v. Guerra*,[66] the U.S. Supreme Court considered whether a California law, which required employers to provide up to four months unpaid leave for pregnancy- or childbirth-related

[60] See S. Rep. 95–331, at 43 (1977).

[61] See ibid., at 40 ("As the testimony received by this committee demonstrates, the assumption that women will become pregnant and leave the labor market is at the core of the sex stereotyping resulting in unfavorable disparate treatment of women in the workplace").

[62] 42 U.S.C. § 2000e(k) (2000).

[63] See generally Ritter, *Constitution as Social Design*, at 242–60.

[64] See, e.g., Wendy Williams, "The Equality Crisis: Some Reflections on Culture, Courts, and Feminism," 7 *Women's Rts. L. Rep.* 175 (1982); Wendy Williams, "Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate," 13 *N.Y.U. L. Rev. L. and Soc. Change* 325 (1985).

[65] See, e.g., Linda Krieger and Patricia Cooney, "The *Miller-Wohl* Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality," 13 *Golden Gate U. L. Rev.* 513, 537–57 (1983); Ann Scales, "Towards a Feminist Jurisprudence," 56 *Ind. L. J.* 375, 426–30 (1981).

[66] 479 U.S. 272 (1987).

disability, had been preempted by the PDA. The Court ruled against preemption, paving the way for voluntary accommodation of pregnancy-related disability by employers. The Court concluded that "Congress intended the PDA to be a floor beneath which pregnancy disability benefits may not drop, not a ceiling above which they may not rise."[67]

The Failed Promise of Full Citizenship for Pregnant Workers

Without question, the PDA opened workplace doors for pregnant women. As just one data point, consider the stark drop in pregnant women dropping out of the work force – from a majority in the 1960s to only 27 percent in 1995.[68] Yet the PDA has ultimately fallen short of its promise of equal citizenship.

Today, pregnant workers benefit from an amalgam of statutory and constitutional protections, including, most centrally, the right not to be presumed *incapable* of work by the mere fact of pregnancy. This translates into a right of individualized assessment, protected both by notions of due process and by the PDA.[69] Unless impracticable, a pregnant employee is entitled to be individually assessed before her capacity can be used to limit her work opportunities.[70]

A pregnant woman who is fully capable has the right to work on the same terms as other workers. The PDA adopts an official stance of pregnancy blindness, which prohibits an employer from applying special rules to pregnant women whether motivated by a desire to harm or protect. Congress specifically intended to eradicate the system of special rules that had developed, observing that "employers will no longer be permitted to force women who become pregnant to stop working regardless of their ability to continue."[71]

Fetal protection policies, which routinely barred women from jobs posing potential hazards to their fetuses, challenged the law's commitment to pregnancy-blindness. The Supreme Court, however, invalidated a policy barring fertile women from jobs in a battery manufacturing plant that involved lead exposure in *International Union v. Johnson Controls, Inc.*,[72] ruling that fetal risk is not an aspect of a woman's *capacity* to work. The decision whether to endure potential risks to fetuses must be left to the individual woman.

[67] *Guerra*, at 285. In *Miller-Wohl Co. v. Commissioner of Labor and Industry*, 692 P.2d 1243 (Mont. 1984), the Montana Supreme Court upheld a state law mandating maternity (but not disability) leave on similar grounds.

[68] See Johnson and Downs, "Maternity Leave and Employment Patterns."

[69] *LaFleur*, at 645 ("the ability of any particular pregnant woman to continue at work past any fixed time in her pregnancy is very much an individual matter").

[70] Courts, for example, have upheld some rather extreme policies grounding flight attendants during all or part of pregnancy. See, e.g., *Harriss v. Pan Am. World Airways, Inc.*, 649 F.2d 670 (9th Cir. 1980) (upholding "stop" policy requiring a woman to disclose her pregnancy within twenty-four hours of becoming aware of it and immediately commence an unpaid sick leave).

[71] "Prohibition of Sex Discrimination Based on Pregnancy," H.R. Rep. 95-948 (1978), at 3–6.

[72] 499 U.S. 187 (1991).

A woman who is not capable of working due to pregnancy-related disability may have a right to leave. The PDA provides a comparative right to benefits like temporary disability leave, but provides no absolute guarantee.[73] After *Guerra*, a pregnant employee could end up with generous leave and benefits for pregnancy-related disability either because the employer generally accommodates temporary disability well or because the employer decides to offer leave for pregnancy-related disability even without offering similar benefits to other temporarily disabled employees. An employer can be meager with its provisions for all forms of temporary disability, pregnancy included. Disparate impact doctrine theoretically provides an additional measure of protection against, for example, a no-leave policy that would be devastating for pregnant women. But, while such policies have been successfully challenged in a small number of cases,[74] they have survived many other challenges.[75] It seems fair to note that disparate impact cases are notoriously hard to win, and some courts have gone so far as to suggest that disparate impact theory cannot be used to challenge unintentional pregnancy discrimination at all.[76]

The Family and Medical Leave Act (FMLA) of 1993 provides some additional access to leave[77] by granting eligible employees the right to *unpaid* leave in a variety of situations, including as needed for prenatal care or if a woman's pregnancy renders her unable to work,[78] or to recover from childbirth.[79] The total leave, however, is limited to twelve weeks per year, regardless of the duration of the circumstance necessitating the leave. Nearly 40 percent of American workers are not eligible for FMLA leave,[80] and among those who are, many cannot afford to take leave that is unpaid.[81]

But what about the pregnant woman who wants or needs to continue working through her pregnancy, but has suffered a partial diminishment of capacity due to the physical effects of pregnancy? Federal law here is stingy, granting her no

[73] Compare this with Title IX, which requires some absolute accommodations for pregnant students, including student-athletes. Deborah Brake, "The Invisible Pregnant Athlete and the Promise of Title IX, 31 *Harv. J. L. and Gender* 323 (2008).

[74] Miller-Wohl had a no-leave policy for the first year of employment, which the Montana Supreme Court ruled had a disparate impact on women. See *Miller-Wohl Co.*

[75] See *Stout v. Baxter Healthcare Corp.*, 282 F.3d 856, 861–62 (5th Cir. 2002) (upholding, against a disparate impact challenge, a policy limiting leave within the first ninety days of employment to three days); *Dormeyer v. Comercia Bank-Illinois*, 223 F.3d 579, 584 (7th Cir. 2000).

[76] See *Troupe.*

[77] Family and Medical Leave Act, Pub. L. 103-03, 107 Stat. 6 (1993) (codified as amended at 29 U.S.C. §§ 2612–54 [2000]). For more on the FMLA and its contribution to women's equality, see Joanna L. Grossman, "Job Security Without Equality: The Family and Medical Leave Act of 1993," 15 *Wash. U. J. L. and Pol'y* 17 (2004).

[78] See 29 C.F.R. § 825.112(c) (2000).

[79] See ibid., § 825.112 (covered employers must grant leave to eligible employees "for birth of a son or daughter, and to care for the newborn child").

[80] See David Cantor et al., *Balancing the Needs of Families and Employers: Family and Medical Leave Surveys 2000 Update* (Washington, DC: U.S. Department of Labor, 2000), at 3–2 to 3–3.

[81] Ibid., at 2–16.

absolute right to work unless she is able fully to perform the duties of her job, and no absolute right to the accommodations that might allow her to perform them. A pregnant woman has a right to work despite partial or full incapacity only if her employer would permit other employees similar in their level – and, potentially, in the source – of incapacity the right to work. Neither the due process clause nor the PDA endows pregnant employees with the right to reasonable or necessary accommodations. Moreover, most courts have held the Americans With Disabilities Act to be inapplicable to disability arising from a normal pregnancy.[82]

Kimberley Troupe learned the limits of the PDA's right of accommodation the hard way. A saleswoman at Lord & Taylor department store in Chicago who suffered chronic and debilitating morning sickness during pregnancy,[83] Troupe requested and received a shift change because of morning sickness. She continued to experience morning sickness at work and reported to work late or left early on a regular basis. She was fired one day before her scheduled maternity leave. The Seventh Circuit Court of Appeals rejected her claim of pregnancy discrimination, with Judge Richard Posner's explaining:

> The Pregnancy Discrimination Act does not, despite the urgings of feminist scholars . . . require employers to offer maternity leave or take other steps to make it easier for pregnant women to work . . . to make it as easy, say, as it is for their spouses to continue working during pregnancy. Employers can treat pregnant women as badly as they treat similarly affected but nonpregnant employees.[84]

Troupe had no absolute right to accommodation and could prevail only if able to show that her employer would *not* have fired a "hypothetical Mr. Troupe" with a similar record of tardiness and plans to take a medically necessary leave.

As Gillian Thomas and I have argued elsewhere, a series of cases challenging employers' light-duty policies also illustrate the limits of pregnancy discrimination law and the consequences of not extending it further.[85] While *Johnson Controls* made clear that employers cannot deem a job too strenuous or dangerous for a pregnant woman to hold if she is physically capable of performing the job, they also have no obligation to provide alternative positions to accommodate a pregnant worker's genuine physical incapacity or her desire to avoid fetal risk. The consequences of this double-edged sword have been exposed in light-duty cases.

The question that has arisen in several cases is whether employers can, consistent with the PDA, offer light-duty assignments only to employees temporarily disabled by on-the-job injuries. Most courts to review such policies have upheld them. In

[82] See, e.g., *Gorman v. Wells Mfg. Corp.*, 209 F. Supp. 2d 970 (S.D. Iowa 2002).
[83] See *Troupe*, at 734.
[84] Ibid., at 738.
[85] See Joanna L. Grossman and Gillian Thomas, "Making Pregnancy Work: Overcoming the Limits of the Pregnancy Discrimination Act's Capacity-Based Model," 22 *Yale J. L. & Feminism* (2009).

Reeves v. Swift Transportation Co.,[86] for example, the Sixth Circuit permitted a trucking company to deny the plaintiff's request for a light-duty assignment (one that would not require lifting more than twenty pounds) because her "injury" was not incurred on the job. The company's express policy permitted light duty for employees who could not perform heavy lifting, but only if they were eligible for workers' compensation because of an on-the-job injury. The policy, according to the court, was "indisputably *pregnancy-blind*" and thus could be challenged only upon a showing of pretext or statistically significant disparate impact.[87] Reeves's request for accommodation – even though based on the comparative provision of accommodation already available – was classified as a demand for *preferential* treatment and thus was not supported by the PDA's guarantee of "no worse" treatment. As *Reeves* and other similar cases illustrate, the comparative right of accommodation can be quite limited.

Cases like *Reeves* arise because there can be genuine conflicts between the physical effects of pregnancy and the performance of certain jobs. While most women work safely and effectively throughout pregnancy, pregnant workers may encounter a variety of risks to maternal or fetal health ranging from exposure to hazardous materials or contagions to physical movements difficult to perform while pregnant to job conditions like stress or night shifts.[88] Job performance may also suffer in the absence of risks due to sheer physical incapacity. While the potential for conflicts is not new, it was exacerbated by women's mass entry into the work force beginning in the 1960s,[89] as well as by the steady increase in workforce commitment of pregnant women.[90]

These potential conflicts are not evenly distributed across the occupational spectrum. Research showing positive correlations between pregnancy, on the one hand,

[86] 446 F.3d 637 (6th Cir. 2006).

[87] Other courts have reached the same conclusion in similar cases. See, e.g., *Urbano v. Continental Airlines*, 138 F.3d 204, 208 (5th Cir. 1998); *Spivey v. Beverly Enters.*, 196 F.3d 1309, 1312–13 (11th Cir. 1999).

[88] See, e.g., University of Michigan Health System, "Working During Pregnancy," available at http://www.med.umich.edu/ (accessed Oct. 6, 2008); D. Hollander, "Improving Work Situations During Pregnancy May Help Improve Outcome," 32 *Int'l Fam. Plan. Persp.* 156 (2006) (concluding that "the odds that an infant was small for gestational age increased steadily with the number of risky conditions present at the beginning of pregnancy; they were 30% higher among women with 4–6 conditions than among those with none"); Maureen Hatch et al., "Do Standing, Lifting, Climbing or Long Hours of Work During Pregnancy Have an Effect on Fetal Growth?," 8 *Epidemiology* 530 (1997) (finding, as other studies have, that "a shorter work week during pregnancy appears to be advantageous for the fetus"); Claire Infante-Rivard et al., "Pregnancy Loss and Work Schedule During Pregnancy," 4 *Epidemiology* 73, 74 (1993) (finding, based on a study of 331 pregnant women, that "women who always worked evenings or nights were at a substantially higher risk of pregnancy loss compared with women who were fixed day workers").

[89] See Kessler-Harris, *A Woman's Wage*, at 301.

[90] See Julia Overturf Johnson and Barbara Downs, U.S. Census Bureau, "Maternity Leave and Employment Patterns: 1961–2000," *Current Population Rep.* 70 (2005); see also Kristin Smith et al., U.S. Census Bureau, "Maternity Leave and Employment Patterns: 1961–95," *Current Population Rep.* 70 (2001).

and age or educational level, on the other, suggests that they may be felt more acutely by women who work in male-dominated, blue-collar occupations or in female-dominated jobs with similar requirements or conditions.[91]

Reconsidering Pregnancy Discrimination Law

This quick examination of the promises and pitfalls of current pregnancy discrimination law shows the limits of a legal framework that ties rights to capacity and offers only a minimal, comparative right of accommodation. The problems pregnant workers face today call us back to the feminist debate in the 1980s about the proper way to conceptualize pregnancy within an equality frame.

The equal treatment feminists were adamant that women could not receive special treatment because of pregnancy, for fear of emphasizing and essentializing gender differences and sacrificing the real needs of other workers. They sought a formal equality approach to the problem of pregnancy discrimination. But scholars like Herma Hill Kay argued then that formal equality could not be applied to situations involving real physical difference because it "contains no independent justification for making unequals equal."[92] She argued, instead, that "equality of opportunity" provided a "theoretical basis for making unequals equal in the limited sense of removing barriers which prevent individuals from performing according to their abilities." Pregnant women's experience over the last three decades has proven that a formal equality approach is perhaps a necessary first step, but insufficient to bring about women's full integration across the occupational spectrum.

The ideal of full citizenship is premised on the notion that all members of society have the same opportunity to make use of their abilities. As Justice Ginsburg wrote in her majority opinion in *United States v. Virginia*, in which the Court struck down the Virginia Military Institute's long-standing male-only admissions policy, "neither federal nor state government acts compatibly with equal protection when a law or official policy denies to women, simply because they are women, full citizenship stature – equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities."[93] Pregnancy might temporarily prevent a worker from making use of her ability, though her innate ability remains unchanged. The law's failure to insist that her temporary needs be accommodated can mean that those short-term impairments become long-term consequences.

91 Johnson and Downs, "Maternity Leave and Employment Patterns," at 4, 6; see also Sonalde Desai and Linda J. Waite, "Women's Employment During Pregnancy and After the First Birth: Occupational Characteristics and Work Commitment," 56 *Am. Soc. Rev.* 551, 560 (1991) ("strength requirements of the job had a significant effect on exits from work"); David A. Savitz et al., "Maternal Occupation and Pregnancy Outcome," 7 *Epidemiology* 269, 270 (1996) (finding evidence of increased risk of preterm delivery among electrical equipment operators, janitors, textile workers, and food service workers, compared with "markedly reduced" risk for teachers and librarians).

92 See Herma Hill Kay, "Equality and Difference: The Case of Pregnancy," 1 *Berkeley Women's L. J.* 1, 26 (1985).

93 *United States v. Virginia*, 518 U.S. 515, 532 (1996).

Kay's argument could be recast as a plea for equal citizenship. Pregnancy blindness does not ensure equal social citizenship because it may cause women to lose ground in the workplace regardless of their innate capacities. Women's equal citizenship requires at least some accommodation of the temporary impairments of pregnancy to preserve equal opportunity to make use of their innate abilities. The antidiscrimination model of pregnancy, as currently constructed, leaves women inadequately integrated into the workplace. It would do a disservice to women to demand work relief for all pregnant women, regardless of their jobs and regardless of their individual ability to work. Indeed, fetal protection policies were challenged as undermining women's workplace equality. But the law currently tends too far toward the other extreme – letting pregnant women workers fend for themselves financially and medically, despite genuine changes in capacity due to pregnancy and childbirth. Accommodation is even more important today, as women seek to infiltrate physically demanding jobs traditionally reserved for men.

A modest step toward equal social citizenship would be to amend federal law to require employers to provide reasonable accommodations for pregnant workers. An accommodation law could be modeled on the Americans With Disabilities Act, which promises otherwise qualified employees the right to reasonable accommodations that do not impose undue hardship on their employers.[94] Or it could be modeled on the handful of state laws that target pregnancy accommodations directly.[95] Regardless of the legal vehicle used to deliver it, the thrust of any accommodation model is to ask "how the job might be modified to enable more individuals to perform it," rather than "taking job descriptions as a given."[96] Many pregnant workers could be accommodated by slight modifications of tasks or short-term assignments to alternative positions. Making such adjustments would enable more pregnant women to stay at work, especially those who labor in physically demanding jobs.

Conclusion

The touchstone of pregnancy discrimination law has been capacity to work. But the focus has been too much on short-term capacity and too little on innate capacity. While the current approach promotes equality to the extent of sameness, it offers little, if any, protection in the case of difference. Thus, while pregnancy discrimination law has opened doors to the workplace by reducing or eliminating employment disadvantages rooted in stereotypes about the pregnant woman's ability to work, it has done little to deal with the *real* physical effects of reproduction for women.

[94] See Karlan and Rutherglen, "Disabilities, Discrimination" (describing the right of reasonable accommodation under the ADA).

[95] See, e.g., Cal. Gov't Code § 12945(b)(1) (West 2005) (requiring employers to provide reasonable accommodation for disabling effects of pregnancy and requiring that existing light-duty policies cover pregnancy).

[96] Karlan and Rutherglen, "Disabilities, Discrimination," at 38–39.

Depending on a particular woman's pregnancy and on the nature of the job she holds, it may or may not be possible for her to continue working without accommodation. The likelihood that she will be able to continue is lower in certain occupations, including many that include physical components and have been traditionally reserved for men. The integration of women into the workplace on equal terms with men has been stymied by the law's insistence that all rights flow from an uninterrupted ability to work on exactly the same terms as when hired. Without access to necessary accommodations, pregnant women risk losing paychecks, economic security, and their growing authenticity as workers. The cost of this model is a denial of women's equal social citizenship, a relegation of women as a class to a lesser status. Without refocusing pregnancy law around a goal of equal workplace outcomes and the accommodations necessary to deliver them, we simply guarantee that women will remain second-class citizens.

11

Equality: Still Illusive After All These Years

Martha Albertson Fineman

The title of this chapter owes a debt to Paul Simon, although his phrase is "still crazy after all these years."[1] He uses it to describe the feelings that are generated when he meets an "old lover" on the street, who seems glad to see him. After a few beers together, they go their separate ways, and he reflects on the fact that he is not the kind who tends to socialize, but seems to "lean on old familiar ways," "longing [his] life away," "still crazy after all these years." I think of equality as that old lover, as illusive as ever, meeting and mixing, then going its separate way, leaving the feminist leaning and longing for it – still crazy after all these years.

In this chapter, I will propose that one way to render equality less illusive is to move beyond gender and build a more comprehensive framework on the concept of universal human vulnerability. I propose a new theoretical investigation, one that focuses on privilege as well as discrimination and reflects on the benefits allocated through the organization of society and its institutional structures. Such an approach could move us closer to securing substantive equality and social rights in the United States.

The concept of equality is traditionally associated with the rise of the philosophy of liberal individualism. It also is often cited as the key animating principle of modern feminism. Indeed, the concept of equality has been central to feminist legal thought and politics, as we have pointed out the shortfalls in the originally exclusionary form of our republican government. It is sometimes suggested that the history of equality and the history of contemporary feminism are largely coterminous. It was advocacy of the idea that all human beings are, by nature, free, equal, and endowed with the same inalienable rights that first led women to challenge their inferior legal status. Feminists throughout the twentieth century and into this new one have relied on the concept of equality in confronting the disadvantages and discrimination that were inherent in the founding of the nation and the development of its laws.[2] In

[1] Paul Simon, "Still Crazy After All These Years," on *Still Crazy After All These Years*, compact disc, Warner Bros., 1990.

[2] See Martha Albertson Fineman, *The Autonomy Myth: A Theory of Dependency* (New York: New Press, 2004), at 25–28 (discussing the foundational myth of autonomy in relation to equality).

fact, no other concept has been more productive – at least as measured in terms of page counts and numbers of footnotes generated – than equality.

Hence we gather together in this collection distinguished feminist scholars, poised to consider yet again equality – this time in the context of equal citizenship. *Equal*, in this particular reconsideration, modifies the status of citizenship, raising some interesting questions, which this book explores. Many of the essays in this volume position equality as the measure for full citizenship. One purpose for convening the conference that led to this collection was stated to be to "take stock of progress made toward securing such citizenship and impediments to this goal" (the goal of securing equal citizenship).[3] A premise of this volume is that "equal citizenship of women is a common political value. A commitment to gender equality and the equal rights and responsibilities of men and women features in the constitutional, statutory and common law of many countries and in international law and human rights instruments." In fact, the equal legal status of women is often held out as one of the defining features of the so-called modern state. I am tempted to ask whether adding citizenship in this way conceptually detracts from or constrains a discussion of equality. Why should we confine our consideration of equality to citizenship? Is not equality a much more expansive concept, one that slips beyond the boundaries of the nation-state and into the realm of universal human rights?

On the other hand, is not the modification of citizenship by equal redundant? Citizenship connotes belonging – it is an entitlement and a privilege conferred by the state through inclusion in the category, a relationship or covenant between the state and certain individuals who are labeled citizens. If this is so, does not the very label "citizen" at least confer political and civil equality upon those to whom it applies? Equality is assumed in the designation of citizenship, at least in a modern nation-state.[4] Citizenship is a generalized category, containing uniform bundles of entitlements, claims, obligations, and allegiances equally applicable to those who occupy its terrain.

I am further intrigued by the list of different categories of citizenship that this volume explores. Joanna Grossman and Linda McClain indicate, in their introduction to this book, that citizenship can have multiple dimensions – there are constitutional, political, social, cultural, sexual and reproductive, and global components of

[3] I delivered the keynote address (out of which this chapter grew) at that conference, "Dimensions of Women's Equal Citizenship," held at Hofstra University School of Law on November 3 and 4, 2006. The quoted language in text is from the conference brochure.

[4] On the other hand, citizenship carries with it certain responsibilities, acting in this way as a potential restraint on the individual. Equality encompasses, but extends beyond, citizenship – equality for those who are not citizens, denizens, or subjects, as defined by Webster's *New World Collegiate Dictionary*, fourth edition (2002):

Citizen – "a native or naturalized member of a state or nation who owes allegiance to its government and is entitled to its protection."
Denizen – "an inhabitant, resident – a person who regularly frequents a place."
Subject – "a person who owes allegiance to and is under the domination of a sovereign or state."

citizenship.[5] I assume that all these facets of citizenship are also ideally conceived of as falling under the existing equality regime.[6] On the other hand, they suggest that the commitment to a regime of equality has not triumphed absolutely. We were also told that "despite great steps, there remains resistance and a wavering commitment to and cultural ambivalence about gender equality." This raises another question – on whose part is there resistance? The phrasing suggests that there may be some dispute as to state responsibility in the face of cultural resistance to equality. Is this resistance only found in areas such as cultural citizenship, or do women have to worry about losing the vote or being exiled from juries? What are, for example, the sources of resistance in the United States to social citizenship?

Many of the essays in this collection address these questions and focus us on the modern problems with equality. Surely the commitment to equality can be inhibited by public initiatives, institutional culture, and private conduct. There are also, as the conference literature noted, "perennial debates about differences." Those differences are certainly the ones perceived between women and men but transcend that basic gender category to consider whether equality in different spaces is appropriate. In particular, are the public and political aspects of life currently considered more appropriately equalized than the family? Some argue that equality is unequal within the private sphere.

It seems clear that in spite of over four decades of using the ideal of equality to confront gender-skewed distributions of power, we still find a politics of subordination and domination that seems embedded in society and its ideological and structural institutions, including law. Why is it that the realization of gender equality – even after all these years of theorizing, arguing, and strategizing – remains strangely illusive? Part of the answer is found in the fact that in our ongoing struggle for gender equality we have been constrained by philosophical and jurisprudential concepts shaped and handed down to us by our forefathers.

The Family and Equality

In my chapter for this collection, I was asked to revisit my critique of equality as the appropriate measure or objective for family law reform as it was set forth in *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform*, a book published over fifteen years ago.[7] In that book as well as in articles developed in the 1980s,[8] I

[5] See the introduction to this volume.

[6] Who is a citizen, and how does *citizen* differ from *denizen* in terms of understanding equality? When women consider our history of engagement with equality, should not we also think about the implications that we were more subject than citizen during much of our nation's history?

[7] Martha Albertson Fineman, *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform* (Chicago: University of Chicago Press, 1991).

[8] See generally Martha L. Fineman, "Implementing Equality: Ideology, Contradiction and Social Change," 1983 *Wis. L. Rev.* 789 (1983); Martha L. Fineman, "Illusive Equality: On Weitzman's Divorce Revolution," 1986 *Am. B. Found. Res. J.* 781 (1986); Martha L. Fineman, "A Reply to David Chambers," 1987 *Wis. L. Rev.* 165 (1987); Martha Fineman, "Dominant Discourse, Professional Language, and

argued that equality and gender neutrality were not appropriate concepts to employ in thinking about reform of the family and family law. The gist of my argument then was that the family, as our most gendered institution, was not susceptible to the imposition of a regime of equality, at least not as it was understood in American law. This argument was built on the observation that the nature of the equality reforms urged in the family mimicked the equality reforms sought in the political and public arenas. Outside of the family, legal feminists seemed wedded then (as now) to a liberal regime of equality, which mandated sameness of treatment. I suggested that what we needed in the family was not formal or rule equality, but some notion of substantive or result equality that considered past circumstances and future obligations. The imposition of a mere formal equality regime would only further and deepen existing inequalities.

I identified three sites of entrenched inequality affecting most marriages. First was the inequality in wages and employment opportunity that existed in the market. Next was the inequality of power that persisted and was manifested in family negotiations over whose individual interests should be sacrificed for the larger family good. This was a process that systematically disadvantaged women due to their lower earnings and culturally imposed altruism (they were the ones who were supposed to be making sacrifices for others). Finally, there are inequalities postdivorce, with the responsibilities of custody overwhelmingly assigned to women. This continued and compounded the unequal allocation of the disadvantages and burdens associated with care work that often disadvantaged married women in the paid work force. It can be argued that those inequalities I wrote about a generation ago have lessened in our postegalitarian family law world, but it is also true that they continue to persist in many marriages, even if to a somewhat lesser degree.[9] While gender-neutral, equality-based reforms are firmly in place in the statute books and have proved successful on a rhetorical level, structural family disadvantages associated with caretaking still typically burden women more than men, even after decades of feminist equality reform.[10]

My hope in 1991 was that we might fashion a more substantive or result-sensitive version of equality in the family context. The law would allow unequal or different treatment of divorcing spouses, such as unequal distribution of family assets and obligations, in order to address the existing inequalities created or exacerbated by past and future family responsibilities. This more result-sensitive version of equality – substantive equality – would be considered just and appropriate in that it would satisfy the need that arose because one spouse typically assumed primary responsibility for children both within and after marriage.

Legal Change in Child Custody Decisionmaking," 101 *Harv. L. Rev.* 727 (1988); Martha L. Fineman, "The Politics of Custody and the Transformation of American Custody Decision Making," 22 *U.C. Davis L. Rev.* 829 (1989); Martha L. Fineman, "Introduction to the Papers: The Origins and Purpose of the Feminism and Legal Theory Conference," 3 *Wis. Women's L. J.* 1 (1987).

9 Fineman, *Autonomy Myth*, at 172.

10 Ibid., at 169, 174.

While I still believe in the justness of the substantive equality outcome, my vocabulary and arguments have changed to become less focused on gender and more inclusive of those whose family or other uncounted labor is not valued in a formal equality regime. I now talk about need in terms of dependency and vulnerability.[11] This articulation may not be any more palatable to those who buy into the rhetoric of independence and self-sufficiency, but it is more theoretically promising. Vulnerability is universal and constant. As embodied individuals, we are all just an accidental mishap, natural disaster, institutional failure, or serious illness away from descending into a state of dependency.[12] Furthermore, dependencies are multiple and complex in form.

There are two types of dependency with which I have been concerned. On one hand, dependency is inevitable – a part of the human condition and developmental in nature. On the other hand, those who care for inevitable or natural dependents through essential caretaking work are themselves dependent on resources in order to undertake that care. Those resources must be supplied by society through its institutions. In our American scheme of social responsibility, both dependencies are relegated to the family and, typically within that family, to women in their roles as mothers, wives, daughters, and so on.

When I look at the family through the lens of vulnerability and dependency, I find it enhances and expands beyond that institution the critique of the imposition of a formal equality regime that I earlier developed with marriage and divorce primarily in mind. My subsequent work in developing a theory of dependency, which led to work on the idea of universal human vulnerability, demonstrated to me that both state and market are of necessity implicated in situating the family within society. That work also convinced me that formal equality is a flawed and poorly articulated objective, even when applied beyond the realm of the family. In fact, some of the very same reasons that formal or rule equality is inappropriate for the family also illuminate why it is inadequate to address justice and allocation problems in the larger society. Formal equality is inevitably uneven equality because existing inequalities abound throughout society, and a concept of equality that is merely formal in nature cannot adequately address them.

Gender was an obvious entry point from which to build this larger analysis in part because women have historically been marked as different in relationship to the state and public sphere. Their citizenship and concurrent responsibilities were anchored in the family, not in the wider polity or free-wielding market.[13] The residues of that distinction remain in many ways that implicate the image of women as citizens. We may have secured political and civil rights, been successful in our search for equality

[11] Compare Fineman, *Autonomy Myth*, with Martha Albertson Fineman, "The Vulnerable Subject: Anchoring Equality in the Human Condition," 20 *Yale J. L. and Feminism* 1 (2008).

[12] I go into detail in regard to developing the concept of vulnerability as the basis for making claims upon the state in Fineman, "Vulnerable Subject."

[13] See generally Mary Beth Norton, *Founding Mothers and Fathers: Gendered Power and the Forming of American Society* (New York: Alfred A. Knopf, 1996).

in a formal way, but we continue to stand outside the ebb and flow of mainstream power. Equality for women remains elusive in practical and material terms, in part because they remain mired in a prelegal notion of the family, in which they are understood to have unique reproductive roles and responsibilities that define them as essentially different and necessarily subordinate in a world that values economic success and discounts domestic labor.

Of course, the distinction between the position of women in the family and their position within the larger society is incoherent theoretically. The family is not a separate sphere isolated from the norms and standards applied in the larger society. The notions we have about the mandates of citizenship, the appropriateness of claims to liberty and autonomy, and beliefs about relative equality resonate across societal institutions. This is true on an ideological level as well as on a structural level.

The nature and functioning of other societal institutions profoundly affect the nature and shape of the family. By the same token, the nature and functioning of the family profoundly affect other societal institutions. As I have argued earlier, the metaphor of symbiosis[14] seems more appropriate to describe the family in relationship to the state than does the separate spheres imagery. The family is located within the state and its institutions – they are interactive and define one another. Alterations in the scope or nature of one institution will correspondingly alter the scope or nature of the other. By the same token, if formal equality is inadequate or unattainable in the family, the chances are that is because it has failed or will fail as a regime in the larger society. These are the lessons we need to learn.

Equality Attained

Of course, one way to look at our feminist equality dilemma is to realize that in the United States, women have attained equality – we have achieved our objective in the only way possible within our current political and legal climate. Furthermore, this accomplishment is a meaningful one. We can claim to now live in a postequity world – a world in which equality has been realized. We guarantee equal citizenship, and we prohibit sex discrimination. Our equality regime guarantees access and opportunity to women on a par with men. We have the right to sameness of treatment and freedom from exclusion based on arguments about outdated perceptions of gender differences in all manner of public life.

A woman's political and civil rights are formally ensured, and we have access to all sorts of opportunities. We can get an education, practice a profession, earn money, own property, vote, serve on a jury, hold office, and so on, all on a par with men.

[14] I use this term to indicate a reciprocity or mutualism, although the term *containment* might also be appropriate. Containing family within its traditional form and function is certainly the goal of some political actors.

Importantly, at least on a theoretical level, this conferral of equality on women takes nothing away from men. It is apparently a win-win situation.[15]

However, this equality is not only encompassing, but it is also crude and nondiscerning – a gender-blind monolith, folding all within its embrace. Men also can claim the protection of gender equality should their gender occasion different, comparatively unfavorable treatment. They can do so even if they are privileged as an individual or as a member of an advantaged group. They can do so even against a member of a subordinated group. An abstract notion of discriminatory treatment represents the affront to equality, not the relative position of the person seeking a remedy. Since our equality is based on an antidiscrimination or a sameness of treatment principle, different treatment is suspect, unless there is some legitimate basis for distinguishing among individuals or groups. This equality rejects (at least in regard to gender) affirmative governmental measures designed to raise the unequal to a more equal position.

This vision of equality has the same problems that I fretted over in the family context back in 1991. It operates within a configuration of existing structural, social, societal, and individual inequalities. So we might formally have equal citizenship as an abstract entitlement, but the benefits of that citizenship are unevenly distributed through existing social and cultural structures, particularly through the family. In other words, there is no level playing field, and we do not have a concept of equality that will allow us to try to even things up a bit, except minutely, and then mostly in the context of affirmative action programs related to race. Our equality is weak, its promise largely illusory, because it fails to take into account the existing inequalities of circumstances created both by inevitable and universal vulnerability inherent in the human condition and the societal institutions that have grown up around them, most notably the family and the state.[16]

It is as though these inequalities were the products of natural forces beyond the ability of the state or law to remedy or rectify. They may be beyond the ability of the state under current ideological configurations, but they are certainly not natural. The state and legal institutions confer senses of entitlement and value, including

[15] Technically, increasing the pools for jobs or admission to higher education or for voting on candidates or propositions could be seen as a dilution of male power, but this would seem a difficult argument to sustain in today's equality oriented political world.

[16] Feminist celebration of equality may be more muted than in the past. One problematic question that might be raised is, equal to whom? Are male norms and standards the appropriate measure to which women should aspire? Such an assimilationist approach to equality presumes that socially and culturally imposed roles, obligations, and burdens are similar or equal in nature as regards women and men. If this is not the case, equal treatment will often result in further consolidation of existing unequal power relationships, effectively reinforcing the very gender system that feminists oppose. In addition, the idea of choice may suggest to some that existing inequalities do not show a failure of equality per se, but are simply the result of different life choices freely made by autonomous men and women. If women "choose" to devote more time to family and relationships, rather than investing their energies in the labor market, the resulting gender disparities are merely the neutral results of differing choices made by equally autonomous and free adults.

through a regime of equality that facilitates some results and protects and privileges some persons over, or instead of, others.

I want to suggest two tactics we might productively adopt to challenge the existing equality regime. Both involve relating the concept of equality to something else in order to shift our perspective and provide new questions for theoretical investigation. First, we must consider how equality has been strategically paired with and tamed by other concepts and ideals over time. Equality is only one component of citizenship. It is only one of the parameters that establish the ideal relationship between state and individual. Second, equality discourse must be anchored by an understanding of the human condition, in which we are all vulnerable, and some of us might descend into a state of dependency. Equality must not be built upon the false assumptions that citizen capabilities are equivalent across individuals or that any individual capabilities remain constant throughout a lifetime.[17]

Equality is a dynamic concept and has often been placed in ideological competition with other American values. Equality is then balanced against competing or conflicting qualities or guarantees of citizenship such as autonomy. Equality's meaning and its relative position in this balancing can change over the course of a nation's history and response to experiences.[18] Not surprisingly, different aspirations and expectations for state and individual inform different ideological and political positions on equality. The right to determine the nature and weight given to equality in that balancing is the battle for every generation. It is not surprising that different aspirations and expectations, for state and individual, inform the different political and ideological positions on equality. The balances struck will shift across history, within and among nations, as well as being complexly expressed across competing philosophies and perspectives.

In relation to the question of gender in this process of reconciling and balancing values in the twenty-first century – and to return to Paul Simon's refrain, pushing the metaphor a bit – in America, our old lover, equality, comes with a hefty chaperone: a supervigilant duenna we might call "Aunt Autonomy." In the United States,

[17] In this volume, Joanna Grossman makes this argument with respect to pregnant women's capacity to work (Chapter 10) and Nancy Hirschmann with respect to disability (Chapter 7).

[18] Early in American political history, the label of "dependent" was much more broadly applied, and the state of being dependent was used as the basis for exclusion of some from political rights (voting) as well as providing justification for second-class citizenship. Dependency was used to describe the position of women and children, certainly, but it also was the term applied to men who were mere wage earners and had no property or capital accumulation. Dependency was the status of having to rely on others for your livelihood – working for wages. On the evolving nature of the political meaning of dependency, see Nancy Fraser and Linda Gordon, "A Genealogy of Dependency: Tracing a Keyword of the U.S. Welfare State," 19 *Signs* 309 (1994); see particularly pp. 316–17 for a description of how working-class men came to be considered independent. Of course, today, we consider the wage earner, who has morphed into the taxpayer, to be the exemplar of the independent citizen. The point is that meanings behind potent political terms can change, and such terms may periodically need to be deconstructed and the assumptions behind them explored.

citizenship is understood as conferring a guarantee of autonomy as well as equality.[19] In recent years, the promise of equality has increasingly been eroded by the ascendancy of a narrow and impoverished understanding of autonomy.[20] Interestingly, while equality presupposes an individual seeking inclusion and consistent treatment within a group, autonomy seeks separateness and seclusion. Autonomy forms the basis for the concept of self-governance and is characterized by self-sufficiency and independence, which are individual qualities that are seen as prerequisites for individual freedom of will and action. They have no theoretical room for recognition of dependency and vulnerability.

Autonomy demands freedom from unnecessary or excessively constraining rules and regulations. These constraints turn out to include almost everything of a positive and progressive regulatory nature. The role of the state, we are told, is to stay out of the way, to facilitate competitiveness in a meritocracy that rewards individual initiative and talent. When there is a distortion, such as arises from discrimination, the state should act to correct the problem and then revert to the free market, nonintervention stance.[21] If we start from a perspective that values individual autonomy above equality (an individualistic perspective), we take the inequality of the status quo as a given. If, however, we start with the objective of enhancing individual equality (a comparative perspective), we may see more of a need for protection from human fragility and failings than abandoning individuals to undefined, crude autonomy might provide.

If we factor into the equality-autonomy mix the universality of human vulnerability and the shared possibility of any of us becoming dependent as we age or becoming ill, for example, it is apparent that the problem the state should address is not always, or even predominantly, that of discriminatory treatment. The problem may be in an equality or evenhandedness that brackets off vulnerability and dependency in order to be able to assume them away, along with any disadvantages individuals might experience as a result of their particular vulnerabilities. If we were forced to take vulnerability and dependency into account, it would reveal the inadequacies of our conception of equality as not focused on substance, but rather concerned merely with the formality of treatment. Achieving some form of substantive equality demands more from the state in terms of rules and regulations than we now condone. Substantive equality would require state intervention, even methods for the reallocation of some existing benefits and burdens. To have more equality (for greater numbers – a collective ideal), we would have to sacrifice some adherence to the dictates of individual autonomy.

[19] The importance of the idea of independence to the construction of an autonomous and equal individual may be traced to the fact that the very existence of the United States begins with a document titled "The Declaration of Independence." While it is a declaration of freedom for a fledging nation, it nonetheless sets forth as a "natural" principle that every individual is endowed with inalienable rights such as the right to life, liberty, and the pursuit of happiness.

[20] Fineman, *Autonomy Myth*, at 10.

[21] Fineman, "Vulnerable Subject," at 3.

Of course, *equality* and *autonomy* are abstractions. Terms like *autonomy* and *equality* have no independent meaning or definition and can be understood in conflicting and incompatible ways. Their amorphous, overarching, and imprecise natures mean that both terms can be used by those holding disparate positions. My point is that neither *equality* nor *autonomy* can be understood in isolation from the other, and, at least to the extent we are concerned with substantive equality, one will be emphasized at the expense of the other.

While I recognize the symbolic appeal of the claims for both autonomy and equality and the desire to reconcile any potential conflict between them, I argue against the current understanding of equality as the dependent value, shaped through the dominant lens of autonomy. It is thus reduced in its collective potential to a mere individual entitlement, to be treated the same as everyone else, regardless of the differences in material, social, historical, or other resources. Unless confronted with the challenges presented by vulnerability and dependency, equality is nothing more than a measure or standard for opportunity and access. It guarantees the right to strive for self-sufficiency and independence to an abstract individual shorn of limiting human characteristics and potentially debilitating social and historical inequities. Equality is not now a standard with which to assess contexts and conditions – the circumstances under which an individual competes in the markets. Nor is it to be used as a levelling notion, employed to even up the playing field before the games begin – a tool to ensure some degree of equality of opportunity and access. Some argue that this sense of individualized, formal equality that dominates our law and culture is as much as we can expect in our post–Ronald Reagan United States, where we are trapped in scripts that presuppose both a meritocracy and a functioning free market in an ahistoric and context-free articulation of the American dream of the self-made man.[22]

What are the questions we might ask about the current trade-offs between equality and autonomy to challenge that static conclusion and open up the issue for further consideration? They certainly would include the following:

- What distortions result from viewing our aspirations through the lens of individual autonomy, rather than our collective destiny of vulnerability and dependency?
- Whose interests are served by this current balance, which privileges autonomy over a substantive equality frame?
- How does a preference for autonomy result in creating the reality of common vulnerability and dependency and interfere with the development of a more substantive concept of equality?
- Are there other values similarly sacrificed to autonomy when we ignore vulnerability and dependency in our political theory and policy making?

[22] Martha McCluskey (Chapter 12) critiques the economic neoliberalism and moral neoconservatism that have fueled a backlash against egalitarian socioeconomic policy and social citizenship in the United States.

Answering some of these questions would allow us to assess what harms come to our society and its citizens by invoking autonomy, with its complementary components of individual independence and self-sufficiency as primary aspirations for citizenship. From that assessment, the will for political and legal change might come.

The second strategy to challenge the existing equality regime, which is formal in nature, is to begin the hard work of constructing a viable and credible concept of substantive equality that can resonate in the American context. This second strategy is related to the first in that it seeks to shift the frame, decentering autonomy and allowing a more robust notion of equality to emerge as the guiding principle for assessing governmental action. This framing process is not only descriptive, it is also normative, a way to give a different meaning to a series of issues and help redefine them in a more progressive manner.

In accomplishing this framing, we must recognize that as a nation, we are steeped in an ideology of individualism.[23] However, it should not be forgotten that this individualism is grounded or nested within a complementary set of beliefs about equity, access, and opportunity. Development of these concepts, particularly if they are accompanied by an appreciation of the universal and ever-present nature of our shared vulnerability and potential for becoming dependent, will be useful in redefining and repositioning both equality and autonomy.

If you had asked me even a year ago how to go about this project of reframing, I would have suggested looking to international human rights law and the constitutional processes of other industrialized democracies. Robust notions of substantive equality are set out in these documents and in cases interpreting them.

The Canadians realized it was simply not enough to assess equality from a formalistic perspective. The law must consider the societal context that defines groups and understand how individuals, identified and positioned in society through those groups, are advantaged or disadvantaged. Such an understanding would fulfill the Canadian courts' "mandate" that an interpretation of equality be a generous rather than a legalistic one, aimed at fulfilling the purposes of the guarantee of "substantive equality" and securing for individuals the full benefit of the Charter's protections.[24]

In other Western democracies, there has been a general acceptance of the assertion that modernization and the expansion of equality mandate some sort of obligation on the part of government to guarantee fundamental social goods. This obligation

[23] Fineman, *Autonomy Myth*, at 31–54.

[24] Errol P. Mendes, "The Charter and Its Constitutional Lineage: An Evolving Template of Distributive Justice for Reconciling Diversity, Collective Rights of National Minorities and Individual Rights?", 22 *Nat'l J. Const. L.* 61, 84 (Dec. 2007). Diana Marjury, "Equality and Discrimination According to the Supreme Court of Canada," 4 *Canadian Journal of Women & the Law* 407 (1991). In spite of such strong statements by the Canadian Supreme Court, supporting remedial or affirmative action and endorsing substantive equality, the Canadian Charter of Rights and Freedoms is still criticized as being structured in such a way as to make it difficult for some people to achieve equality even when rights are guaranteed in this way. M. David Lepofsky, "The Canadian Judicial Approach to Equality Rights: Freedom Ride or Roller Coaster?", 55 *Law & Contemp. Probs.* 167, 170, 177 (Winter 1992).

has been codified, and an international consensus has begun to emerge in the form of international human rights documents that describe the obligations of states to citizens.

These documents are far-reaching and diverse in subject matter. They include the Universal Declaration of Human Rights,[25] the International Covenant on Civil and Political Rights,[26] the International Covenant on Social and Cultural Rights,[27] the American Convention on Human Rights,[28] the African Charter on Human and Peoples' Rights,[29] and the European Convention for the Protection of Human Rights and Fundamental Freedoms.[30] These documents, taken together, articulate a whole range of human rights as understood by the states that have signed on to them.

In the pantheon of international human rights, formal equality is certainly present. However, equality does not stop there, nor does the state's responsibility. While it is true that these documents have not been ratified by every country – certainly not by the United States – and their principles are not uniformly followed in those states that have adopted them, they do set out a full range of equal rights in aspirational terms. They stand witness to what are generally considered desirable objectives, widely accepted in many different societies and increasingly used as the basis for articulating the need for specific laws.

However, I now believe that arguments for a more expansive notion of equality are futile, at least for now. Recent developments in both political and academic circles show the ascendancy of a version of American exceptionalism regarding the superiority of our laws and Constitution. Labeling human rights as "foreign fads" and proposing legislation that would lay the foundation for impeachment of judges who referred to them, rather than American constitutional law, indicate just how parochial our judges and politicians have become, even at the highest levels.[31]

Such parochialism underscores the importance of excavating from the history of the United States and its legal and political principles the foundation for a more robust and expansive notion of equality that would lay out the parameters for state responsibility in regard to ensuring that access and opportunity were in fact equal, even if this meant the autonomy of some was of necessity somewhat crimped in the process. Such excavation could include building on the United States'

[25] G.A. Res. 217A, U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (Dec. 10, 1948).

[26] G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976.

[27] G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force January 3, 1976.

[28] O.A.S. Treaty Series 36, 1144 U.N.T.S. 123, entered into force July 18, 1978.

[29] Banjul Charter on Human and People's Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force October 21, 1986.

[30] 213 U.N.T.S. 222, entered into force September 3, 1953, as amended by Protocols 3, 5, 8, and 11, which entered into force on September 21, 1970, December 20, 1971, January 1, 1990, and November 1, 1998, respectively.

[31] Adam Liptak, "U.S. Court, a Longtime Beacon, Is Now Guiding Fewer Nations," *New York Times*, Sept. 17, 2008, at A1.

underdeveloped social citizenship tradition. In fact, to argue that a formulation of state responsibility to guarantee positively that access and opportunity is as equally available as possible is neither antithetical nor antagonistic to the American spirit. We can argue that the guarantee of inalienable rights encompasses the idea of state obligation to ensure by positive entitlement a level playing field in the name of equality. To accomplish this, I suggest a turn of our critical attention to issues of privilege and advantage, in addition to those of discrimination and oppression.

Of course, we must continue to consider how some individuals and groups are uniquely disadvantaged, rendered unequally and oppressively vulnerable, by the structures and ideological predispositions of our system. However, the inquiry cannot stop there. We must also explore why and how some, often only a few, but also frequently a majority, are and have been advantaged and privileged by that system.

The question, then, is not only who is harmed, but also who benefits by the organization of society and the structure of our institutions, including the state. We must explore the ways that state mechanisms enable and privilege some people and institutions and how that privilege may come at a cost to other people and institutions. Some in society are shielded by state action, including through enacting laws, from the harshest implications of our shared vulnerability and the dependency that might arise as a result. The privileged are vulnerable, too – vulnerability is inevitable in the human condition – however, privilege can provide subsidy and support to cushion the concrete manifestations and implications of that vulnerability.

When we only study the poor, the rich remain hidden and their advantages remain relatively unexamined, nestled in secure and private spaces, where there is no need for them or the state to justify or explain why they deserve the privilege of state protection. We need to excavate these privileged lives. While sometimes this will be a difficult and complex undertaking, there are certainly abundant records and instruments of privilege all around us that can be accessed relatively easily. These archives are located in corporate boardrooms and in the rules setting up or limiting state and national regulatory regimes. They can be gleaned from tax and probate codes, history books, literature, political theories, and of course, from the language and logic of the law.

We need to ask questions and critically examine the assumptions that prop up the same old answers. For instance, why is it that we have been able to debate, even accept, the basic premise of imposition of a minimum wage but until President Obama and his administration confronted the disastrous economic meltdown and the acute need for financial bailouts and stimulus packages, we were unwilling to consider seriously the idea of imposing a maximum wage? We must go beyond criticizing the prison system because of whom it hurts and how it discriminates and consider whom it privileges and how certain people are benefited. Not only do small, rural, predominantly politically conservative communities benefit, but also the Republican Party does when prisoners are counted as members of those communities for purposes of assessing representation in the House of Representatives. We have to ask why health care and old age protection are privatized within the work force and

through the family, and why family labor is not valued or compensated, and who is benefited and who burdened in such societal arrangements.

A focus on privilege and its role in minimizing vulnerability might also help to change the nature of the inquiry. It moves us away from assessing the individual characteristics of designated groups within society to see if they are the subjects of animus. The focus would not be on the identity of the disadvantaged in the sense that has been developed over the past few decades under a discrimination paradigm – gender, race, sexuality, and so on. Nor would the task be to explore the intent and purposeful nature of actions by individual employees, educators, landlords, and so on. Individual intention is not the issue, nor is discrimination. You do not need ill will if everyone is operating with the same set of prejudicial assumptions and beliefs – sharing a culture that ignores the many ways in which it is organized to privilege some and not others. After all, we are all products of our cultures, and the meta-narratives of those cultures about what and who has value and what characteristics or actions gain entitlement affect us all.

State structures must become the focus, and the inquiry will be into the ways in which societal resources are channelled in ways that privilege and protect some, while tolerating the disadvantage and vulnerability of others. It is the structures of society that need attention if we are to argue that the state has an obligation not to privilege any group of citizens over others – an affirmative obligation to structure the conditions for equality, not just prevent discrimination.

Interestingly, the same-sex marriage debates reveal the potential power of this approach. In some of those cases, the plaintiffs focused on the privileges associated with marriage to develop an inequality-based argument that the state had an obligation to provide those privileges to all.[32]

In 1999, the Supreme Court of Vermont looked into its own early American history and held that same-sex couples were entitled to receive the legal benefits and protections that were previously only afforded to married couples of opposite sexes.[33] The court focused on those benefits afforded to married couples, and there were lots of them. Marriage was the institution through which the state privileged and subsidized certain relationships. It is also the societal organization that assumes responsibility for the vulnerability of its members – the way we privatize dependency. The court's rationale in extending these benefits to same-sex couples derived, not from arguments of formal equality under the equal protection clause of the U.S. Constitution, but from a more expansive and earlier notion of equality derived from the experience of colonial America.

The Vermont Constitution's common benefits clause predated the Fourteenth Amendment and was not based on a concept of discrimination. Nor was it focused

[32] Fineman, "Vulnerable Subject," at 22–23.
[33] *Baker v. Vermont*, 744 A.2d 864 (1999).

only on protection for a specific category of persons. The common benefits clause states, in part,

> That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community.[34]

The court distinguished federal jurisprudence from its interpretation of Vermont's common benefits clause, which it characterized as a matter of concern with ends, rather than merely means. It noted that federal courts had been "broadly deferential to the legislative prerogative to define and advance governmental ends, while vigorously ensuring that the means chosen bear a just and reasonable relation to the governmental objective."[35]

By contrast, underpinning the common benefits clause was the notion that "the law uniformly afforded every Vermonter its benefit, protection, and security so that social and political pre-eminence would reflect differences of capacity, disposition, and virtue, rather than governmental favor and privilege."[36] This represented an end-focused analysis. The majority continued, noting that the clause prohibits "not the denial of rights to the oppressed, but rather the conferral of advantages or emoluments upon the privileged."[37] Furthermore, the common benefits clause, "at its core . . . expressed a vision of government that afforded every Vermonter its benefit and protection and provided no Vermonter particular advantage."[38]

The majority in *Baker* was not limiting the potential classes whose interests may be protected under the common benefits clause to those groups identified by the U.S. Supreme Court.[39] For, as the court noted, "the plaintiffs are afforded the common benefits and protections of Article 7, not because they are part of a 'suspect class,' but because they are part of the Vermont community."[40] This fact alone compelled the court to "police a political process whose product frequently discriminates between

[34] Vermont Constitution, Chapter I, Article 7.

[35] *Baker*, at 871.

[36] Ibid., at 876.

[37] Ibid., at 874.

[38] Ibid., at 875.

[39] A handful of states contain provisions granting affirmative rights, distinctly departing from the U.S. Constitution's "negative" rights model. For instance, the preamble of the 1776 Pennsylvania Constitution read, "It is our . . . duty to establish such original principles of government as will best promote the general happiness of the people of this State . . . and provide for future improvements, without partiality for, or prejudice against any particular class, sect, or denomination of men whatever." Pa Const. pmbl., *reprinted in* Ben Perley Poore, The Federal and State Constitutions, Colonial Charters, and Pa Const. pmbl., *reprinted in* Ben Perley Poore, The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States, Pt. II, at 1541 (2d ed. 1972), *available at* http://www.paconstitution.duq.edu/PAC_C_1776.html (accessed April 6, 2009).

[40] *Baker*, at 878 n. 10.

citizens in respect to benefits and privileges."[41] This sounds like a fruitful inquiry if what we want is substantive equality, or attention to the equality of outcome.

What does all this mean to those of us who seek a more just and equal society? For me personally, gender increasingly has become the door through which I enter the discussion about equality – not the entire focus of my inquiry, but merely the beginning. Equality must escape the boundaries that have been imposed upon it by a jurisprudence of identity and discrimination and the politics that has grown up around it. The promise of equality cannot be conditioned upon belonging to any identity category, nor can it be confined to only certain spaces and institutions, be they in the public or the private sphere. Equality must be a universal resource, a radical guarantee that is a benefit for all.

We must not define our aspiration for equality in the shadow of autonomy, in which the state is a neutral (and level) backdrop for a competition of presumed equals; rather, we must begin to think first of the state's commitment to equality as one that must be rooted in an understanding of vulnerability and dependency, recognizing that autonomy is a product of social policy and not a naturally occurring characteristic of the human condition.

Autonomy is only possible when one is in a position to be able to share in society's benefits and burdens. Moreover, sharing in benefits and burdens can only occur when individuals have the basic resources that enable them, in their particular circumstances, to act in ways that are consistent with the tasks and expectations imposed upon them by the society in which they live.

The expectation that one should be able to achieve this form of autonomy – autonomy within an overarching and primary commitment to equality – should be every citizen's birthright. Autonomy, in this sense, concedes that all individuals share an inherent dependence on the society in which they live and that society has a responsibility to structure its institutions for the benefit of all. Recognizing this claim would allow us to realize our historic commitment to be a nation of laws in which the same rules apply to all, unaffected and uninfluenced by our station or status in life.

[41] Lawrence Friedman and Charles H. Baron, "*Baker v. State* and the Promise of New Judicial Federalism," 43 *B.C. L. Rev.* 125, 152 (2001).

12

Razing the Citizen: Economic Inequality, Gender, and Marriage Tax Reform

Martha T. McCluskey

Social citizenship ideals fall not only outside the bounds of fundamental constitutional rights, but also at the margins of plausible politics in the United States. Citizenship, in the prevailing view, confers the political and civil rights that ensure access to a democratic state and market. That view distinguishes rights to economic equality or socioeconomic security as peripheral, or even antagonistic, to the concerns of democratic government.

Indeed, over the last several decades, leading U.S. intellectuals and policy makers have designed and defended a citizenship vision linked to upward redistribution of economic resources. In this vision, economic inequality and widespread insecurity are necessary and natural to freedom and strength in state and market. Among mainstream leaders of law and politics, the response to this antisocial citizenship has been mostly acquiescence, obliviousness, or resignation, rather than sustained critical analysis or vigorous resistance.

This chapter links the failure of social citizenship ideals in the United States to a broader weakness in citizenship ideals – a weakness that is deeply related to gender ideology and practice. To better advance a vision of social citizenship, U.S. law and politics need a stronger vision, not just of economic equality, but of gender equality and of democracy in general. Feminist scholars have analyzed how ideas about gender help shape the common assumption that the costs of raising and sustaining capable, productive citizens are largely private family responsibilities. But ideas about gender also help to undermine egalitarian economic policy more generally. Gender ideology subtly shapes a vision where civic virtue ironically includes the project of *razing* citizens: turning democratic citizens into premodern subordinates dependent on private power. I use the example of recent tax policy reforms focused on reducing the so-called marriage penalty to show how problematic ideas of gender, anticitizenship, and economic inequality have become entangled and how these must be reconsidered together to promote a meaningful vision of equal citizenship.

Social Citizenship in Theory

Liberal Citizenship, Gender, and Economic Inequality

Mainstream liberalism tends to frame social citizenship as an oxymoron. As a general political philosophy, liberalism has many richly and widely diverging strands (including both liberal and conservative positions in contemporary U.S. politics). But these strands share a general ideal of a state and society where individuals retain personal freedom, while joining in public self-governance. Many differing versions of liberalism highlight autonomy in the state and market as the characteristic that makes the liberal individual deserving of democratic citizenship, as Martha Albertson Fineman has analyzed.[1]

Early ideas of the liberal state distinguished the citizen capable of self-determination in market and state from the property, women, children, and servants under others' political and economic custody in the domestic sphere. This traditional liberal framework positions the right to social and economic support as a badge of dependent status squarely opposed to liberal citizenship. Though contemporary strands of liberalism typically embrace a more inclusive vision of citizenship (going beyond white male property owners), the original distinction continues to shape citizenship ideas. In particular, liberal theory continues to presume that the role of the state is to promote and protect individual autonomy, not individual dependence. By defining social citizenship as protection for personal economic security, distinct from political and civil liberty, liberalism sets up a bind in which social citizenship seems to undermine virtuous citizenship.[2]

This link between economic support and gender-based dependent status poses a number of challenges for contemporary advocates of progressive social citizenship. One problem is how to construct rights to social and economic security that include women (and others relegated to a subordinate status) without further confining them to a social sphere apart from and disadvantaged in state and market.[3] The disproportionately female labor of domestic caretaking tends to be defined in opposition to productive and rational action in state and market.[4] As a result, women's contributions to state and market are often viewed as so-called social relationships that

[1] Martha Albertson Fineman, *The Autonomy Myth: A Theory of Dependency* (New York: New Press, 2004), at 18–22.

[2] See Martha T. McCluskey, "Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State," 78 *Ind. L. J.* 783, 805–06 (2003).

[3] For discussions of this problem and its possible solutions, see Mary Anne Case, "How High the Apple Pie? A Few Troubling Questions About Where, Why, and How the Burden of Care for Children Should Be Shifted," 76 *Chi-Kent L. Rev.* 1753–86 (2001); Linda C. McClain, "Toward a Formative Project of Securing Freedom and Equality," 85 *Cornell L. Rev.* 1221, 1251–56 (2000).

[4] See, e.g., Katharine Silbaugh, "Turning Labor into Love: Housework and the Law," 91 *Nw. U. L. Rev.* 1 (1996); Reva Siegel, "The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860–1930," 82 *Geo. L. J.* 2127, 2131 (1994).

do not merit political and economic recognition and reward.[5] At times, however, government programs have targeted benefits to certain white women (especially those privileged by sexual, marital, and class status) to protect the productive work of "raising citizens."[6] Nonetheless, even when caretaking labor has received public support as essential to political and market well-being, that support typically has been designed as social intervention that operates to limit even the more privileged domestic caretakers' independent political and civil power.[7] Whether devalued or revered, women's caretaking labor generally has been construed as outside (above or below) the normal operation and normal rights of market and state.[8]

This gendered separation of the social from political and civil spheres stymies social citizenship goals more fundamentally, however. A vision – and division – of citizenship that identifies the social sphere with domestic caretaking tends to cast all social citizenship rights in a gendered light. If the social sphere is a place of feminized dependent care distinct from the political and civil spheres of independent citizenship, then social citizenship rights will appear to be protection for dependent status contrary to virtue and power in state and market.

Following such logic, the judicial decisions of the early-twentieth-century *Lochner* era made social citizenship for independent workers unconstitutional, while carving out exceptions for women, some immigrants, and others whose incapacity for direct citizenship relegated them to paternalistic protection.[9] Even when white women left home production and caretaking to became factory workers, the law constructed them as quintessential dependents deserving of social protection in lieu of equal citizenship.[10]

Subsequent constitutional doctrine renounced *Lochner*'s rule, opening the door to federal welfare state programs promoting economic equality in the New Deal and, in the 1960s, the Great Society initiatives. However, *Lochner*'s shadow continues to make egalitarian welfare policies appear suspect and stigmatizing, in part because the gendered separation between household dependents and state and market citizens at the heart of *Lochner*'s logic has never been similarly renounced. State economic

[5] For discussion and criticism of this presumption, see Fineman, *Autonomy Myth*, 35–54; see also Linda C. McClain, "Care as a Public Value: Linking Responsibility, Resources and Republicanism," 76 *Chi-Kent L. Rev.* 1673, 1677–90 (2001).

[6] See Alan Pifer and Forrest Chisman, eds., *50th Anniversary Edition of the Report of the Committee on Economic Security of 1935 and Other Basic Documents Relating to the Development of the Social Security Act* 56 (Washington, DC: Project on the Federal Social Role, 1985, 1985).

[7] See Mimi Abramovitz, *Regulating the Lives of Women: Social Welfare Policy From Colonial Times to the Present* 318–19 (Boston: South End Press, 1988).

[8] See generally Frances E. Olsen, "The Family and the Market: A Study of Ideology and Legal Reform," 96 *Harv. L. Rev.* 1497–578 (1983).

[9] See *Lochner v. New York*, 198 U.S. 45, 54–55 (1905) (striking down a New York labor law regulating bakers' hours as an unconstitutional infringement on economic liberty but distinguishing a regulation of miners' hours in part because of the miners' character).

[10] See *Muller v. Oregon*, 208 U.S. 412, 418–23 (1908) (upholding a minimum wage law for women and distinguishing *Lochner* on the ground of women's dependent status).

protection for workers is still sharply constrained out of concern that economic security will encourage weak, immature, and irresponsible citizens. In part, these concerns have led to programs that privilege groups of workers most identified with market independence, rather than domestic servitude.[11] Unemployment benefits and old age social security, for example, have been structured to exclude or disadvantage many workers of color and women workers with caretaking responsibilities. But the constraints of *Lochner*'s logic affect even economic security policies identified with masculinized, white, full-time manufacturing workers. For instance, popular media and policy makers have often denounced workers' compensation benefits and international trade protections for U.S. steelworkers, arguing that these discourage the self-reliant character traits that enhance civic and market virtue.

Reviving Social Citizenship

Advocates of social citizenship have tried to stretch the liberal frame that pits economic support against good citizenship by pushing its boundaries in two directions. First, economic security can be imagined as a *precondition*, or floor, that will create capacity for meaningful citizenship in state and market.[12] Second, following T. H. Marshall, economic security can be imagined as a *postcondition*, or ceiling.[13] In that second formulation, economic rights are the final step toward perfecting liberal democracy, reached once equal political and civil rights are firmly behind us.

But the gendered liberal framework lashes back against these attempts to stretch autonomous citizenship to include government support for economic well-being. First, as a precondition for political and civil rights, social citizenship reinforces the suspect status of those who claim it so that they appear to be marginal citizens with diminished capacity. When people need a boost up to virtuous citizenship, prevailing politics and theory tend to offer, not material comfort, but the disciplining hand of low-wage (or no-wage) service in market, prison, the military, or traditional marriage.

For example, in a book that helped shape late-twentieth-century welfare reforms, Charles Murray argued that twentieth-century U.S. social policy failed because public income support programs created incentives for a culture of economic dependence and criminality, especially among nonwhites.[14] He focused on what he described as a sharp rise in crime by black men beginning in the 1960s, and he attributed this purported crime wave to insufficient punishment and discipline due to

[11] See Martha T. McCluskey, "The Politics of Economics in Welfare Reform," in Martha Albertson Fineman and Terence Dougherty, eds., *Feminism Confronts Homo Economicus: Gender, Law and Society* (Ithaca, NY: Cornell University Press, 2005), at 193, 199.

[12] See Cass R. Sunstein, *The Second Bill of Rights: FDR's Unfinished Revolution and Why We Need It More Than Ever* (New York: Basic Books, 2004), at 185 (giving public support for basic education as an example); Desmond S. King and Jeremy Waldron, "Citizenship, Social Citizenship and the Defence of Welfare Provision," 18 *Br. J. Pol. Sci.* 415, 426–27 (1988).

[13] See T. H. Marshall, *Citizenship and Social Class, and Other Essays* (Cambridge: Cambridge University Press, 1950).

[14] Charles Murray, *Losing Ground: American Social Policy 1950–1980* (New York: Basic Books, 1984).

expanded welfare and civil rights protections that encouraged female-headed households, alternatives to the discipline of low-waged work, and new policies protecting criminal defendants (especially young black men) from incarceration. Murray advocated "scrapping" public welfare programs to increase economic pressure on those in poverty, especially black Americans and single mothers, so that they would be more likely to participate in wage labor and to make different family choices.[15] Another prominent think tank writer, George Gilder, similarly used gender and racial ideology to argue that federal income support will not lift families out of poverty.[16] Gilder argued that economic support from the government will "destroy the key role and authority of the father," thereby fostering a "welfare culture" of laziness and irresponsibility, especially among black Americans, Native Americans, and Latin American immigrants. According to Gilder, effective antipoverty policy must make welfare benefits austere and temporary to encourage "hard work."[17]

The second liberal rationale for social citizenship also invites a backlash against government programs promoting economic equality. If economic security is the icing on the cake after political and civil rights are assured, it will tend to appear to be an unaffordable luxury or unhealthy indulgence that weakens the state and market. By construing state and market freedom as fundamental for justice, and by making socioeconomic well-being separate and supplemental, this theory of social citizenship subtly reinforces the idea that economic inequality is a natural, benign, and often necessary part of the social order. And when state and market seem shaky, this argument for supplemental social citizenship supports the principle that economic resources must go first toward controlling those who threaten the presumed first-order political and civil liberties. The argument for economic rights as the final piece in democratic citizenship therefore risks enhancing a politics that pushes for more policing, more prisons, more military intervention in the public sphere, and more responsibility and sacrifice at home. What may result is a cycle that produces less freedom and security for most: more devastated individuals, homes, and communities, who produce more threats to others' state and market freedom, justifying more diversion of resources away from the separate social projects that would bring broad-based economic security.

For example, in her study of California's prison system, Ruth Wilson Gilmore argues that a punitive "gulag" state replaced a more egalitarian welfare state in the late twentieth century, in response to a political and market crisis marked by California's industrial restructuring and job displacement, agricultural concentration and instability, decreasing federal funds, and rising poverty and immigration.[18] From

[15] Ibid., at 227–28.

[16] George Gilder, "The Coming Welfare Crisis," in Gwendolyn Mink and Rickie Solinger, eds., *Welfare: A Documentary History of U.S. Policy and Politics* (New York: New York University Press, 2003), at 443–46 (reprinted from 11 *Pol'y Rev.* 25 [1980]).

[17] Ibid., at 443, 445–46.

[18] Ruth Wilson Gilmore, *Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California* (Berkeley: University of California Press, 2007), at 40–51, 70–72, 83, 140–55.

1982 to 2000, California increased its prison population nearly 500 percent, making the Department of Corrections the largest state agency, consuming about 8 percent of the state's general fund.[19] Gilmore analyzes this "prison fix" as establishing a system of "permanent crisis," in which dehumanization and isolation of "criminals" produces escalating fear, racism, and insecurity in state and market, which in turn diverts public and private funding from local infrastructure, education, social services, and nonprison employment, thereby further exacerbating crime, inequality, and insecurity.[20]

Conservative Challenges to Social Citizenship

Two prongs of right-wing ideology and advocacy fueled a late-twentieth-century backlash against egalitarian socioeconomic policy in the United States that continues into the current century. The economic branch of right-wing politics, which claims to prioritize market freedom and a minimal state, often seems most directly opposed to social citizenship rights. Its "neoliberal" ideology (drawn from neoclassical economics) holds that an unfettered market, by definition, produces the greatest economic security for the most people, while government "intervention" to promote economic security ends up draining resources and enriching special interests at the expense of the most disadvantaged. This free-market doctrine was given a major boost in the 1970s by a movement among wealthy business leaders to channel philanthropy into think tanks and scholarship that would promote "free enterprise" and oppose what they often characterized as the "socialist" policies of the New Deal and 1960s, including civil rights laws, welfare programs, and protections for consumers, labor, and the environment.[21] The John M. Olin Foundation, for example, spent more than $68 million to establish the influential "law and economics" school of thought, which challenges the idea that legal rules should be designed to promote the goals of "fairness" or equality.[22]

The social branch of the political Right, in contrast, sometimes seems more conducive to social citizenship goals. Neoconservative ideology sees the state as a legitimate source of moral authority capable of protecting the well-being of families and communities. Neoconservatives have promoted what they claim is a return to moral authority, for example, by promoting domestic policies restricting abortion and sex education and opposing same-sex marriage and by justifying U.S. foreign intervention on grounds of supposedly superior values and culture.[23] To some extent, this moralistic vision seems to offer support for economic policies designed to restrain individual market greed for the benefit of social solidarity, civic virtue, and human

[19] Ibid., at 7–10.

[20] See ibid., at 86, 107–13, 177–79.

[21] See Lewis H. Lapham, "Tentacles of Rage: The Republican Propaganda Mill, a Brief History," *Harper's*, Sept. 2004, at 31–41; John J. Miller, *A Gift of Freedom: How the John M. Olin Foundation Changed America* (New York: Encounter Books, 2004), 23, 32–37.

[22] Miller, *A Gift of Freedom*, at 62, 71, 81.

[23] See Peter Steinfels, *The NeoConservatives: The Men Who Are Changing America's Politics* (New York: Simon & Schuster, 1979), at 53–56.

life and dignity. For example, it might appear that so-called family values advocates could be convinced to focus not only on restricting abortion and gay marriage, but also on increasing public funding for child care and children's health insurance.

Despite the moralistic Right's frequent efforts to regulate community well-being, a closer examination shows how economic and social conservativism work together to undermine social citizenship goals. First, neoliberalism attacks social citizenship by making a gendered, unequal idea of the *market* the standard for virtuous citizenship. Second, neoconservatism attacks social citizenship by making a gendered, unequal idea of the *family* the standard for virtuous citizenship.

The economic prong of right-wing politics (neoliberalism) makes policies promoting economic equality appear opposed to freedom and security. The conventional free-market tautology defines equality as coercive intervention in a voluntary market where promotion of individual self-interest naturally maximizes resources for the good of all. The economic Right insists that those who lose out in the inegalitarian market will best achieve economic protection by policies that enhance that market's power to command behavior and to allocate gains. This theory explains that more jobs, and better economic choices, will not come from more rights for workers, more social spending on impoverished children, or more regulation of business to protect consumers, workers, or communities. Instead, the solution is policies that better attract and appease capital owners, who comprise the market's masters, and policies that better discipline the market's workers and consumers.[24]

On the other hand, the social prong of right-wing politics makes egalitarian economic support appear antifamily. This view defines the virtuous, free, and secure family as one in which the promotion of individual sacrifice naturally maximizes resources for the good of society. The moralistic Right insists that those who lose out in the unequal market will best be helped by more fully embracing a hierarchical family model. For them, problems of economic insecurity are solved not by policies promoting equality in government and market, but by policies that remove state and market impediments to family and religious authority to recognize natural inequalities. In this view, true security for the most economically vulnerable comes from attracting and appeasing husbands, or from submission to the discipline of earthly or divine fatherhood, not from government resources. True economic power, according to social conservativism, results not from challenging the masters of market or state, but instead from enhancing the authority of family and religious masters over dependent others.[25] In this view, if impoverished pregnant women lack the

[24] For some examples of this line of reasoning, see generally Daniel Yergin and Joseph Stanislaw, *The Commanding Heights: The Battle Between Government and the Marketplace That Is Remaking the Modern World* (New York: Touchstone, 1998); Thomas L. Friedman, *The Lexus and the Olive Tree: Understanding Globalization* (New York: Farrar, Straus and Giroux, 1999). For criticisms of this neoliberal challenge to social citizenship, see generally McCluskey, "Efficiency and Social Citizenship."

[25] For an example of this kind of argument, from an affiliate of the right-wing Family Research Council, see Allan Carlson, *Fractured Generations: Crafting a Family Policy for Twenty-First-Century America* (New Brunswick, NJ: Transaction, 2005). For a criticism of family values arguments that dismiss the problem of economic inequality, see Fineman, *Autonomy Myth*, at 89–94.

economic and social resources to raise healthy children, then they deserve not more income, public services, or better child care to help them avoid abortion, but stronger controls on their sexual behavior, stronger pressure to put work before family, and more punitive government intervention in their families through the child protection and criminal justice systems.[26]

Together, both intertwining branches of the Right idealize an illusion of citizenship as a privilege linked to independence from the state, grounded in the mythic free market and the mythic self-sufficient family.[27] And both economic and social strands of the Right draw on gender ideology to legitimate and promote this antisocial citizenship vision. The "nanny state" epithet is used by both the libertarian and moralistic Right to disparage the welfare state and the regulatory state.[28] The "nanny state" slur expresses the idea that social citizenship is an oxymoron not only because it makes autonomous citizens into coddled dependents, but also because it makes autonomous men into dependent women, children, or servants.

The "nanny state" metaphor not only disparages *social* citizenship, but also suggests that both economic and social strands of conservativism sow doubt about the value of *democratic* citizenship itself. This "nanny state" metaphor imagines that the public order depends on a gendered (and classed and raced) status hierarchy: we know government and market have failed if female (or feminized) servants make the rules.

Gendered Challenges to Democratic Citizenship

The success of the Right's ideas shows that the gendered liberal citizenship framework has problems that go beyond disadvantaging socioeconomic equality in general, and caretaking women in particular. Gender ideology also works to undermine social citizenship ideals by casting doubt on democratic citizenship more deeply and broadly. The prevailing vision of political and civil success not only marginalizes the work of "raising citizens." More insidiously, the prevailing view promotes the gender-infused assumption that *razing* citizens is fundamental to state and market well-being; that is, recent policy and ideology have subtly (or not) revived and enhanced a vision in which democratic citizenship itself is antagonistic to political and civil virtue.

On the surface, the mainstream commitment to liberalism rejects an older social structure centered on master and servant to embrace a vision of free, self-governing citizens. But mainstream liberalism's uneasiness with social citizenship is intertwined with a continued reliance on assumptions of a hierarchical, authoritarian order limited by tradition-bound status.

[26] See generally Rickie Solinger, *Beggars and Choosers: How the Politics of Choice Shapes Adoption, Abortion and Welfare in the United States* (New York: Hill and Wang, 2001).

[27] See Fineman, *Autonomy Myth*, at 31–34.

[28] See Martha T. McCluskey, "Thinking With Wolves: Left Legal Theory After the Right's Rise," 54 *Buffalo L. Rev.* 1191, 1293 (2007).

Opposition to social citizenship draws on and interconnects with a preliberal and premodern political ideal that models government on the unequal household, where legitimate authority comes from a master's governance of legally dependent family and servants. As Markus Dubber explains, Western traditions of democratic sovereignty not only permitted, but required, a system of inequality in governance.[29] For the majority, who were household members, rather than household heads, in early European versions of democracy, virtuous governance required submission and sacrifice to a household status hierarchy. The traditional citizen was independent and virtuous to the extent he controlled, protected, and represented others without independent political and market power. That political order was gendered: the status of head of household was linked to masculinity (as well as to race, nationality, sexuality, economic class, and other characteristics). For example, Blackstone's commentaries identified the king as the "father" of his people, explaining that "the individuals of the state, like members of a well-governed family are bound to . . . be decent, industrious, and inoffensive in the respective stations."[30] Dubber argues that this ideal of patriarchal governance was not rejected by the change from monarchy to liberal republican government in the United States, but instead was incorporated within it.[31] Current controversies over law and government in the United States continue to raise the fundamental question of whether American government should be a democracy of household members, where unequal and dependent status requires most to submit to policing by their autonomous superiors, or whether American government constitutes a democracy of persons equally capable of self-government.

Gender ideology helps perpetuate that older antidemocratic ideal by identifying mastery and servitude with the natural or at least normal and benign characteristics of biological difference within the private family, rather than as a public rejection of democracy. For example, George Lakoff analyzes how an antiliberal view of the family fuels "conservative" opposition to "liberal" efforts to promote equality in the United States.[32] Lakoff explains that the political Right builds popular support by tapping into a widespread belief that the good family is characterized by sharp gender differentiation, with a father responsible for authority, discipline, and protection over dependent, obedient women and children.[33] In the conservative view, the "strict father" family has become the primary metaphor for the state, creating a frame in which inequality is a virtuous correcting force rewarding successful dominance, while protecting and punishing unsuccessful dependents. Lakoff traces the

[29] See Markus Dirk Dubber, *The Police Power: Patriarchy and the Foundations of American Government* (New York: Columbia University Press, 2005), at 5.

[30] See ibid., at 49.

[31] See ibid., at 83–93 (describing Jefferson's vision of transforming America from a hierarchical monarchy); see also ibid., at 217 (concluding that Jefferson's effort needs to be revived today because an unexamined patriarchal vision of governance continues to ground American law).

[32] See generally George Lakoff, *Moral Politics: How Liberals and Conservatives Think* (Chicago: University of Chicago Press, 2nd ed. 2002).

[33] George Lakoff, *Don't Think of an Elephant: Know Your Values and Frame the Debate* (White River Jct., VT: Chelsea Green, 2004), at 6–10.

opposing "liberal" political vision to a sharply contrasting ideal of the "nurturant parent" family, which encourages freedom, gender equality, fairness, negotiation, and caring.

Lakoff explains that for people who identify with the "strict father" family model, government economic support appears immoral and harmful because it interferes with the strict, hierarchical rule that they believe best protects people from a dangerous world. But this conservative "strict father" model leads beyond rejection of social citizenship principles to make equal political and civil rights appear problematic. If virtue comes from using punishment and reward to maintain strong control over dependents, both in the family and in the state and market, then justice and morality will be consistent with substantial authoritarian rule and unequal benefits and burdens in state and society. In this "strict father" model, the discipline of a harsh, unequal market and state appropriately fosters both the coldhearted, uncompromising calculation and the irrational, submissive devotion that establish the morality and power necessary to defend home, business, and nation from ruthless opponents.[34]

Advocating Meaningful Equal Citizenship

Four not-so-easy steps might help proponents of economic equality better challenge the framework that defeats economic equality and gender equity and that undermines the very idea of democratic citizenship as well.

First and foremost, we must reject the separation of political, civil, and social rights. Economic protection is neither the floor below nor the ceiling above civil and political rights, but the core that gives those rights substance and structure. Who has political and civil rights determines who has the power to direct social resources to meet his or her interests, according to his or her ideals and identities. The ideal of formal political and civil rights divorced from substantive power and material benefit is a myth. When political and civil rights are insufficient to command socioeconomic protections, that signifies not just the failure of social citizenship, but the failure of political and civil citizenship as well. The power to share in governing state and market includes the power to define and enact one's economic interests as fundamental virtues, public necessities, and market efficiencies, rather than as redistribution, as luxuries, or as compensation for incapacity.[35]

Second, advocates of economic equality should not frame the issue as a debate between security, solidarity, and regulation, on one hand, and risk, individualism, and autonomy, on the other.[36] The individual autonomy and insecurity claimed by current state and market authorities is rhetoric more than reality. Instead, we should

[34] Ibid., at 8–10.

[35] See Martha T. McCluskey, "The Illusion of Efficiency in Workers' Compensation 'Reform,'" 50 *Rutgers L. Rev.* 657, 918–20 (1998).

[36] See Martha T. McCluskey, "Rhetoric of Risk and the Redistribution of Social Insurance," in Tom Baker and Jonathan Simon, eds., *Embracing Risk: The Changing Culture of Insurance and Responsibility* (Chicago: University of Chicago Press, 2002), at 146, 164–66.

reframe the debate as the question of the *distribution* of security and freedom: who gets protection and who gets risk, and whose interests are advanced and impeded by regulation and social responsibilities. The myth of autonomy covers up a gendered double standard of independence, as Fineman shows.[37] The problem is *who* deserves substantive citizenship, not whether citizenship encompasses material support.

Third, arguments for economic equality should challenge the opposition to economic equity as a movement against political and civil citizenship, not just against economic citizenship. Both prongs of conservatism promote a restructuring of state, market, and family to encourage control, risk, and coercion for most people as the means of securing power for a few. The illusion of freedom and decentralized power in market and family serves to excuse and support a movement toward increasing state authoritarianism that is eroding liberal citizenship. The rising economic insecurity for the majority in the United States is about a systematic increase in inequality in voting rights, an increase in corruption of democracy by campaign financing and lobbying, and the barriers to representation of diverse viewpoints in the media and in the legislative process – as well as other major flaws in political rights.

Fourth, arguments for economic equality should challenge the prevailing culture of gender difference. Policies of economic security will face popular stigma and political constraint as long as sacrifice, economic vulnerability, and unproductiveness are distinctly feminine virtues, while individual economic mastery over more vulnerable others is the sign of mature masculinity. To break down the ideological separation between political, economic, and social power, it will be necessary to challenge the assumption that this separation reflects a natural, reasonable, or trivial gender division.

Social Citizenship in Public Policy: Marriage Tax Reform

Taxation is one of the most important policy arenas affecting the questions of economic equality and citizenship in general. Social citizenship rights depend, to a large extent, on determinations of how much economic gain individuals must share with the state, and how that obligation to the state is distributed among citizens. The early-twentieth-century introduction of the income tax, followed by the New Deal payroll tax system for social security, helped support some federal social spending and regulation that led to increased economic equality in the mid-century United States.

Feminists have explored how the twentieth-century United States' steps toward social citizenship were limited by a gendered, racialized vision of economic productivity that privileged formal market work, typically done by white men. But along with work-based income support and protections for workers' rights, mid-twentieth-century policy instituted a marriage benefit in the income tax code that (at least implicitly) addressed the economic contributions of some women's informal

[37] See Fineman, *Autonomy Myth*, at 33–53.

domestic labor. This marriage-based benefit, however, has troubling implications both for women and for social citizenship in general.

Economic Support as Gendered Citizenship

After 1948, the switch from individual to joint taxation of married couples (combined with favorable marital tax rates) produced a so-called marriage bonus for well-off breadwinner-homemaker married couples.[38] By treating married taxpayers as a unit, rather than as two separate taxpayers, a relatively high earning breadwinner married to a nonearning or low-earning spouse could split his (very rarely, her[39]) market income in half, as if it were really earned by two equal earners. With this 1948 change to joint marital taxation, the couple with a husband earning $100,000 and a nonearning wife was taxed as if both earned $50,000. Because of progressive tax rates, the total tax owed by two individual (unmarried) $50,000 earners added together would be lower than the total taxes owed by the combination of one (unmarried) $100,000 earner taken together with another taxpayer earning zero.

Progressive tax rates normally reward equality and create incentives to reduce inequality. This 1948 change to marriage-based taxation effectively created an exception to the progressivity rule: it allowed unequal earners, if married, to be rewarded *as if* they were equal. The *as if* is important – it was designed to protect high-earning husbands from incentives to *in fact* equalize title to family resources.[40] This system effectively allowed a spouse with significant taxable income to use a nonearning or low-earning spouse as a tax shelter that would substantially reduce the family's tax liability.

Some have claimed that this marriage bonus furthers women's social citizenship because it has acted as support for family caretaking. It even *privileges* homemaking to some extent, giving greater support to taxpaying units in which one spouse forgoes substantial market income than to single people or married couples without a primary homemaker.[41]

But as feminist critics noted from the beginning, this tax-based system of economic support for caretaking is founded on a vision opposed to women's political and market citizenship.[42] This tax support for homemaking labor was enacted effectively to *impede* women's ability to bargain independently for direct compensation for that

[38] For a discussion of the 1948 tax law change creating the marriage bonus, see Edward J. McCaffrey, *Taxing Women* (Chicago: University of Chicago Press, 1997), at 54–57.

[39] Data from the pre-1948 system show that in 1918, only 1.4 percent of wives earned enough to be subject to the income tax individually (exceeding the zero-tax bracket), and by 1939, less than 7 percent of wives did so. See ibid., at 31.

[40] See ibid., at 51–54; see also Carolyn C. Jones, "Split Income and Separate Spheres: Tax Law and Gender Roles in the 1940s," 6 *Law and History Rev.* 259, 294–96 (1988).

[41] See Anne L. Alstott, "Tax Policy and Feminism: Competing Goals and Institutional Choices," 96 *Colum. L. Rev.* 2001, 2015–18 (1996).

[42] See Alice Kessler-Harris, *In Pursuit of Equity: Women, Men, and the Quest for Economic Citizenship in 20th-Century America* (New York: Oxford University Press, 2001), at 188–98.

household labor. The mid-twentieth-century change treating married women not as taxpaying individuals, but as part of a unit consisting of one taxpayer and one spouse, evoked earlier centuries' legal doctrine of *coverture*, by which a woman largely lost her separate legal identity upon marriage, surrendering independent citizenship for the cover of a husband, who assumed full ownership of the woman's property and income.[43] Consistent with that tradition, and rejecting the previous half-century of income tax practice, the marriage bonus recognized homemakers not as individuals directly contributing to the state or to the family, but as *wives*, whose income and obligations are only counted through and claimed by their taxpaying breadwinner spouse.

More materially, this tax support for marital homemaking is not tailored to support traditionally female *dependent* caretaking. This tax advantage targets marital homemaking regardless of dependents, and separate from other, less generous, dependent caretaking protections. For that reason, the marriage bonus system can be viewed as a policy aimed at supporting "affluent husband care": it recognizes, revives, and subsidizes the traditional coverture duty of wives (or gender-neutral spouses) to forgo market earnings to serve their husbands for no pay. And it affirms the traditional view that the self-governing citizen is one who can command domestic service not as an equal bargainer in a free market, but as a master based on marital status.

Reframing Social Support as Gendered Privilege

By criticizing this family tax policy as an affluent husband care subsidy, this analysis follows Fineman's call to shift the focus from disadvantage to privilege and to excavate the history of affirmative support for substantive citizenship.[44] Identifying this privilege and the continuing political interests behind it helps to challenge the conventional wisdom that this marriage bonus is a relic reflecting now-outdated demography, a view that fails to explain why it has not only persisted, but increased, as the married breadwinner-homemaker couple has become less representative of American families.

In addition, by identifying this tax policy as a problem of *unequal power and privilege*, rather than of unequal need for support, we can shed light on how to escape the tough trade-offs that confound the question of economic security for family caretakers in the tax system. Many have framed the marriage tax question as a dilemma about whose needs for economic support are stronger: market-working versus homemaking wives; single versus married taxpayers; men versus women; those who satisfy formal definitions of dependency versus those who can prove functional dependency.

Better to promote women's equal social citizenship, this affluent husband care subsidy should not be eliminated, but instead should be extended to support caretaking

43 See Hendrik Hartog, *Man and Wife in America: A History* (Cambridge, MA: Harvard University Press, 2000), at 115–22.

44 See Fineman's exposition in Chapter 11.

more equitably for the majority of nonaffluent earners, regardless of marital or family status, and regardless of whether their domestic care comes from market or nonmarket labor. This would involve, first, taxing people as individuals, rather than as a marital unit; second, expanding the progressivity of the tax code to provide more equitable tax relief to support the caretaking needs of low-income and modest-income workers and dependents; and third, structuring tax and other laws formally to recognize and enforce intrafamily exchanges of income and assets for informal family care.

Furthermore, by recognizing the tax system's long-standing privilege for affluent husband care, we may better defend government support for *dependent* care as continuing a normal and traditional relationship among between state, family, and market – rather than as a supplement to state and market. The husband care subsidy shows that the well-off, two-parent marital family held up as the model of self-sufficiency actually has depended on substantial governmental support. Equalizing and extending that economic support to others will not simply expand "dependency," but will give more people more independent power to negotiate their interests in market and family.

Economic Privilege as Antidemocratic Citizenship

Recent tax reforms provide an example of the links between opposition to social citizenship and opposition to democratic citizenship. In 2001 and 2003, Congress enacted significant, much publicized reforms to this long-standing marriage tax system. But these reforms did not end the affluent husband care subsidy otherwise known as the marriage bonus. Instead, they ended the so-called marriage *penalty* for middle income taxpayers. This penalty was actually the result of a 1969 change to the income-splitting rate for married couples: instead of treating married taxpayers as if they were fully equal earners, the 1969 reform treated married taxpayers' income as if it were divided somewhat less equally – as if one spouse earned 70 percent and the other 30 percent, rather than as if each earned 50 percent of the couple's joint income.[45] This change somewhat reduced the so-called marriage bonus – or affluent husband care subsidy – thereby softening the blow to affluent husbands who divorced their tax-shelter wives.

But this change actually penalized equal-earning married couples because it meant they were taxed at a higher rate than if they were single. Remember that the 1948 marital income splitting system basically altered the normal progressivity of the tax system to reward unequal-earning couples *as if* they were equal earners: the couple with one $100,000 earner and one nonearner was taxed at the lower rate applied to two $50,000 earners. Under that 1948 joint marital taxation system, those who *really* were equal earners did not receive a so-called marriage bonus. Instead, the 1948–1969 scheme left equal-earning married couples with the same standard progressive tax rates as single persons. Under that older system, married couples

[45] See McCaffery, *Taxing Women*, at 63–69.

whose earnings were already equal could not gain a tax shelter by attributing a higher earner's income to a lower-income spouse, but they did not lose the normal benefits of the progressive tax rates. The 1969 marriage tax law change had the perverse effect of taking away the normally progressive tax treatment of these equal-earning married couples. Instead, it treated equal-earning marriages *as if* the earnings were somewhat unequal – creating a marriage penalty for many two-earning couples. After 1969, for example, the husband and wife who each earned $50,000 would have been treated *as if* they earned roughly $70,000 and $30,000, effectively penalizing them with the steeper tax rate associated with a higher-earning taxpayer.

As dual-earning marriages became a mainstay of the increasingly struggling middle class in the 1970s, this regressive tax penalty became a particular target of criticism. Remember, however, that it was never really a *marriage* penalty, but always more specifically an *equal-earning* marriage penalty, and it coexisted with the bonus for higher-income unequal marriages – the affluent husband care subsidy. The series of reforms from 2001 through 2005 largely removed this equal-earning penalty at middle income levels. As a result, those recent reforms might seem to take at least a small step toward more substantive gender equity and economic equity in the tax system, providing a positive example of the possibilities for social citizenship. However, the bigger picture is grimmer.

The so-called marriage penalty was eliminated by *expanding* the tax bonus for unequal-earning couples – the affluent husband care subsidy – to the higher levels of the 1948–1969 period.[46] The recent reforms replace the 1969 policy of taxing marital income as if it were earned somewhat unequally (split in a 70/30 ratio between spouses) with one taxing marital income as if it were earned on a fully equal basis (a 50/50 split). This means that those married couples with the most unequal spousal division of income can shelter more of the higher-earning spouse's income under the lower-earning spouse's tax rates. For example, a husband earning $100,000 will get taxed as a $50,000 earner (rather than as a $70,000 earner under the 1969 scheme) when married to a wife without taxable income.

By replacing the fiction of a 70/30 marital income split with a fiction of a 50/50 marital income split, the recent reforms claim to alleviate equal earners' marriage penalty because these married couples no longer lose the progressive rates normally available for their individual earnings. Two $50,000 earners now will have the same combined taxes, whether married or unmarried, because marriage no longer effectively redistributes marital income to meet the more unequal, and therefore more steeply taxed, 70/30 division. But these recent reforms still privilege unequal-earning married couples compared to dual-earning marrried couples and also compared to unmarried taxpayers. By expanding the income-splitting tax shelter so that unequal-earning married couples can shift more of the high-earner's income to a lower tax bracket, the recent reforms increase the tax bonus to breadwinners who marry a

[46] See Susan Kalinka, "Highlights of the 2003 Jobs and Growth Tax Relief Reconciliation Act: Economic Stimulus or Long-Term Disaster?," 64 *La. L. Rev.* 219, 229–30 (2004).

non-earning or low-earning homemaker. An individual earning $100,000 with a spouse who specializes in unpaid homemaking, for example, could save over $6,000 in annual taxes compared to an unmarried person with the same income (using 2008 tax rates). In contrast, an individual earning $50,000 who marries a spouse who combines homemaking with $50,000 in market earnings will not get any tax savings upon marriage. This tax privilege for unequal-earning marriages is particularly problematic because those couples are typically better off economically compared to dual-earning couples with the same joint formal market income. Dual-earning married couples are likely to work more hours per couple to earn the same market earnings, leaving less time or money for household labor and leisure.[47] Compared to both single taxpayers and dual-earning married couples, married breadwinner-homemaker couples with comparable income are likely to benefit from substantial informal productive labor and economic security provided by full-time homemakers but not counted as taxable income. By effectively taxing the $100,000 breadwinner with a non-earning homemaker spouse *as if* they were two $50,000 earners, the current marital tax system rejects the progressive principle that $100,000 is taxed less if it represents the market earnings of two or more workers rather than one. By directing tax support to unequal-earning married couples, but not to taxpayers filing singly or to dual-breadwinners, the recent current marriage tax system continues to exclude the most burdened middle-class taxpayers from the biggest middle-class tax break.

This inequity shows the power of the right-wing, two-pronged attack on social citizenship, in the tax code and beyond. Protection for unequal family status becomes a political substitute for meaningful economic equality. To address the increasing economic insecurity that has eroded the breadwinner-homemaking family, the Right offers increased privileges for that family. Struggling, dual-earning married couples get relief from penalties based on their formal marital status, without getting substantial support for their actual economic vulnerability. According to social conservative arguments, economic privileges for the breadwinner-homemaker marital family are good for society overall because that is the family that is the model of self-sufficiency and public virtue.[48] That logic helps justify and normalize the economic vulnerability of dual-earning married couples and single taxpayers as the product of personal choice and character, rather than as the result of exclusion from state and market privileges.

Although the focus on marriage penalty relief suggests a largely moral victory for the social conservatives, a more complete view of the recent tax policy changes shows that the most substantial impact of the reforms went toward advancing the economic prong of the conservative backlash. After all, the real action in the recent

[47] See Julie A. Nelson, *Feminism, Objectivity and Economics* (New York: Routledge, 1996), 104–05.

[48] See Wade F. Horn, "The Marriage 'Bonus' Offers Little Tax Relief," *Washington Times*, April 11, 2000, at E2.

tax reforms of 2001 and 2003 has been massive tax cuts for the very rich[49] – in the name of shrinking state interference in free market earnings. In dollar amounts, those tax cuts for the rich far outstripped the gains to the middle class from marriage penalty relief. Some have suggested that the marriage reforms acted like a bribe that got enough of the middle class to accept the massive upward redistribution of wealth through the tax system.[50] This would suggest a toned-down vision of social citizenship – limited economic support is possible for the majority if that support is tailored to accommodate a right-wing *moral* ideal of an unequal family along with a right-wing *economic* ideal of an unequal market skewed to advantage the very rich.[51]

But a closer look at these tax reforms shows an even worse picture for social citizenship in particular, and for liberal citizenship in general. Marriage remains penalized for many equal-earning couples, especially in lower-income families, who are supposedly the primary targets of pro-marriage policy.[52] Moreover, the marriage penalty relief these recent reforms offer to the middle class is, to a large extent, temporary and illusory: just as these income tax reforms go into effect, the regular income tax will no longer apply to large portions of the married middle class.[53] That is because of an effective shift in the alternative minimum tax, originally designed to close loopholes protecting the rich, but which soon will apply primarily and increasingly to the middle class and not the rich. Indeed, some tax experts suggest that the alternative minimum tax is now perversely aimed at increasing taxes on the middle class to make up the revenue lost from upper-income tax cuts.[54] And how does this alternative minimum tax work to increase taxes on the middle class? In part, it does so by eliminating the tax benefits for marriage and for dependent care that would otherwise help the middle-class family.[55]

In short, what we get from this picture is not simply a constrained, moralistic, and gendered vision of social citizenship, but a *deceptive* vision of social citizenship, or more precisely a vision that replaces social citizenship with upper class power and privilege in state and market. In this vision, gender ideology serves to distract and divide the middle class to allow the upward redistribution of wealth.

But these tax reforms also suggest another shift in gendered citizenship. The affluent husband care subsidy of the second half of the twentieth century reflected

49 See Lawrence A. Zelenak, "The Declining Progressivity of the Federal Income Tax," in Paul D. Carrington and Trina Jones, eds., *Law and Class in America: Trends Since the Cold War* (New York: New York University Press, 2006), at 163–90.

50 See ibid., at 183.

51 Ezra Klein, "The Rise of the Republicrats," *American Prospect*, Aug. 13, 2006.

52 See Adam Carasso and Eugene Steuerle, "The Hefty Penalty on Marriage Facing Many Households With Children," 15 *Future of Children* 157, 159, 163 (2005).

53 See Leonard E. Burman et al., *The Expanding Reach of the Individual Alternative Minimum Tax* (Washington, DC: Urban Institute and Brookings Institute, 2005), at 4–6.

54 See Zelenak, "Declining Progressivity," at 174.

55 See Jane G. Gravelle, *The Individual Alternative Minimum Tax: Interaction With Marriage Penalty Relief and Other Tax Cuts* (Washington, DC: Congressional Research Service, 2001), at CRS-7.

and reinforced an ideal of deserving citizenship represented by the married, white, male, upper-middle-class worker, whose capacity for governance is established by his status as master of the household, entitled to unpaid domestic service. The twenty-first-century tax system is perhaps taking steps toward replacing this ideal: in place of the affluent husband care subsidy, we have what might be called the "superrich capital care subsidy."

Perhaps the ideal citizen on the horizon is not the married, affluent breadwinner, but the wealthy capital owner, who, as master of the state and market, asserts entitlement to the service and sacrifice of both market workers and family caretakers. In the early twenty-first century, the promise of economic and political power associated with middle-class status in the United States often proves hollow, even as poverty and extreme wealth increase.[56]

Recent tax policy changes track twenty-first-century changes in many other areas of U.S. government policy at the local, national, and international levels, as the burdens and benefits of government and market have shifted to increase protection for a superrich minority at the expense of most others.[57] Income from wage work, government benefits, and retirement is often less secure and more meager.[58] Rising burdens of housing, health care, and education have squeezed the middle class as well as the poor, and the route toward the American dream typically includes a dual-earning household and a high debt load. But many of these dreams end in bankruptcy, as this path offers little cushion against crisis in work, family, or health. Between 1989 and 1999, the number of women filing for bankruptcy increased over 600 percent, and bankruptcy expert Elizabeth Warren concludes that the data show that raising children is a major economic risk factor for married parents as well as for single women.[59] The chance of falling from the middle class into poverty has increased substantially since the 1960s and 1970s; more than half of American children spend at least a year in poverty before reaching age eighteen, and more than half of all American adults can expect to spend at least a year in poverty between the ages of twenty-five and seventy-five, according to sociologist Mark Rank.[60] Women work an annual average of 200 hours more than in the mid-1970s; men work an average of 100 hours more; most American families have replaced savings with net debt; bankruptcy (especially in the middle class) has soared; public services – such as education and infrastructure spending – have been starved over several decades in favor of spending on warfare, prisons, and business subsidies; and Americans sacrifice

[56] See Robert Perrucci and Earl Wysong, *The New Class Society: Goodbye American Dream?* (New York: Rowman and Littlefield, 2nd ed. 2002), at 3–34.

[57] See McCluskey, "Rhetoric of Risk."

[58] See generally Jacob S. Hacker, *The Great Risk Shift: The Assault on American Jobs, Families, Health Care, and Retirement (and How You Can Fight Back)* (New York: Oxford University Press, 2006).

[59] See Elizabeth Warren and Amelia Warren Tyagi, *The Two-Income Trap: Why Middle-Class Mothers and Fathers Are Going Broke* (New York: Basic Books, 2003), at 5–6.

[60] Hacker, "Great Risk Shift," at 32, citing Mark Robert Rank, *One Nation, Underprivileged, Why American Poverty Affects Us All* (New York: Oxford University Press, 2004), at 94.

not only leisure, but sleep, to the growing demands of work and home.[61] At the same time, lawmakers at the local, national, and international levels typically shape policy in direct response to the demands of their superrich funders, exemplified by the rise in local "corporate welfare" spending and privatization,[62] the influence of well-funded corporate lobbyists and wealthy campaign donors in national government,[63] and international governance (in institutions like the World Trade Organization and the International Monetary Fund) prioritizing protections for multinational corporate profits at the expense of labor, environment, and human rights.[64] President Barack Obama's election and economic stimulus legislation have spurred hopes that new economic policy will increase support for the middle class. Yet this mobilization for change coincides with a financial crisis in which newly uncovered threats of staggering losses from elite profit-seeking give those elites more power to demand further protection from taxes along with massive increases in government financial support.

Rather than turning wives from servants into citizens, perhaps recent marriage tax policy reflects and reinforces a trend toward turning most citizens (regardless of gender or marital status) into "wives" of capital. Reminiscent of the traditional coverture doctrine giving husbands the right to control women's power to own, earn, and govern, perhaps law and ideology are moving back toward a broader premodern ideal, in which a small group of wealthy property owners and governors are entitled to assert cover over most workers and families, whose power to secure the fruits of their labor is increasingly at the discretion of the rich masters, instead of being a right fundamental to a healthy state, family, and market.

[61] See Robert H. Frank, *Falling Behind: How Rising Inequality Harms the Middle Class* (Berkeley: University of California Press, 2007), at 78–86.

[62] See generally Greg LeRoy, *The Great American Jobs Scam: Corporate Tax Dodging and the Myth of Job Creation* (San Francisco: Berrett-Koehler, 2005).

[63] For data on the influence of money in U.S. politics, see Center for Responsive Politics, "OpenSecrets," available at http://www.opensecrets.org/ (accessed Sept. 1, 2008).

[64] See, e.g., Jeff Faux, *The Global Class War: How America's Bipartisan Elite Lost Our Future – and What It Will Take to Win It Back* (Hoboken, NJ: John Wiley, 2006) (reporting on the politics and economics of the North American Free Trade Agreement).

PART
IV

SEXUAL AND REPRODUCTIVE CITIZENSHIP

13

Sexual Citizens: Freedom, Vibrators, and Belonging

Brenda Cossman

In *Sex and the City*, HBO's acclaimed television show about the intimate, erotic, and neurotic pursuits of four single women in New York City, Carrie Bradshaw and her friends are either having sex or talking about sex.[1] While single women have been having sex on television for a long time, what distinguishes Carrie and company is the extent to which their sexualities are a crucial part of their belonging to imagined communities of New York City. Carrie makes a living as a journalist who writes about sex.[2] Samantha, a highly successful public relations agent, is unapologetically sexual in all aspects of her life – refusing the distinction between public and private.[3] Miranda negotiates the tensions of the demands of an asexual profession – she is a lawyer – and her more intimate pursuits.[4] Charlotte is the traditionalist, the one that speaks about sex in hushed tones.[5] Episode after episode explores once forbidden topics, from the etiquette of oral sex and public sex to older women–younger men intergenerational relationships and lesbianism, while Carrie reflects upon the deep inner truths of human intimacy for her column. The intimate public sphere explored in *Sex and the City* is part of the broader transformations of sexual citizenship, a process of becoming, which transgresses the borders of old and domesticates the citizens of new. These women are strong and independent and unapologetically sexual. But they are also responsible market citizens, impeccably attired, with aspirations of relational and domestic happiness. They are part of the new sexual citizenry – a citizenry that, although highly sexualized, can be relied upon to self-discipline.

Consider the infamous vibrator episode: in the first season of *Sex and the City*, Miranda introduces Charlotte to a vibrator – a candy-colored one known as the rabbit.[6] Despite her initial shock and profound reserve, Charlotte warms up to her vibrator – so much so that Carrie and Samantha have to stage an intervention, as

[1] See HBO, "*Sex and the City*," available at http://www.hbo.com/ (accessed Oct. 20, 2008).
[2] HBO, "*Sex and the City*, Cast and Crew," available at http://www.hbo.com/ (accessed Oct. 20, 2008).
[3] Ibid.
[4] Ibid.
[5] Ibid.
[6] "The Turtle and the Hare," *Sex and the City*, television broadcast (HBO, Aug. 2, 1998).

Charlotte is repeatedly cancelling her social engagements to stay home with her new friend. The day after the show aired, sex shops across North America reportedly sold out of the model.[7] What Manolo Blahniks were to shoes, the rabbit now was to vibrators, with the show once again epitomizing the new sexual citizenship as a merging of sex and shopping. This was neither the first nor the last depiction of vibrators on the series – Miranda is seen to have one in her bedside table, and Samantha spends an unsuccessful day at home with several vibrators in an attempt to get her orgasm back. But it did represent a new high water mark, as vibrators came out of the closet and into the public sphere.

The show was not simply an affirmation of women's right to unmitigated sexual pleasure. The episode set up a problem that needed to be managed: Charlotte was not self-disciplining in her sexuality. She was bordering on sexual excess. She was withdrawing from her community, real (her friends) and imagined (the world of possibilities of New York City). Indeed, her withdrawal was threatening her idealized sexual world to be because she was failing to fully participate in the dating world that would/could/should produce a future husband. And so her friends did what friends are supposed to do: they intervened and helped reestablish the requisite sexual self-discipline. Charlotte's sexual freedom was a terrain that needed to be managed; she needed to be redirected to make the right choices. Sex was still an important part of that choice, but it had to be appropriately directed.

The vibrator episode encapsulates many of the transformations in the terms of contemporary sexual citizenship, wherein a new degree of sexual freedom is accompanied by a set of codes designed to discipline it. Single women may be entitled to their sexual pleasures, but they must self-govern appropriately. It is a vision of sexual citizenship, however, that stands in stark contrast to a vision that continues to the legal regulation of vibrators in particular, and sexual privacy more generally. In this vision, vibrators continue to cast a shadow of indecency over women's sexuality, and at least some legislatures assisted by at least some courts are more than prepared to step up to do the disciplining. The vibrator cases are an intriguing example of a legal vision of sexual citizenship that appears increasingly out of sync with a cultural vision, producing tensions within the terms of contemporary belonging.

Sexual Citizenship

Citizenship has always been sexed. The terms of belonging have always incorporated norms of appropriate sexual practices. From the practices of the ancient Greeks, to the proliferation of public discourses of sex from the seventeenth century forward,[8] to

[7] Lianne George, "Toyland in the Torrid Zone," *Maclean's*, May 17, 2004.

[8] See, e.g., Michel Foucault, Introduction to *The History of Sexuality* (New York: Random House, 1980), at 1; Michel Foucault, "The Use of Pleasure," in *The History of Sexuality* (New York: Random House, 1985), at 2.

the articulation of the American nation,[9] sex has long been implicated in citizenship. Membership in the public sphere, whether envisioned as rights, political participation, or broader practices of belonging, have been conditional upon a set of sexual norms and practices circumscribed within the private sphere. In the modern context, this belonging has presupposed a highly privatized, familialized, and heterosexual sexuality.[10] Some subjects were explicitly excluded. Much of the sexual citizenship literature has focused on the exclusion of gay men and lesbians: citizenship, as social membership in a nation-state, as a set of rights and responsibilities associated with that membership, and as a set of practices defining membership in the community, has long been associated with heterosexuality. The sexual citizen was a heterosexual citizen.[11] From the criminalization of gay sexuality through sodomy laws, to the legal condonation of discrimination, lesbians and gay men have been denied citizenship.

But the terms of sexual belonging change over time. A second theme within sexual citizenship is that within the last few decades, the once private sphere of intimate life has transformed into more expressly public and political concerns. Scholars, such as Jeffrey Weeks and Anthony Giddens, have argued that a new primacy has been given to sexual subjectivity, related to the democratization of relationships, the production of new subjectivities, and the proliferation of new stories of the self, sexuality, and gender.[12] One-time sexual outlaws – from sexually single women, to gay men and lesbians, to porn stars – have demanded inclusion and begun to revise and expand the meaning of citizenship by claiming their rights and/or their political participation. In so doing, they have contributed to the politicization of the once private sphere, claiming that issues once relegated to this sphere are themselves the proper subject of political contestation. While discourses about sex have long been part of the public sphere, there is a way in which citizenship in our current era appears to be increasingly sexed up. More and more sexual practices have become visible within the public sphere. From representations of sexuality in popular culture – film, television, advertising, music videos – to the increasingly public performances of sex acts once deemed aberrant, such as S and M sex, swinger sex, and commercial sex, sexual discourses saturate the public sphere, as the subject of political contestation and cultural representation.

Sexual citizenship, then, is not just about challenging the heterosexuality of conventional belonging. It is about interrogating the sexual norms and practices that

9 Nancy Cott, *Public Vows: A History of Marriage and the Nation* (Cambridge, MA: Harvard University Press, 2000).

10 Diane Richardson, *Rethinking Sexuality* (London: Sage, 2000).

11 See, e.g., David Bell and Jon Binnie, *The Sexual Citizen: Queer Politics and Beyond* (Cambridge: Polity Press, 2000); Shane Phelane, *Sexual Strangers: Gays, Lesbians and Dilemmas of Citizenship* (Philadelphia: Temple University Press, 2001).

12 Jeffrey Weeks, "The Sexual Citizen," 15 *Theory, Culture and Soc'y* 35 (1999); Jeffrey Weeks, "The Delicate Web of Subversion, Community, Friendship, and Love: In Conversation With Sue Golding," in Sue Golding, ed., *The Eight Technologies of Otherness* (London: Routledge, 1997); Anthony Giddens, *Sexuality, Love and Eroticism in Modern Societies* (Stanford, CA: Stanford University Press, 1992).

condition and constitute belonging more generally. My work on sexual citizenship traces the contours of the current modality of sexual citizenship.[13] Who is the good sexual citizen, and why? What are the borders of citizenship? What practices are constituted as legitimate, and what practices are marked as deviant or unbecoming? I am interested in the ways in which sex – as sexual practices, sexual norms, and sexual representations – is implicated in the terms of our belonging. What kind of sexual norms, practices, and representations affirm our belonging, and what kind of belonging to these norms, practices, and representations is affirmed? How does crossing the border from outlaw to citizen, and how does the process of becoming a citizen, reconstitute the subject in the discourses of belonging? Conversely, how do certain sexual practices, norms, and representations operate to produce other citizens as unbecoming, or outlaws?

I use the concept of sexual citizenship to explore these questions and capture the extent to which sexual practices are a central dimension of contemporary belonging. In contemporary citizenship, sexual discourses have saturated the public sphere in more explicit but also circumscribed ways. This sexing of the public sphere and of the terms of belonging has been accompanied by other changes. There is the emergence of neoliberal citizenship, with its emphasis on individual self-reliance. Unlike the model of social citizenship of an earlier Keynesian era, government responsibility for even the most basic welfare of its citizens has receded as individuals are called upon to take responsibility for themselves and their families. Individual risk management and marketized self-reliance are now the hallmarks of the good citizen. Second is an increasing self-disciplining or self-governing of citizenship. Relying on Foucault's later work on governmentality, scholars like Nicholas Rose and Alan Hunt have explored the ways in which the good citizen has become the self-disciplining citizen. Individuals are called upon to govern themselves: "individuals are incited to live as if making a project of themselves."[14] Through sustained and intense self-scrutiny, individual citizens are called upon to take responsibility for their lives.[15] Citizenship becomes a practice a "self inspection and self regulation through choice," and a practice of "responsibilization," of becoming a responsible risk manager for one's self and one's family.[16] As neoliberal citizenship has become more about self-governance, this responsibilitized citizenship includes an explicitly sexual dimension; individuals are called upon to make the right choices about sex, managing sexual risks through self-discipline.[17] Like freedom more generally, sexual

[13] Brenda Cossman, *Sexual Citizens: The Legal and Cultural Regulation of Sex and Belonging* (Stanford, CA: Stanford University Press, 2007).

[14] Nicholas Rose, *Inventing Our Selves: Psychology, Power and Personhood* (Cambridge: Cambridge University Press, 1996), at 157.

[15] Alan Hunt, *Governing Morals: A Social History of Moral Regulation* (Cambridge: Cambridge University Press, 1999), at 218.

[16] Ibid.; Nicholas Rose, *Powers of Freedom: Reframing Political Thought* (Cambridge: Cambridge University Press, 1999), at 88.

[17] Rose, *Inventing Our Selves*.

freedom has become a terrain to be managed.[18] Belonging is not achieved at the expense of freedom per se, but rather, in and through its proper exercise. Sexual citizenship is produced and realized by managing the multitudinous possibilities and making the right sexual choices.

My work on sexual citizenship explores multiple ways in which citizenship is being sexed, privatized, and self-disciplined.[19] From the regulation of consensual sex in obscenity and indecency laws, to the promotion of sex in marriage in welfare law, to the legal contestations over same-sex marriage, sexual norms, practices, and representations are deeply implicated in contemporary debates over good and bad citizenship. In each of these areas, individuals are being called upon to manage their sexual choices, to make sure that given the range of options that are available to them, they make the best – which often means privatized, familialized, and self-disciplined – choice available to them. In the sections that follow, I explore the legal and cultural regulation of sexual citizenship by focusing on the vibrating citizens of *Sex and the City* and their real-life compatriots in the vibrator cases, that is, the constitutional challenges to antivibrator state legislation.

Vibrating Citizens

Some may rightly object to the idea of Carrie and her gang as representative of the terms of contemporary belonging, rooted as they are in the imaginaries of New York the fabulous, with its glamorous parties, clubs, gallery openings, and fashion shows. Yet their sexual lives and their endless discussions thereof seemed to have a resonance well beyond the imagined metropolis. The rabbit, after all, did not just sell out in New York: it sold out across America. The women of *Sex and the City* captured a kind of sexual zeitgeist, in which women were entitled to sexual pleasure, even in the absence of a male partner. It was a zeitgeist with uptake well beyond the confines of upper-middle-class northeastern urbanites, as evidenced in the increasingly popularity and profitability of the sex toy market directed at women.

Saucy Lady is a small, Alabama-based company that conducts in-house Tupperware-style parties for women at which sex toys are sold. Owner B. J. Bailey has been organizing these parties since 1993. Vibrators, dildos, lingerie, massage oils, lubricants, anal beads, and instruction manuals are amongst the products displayed and sold at these parties. Like larger-scale direct-selling organizations specializing in sex products, such as Passion Parties, Saucy Lady brings sex toys to women through local distributors – or party planners – who host house parties. The idea behind the parties is to take these sex products to the women who may otherwise be too timid to go to the sex products. These direct-selling organizations demystify and normalize them for use by otherwise proper, housewifely citizens. Passion Parties, described in a *New York Times* magazine article as "one of the country's tamest, most

[18] Ibid.; Foucault, *History of Sexuality*; Foucault, "Use of Pleasure."
[19] Cossman, *Sexual Citizens*.

pro-family peddlers of sexual paraphernalia," does good business in the southern Bible Belt: in 2003, Mississippi, Arkansas, and Tennessee ranked third, fourth, and ninth, respectively, in sales.[20]

And Passion Parties is big business. In 2003, it sold $20 million of goods, and projected sales for 2004 were $35 million. Sales grew at a rate of 50 percent annually between 2001 and 2004.[21] Nor is Passion Parties alone: its major competitors, Slumber Parties and Pure Romance, each have more than 3,000 consultants across the United States. The economic success of these sex toy parties has been incorporated into the marketing of the parties. For example, Passion Parties promotes becoming a Passion Parties associate as an avenue for women's financial independence and economic empowerment. The sex toy Tupperware parties are partially framed and legitimated within the discourse of market citizenship. The distributors – the party planners – are good citizens by virtue of the norms of market self-reliance. The consumers are similarly being constituted as good citizens by virtue of the norms of market consumption. As Martha McCaughey and Christine French have argued, the consumption of sex toys – like the consumption of a range of novel lifestyle goods – becomes part of the project of self-actualization.[22] Self-help, sexual enhancement, and market consumption are integrated into a new synthetic citizen.

But, just like in the *Sex and the City* episode, these sex toy parties are not a simple affirmation of an unmitigated right to sexual pleasure; rather, these parties are highly disciplined affairs. The parties are private affairs – they are conducted in one of the women's homes, and the invitations are by word of mouth. Men are excluded because a male presence would contaminate the pristine female domesticity. There is an implicit code of conduct at these parties: women can talk about sex, they can laugh and let their hair down, but, as the promotional materials provide, "if you did come tonight looking for any vulgarity or pornography, you're going to be very disappointed." McCaughey and French, in their participant-observation research on women's sex toy parties, similarly observed that despite the sexual explicitness of these parties, the "atmosphere attempts to retain some sense of refinement by avoiding putatively dirty words for body parties. . . . Saleswomen use nice-nellyisms such as 'button' for clitoris, 'lily' for vulva and/or vagina and 'unit' for penis."[23]

The containment of the erotic content of these parties is also accomplished by particular forms of exclusion. For example, Merl Storr, who has studied the Ann Summers Tupperware-style sex parties in the United Kingdom, has argued that the parties are a form of female homosociality – a performance of a certain kind of femininity that allows women to belong and to exclude those who do not fit in.[24]

[20] Jennifer Senior, "Sex Tips for Red State Girls," *New York Times Magazine*, July 5, 2004, at 32.

[21] Brian Alexander, "Sex Toys and Porn on Her Terms," MSNBC, available at http://www.msnbc.msn.com/ (accessed Oct. 20, 2008).

[22] Martha McCaughey and Christine French, "Women's Sex Toy Parties: Technology, Orgasms, and Commodification," 5 *Sexuality and Culture* 77 (2001) (citing Giddens, *Sexuality, Love*, at 91).

[23] Ibid., at 81.

[24] Mel Storr, *Latex and Lingerie: Shopping for Pleasure at Ann Summers Parties* (Oxford: Berg, 2003).

While the parties are all women, the tension between homosociality and lesbianism is carefully policed: lesbians are not generally welcomed within this heterosexual enclave, and although there may be a range of games and banter in which the women may even "flirt" with other women, the male gaze, the woman as sex object for her man, is ever present.[25] Storr suggests that the range of products on sale – sex toys, the massage oils, the sex guides, the lingerie – all invoke the male gaze, even in its absence. McCaughey and French have similarly observed the extent to which women's sex toy parties assume the heterosexuality of participants.[26] For example, while a broad range of dildos and vibrators are displayed, many parties do not mention or sell strap-on vibrating dildos.[27] As McCaughey and French observe, "it's as though the companies and/or their dealers presume all women have male partners – and male partners who do not want to be penetrated – or as though keeping the 'clean' image of sex toys involves pretending women use them only with men or when alone."[28] Any threat to heteronormativity is managed by the exclusion of the lesbian and, just as important, the lesbian gaze.

The parties and their emphasis on women's sexual pleasure are also often contained with the discourses of romance and self-help. Passion Parties long used the tag line "Where every day is Valentine's Day" and has a flagship product line called "Romanta Therapy."[29] These products are expressly marketed as relationship enhancing. Indeed, the products are often described by the distributors as relationship saving. Joanne Webb, a Passion Parties representative charged under the Texas obscenity statute, described her work as helping to keep couples together: "I thought . . . if I could educate women on how to get the most out of their sensuality, how to give the most in their relationship through their sensuality, maybe, just maybe some of these divorce rates would go down."[30] Kim Airs, who runs two retail sex toy stores specifically directed to women, similarly says, "I cannot tell you how may times I hear, 'This saved my marriage, this has saved my relationship.'"[31] The distributors see themselves not only as saleswomen, but as sex educators and therapists, helping women to help themselves toward more fulfilling sexual relationships.

These sex parties are part of an increasing emphasis on self-help and self-actualization, wherein women are taking responsibility for their own sexual pleasure.[32] But they are also about women taking greater responsibility for their marriages and their marital sex life. It is the project of sexual responsibilization, in which individuals are being called upon to make their lives a project, and to take

[25] Ibid.
[26] McCaughey and French, "Women's Sex Toy Parties," at 90.
[27] Ibid.
[28] Ibid.
[29] Passion Parties, Home page, available at http://www.passionparties.com/ (accessed Oct. 20, 2008). Passion Parties has recently changed its tag line to "The Ultimate Girls' Night In."
[30] "'Passion Parties' Expand Female Freedom," *ABC News*, television broadcast (ABC, Feb. 5, 2004).
[31] Alexander, "Sex Toys and Porn."
[32] McCaughey and French, "Women's Sex Toy Parties."

responsibility for this project,[33] a project that includes taking responsibility for one's intimate, romantic, and sexual life.[34] It is part of the "Dr. Philification" of intimacy, in which individuals must work hard on their relationships. In his *New York Times* best-selling book, *Relationship Rescue*, as well as on his popular afternoon television talk shows and Web site, Dr. Phil calls on his readers to "Put Your Relationship on Project Status":

> To rescue your relationship, you have to put it on Project Status. This means that you must consciously decide to actively, purposefully work on improving your situation each and every day. It's not that you just "want to" or "intend to" work on it. You need to do it, every single day. Discipline yourself to do the work.[35]

Sex has a particularly important role to play in this work because it is said to be an essential part of emotional intimacy and hence of a healthy relationship. So the advice continues:

> Put your sex life on project status. Make a conscious decision to recommit to each other and move sex higher on the priority list. Physical intimacy in a relationship deserves a lot of attention. You can start by making small changes. Put your kids to bed earlier, don't fall asleep on the couch and go to bed at the same time as your partner.[36]

While Dr. Phil directs his message to women and men alike, Passion Parties and the sex toy home distribution industry takes this message specifically to women, to help them take responsibility for their sex lives.

The sex toy network is part of a much broader trend, in which sexual citizens are being called upon to make their sex lives a project – to take responsibility for their sex lives as part of a broader project of taking responsibility for their marriages. As some of the distributors suggest, women are being taught to make sex a priority, to make their sex lives a project, and in so doing, to save their relationships. The sex toy parties can then be framed within a discourse of the self-disciplining of sexual citizenship. Rather than challenging the heteronormativity of sexual citizenship, women are assuming a central role in the project of intimate self-governance, with a view to sustaining the marital relationship. It is admittedly a modality of citizenship with a new emphasis on women's sexual pleasure, one that disrupts the foreclosure on women's sexual agency. It makes women's sexual pleasure speakable, but not entirely for its own hedonistic sake; rather, this pleasure is contained with the marital, the heterosexual, the domestic, where it is put to work to produce a better relationship.

33 Rose, *Inventing Our Selves*.

34 Ibid.

35 Phil McGraw, *Relationship Rescue: A Seven Step Strategy for Reconnecting With Your Partner* (New York: Hyperion Books, 2000).

36 Dr. Phil, "Putting Passion Back Into Your Relationship," available at http://www.drphil.com/ (accessed Oct. 20, 2008).

The Vibrator Cases

Not everyone is on board this new vibrating nation. Several states continue to have statutes criminalizing the sale of sexual devices, including Alabama, Georgia, Mississippi, Texas, and Virginia, which have been held to be constitutional. Similar statutes in other states have been struck down as unconstitutional.

Alabama v. the Vibrator

In 1998, Alabama passed the Anti-Obscenity Enforcement Act, prohibiting the sale of "any devise designed or marketed as useful primarily for the stimulation of human genital organs for anything of pecuniary value." Shortly after the law went into effect, several women launched a constitutional challenge. B. J. Bailey, the owner of Saucy Lady (a small, Alabama-based company that conducts in-house sex toy parties) and Sherry Williams, a co-owner of Pleasures, an upscale sex boutique in Alabama, supported by the American Civil Liberties Union (ACLU), brought the challenge, arguing that the law violated the constitutional right to privacy and personal autonomy under the Fourteenth Amendment. So began a protracted legal battle, bouncing back and forth between the trial court and the Court of Appeals for the Eleventh Circuit.

Round 1

The District Court for the Northern District of Alabama held that there was no recognized fundamental right to use sex toys.[37] However, reviewing the statute under the rational basis review, the court concluded that the statute lacked any rational basis.[38] In the court's opinion, none of the three legitimate state interests – (1) banning public displays of obscene material, (2) banning commerce of "sexual stimulation and auto-eroticism for its own sake, unrelated to marriage, procreation or familial relations," and (3) banning commerce of obscene material – was rationally connected to the legislation.[39] The court ordered the attorney general of Alabama not to enforce the law.[40]

The state appealed.[41] The Court of Appeals for the Eleventh Circuit reversed the district court's conclusion.[42] It agreed that the appropriate standard for review was rational basis.[43] However, it disagreed with the district court on the application of that standard to the vibrator law. In its view, the promotion and preservation of public morality was a rational basis for the legislation. However, the Eleventh

37 *Williams v. Pryor*, 41 F. Supp. 2d 1257 (N.D. Ala. 1999).
38 Ibid.
39 Ibid.
40 Ibid.
41 *Williams v. Pryor*, 240 F. 3d 944 (11th Cir. 2001).
42 Ibid.
43 Ibid.

Circuit remanded the case to the district court for further consideration of the as-applied fundamental rights challenge.[44] More specifically, it directed the district court to further consider the application of the statute to the "user" plaintiffs and "whether our nation has a deeply rooted history of state interference, or state non-interference, in the private sexual activity of married or unmarried persons" and whether "contemporary practice bolsters or undermines any such history."[45]

Round 2

The district court once again struck down the statute, holding that it burdened a constitutionally protected right to use sexual devices within private, adult relationships.[46] The court reviewed the history of sexual privacy in the United States, from the seventeenth century to the present, and the withdrawal of state regulation throughout the twentieth century. According to the court, this trend toward legislative and social liberalization supports the finding of a fundamental right to sexual privacy, and this right was broad enough to encompass the right to use the sexual devices in question.[47] This right was, in turn, burdened by the prohibitions on the sexual devices.

The state of Alabama argued that it had a compelling state interest for this burden: specifically, to protect children from obscenity, to prevent assault on the sensibilities of the unwilling adult, to suppress the proliferation of adult-only stores, and more generally, the belief that "the commerce of sexual stimulation and auto-eroticism, for its own sake, unrelated to marriage, procreation or familial relationships is an evil, an obscenity . . . detrimental to the health and morality of the state."[48] The court held that even though the state possesses a compelling state interest in protecting children and in regulating obscenity, the statute was not sufficiently narrowly tailored to meet these interests.[49] For example, the fact that the statute could apply to the Tupperware-style parties organized in private homes advertised solely by word of mouth meant that the statute was not narrowly tailored to prevent public exposure to children and unwilling adults. Nor was the statute sufficiently narrowly tailored to meet the objective of preventing "the commerce of sexual stimulation . . . unrelated to marriage, procreation or familial relations."[50]

According to the court, the law "in fact, has the effect of accomplishing the reverse for the user plaintiffs. Each of the user plaintiffs has stated that use of sexual devices during marital and dating relationships has enabled them to, among other things, improve the quality of their marital communications, better their sexual relationships, encourage intimacy in their marital relationships, eradicate

44 Ibid.
45 Ibid., at 955–56.
46 *Williams v. Pryor*, 220 F. Supp. 2d 1257 (N.D. Ala. 2002).
47 Ibid.
48 Ibid., at 1301 (citing "Brief for the Attorney General for the State of Alabama").
49 Ibid., at 1257.
50 Ibid., at 1301.

fears of infidelity between spouses, and to combat embarrassing or painful medical conditions."[51] The court continued,

> "a great many" of vendor plaintiff B.J. Bailey's customers have "reported to Ms. Bailey that the products they purchased helped them to become orgasmic and greatly improved their marital and sexual relations." . . . The parties further have stipulated to the opinions of two experts in the study of human sexuality that "sexual aids help in the revitalization of potentially failing marital relations," and that the use of sexual devices is recommended in "therapy for couples who are having sexual problems in their marriage." . . . Also compelling is the fact that the State of Alabama's own University Health System Internet site advocates applying a "powerful vibrator on the glands of the penis" to enable men who have suffered spinal cord injuries to ejaculate, for the specific purpose of "impregnat[ing] their wives and hav[ing] normal, healthy children."[52]

The district court concluded that the ban on the sexual devices was unconstitutional and enjoined the enforcement of the law.[53]

Again, the state of Alabama appealed, and again, the Eleventh Circuit overturned the district court.[54] The court held that there was no fundamental, substantive due process right of consenting adults to engage in private, intimate sexual conduct, as would trigger a strict scrutiny review of any infringement of that right. In the court's view, *Lawrence v. Texas*[55] simply did not establish a right to sexual privacy: "to do so would be to impose a fundamental-rights interpretation on a decision that rested on rational-basis grounds, that never engaged in *Glucksberg* analysis, and that never invoked strict scrutiny. Moreover, it would be answering questions that the *Lawrence* court appears to have left for another day."[56] Nor, the court held, should any new fundamental right be recognized.[57]

In searching for, and ultimately finding, this right to sexual privacy, the district court did little to define its scope and bounds. As formulated by the district court, the right potentially encompasses a great universe of sexual activities, including many that historically have been, and continue to be, prohibited. At oral arguments, the ACLU contended that "no responsible counsel" would challenge prohibitions such as those against pederasty and adult incest under a "right to sexual privacy" theory. However, mere faith in the responsibility of the bar scarcely provides a legally cognizable, or constitutionally significant, limiting principle in applying the right in future cases.[58]

[51] Ibid., at 1305.
[52] Ibid.
[53] Ibid., at 1257.
[54] *Williams v. Pryor*, 378 F. 3d 1232 (11th Cir. 2004).
[55] *Lawrence v. Texas*, 529 U.S. 558 (2003).
[56] *Williams v. Pryor*, 378 F. 3d 1238.
[57] Ibid.
[58] Ibid., at 1232.

The Eleventh Circuit observed that the only limitation provided by the district court was that the right would only apply to consenting adults.[59] However, this "consenting adult formula" was not an appropriate constitutional standard: "if we were to accept the invitation to recognize a right to sexual intimacy, this right would theoretically encompass such activities as prostitution, obscenity, and adult incest – even if we were to limit the right to consenting adults."[60] This passage was followed by a quotation from the Supreme Court's ruling in *Paris Adult Theatre I*: "the state statute books are replete with constitutionally unchallenged laws against prostitution, suicide, voluntary self-mutilation, brutalizing 'bare fist' prize fights, and duels, although these crimes may only directly involve 'consenting adults.'"[61]

The court concluded its discussion of the first part of the *Washington v. Glucksberg*[62] test by framing the alleged right as the right to use sexual devices and then turned to a consideration of the second part of the *Glucksberg* test, namely, whether the right can be said to be deeply rooted in the nation's history or implicit in the concept of liberty.[63] In rejecting this right, the court criticized the district court for focusing on the history of sex in American culture, rather than on sexual devices; for overemphasizing the importance of contemporary practices; and for equating non-intervention in the access to sexual devices with historical protection. The majority referred several times to, and disagreed with, the district court's discovery of a constitutional "right to use sexual devices like . . . vibrators, dildos, anal beads, and artificial vaginas."[64]

It similarly rejects the district court's discussion of the "contemporary trend of legislative and societal liberalization of attitudes toward consensual, adult sexual activity"[65] and the "specter of twentieth century sexual liberalism"[66] on the basis that this contemporary practice is simply not relevant for the *Glucksberg* analysis. Indeed, in the majority's view, this focus on contemporary practice "ultimately proves too much. The fact that there is an emerging consensus scarcely provides justification for the courts, who often serve as an antimajoritarian seawall, to be swept up with the tide of popular culture."[67] Popular culture – rather than influencing or shaping legal tradition – is held out as the very thing that law must resist.

The Eleventh Circuit concluded that the district court had erred in finding a constitutionally protected right to use sexual devices and remanded the case to the district court, including a consideration of whether, post-*Lawrence*, the previous holding that there was a rational basis for the ban was still good law. The plaintiffs sought a rehearing of the case en banc from the Eleventh Circuit, but their request

[59] Ibid.
[60] Ibid., at 1240.
[61] Ibid. (citing *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 [1973]).
[62] *Washington v. Glucksberg*, 521 U.S. 702 (1997).
[63] *Williams v. Pryor*, 378 F. 3d 1232.
[64] Ibid.
[65] Ibid., at 1243.
[66] Ibid.
[67] Ibid., at 1244.

was denied.[68] Their application for certiorari to the U.S. Supreme Court was also denied.[69]

Round 3

On second remand, the district court held that that the previous holding that there was a rational basis for the ban of sexual devices was still good law in the aftermath of *Lawrence*.[70] In the court's view, the ban on sexual devices was distinguishable from *Lawrence* because it neither targeted a minority nor was exclusively about criminalizing "private" and "consensual" activities ("There is nothing 'private' or 'consensual' about the advertising and sale of a dildo").[71] Therefore the ban on sexual devices did not fit the *Lawrence* mould of a case in which public morality is not a legitimate state purpose. The law was therefore constitutional, and the plaintiffs' motion was dismissed.[72]

The case was, for a third time, appealed to the Eleventh Circuit, which affirmed the district court's finding that public morality was a legitimate state purpose and that the state had a rational basis for the ban on sexual devices.[73] A petition for a writ of certiorari to the U.S. Supreme Court was again denied.[74]

In the aftermath of the Supreme Court's refusal to hear the appeal, Sherri Williams expressed both her disappointment and resolve in opposing the law: "my motto has been they are going to have to pry this vibrator from my cold, dead hand. I refuse to give up."[75] She has vowed to continue her challenge by bringing a First Amendment challenge to the law.[76] In an interview with local news media, Williams stated, "What I do is very pro-marriage and pro-relationship. It's also pro-women and empowering for women."[77] According to the report, she plans to continue selling lingerie, lotions, and risqué adult party favors for bachelorette parties. But for other items (presumably, sex toys), she will now require her customers to sign a release stating that what they are buying is for medical or educational purposes.[78]

The reaction of the Alabama Attorney General's Office to the Supreme Court's refusal to hear the appeal was to immediately notify county district attorneys responsible for enforcement.[79] However, Madison County district attorney Tim Morgan said that he did not plan to mount a campaign against sex toy retailers, but would

[68] *Williams v. Attorney General of Ala.*, 122 F. Appx. 988 (2004).
[69] *Williams v. King*, 543 U.S. 1152 (2005).
[70] *Williams v. King*, 420 F. Supp. 2d 1224 (2006).
[71] Ibid.
[72] Ibid.
[73] *Williams v. Morgan*, 478 F.3d 1316 (2007).
[74] *Williams v. King*, 2007 WL 1433336 (Oct. 1, 2007).
[75] Ibid.
[76] "It's Official," *Lagniappe*, Oct. 23, 2007, available at http://www.lagniappemobile.com/ (accessed Oct. 20, 2008).
[77] Ibid.
[78] Ibid.
[79] "Court Leaves Alabama Sex Toy Law Intact," *ABC News*, Oct. 1, 2007, available at http://abcnews.go.com/ (accessed April 16, 2009).

consider cases brought forward by police.[80] "It's a pretty low priority," said Morgan. "We've got plenty of work to do. We don't need to be going out drumming up business. . . . We've got real crimes."[81]

The absence of any intention to go after sex toys was reflected in Morgan's earlier comments, noting that the law was not originally directed at sex toys. According to Morgan, Senator Tom Butler, who sponsored the bill, never set out to ban the sale of sex toys. "Sex toys were not even the focus of the bill," said Tim Morgan, the district attorney in Madison County, who helped Butler compile the information for the 1998 antiobscenity law; rather, Butler had been attempting to ban nude dancing. Several statutes had been tried, but club owners found ways to avoid them. The 1998 obscenity law was designed to close the loopholes.[82] "That's where it started," confirmed Senator Butler in a local newspaper. According to Morgan, the 1998 Anti-Obscenity Enforcement Act was successful in that sense, completely ending nude dancing in Alabama. Morgan stated that the ban on sex toys was the result of a law modeled on the laws of surrounding states. Morgan confirmed that, saying, "Neither Tom Butler nor myself or anybody drafted the bill."[83] He said that his staff copied similar laws from surrounding states and that information went directly to the Legislative Reference Service in Montgomery, which then drafted what would become the final bill.[84]

So nine years of litigation went on, with no intention of going after sex toys. A more rational universe might have seen the Alabama legislature amend its statute to clarify that it did not intend to ban the sale of sex toys, but simply nude dancing. However, once the challenge had been brought, the point seemed to become that that state should have the right to ban sex toys, regardless of whether it actually wants to ban them or intended to ban them. The *Williams* challenge to the obscenity law became a test case not so much over the legitimacy of sex toys in Alabama, as over the existence of a right to sexual privacy and whether, in a post-*Lawrence* world, a state could still legislate on the basis of public morality. For the state of Alabama, the ability to legislate on the basis of public morality would be pivotal in upholding other provisions that were far more important, like the very target of the 1998 obscenity law: nude dancing. And the recognition of a right to sexual privacy might compromise the state's future ability to legislate in relation sexual morality. The case was arguably propelled by a kind of slippery-slope, floodgates anxiety: if we can not ban sex toys, then we won't be able to ban other things sexual, like prostitution, obscenity, or adult incest (or nude dancing, the actual object of the law).

[80] "State Set to Enforce Ban on Sex Toys," *Huntsville Times*, Oct. 2, 2007, available at http://www.al.com/ (accessed April 16, 2009).

[81] Ibid.

[82] "Sex Toys Never Focus of Bill," *Huntsville Times*, May 21, 2007, available at http://www.al.com/ (accessed April 16, 2009).

[83] Ibid.

[84] Ibid.

Sex and the City Cases: Striking Down Antivibrator Laws

The *Williams* rulings can be contrasted with constitutional challenges in other states that have successfully struck down similar antivibrator laws. In *People v. Seven Thirty-Five East Colfax*, the Colorado Supreme Court held that the provisions of an obscenity statute prohibiting the sale of sexual devices violated the right to privacy.[85] The court stated that "the statutory scheme, in its present form, impermissibly burdens the right of privacy of those seeking to make legitimate medical or therapeutic use of such devices." The court noted that the Food and Drug Administration had issued regulations on the therapeutic use of vibrators in the treatment of sexual dysfunction, suggesting that there is a legitimate use, and concluded that the provisions that prohibited their legitimate use were unconstitutional.

In *State v. Hughes*, the manager of an adult bookstore who was arrested for selling two obscene devices (including a vibrator kit with a dildo attachment) brought a constitutional challenge to the Kansas obscenity law that prohibited the dissemination of the devices.[86] The trial court held that the statute violated the right to privacy because it infringed on the right to perform or receive recognized, legitimate medical treatment. The trial court had heard the evidence of a certified psychologist and sex therapist, who testified as to the therapeutic uses of vibrators. The court was concerned that the statute was overbroad because it would subject licensed physicians, psychologists, and sex therapists to criminal sanctions.[87] The Kansas Supreme Court upheld the trial court ruling:

> When a state chooses to regulate matters involving sensitive rights of its citizens, it is obligated to do so in a manner that bears a real and substantial relationship to the objective sought and is narrowly drawn to express only those objectives. We hold the dissemination and promotion of such devices for purposes of medical and psychological therapy to be a constitutionally protected activity.[88]

In striking down the provisions, the court emphasized that the legislature had made no provision for this legitimate use of sexual devices.[89] The seeds of subsequent defeat were thereby included within the victory: in the aftermath of the decision, the Kansas legislature amended the statute to prohibit the sale of "a dildo or artificial

[85] *People v. Seven Thirty-Five E. Colfax*, 697 P. 2d 348 (Colo. 1985).

[86] *State v. Hughes*, 792 P.2d 1023 (Kan. 1990). The Kansas obscenity statute included a provision prohibiting obscene devices, which were defined as "a device, including a dildo or artificial vagina, designed or marketed as useful primarily for the stimulation of human genital organs." Ibid., at 1027. The second device for which Hughes was charged was an inflatable doll with an artificial vagina. However, in the reported case, there is very little discussion of the doll. The reported case simply states that "Dr. Mould [the expert who testified at the trial] testified that he knew of no therapeutic purposes for an inflatable doll and believed such a device to be 'more a novelty than any serious sex tool.' The inflatable doll was not the basis of the trial court's determination of the issues of this case, and we will not discuss it further in this opinion." Ibid., at 1025–26.

[87] Ibid., at 1030.

[88] Ibid., at 1032.

[89] Ibid., at 1031–32.

vagina, designed or marketed as useful primarily for the stimulation of human genital organs, except such devices disseminated or promoted for the purpose of medical or psychological therapy."[90]

Finally, a Louisiana obscenity statute prohibiting the sale of sexual devices was struck down in *State v. Brenan*.[91] Christine Brenan, owner of a dance wear boutique, was arrested on three occasions for selling "obscene devices." Rejecting the State's appeal, the Supreme Court of Louisiana echoed the previous decisions in emphasizing the potential therapeutic use of vibrators:

> The State's unqualified ban on sexual devices ignores the fact that, in some cases, the use of vibrators is therapeutically appropriate. The Food and Drug Administration has promulgated regulations concerning "powered vaginal muscle stimulators" and "genital vibrators" for the treatment of sexual dysfunction or as an adjunct to Kegel's exercise (tightening of the muscles of the pelvic floor to increase muscle tone). Such regulations indicate that the federal government recognizes a legitimate need for the availability of such devices.[92]

The court further noted, "Notwithstanding their reputation as a naughty novelty item, vibrators remain an important tool in the treatment of anorgasmic women who may be particularly susceptible to pelvic inflammatory diseases, psychological problems, and difficulty in marital relationships."[93] The court concluded that given these therapeutic uses of vibrators, the legislation banning all such devices "without any review of their prurience or medical use" is not "rationally related to the 'war on obscenity.'"[94]

Oscillating Citizenships

In none of the cases in which the ban on vibrators was struck down did the idea of women's sexual pleasure or sexual freedom come into play; rather, the legitimating focus was, in each case, on the therapeutic use of vibrators in treating sexual dysfunction. In this regard, the courts also tend to note that experts – doctors, psychologists, and sex therapists – risk being captured by the law simply by virtue of performing their therapeutic role. Not unlike the discourse of those who sell sex toys, there is also an emphasis on marriage and, more specifically, on the ability of vibrators to address sexual problems within marriage. In this line of cases, vibrators then are legitimated but contained within a set of privatized discourses: the "psy" professions and their expertise over the therapeutic use of vibrators and sexual relationships within marriage. This privatization of the legitimate terms for the circulation of sex toy use can be contrasted to the unacceptable privatization emphasized by the appellate court in *Williams*, in which the commercialization of vibrators and other sex toys is framed

[90] Kan. Stat. Ann. § S21–4301 (2004).
[91] *State v. Brenan*, 739 So. 2d 268 (La. App. 1999).
[92] *State v. Brenan*, 772 So. 2d 64, 75 (La. 2000).
[93] Ibid.
[94] Ibid., at 76.

as illegitimate and immoral. Shopping for sex toys is not, in this view, at all akin to shopping for shoes; rather, the very marketization of these products produces them as "public" – as public goods in public view – and pruriently so, marking them as even more abject.

But what, one might well ask, does all of this fuss over vibrators, the right to privacy, and public morality have to do with citizenship? These obscenity cases are an example of the contemporary contestations over the appropriate modalities of the governance of intimacy and sexuality. The two lines of cases represent two very different modalities of governance and circulation of power. In the *Sex and the City* approach, sexuality becomes more of a terrain of self-governance. In these cases, the use of vibrators is circumscribed within the more privatized realm of the therapeutic, legitimized by marriage and medicine. In contrast, in the *Williams* approach, sexuality remains an appropriate terrain of state regulation. In this approach, the state has a continued and legitimate role in regulating sexuality, with an emphasis on the publicity of the issue (e.g., "there is nothing private . . . about the advertising or sale of a dildo").

Moreover, the appellate court's reasoning in *Williams* shows an almost obsessive concern with maintaining the state's power to legislate in the sexual arena. Over and again, the Eleventh Circuit expresses a slippery-slope anxiety: there will be nowhere to draw the line between legitimate and illegitimate sexual practices. The courts are engaged in a kind of border patrol, ensuring sharp boundaries between legitimate and illegitimate sexual practices. The courts in the *Sex and the City* cases are no less concerned with sexual borders. However, they seem to have more confidence in a new border to do the work of distinguishing between legitimate and illegitimate sexuality. Good sexuality is private and consensual, therapeutic, and marital. Bad sexuality, one can imply, is on the other side of the binary: public or coercive, non-therapeutic, and nonmarital. The use of vibrators can be incorporated into good and legitimate sexual practices, by virtue of a range of privatizing and self-disciplining discourses, including their integration into the self-governing discourses of marriage.

Some may still find the connection between the governance of sexual practices and the discourses of citizenship to be a stretch. It requires that we move beyond the idea of a proper object to citizenship studies, such as the political relationship between citizen and state, to a broader exploration of the modalities of contemporary governance and belonging.[95] From this perspective, the idea of citizenship involves more than the civil or political rights and obligations of individuals. It involves the ways in which individuals are constituted as good citizens and the multiple practices implicated in this process. Sex and sexuality are amongst these practices. Sexual practices have become a significant terrain on which the terms of contemporary belonging are contested and constituted. Certain kinds of sexual practices, which might have once excluded the subject from belonging – like the use of sex toys – are being publicly and politically contested by subjects who seek to shift to the line

[95] On the idea of "proper objects," see Judith Butler, "On Proper Objects," in Elizabeth Weed and Naomi Schor, eds., *Feminism Meets Queer Theory* (Bloomington: Indiana University Press, 1997).

between legitimate and illegitimate sex. When it is successful (and as the *Williams* case demonstrates, it is not always), these sexual practices are recoded in terms of belonging, terms that ensure their appropriate containment. Just like in *Sex and the City*, the use of sex toys might be okay, but only if it is appropriately contained within the privacy of the home and appropriately self-disciplined. Belonging can incorporate more sexualization, but only, it seems, if it is simultaneously privatized and self-disciplined.

Yet these discourses remain deeply contested. In the legal sphere, the more conservative movement to hold the line on sexual morality continues to exercise some, though certainly not unanimous, sway. At the same time, the *Williams* vibrator cases have been subject to pervasive critique, and even ridicule, in the blogosphere. The idea of criminalizing vibrators does not appear to be a popular one. Even Christian sex-advice web sites counsel married couples that using vibrators is not a violation of scripture.[96] Indeed, the burgeoning Christian sex-advice industry is itself a fascinating example of a highly disciplined and privatized sexual citizenship. These web sites and self-help manuals advocate sexual pleasure, but exclusively within a marital relationship.[97] Indeed, there are even Christian sex toy distributors that claim to sell their products only to married couples.[98]

As these Christian web sites themselves reveal, it is important not to underplay the extent to which the sexual citizen is being reconstituted on the terrain of the sexual. Notwithstanding the domestication of sex toy party participants, this performance pushes at the edges of the previously respectable and desexualized citizen. This is a sexual citizenship that is explicitly sexual; it is a desiring, pulsating, pleasure-driven, orgasmic body. This is a new modality of sexual citizenship. It is also an explicitly gendered sexual citizenship. *Williams* and the broader Passion Parties phenomenon are all about women – otherwise respectable, often married women who are buying and selling sex toys. There is no escaping the sexual desire and sexual pleasure of women – married or otherwise. Orgasmic women are part of the new sexual citizen, just as long as they have their orgasm in the right place, at the right time, and with the right person.

[96] See, e.g., "The Marriage Bed," available at http://www.themarriagebed.com/ (accessed Oct. 20, 2008) (stating, "We see no scriptural prohibition on toys, nor any way in which toys violate any scriptural guidelines"). For a discussion of the Christian sex-advice industry, see Mark Oppenheimer, "In the Biblical Sense: A Guide to the Booming Christian Sex-Advice Industry," *Slate*, Nov. 29, 1998.

[97] See, e.g., two best-selling Christian sex-advice manuals: Tim LaHaye and Beverley LaHaye, *The Act of Marriage* (Grand Rapids, MI: Zondervan, , 1998), and Tim Gardner, *Sacred Sex: A Spiritual Celebration of Oneness in Marriage* (Colorado Springs, CO: WaterBrook Press, 2002).

[98] See, e.g., Book22, "Intimacy Products for Married Couples," available at http://www.book22.com/ (accessed Oct. 20, 2008) (Christian sex toy distributor). Its Web site describes the organization's name and mission: "The twenty second book of the bible is Song of Solomon. We believe that God intended that such love, as spoken of in Song of Solomon, be a beautiful and normal part of marital life. Unfortunately this gift from God has been grossly distorted and abused by both ancient and modern people. Book22 is offering quality products to enhance the intimate life of God's children. Our hope is that our products will serve as intimacy enhancers for your marriage." Ibid. Amongst the many sex toy items that they sell are two versions of the rabbit: the jelly rabbit and the removable rabbit. Ibid.

14

Feminism, Queer Theory, and Sexual Citizenship

Maxine Eichner

The terms of full membership in society have, in the United States, as elsewhere, been conditioned on citizens conforming to a specific set of sexual norms. Some of these terms of sexual citizenship have been explicitly encoded into U.S. law. These have included, among many others, the historical ban on immigration of homosexuals,[1] criminal proscriptions on the act of sodomy,[2] the now rarely enforced bans on sex outside of marriage,[3] and the still enforced criminal prohibitions on prostitution.[4] Other sexual norms have largely been enforced extralegally through social sanctions. For example, the widespread disapproval of sex by unmarried women in the early twentieth century led to the ostracizing of unmarried pregnant women from polite society.[5]

In the last few decades, the terms of sexual citizenship have undoubtedly changed. The U.S. Supreme Court boldly announced, in the landmark case of *Lawrence v. Texas* in 2003, that states could no longer criminalize sodomy, whether homosexual or heterosexual.[6] Four state supreme courts have now struck down state laws banning

[1] See Immigration Act of 1917, Pub. L. 64-301, 39 Stat. 874, 875 (1917) (repealed 1990) (excluding individuals from entering the United States who had a "constitutional psychopathic inferiority"); Immigration and Nationality Act of 1952, Pub. L. 82-414, 66 Stat. 163 (1952) (repealed 1990) (excluding "aliens afflicted with a psychopathic personality"); S. Rep. 81-1515, at 345 (1950) (clarifying that "psychopathic personality" language was intended to apply to "homosexuals and sex perverts"); Immigration and Nationality Act of 1965, Pub. L. 89-236, 15(b), 79 Stat. 911 (1965) (repealed 1990) (amending the act to include "sexual deviation" as a medical ground for denial of entry into the United States). The practice of statutory exclusion of homosexuals ended when Congress passed the Immigration Act of 1990, which withdrew the phrase "sexual deviation" from the act. See Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978 (1990).

[2] Sodomy laws were in force in every state prior to 1961 (see *Lawrence v. Texas*, 539 U.S. 558, 572 [2003]) and were upheld as constitutional by the U.S. Supreme Court in *Bowers v. Hardwick*, 478 U.S. 186 (1986). In the last quarter of the twentieth century, however, most state sodomy laws were either repealed or declared unconstitutional by state supreme courts.

[3] See William N. Eskridge Jr. and Nan D. Hunter, *Sexuality, Gender, and the Law* (New York: Foundation Press, 2004), at 98, 111.

[4] See, e.g., Conn. Gen. Stat. § 53a-82 (2007); Haw. Rev. Stat. § 712–1200 (2007).

[5] See Angus McLaren, *Twentieth Century Sexuality* (Oxford: Blackwell, 1999), at 44; Regina G. Kunzel, *Fallen Women, Problem Girls: Unmarried Mothers and the Professionalization of Social Work* (New Haven, CT: Yale University Press, 1993), at 51–52.

[6] *Lawrence*, at 558.

same-sex marriage, and three of these states are now authorizing such marriages.[7] In addition, three states, Maine, New Hampshire, and Vermont, recently adopted same-sex marriage legislatively. Almost all citizens now engage in sex before marriage,[8] and most teenagers are sexually active.[9] Furthermore, while women bearing children out of wedlock is still controversial, society is now far from a consensus that it is morally wrong.[10]

What critical theory should we use to analyze and evaluate the norms of sexual citizenship in these early years of the twenty-first century? Until the recent advent of queer theory, analyses of sexuality had been conducted largely through the lens of feminist theory, which analyzed sexual citizenship primarily in terms of gender. A dominant strand of feminist theory, as it developed in the 1980s, saw the terms of sexual citizenship as intimately connected with gender inequality in society. In this view, women's and men's sexuality, as they live it, come to track these oppressive norms of sexual citizenship, and become the central mechanism of gender inequality in contemporary society. In the last few decades, queer theory has contested analyses of sexual citizenship that are exclusively focused on gender, arguing, instead, that theoretical scrutiny should focus on the marginalization of particular sexual practices and those who engage in them. In doing so, queer theory has produced far more positive assessments of the role of sexuality in citizens' lives. Sexual practices, in the work of queer theorists, are associated with freedom, or at least a means of resistance to repressive norms, rather than the mechanism of citizens' subjection.

In this chapter, I assess the roles that both feminist theory and queer theory should play in theorizing contemporary norms of sexual citizenship, and the relationship between these norms and citizens' lives. My discussion in this chapter proceeds in four parts. In the first, I consider the feminist discussion of sexuality that developed in the 1980s, and the dissension in the feminist movement that sowed important seeds for queer theory. I also assess the strengths and weaknesses of the theories that feminists created. In brief, I argue that the dominant feminist accounts of this era significantly advance the theorization of power's effects on citizens. They failed to grasp, however, that oppressive norms of sexual citizenship are neither monolithic nor all-powerful and the ways that they are, in fact, contested in citizens' daily lives.

[7] See *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003); *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008); *Kerrigan v. Commissioner of Public Health*, 2008 Conn. LEXIS 385 (2008); *Varnum v. Brien*, 2009 Iowa sup. LEXIS 31 (April 3, 2009). Massachusetts, Connecticut, and Iowa are now allowing same-sex marriage. The California Supreme Court declared same-sex marriages legal in May 2008, but same-sex wedding ceremonies abruptly came to a halt when voters passed Proposition 8 to amend the California Constitution to disallow same-sex marriage on November 4, 2008. At the time this chapter went to press, cases challenging the amendment were pending before the California Supreme Court.

[8] Lawrence B. Finer, "Trends in Premarital Sex in the United States 1954–2003," 122 *Pub. Health Rep.* 73 (2007) (finding that by age forty-four, 95 percent of respondents had had premarital sex and concluding that "almost all Americans have sex before marrying").

[9] See Leslie J. Harris et al., *Family Law* (New York: Aspen, 2005), at 290 (75 percent of teenagers report having intercourse before age twenty).

[10] See Lydia Saad, "The Cultural Landscape: What's Morally Acceptable?," Gallup Poll News Service, June 22, 2004 (49 percent of respondents believe that having a child out of wedlock is morally acceptable, while 45 percent believe that it is morally wrong).

In the second part, I discuss the development of queer theory and the features that mark this mode of theorizing. Some of the shifts between the feminist and queer theory modes of theorizing, I contend, offer conceptual advantages for understanding contemporary sexuality. The third part of this chapter turns to consider some troubling tendencies of the queer theories that have developed, and argues that these characteristics threaten the theoretical gains that this mode of theory potentially offers. Specifically, the tendency to valorize all sexual activity as liberatory oversimplifies both existing norms of sexual citizenship and their relationship to citizens' lives. This tendency, interestingly, is the obverse flaw of feminist theory's: while feminist theory overstates the effects of oppressive norms of sexuality in citizens' lives, queer theorists understate them. Finally, in the last section, I discuss how current norms of sexual citizenship and their relationship to citizens' lives might be better theorized, and consider the roles that feminist and queer theory can play in this process.

Second-Wave Feminist Theory and Sexual Citizenship

Contemporary theoretical work on sexuality first emerged from second-wave feminism. As this movement took off in the 1970s, feminists began to interrogate the relationship between gender and sexuality. In the 1980s, a particular position on sexuality that was developed largely by radical feminists rose to prominence. This position saw dominant norms of sexual citizenship as intricately tied to gender hierarchy, and saw women's and men's sexuality as conforming to those norms. In its most sophisticated version, as presented in the work of Catharine MacKinnon, sexuality is not problematic simply because it *reflects* women's subordinate position in society, but rather because it *creates* it. MacKinnon wrote that "sexuality is the dynamic of control by which male dominance – in forms that range from intimate to institutional, from a look to a rape – eroticizes and thus defines man and woman, gender identity and sexual pleasure."[11] Sexuality therefore serves as the prime mover of the system of gender hierarchy, the method by which male dominance is institutionalized.[12] As MacKinnon starkly phrases it, "Man fucks woman; subject verb object."[13]

Certain features of MacKinnon's account of sexuality sound jarring to the contemporary theoretical ear because her account rests on a conception of power that has largely fallen out of favor. This theory of power, which is sometimes called the "dominance" model of feminism, was developed by MacKinnon and other radical feminists in the context of their theorizing sexuality. The dominance model responded to a conception of power that was widely held at the time, which conceived power as something that some people possessed and wield consciously for

[11] Catharine A. MacKinnon, *Toward a Feminist Theory of the State* (Cambridge, MA: Harvard University Press, 1989), at 137.
[12] Ibid., at 127–31.
[13] Ibid., at 124.

their own ends against others. As Max Weber describes this view, "we understand by 'power' the chance of a man or a number of men to realize their own will in a social action even against the resistance of others who are participating in the action."[14] Dominance in this mainstream model is sustained from above, as the less powerful are forced to comply with the edicts of those in power. Power's effects, however, extend only to external obedience; they have no impact on an individual's interior wants and desires. In this view, the terms of sexual citizenship may keep citizens from acting on particular sexual desires, but they do not affect the desires themselves.

While liberal feminists generally accepted the mainstream model of power at the inception of second-wave feminism in the 1960s and 1970s, radical feminists recognized its limitations. Their dominance conception incorporated the mainstream model's view that power is something possessed by some and wielded against others: in the dominance model, men hold power and intentionally wield it against powerless women. In contrast to the mainstream view, however, power acts in the dominance model to construct the wants, needs, and even the very identities of the women in its ambit. Male power is seen as univocal and completely totalizing, creating the world, including women's sexuality, according to its will. According to MacKinnon, "in feminist terms, the fact that male power has power means that the interests of male sexuality construct what sexuality as such means, including the standard way it is allowed to be felt and expressed and experienced, in a way that determines women's biographies, including sexual ones."[15] In other words, the norms of sexual citizenship are constructed by men, conform to their interests, and are built to ensure gender inequality. Women's sexuality is absolutely shaped by these norms.

The dominance model made considerable gains for feminist theory by responding to serious deficiencies in the mainstream view of power. The mainstream view, in holding that power operated externally on individuals, failed to link power with women's characteristics, aims, and desires. It therefore allowed opponents of feminism to argue that women's differences from men justified their different and unequal treatment. In this view, these differences demonstrated that women either were "naturally" the weaker sex (an argument also phrased in terms of how women's submissive nature led them to gravitate to certain roles), or women themselves were responsible for the choices that left them in second-class positions in their relationships and in society. The dominance model of power put forth by radical feminists effectively countered these arguments. Under this model, gender hierarchy could no longer be justified by women's differences or desires. In Susan Bordo's words, "the insistence that women are the *done to*, not the *doers*, here; that *men* and *their* desires bear the responsibility; and that female obedience to the dictates of [dominant

[14] Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (New York: Bedminster Press, 1968), at 926; see also Dennis H. Wrong, *Power: Its Forms, Bases, and Uses* (New York: Harper and Row, 1979), at 21 (stating that the dominant understanding of power is "the capacity to impose, or to threaten successfully to impose, penalties or deprivations for noncompliance").

[15] MacKinnon, *Toward a Feminist Theory of the State*, at 129.

gender norms] is better conceptualized as bondage than choice – was a crucial historical moment" for feminism.[16] Under the dominance approach, it was no longer an answer to feminist claims of oppression in the arena of sexuality that women participated "voluntarily" in sexual relationships with men or found particular subordinating practices to be arousing. And the dominance model of sexuality helped reveal the complex interplay between women's inequality in the sexual realm and in other realms; the motto of second-wave feminism that the "personal is political" emanated from this recognition.

With that said, the dominance model also has considerable flaws when it comes to assessing the terms of sexual citizenship in contemporary society and their relation to citizens' lives. First, in MacKinnon's theory, all women are oppressed in the same totalizing manner, without regard to differences in sexual orientation, race, class, and a host of other factors.[17] Yet gender is only one of a number of cross-cutting axes of power when it comes to such norms. Accordingly, while women who identify as straight may find themselves subordinated because of their sex, they may also be privileged with respect to those who identify as lesbians, gay men, transgendered persons, and other sexual minorities. The dominance model does not give us the tools to think through the complexity of these axes.

Furthermore, MacKinnon's view of power is so totalizing that it cannot conceptualize how resistance to dominant norms is possible. If women are truly the passive victims MacKinnon theorizes, they could never depart from such norms. This monolithic view of power also causes MacKinnon to miss the myriad ways in which women, in actual fact, fail to comport with norms of sexual citizenship that are grounded in gender hierarchy. In addition, because MacKinnon's theory cannot identify how resistance is possible, it cannot identify the conditions that would foster or retard this resistance. In MacKinnon's world, everything is unmitigatedly black, and even partial escape from the dark forces of power becomes impossible.

On the other side of the coin, MacKinnon's depiction of men as uniformly active oppressors also raises problems. This conception undercuts dominance feminism's own recognition of the way in which systems of power create their subjects. Men, too, are as much the products of the system of gender hierarchy as women. Recognition of this fact should (but does not) complicate MacKinnon's depictions of men as conscious creators of this system for their own interests. By the same token, this theory cannot conceptualize the extent to which men resist unequal norms of sexual citizenship, or the conditions that would promote this resistance.

Finally, the dominance account of power cannot conceptualize the complexity of contemporary norms of sexual citizenship. While MacKinnon posits particular, totalizing norms of sexual citizenship that dominate, the force of many such norms,

[16] Susan Bordo, *Unbearable Weight: Feminism, Western Culture, and the Body* (Berkeley: University of California Press, 1993), at 22–23.

[17] See Kimberle Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color," 43 *Stan. L. Rev.* 1241 (1991); Martha R. Mahoney, "Whiteness and Women, in Practice and Theory: A Reply to Catharine MacKinnon," 5 *Yale J. L. and Feminism* 217 (1993).

for example those relating to sex outside of marriage, those depicting women as submissive, and even those proscribing homosexual sex, has diminished over time. What remains are norms with varying degrees of force, about which multiple, competing discourses circulate. While many of these discourses conform to dominant norms of gender and sexuality, certainly some are resistant, and many contain some resistant elements. As Nancy Fraser states, "we live in a time of intense contestation concerning gender, sexuality, and sexual difference. Far from being monolithically patriarchal, the interpretation of these terms is at every point subject to dispute."[18] The dominance view gives us no guidance in analyzing the complexity of these forces.

By the middle of the 1980s, the dark depiction of sexuality by MacKinnon and other dominance feminists, and particularly their attempt to pass statutes banning pornography,[19] prompted considerable resistance within feminism. "Sex-positive" feminists, who included academics from an array of disciplines in the academy as well as feminist sex radicals outside of the academy, charged that depicting women's sexuality as shaped solely by male coercion and opressive norms of sexual citizenship told an incomplete and misleading story.[20] This story, they asserted, obscured the ways in which women's exercise of their own sexuality could be liberatory, or at least resistant, to dominant gender norms. It also missed the ways in which sex could be a valuable source of women's pleasure.[21] These pro-sex voices gained traction in some areas of the academy, but very little in other areas, including feminist legal theory.[22] In the aftermath of this battle, sex-positive feminists began to call for analyses of sexuality that broke away from gender as their organizing principle. The resulting branch of sexuality study came to be called "queer theory."

[18] Nancy Fraser, *Justice Interruptus: Critical Reflections on the "Postsocialist" Condition* (New York: Routledge, 1997), at 234.

[19] MacKinnon co-wrote a significant number of works with writer Andrea Dworkin, including on the campaign against pornography. See Andrea Dworkin and Catharine A. MacKinnon, *Pornography and Civil Rights: A New Day for Women's Equality* (Minneapolis, MN: Organizing Against Pornography, 1988). MacKinnon and Dworkin also drafted antipornography ordinances that were adopted in three municipalities: Minneapolis, Minnesota; Indianapolis, Indiana; and Bellingham, Washington. However, none of the ordinances was ever implemented because their constitutionality was successfully challenged. See *Hudnut v. American Booksellers Ass'n*, 598 F. Supp. 1316 (S.D. Ind. 1984), aff'd per curiam, 771 F.2d 323 (7th Cir. 1985), aff'd mem., 475 U.S. 1001 (1986); Sheryl Rakestraw, "Current Event: *ACLU v. Reno*," 10 *Am. U. J. Gender Soc. Pol'y and L.* 521, 523–24 (2002); Ann Scales, "Avoiding Constitutional Depression," in Drucilla Cornell, ed., *Feminism and Pornography* (Oxford: Oxford University Press, 2000), at 318, 333 n. 2.

[20] See Kathryn Abrams, "Sex Wars Redux: Agency and Coercion in Feminist Legal Theory," 95 *Colum. L. Rev.* 304–05 (1995).

[21] Ibid., at 311 (quoting Amber Hollibaugh, "Desire for the Future: Radical Hope in Passion and Pleasure," in Carol S. Vance, ed., *Pleasure and Danger: Exploring Female Sexuality* (Boston: Routledge and Kegan Paul, 1984), at 403).

[22] Kathryn Abrams provides a thoughtful discussion of the reasons that sex-positive feminism gained so little sway in some feminist theorizing, including in the legal academy. Abrams, "Sex Wars Redux," at 315–20.

Queer Theory and Sexual Citizenship

One of the critical turns in the conversation regarding sexuality came in a 1984 essay by Gayle Rubin called *Thinking Sex*, which was published in a collection of essays by sex-positive feminists.[23] Rubin stated,

> I want to challenge the assumption that feminism is or should be the privileged site of a theory of sexuality. Feminism is the theory of gender oppression. To automatically assume that this makes it the theory of sexual oppression is to fail to distinguish between gender, on the one hand, and erotic desire, on the other.[24]

According to Rubin, gender certainly is one axis of power intimately implicated in sexuality, but not the only axis. Another critical axis involves the encouraging of certain sexual practices and the punishment of others. Rubin argued that those who sought to practice disfavored forms of sexuality – drag queens, homosexuals, sex workers, lesbians – were oppressed in a manner that could not be adequately captured through a feminist lens. Rubin therefore insisted that "an autonomous theory and politics specific to sexuality must be developed."[25]

Six years later, Eve Kosofsky Sedgwick's *The Epistemology of the Closet* moved the conversation regarding sexuality still further along the path toward queer theory. Whereas Rubin affirmatively sought to claim a space in analyses of sexuality for sexual minorities, such as gays and lesbians, Sedgwick entirely rejected identity politics, even where sexual orientation was the identification at issue. For Sedgwick, the labels "gay" and "straight" are themselves the products of norms of sexuality that oppressively distinguish citizens based on the gender of their sexual partners. These norms are premised on the problematic assumption that gender – one's own or that of one's partner –should matter tremendously:

> It is a rather amazing fact that, of the very many dimensions along which the genital activity of one person can be differentiated from that of another (dimensions that include preference for certain acts, certain zones or sensations, certain physical types, a certain frequency, certain symbolic investments, certain relations of age or power, a certain species, a certain number of participants, and so on) precisely one, the gender of the object choice, emerged from the turn of the century, and has remained, as *the* dimension denoted by the now ubiquitous category of "sexual orientation."[26]

[23] See Gayle Rubin, "Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality," in Vance, *Pleasure and Danger*, at 307.
[24] Ibid., at 308.
[25] Ibid., at 309.
[26] Eve Kosofsky Sedgwick, *The Epistemology of the Closet* (Berkeley: University of California Press, 1990), at 8.

Rather than making claims on behalf of one's identity as homosexual, she argued that the distinction between gay and straight must itself be interrogated as a source of oppression. Sedgwick contended that both feminism and gay and lesbian studies, by accepting gender and sexual orientation as the lenses through which to view norms of sexuality, "[give] heterosocial and heterosexual relations a conceptual privilege of incalculable consequence."[27]

What followed was the proliferation of a vast array of works of queer theory that develop many of the themes laid out by Rubin and Sedgwick. For one thing, they move away from assessing norms of sexual citizenship through a gender lens and instead focus on the way that these norms marginalize those who engage in disfavored sexual practices. For another, this work is generally sex-positive in nature. As queer theory has developed, this pro-sex position has extended to embrace not only marginalized sexual practices, but projects that advocate "old-fashioned" heterosexual sex, as well. Thus Janet Halley suggests that Duncan Kennedy's work is queer "*because* of its embrace of male heterosexual erotic interests."[28] In this work, sexual practices – both transgressive and not-so-transgressive – are seen as a means of both resistance and liberation. As Elisa Glick explains, contemporary queer theorists "encourage us . . . to fuck our way to freedom."[29]

Queer theory also follows through on the anti-identity turn made by Sedgwick to reject the identity politics that feminism and gay and lesbian activism had promoted. This rejection is premised on principles of poststructuralist theory, which posit that prevailing power relations replicate themselves through the way in which we see the world –in other words, through shared patterns of language and thought called "discourse." The categories through which we see the world – including the male/female binary and the heterosexual/homosexual binary – are, in this view, discursively constructed, rather than stemming from the essence of the categorized objects themselves. The simple fact that we consider particular categories to be important – including whether one is a man or woman, heterosexual or homosexual – is a function of the normalizing power of particular modes of thought. More broadly, poststructuralists, including queer theorists, point out that universalizing accounts of truth, which assume that particular concepts and ideological constructions are timeless and universal, paper over difference, complexities, and ambiguity. They seek to displace such narratives by more localized explanations that govern particular cultures at particular times.

The link here with Sedgwick's argument should be clear: arguing for full sexual citizenship on behalf of gays and lesbians assumes the importance of categorizing people based on their own gender and the gender of their sexual partner. Yet the assumption that anything of significance should turn on these categories is part of

[27] Ibid., at 31.

[28] Janet E. Halley, *Split Decisions: How and Why to Take a Break From Feminism* (Princeton, NJ: Princeton University Press, 2006), at 171.

[29] Elisa Glick, "Sex Positive: Feminism, Queer Theory, and the Politics of Transgression," 64 *Feminist Rev.* 19, 19 (2000).

the problem. It is this very position that distinguishes queer theory from gay and lesbian studies and gives the movement its name. As Richard Thompson Ford puts it:

> *Queer* denotes not an identity but instead a political and existential stance, an ideological commitment, a *decision* to live outside some social norm or other. At the risk of (the certainty) of oversimplification, one could say that even if one is born straight or gay, one must decide to be queer.[30]

Or, as put more colorfully by the anonymous authors of a pamphlet circulated in London in 1991, "queer means to fuck with gender. There are straight queers, bi-queers, tranny queers, lez queers, SM queers, fisting queers."[31]

Queer theory's critique of identity is linked to its theory of sexuality, which it also derives from poststructuralism. Michel Foucault, who began to lay this theory out in the first volume of *The History of Sexuality*, argued against the view that individuals possess a natural, instinctual sex drive that society has wrongly repressed and for which the appropriate remedy is to liberate individuals to express that drive.[32] To the contrary, Foucault argued that sexuality is, at its base, not some natural urge, but, like sexual and gender identity, discursively constructed. He contended that a complex matrix of discourses surrounding norms of sexual citizenship constructs particular types of sex as normal and other types of sex as deviant, and at the same time creates both normalized and deviant subjects. The discourse surrounding psychiatry, for example, was instrumental both in delineating the boundaries of homosexuality and in pathologizing it by treating it as a mental illness. This view of the relationship between power and sexuality rejects claims by gay and lesbian activists that the central harm of homophobia and heterocentrism involves forcing gays and lesbians to "cover up" their "real" identity in order to comport with dominant norms of sexual citizenship. Instead, it is the fact that citizens identify as either homosexuals or heterosexuals that demonstrates the normalizing power of dominant discourses regarding sexual citizenship and limits the possible lives that these citizens can lead.

As this discussion of sexuality reveals, there are significant differences between the poststructuralist and the dominance feminist conceptions of power. In contrast to MacKinnon, Foucault sees *both* women's and men's sexuality as an effect of power. For Foucault, power in modern society operates primarily as a productive force that shapes all humans – turning them into women and men, heterosexuals and homosexuals – by molding their desires and self-concepts. As such, power operates in everyday interactions, where it "reaches into the very grain of individuals, touches

[30] Richard Thompson Ford, "What's Queer About Race?," 106 *S. Atlantic Q.* 477, 479 (2007).

[31] Quoted in Nikki Sullivan, *A Critical Introduction to Queer Theory* (New York: New York University Press, 2003), at 44.

[32] See generally Michel Foucault, *The History of Sexuality*, vol. 1, *An Introduction* (New York: Pantheon Books, 1978).

their bodies and inserts itself into their actions and attitudes, their discourses, learning processes and everyday lives."[33]

Foucault's understanding of power offers several advantages over the dominance feminist model for analyzing norms of sexual citizenship. For one thing, it gives us a better understanding of how norms of sexual citizenship influence citizens' daily lives. As Foucault explained it, through their discursive circulation in society, these norms influence how citizens see their own identity, and make some ways of life and sexual practices conceivable and pleasurable, while they marginalize others or make them altogether inconceivable.

Foucault's model also offers a more satisfying explanation for how dominant norms can change or otherwise be resisted. Because power produces particular subjects with particular capacities, it gives rise to the possibility for action and resistance. Furthermore, by conceiving of power as operating at the micro level, rather than as a totalizing force that permeates throughout society, the poststructuralist model better grapples with the multiplicity of voices on contested issues such as sexual citizenship, rather than insisting that there is some monolithic viewpoint into which women are indoctrinated. Consideration of the welter of discourses that circulates around sexuality and their effect on citizens enables theories to grapple with how to foster resistance around these discourses.

Considering Queer Theory and Sexuality

Queer theory's adoption of the poststructuralist conception of power opens the door to significant gains in theorizing sexuality. Some of these gains, however, have been foreclosed by the uncritical pro-sex stance that much of queer theory assumes. Although this pro-sex stance generally appears alongside the poststructuralist conception of power in works of queer theory, there is no intrinsic tie between these two positions. In fact, on close examination, there is considerable tension between them. Certainly queer theory came by its pro-sex position honestly, given that its progenitors were, on the one hand, sex-positive feminists seeking a mode of theorizing that departed from dominance feminism's bleak view of sexuality, and, on the other hand, gays and lesbians who sought to end proscriptions on homosexual conduct. And in fact, some of the less persuasive parts of Foucault's own work, from which queer theory draws heavily, link a pro-sex stance – or at least a position supportive of "bodies and pleasure" – with resistance.[34] In generally attaching a positive valence

[33] Michel Foucault, "Prison Talk," in Colin Gordon, ed., *Power/Knowledge: Selected Interviews and Other Writings, 1972–1977* (New York: Pantheon Books, 1980), at 37, 39.

[34] Foucault unconvincingly sought to distinguish between, on the one hand, a pro-sex stance and, on the other, a pro-bodies and pleasure stance, precisely because he recognized the problems with the argument that a pro-sex stance is liberatory: "We must not think that by saying yes to sex, one says no to power; on the contrary one tracks along the course laid out by the general deployment of sexuality. It is the agency of sex that we must break away from, if we aim – through a tactical reversal of the various mechanisms of sexuality – to counter the grips of power with the claims of bodies, pleasure, and knowledge, in their multiplicity and their possibility of resistance. The rallying

to sex, however, queer theory sacrifices poststructuralism's promise of yielding more nuanced, textured analyses of sexuality that grapple with the complexities of power in this area.

Taking the poststructuralist conception of power seriously, sexual activity is not appropriately valenced as intrinsically positive, as many queer theorists would have it, just as it is not as negative as dominance feminists portrayed it. Sexuality, instead, is a discursive creation that, in itself, is neither good nor bad. Once we discard the notion that sexuality is some natural, innate drive that society wrongfully causes us to repress, we must discard the view that sexual performances, by themselves, are liberating. Likewise, the simple fact that sex is pleasurable should not, for queer theory, make engaging in the activity good or liberatory in any uncomplicated sense.[35] As Foucault recognizes, power forms subjects in a way that can make subjection feel good. (And if, as MacKinnon argues, the *purpose* of sexual pleasure is to enforce hierarchy, there is even less reason to consider the argument in favor of pleasure sufficient.) A politics that strives for freedom and self-determination accordingly needs a more nuanced set of precepts than "if it feels good, do it."[36]

To the extent that queer theorists' pro-sex views are motivated by the notion that dominant norms of citizenship generally marginalize sexuality, and that all acts of sex therefore transgress these forces, these theorists read these cultural forces in an overly simplistic light. While clearly some discourse surrounding sexual citizenship opposes sexual activity generally (at least outside of marriage), there are, as MacKinnon pointed out,[37] many other strands that do exactly the opposite and communicate the message that sex is just daring and risky enough to be titillatingly, not-quite-so off limits, and that everyone should be doing this wonderful, naughty thing. In other words, the taboo surrounding sex generally (as opposed to particular forms of sex) is

point for the counterattack against the deployment of sexuality ought not to be sex desire, but bodies and pleasures." Foucault, *History of Sexuality*, at 157. The quotation might lead an astute reader to conclude that Foucault was a better positive theorist of the workings of power than he was a normative theorist of freedom. For more discussion of Foucault's distinction between desire and pleasure, see inf. n. 36.

35 For example, Janet Halley cites with approval the analysis of pro-sex feminists who, in her words, affirm that "danger [connected to the risk of sexual violence] was real, and really bad. But they tended to say it was bad not because it realized male dominance, but because it deterred women from being sexually adventurous, from seeking and finding pleasure." See Halley, *Split Decisions*, at 117.

36 Foucault himself sought to answer this argument by claiming that although the term *desire* carried heavy discursive baggage, the term *pleasure* was more open as a discursive matter and hence carried possibilities for freedom, agency, and self-creation: "That term [desire] has been used as a tool . . . a calibration in terms of normality. Tell me what your desire is and I will tell you who you are, whether you are normal or not, and then I can qualify or disqualify your desire. The term pleasure on the other hand is virgin territory, almost devoid of meaning. There is no pathology of pleasure, no 'abnormal' pleasure. It is an event 'outside of the subject' or on the edge of the subject, within something that is neither body nor soul, which is neither inside nor outside, in short a notion which is neither ascribed nor ascribable." Michel Foucault, "Le Gai Savior II," *Mec Magazine*, July–August 1988, at 32. While the term *pleasure* may, as Foucault asserts, allow for more linguistic mobility than the term *desire*, it seems far-fetched to argue that the *circumstances* that give someone sexual pleasure are not shot through with cultural baggage.

37 See MacKinnon, *Toward a Feminist Theory of the State*, at 133.

only skin-deep; the simple fact of engaging in sexual behavior, in and of itself, should not be deemed liberatory or even resistant. In fact, the blanket view that performances of sexuality are emancipatory is exactly the kind of universalizing narrative that queer theorists properly reject in other settings. Treating sexual activity as positive, without paying attention to the context of the performance, how it functions in a particular time and place, and how that performance is likely to be interpreted, attributes a positive essence to sexuality beyond its social meanings. Sex therefore comes to serve, in queer theory, as an unshakeable ground – inherently liberatory and intrinsically resistant to whatever needs to be resisted. Properly framed, however, sexuality is a product of a complex of interwoven, sometimes conflicting, discourses. Any given performance of sexuality can draw on narratives that largely reinforce existing power relations, undercut them, or contain both dominant and transgressive strains to varying degrees. Simply performing sexual acts is not necessarily resistant; we need to know more about the performance to make this judgment. The tendency in queer theory to see all acts of sexuality as transgressive, ironically, mirrors the flaw that queer theorists and pro-sex feminists correctly criticized in earlier feminist theory. Dominance feminist accounts flatten the terrain of gender hierarchy when they see all acts of sex as similarly subjugating without recognizing the ways in which some can, at the very least, contain some resistant elements. Queer theorists, however, make the obverse mistake when they see all sex as liberating.

The positive valence accorded sex is sometimes justified in queer theory by the claim that sex interrupts the illusion of stable identity, clean boundaries, and neat ethical logic enforced by Western ideology. For example, Janet Halley praises queer theory's "willingness to affirm sexuality as carrying an appetite for deep threats to integrated selfhood, its willingness to lose touch of propositional ethical logic to do so, its plunge into a profoundly irresolvable problematic of desire, and its fragmentation not only of the self but of the gendered self."[38] Halley's description of sexuality derives from a provocative 1987 essay by Leo Bersani. In that essay, *Is the Rectum a Grave*?, Bersani, a literary theorist and French literature professor, argues against the view that homosexual sex has any predictable, beneficial political effects. As Bersani puts it, "While it is indisputably true that sexuality is always being politicized, the ways in which *having sex* politicizes are highly problematical." Of the claim by gay rights activists that homosexual sex promotes egalitarian politics, he states, "To put the matter polemically and even rather brutally, we have been telling a few lies."[39]

Toward the end of the essay, however, in a far more conjectural section, Bersani speculates that sex still has some considerable value when it comes to resisting the normalizing tendencies of modern Western society. He adapts Freud's theories to argue that the way the human body is constructed makes it "almost impossible" for sexuality not to be associated with starkly divided roles of mastery and subordination.

[38] Ian Halley, "Queer Theory by Men," 11 *Duke J. Gender L. and Pol'y* 7, 25 (2004).

[39] Leu Bersani, "Is the Rectum a Grave?," In Douglas Crimp, ed, *AIDS: Cultural Analysis/Cultural Actinsm* (Cambridge, MA: MIT Press, 1988), at 206.

Bersani conjectures, however, that at the root of human sexuality is the yearning to transgress this stark polarization. He borrows from Freud the possibility that "sexual pleasure occurs whenever a certain threshold of intensity is reached, when the organization of the self is momentarily disturbed by sensations or affective processes somehow 'beyond' those connected with psychic organization."[40] Sexual pleasure, in this view, involves moving beyond this bounded dichotomy to escape limits.

Despite the overall brilliance of Bersani's essay, this particular argument has little to recommend it from a poststructuralist perspective. Bersani's quest to locate, after Freud, some deep, intrinsic meaning to sex is undercut by poststructuralism's recognition of the problems with essentialism and grand narratives. If sexuality is a construct of power, its meaning should be discerned through particular narratives, rather than seeking ahistoric rationales, as Bersani does. The notion, moreover, that the value of sex lies in its exploding of the fantasy of human identity, even if it were accurate, is a mighty thin edge on which to balance a whole political platform valorizing sex. At most, the "exploding" of human identity at the point of orgasm is momentary. Bersani not only provides us with no arguments that its effects are more than transitory, in the rest of the essay, he argues against the proposition that sex has any predictably positive effects.

Some queer theorists move beyond the facile equating of sex of any sort with resistance, instead valorizing only performances that are marginalized by dominant norms, such as homosexual sex or sadomasochistic sex. The position that only certain kinds of sexual performances are transgressive is certainly a better reading of prevailing norms of sexual citizenship than that which sees all sexuality as marginalized. A few qualifications of this position are in order, however. First, queer theorists should be cautious about overstating the transgressive power even of sex that has been pushed to the boundaries of society. As Bersani points out, there are many ways that performance that might, on first glance, appear to subvert repressive norms of sexual citizenship can backfire, either failing to undercut such norms or even reinforcing the status quo. To the contention that gay-macho style subverts the dominant order, he responds: "It is difficult to know how 'much mischief' can be done by a style that straight men see – if indeed they see it at all – from a car window as they drive down Folsom Street. Their security as males with power may very well not be threatened at all by that scarcely traumatic sight, because nothing forces them to see any relation between the gay-macho style and their image of their own masculinity."[41] What may be intended by the performers as transgressive may not be read in that way by their audience, who may simply dismiss them as deviants without realigning their views. Bersani's cautions here echo Foucault's own warnings about how

[40] Ibid., at 217.

[41] Ibid., at 208. As Kathryn Abrams counsels, with a strategy reliant on subversion, "one is never sure ex-ante whether it is going to be successful in destabilizing dominant norms, whether its going to have little effect, or whether maybe it might even reinforce the status quo." Zipporah Wiseman et al., "Roundtable Discussion: Is Subversion Subversive?," 13 *Tex. J. Women and L.* 149, 151 (2003).

strong the recuperative forces of power are in Western society: even when subjects think that they are resisting dominant norms of sexual citizenship, they are often unintentionally reinforcing these very forces.

Second, queer theory's support for marginalized forms of sexuality requires some more developed normative theory of the appropriate terms of sexual citizenship than simply promoting resistance for resistance's sake. Without this, queer theory is like a teenager who invests all her energy in rejecting every position taken by her parents, without thinking about her own goals. There are many good reasons to favor easing the strictures on same-sex sexual relationships beyond the simple fact that they are currently off limits. This may not be the case, however, for all other currently disfavored forms of sexuality.

Sadomasochism, or S&M, a practice that many queer theorists have cheered, provides an interesting example of this issue. While there is no question that sadomasochism transgresses contemporary norms, it is worth thinking through whether the costs of this practice make this particular transgression a worthy cause to support. An identifying feature of sadomasochism – the assignment of one partner to the dominant role, or "top," and the assignment of the other partner to the submissive role, or "bottom" – should give pause to those who seek to move toward a society characterized not only by liberty, but also by increased equality. S&M's queer theory proponents sometimes seek to allay this concern by describing it as a strategic game that involves only the temporary assumption of roles. The dominant or submissive natures of the roles assumed, they assert, remain localized to the game and have little bearing on the larger context of its practitioners' lives.[42] As Nikki Sullivan points out, however, the empirical evidence is unclear regarding how many couples involved in S&M actually do switch roles with any sort of regularity or success. Some anecdotal evidence suggests that this proportion may not be high. By the same token, there is evidence that at least a significant proportion of S&M participants do carry some aspects of their roles into the rest of their lives.[43]

The inequalities created by S&M, it could be argued, at least have the virtue of not being tied to sexual orientation or gender. Even if this is true, however, one might question whether queer theory should seek to aim still higher, toward a world in which no pervasive inequalities mark the citizens. And there is some reason to question whether S&M truly does help blur the boundaries between genders. While some proponents argue that its practices undercut both hetero- and gender normativity because they focus on pleasures not based on the gender of one's sexual

[42] See, e.g., Ted Polhemus and Housk Randall, *Rituals of Love: Sexual Experiments, Erotic Possibilities* (London: Picador, 1994), at 73–74 (S&M "is best understood as a sort of a game – an enclosed microcosm with its own rules and territory – and as such . . . it is autonomous from real-life inequalities"). See also Michel Foucault, "Sex, Power, and the Politics of Identity," in Paul Rabinow, ed., *Michel Foucault: Ethics: Subjectivity and Truth* (New York: New Press, 1997), at 163–73 (the "S&M game is very interesting because . . . it is always fluid. Of course, there are roles, but everybody knows very well that those roles can be reversed").

[43] See Sullivan, *A Critical Introduction to Queer Theory*, 154–58.

partner,[44] the myriad reports of S&M participants who repeatedly interact only with same-sex partners or opposite-sex partners might cause us to suspect that the gender of one's partner still remains a salient component of the interaction for its participants.

What is more, encouraging S&M may reinscribe some of the very psychic injuries suffered by women and sexual minorities that queer theory seeks to move beyond. As some critics of S&M argue, the practice may reflect the internalization of homophobia and misogyny. In John Rechy's words, "gay S&M is the straight world's most despicable legacy" because the gay male sadist "transfer[s] his feelings of self-contempt for his own homosexuality onto the cowering 'M,' who turns himself willingly into what gayhaters have called him."[45] Sheila Jeffreys, in turn, argues that sadomasochism is a form of sexual abuse that embodies the eroticized dominance and submission of gendered sexuality that MacKinnon discusses.[46] To the extent that those enacting these roles – women and those who identify as sexual minorities – are reenacting wounds they have suffered in a society that they seek to restructure, queer theorists would do better to promote new and different roles, rather than encourage these roles.

Insofar as queer theorists might answer that this kind of reworking allows the constructive reclaiming of damaged identities, the debate over cultural feminism offers useful advice. In the 1980s, cultural feminists similarly argued that qualities connected with women should be revalued and celebrated.[47] While many of the traits traditionally associated with femininity are positive (e.g., emotion, compassion, empathy), feminists have come to realize that some traits traditionally associated with femininity, such as timidity and weakness, are problematic to celebrate. Instead, these traits should be recognized as not intrinsically "feminine," but as products of gender subordination, which would likely fade away in a restructured world without gender oppression. Queer theory might learn from this inquiry and rethink its approach to S&M. The same is likely true for queer theory's celebrating the connection between sex on the one hand, and shame, disgust, and subordination on the other.

Finally, queer theorists' celebration of sexuality sometimes seems to confuse the theoretical *possibility* that subjects can resist dominant norms of sexual citizenship with the belief that these dominant norms no longer hold much power in citizens'

44 David Halperin, *Saint Foucault* (New York: Oxford University Press, 1995), at 95; see also Foucault, *History of Sexuality*, at 156.

45 John Rechy, *The Sexual Outlaw* (London: Futura, 1979), at 261.

46 See Sheila Jeffreys, "Heterosexuality and the Desire for Gender," in Diane Richardson, ed., *Theorising Heterosexuality: Telling It Straight* (Buckingham, UK: Open University Press, 1998), at 76. MacKinnon argues that this eroticized dominance and submission can be enacted in both same-sex and heterosexual relationships, although the eroticization of women's submission always remains the template for the practice. See "Brief of Amicus Curiae National Organization on Male Sexual Victimization," *Oncale v. Sundowner Offshore Servs.*, 1996 U.S. Briefs 568 (Aug. 12, 1997).

47 See Ellen C. Dubois et al., "Feminist Discourse, Moral Values, and the Law – A Conversation," 34 *Buff. L. Rev.* 11–12 (1985).

daily lives.[48] For example, Janet Halley inveighs against the "grim resolution that the structural [i.e., dominance] feminists, in all their consolidated knowledge, produce" in seeing the world in terms of their dark, totalizing vision. She contrasts this with queer theory's "delicious wonder at the . . . profound, almost delirious complexity of sexuality as it is so variously lived" and says of this vision, "I like it better. I hope you will too."[49] For many of us, the world that Halley describes, in which rigid norms of sexual citizenship hold little sway, is far preferable to MacKinnon's vision of the world. Whether Halley's vision reflects the world in which we live, however, is at least partly an empirical question that can be determined only with reference to citizens' lives today: to what extent, in actual practice, are citizens' sexual lives constrained by rigid sexual norms? My own hunch is that although there is more reason for cheer than there used to be, there is still a great deal of work left to do before celebration is in order. Viewed in this way, while MacKinnon clearly paints too dark a picture in conceiving of citizens' lives as completely dictated by totalizing norms, Halley likely paints too bright a picture. In our real world, most citizens conform to gender norms in many ways and at least broadly to conventional norms of sexuality, whether or not those conditions would hold in anyone's ideal world.[50] In this light, Halley's enjoyment of "the profound, almost delirious complexity of sexuality as it is so variously lived" is, in the least, premature.[51]

Theorizing Sexual Citizenship Going Forward

How might we construct a critical theory that can better grasp and evaluate the complexity of existing norms of sexual citizenship and their relationship to the lived

[48] This mirrors a difficulty in Foucault's own work. Foucault's early work leaves little room for subjectivity, socially constructed or not, let alone for resistance. This is the Foucault who famously declared the "death of the subject," and who likened the concept of man, the self-possessed subject of humanist discourse, to "a face drawn in sand at the edge of the sea," subject to being erased by the incoming tide. Michel Foucault, *The Order of Things: An Archaeology of the Human Sciences*, translated by Alan Sheridan (New York: Vintage Books, 1994), at 387. In his later work, however, Foucault asserts that "there are no relations of power without resistances; the latter are all the more real and effective because they are formed right at the point where relations of power are exercised." See Michel Foucault, "Power and Strategies," in Gordon, ed., *Power/Knowledge*, at 134, 142; see also John McGowan, *Postmodernism and Its Critics* (Ithaca, NY: Cornell University Press, 1991), at 140. In this mode of theorizing, Foucault seems to conceive resistant capacities as perpetual: because power will always be present, so will resistance.

[49] Halley, *Split Decisions*, at 207.

[50] To take but a few limited examples, an international discussion group on sexual bondage revealed that 11 percent of heterosexual females say they prefer the dominant sexual role, as compared to 71 percent of heterosexual men. Twelve percent of male homosexuals report preferring the dominant sexual role. Judith Mackay, *Penguin Atlas of Human Sexual Behavior* (New York: Penguin Books, 2000), at 20–21; see also New Strategist Publications, *American Sexual Behavior: Demographics of Sexual Activity, Fertility, and Childbearing* (Ithaca, NY: New Strategist Publications, 2006), at 66. Furthermore, only 6 percent of men and 11 percent of women are believed to have had any kind of same-sex sexual contact. Ibid.

[51] Halley, *Split Decisions*, at 207.

reality of citizens? Such a theory should build on the advances that the poststructuralist conception of power offers in recognizing the role that discourse plays in constructing and replicating norms of sexual citizenship, and determining how subjects see themselves, and the range of sexual possibilities they see as desirable and realistic. Conceiving of these norms in discursive terms helps grasp the complexity and contestation that surrounds them in contemporary life. Yet recognizing that these norms are time-bound, contingent, and always subject to contestation, does not mean that they are simply fictions with no grip on power. As Foucault stated, "we must not place sex on the side of reality, and sexuality on that of confused ideas and illusions; sexuality is a very real historical formation."[52]

Likewise, the recognition of the multiplicity of narratives that circulates about sexuality should not eclipse the recognition that some narratives sound more loudly and circulate more frequently than others. In addition, citizens are more likely to engage in some types of performances than others. In other words, there are still dominant valences within these discursive fields of power. MacKinnon was wrong when she depicted women as being absolutely consigned to submissive sexual roles in today's society and as having no access to alternative scripts. She was right, however, in asserting that being sexually submissive is the role of least resistance for women (pun intended) in contemporary society. By the same token, heteronormativity may be contested by the sitcom *Will and Grace* and the movie *Milk*, but these must be seen in the context of the hundreds of thousands of other cultural scripts that marginalize gays and queers.

The discursive conception of power also points toward strategies for disrupting the norms of sexual citizenship deemed problematic. As Steven Winter argues, conceiving power as inhering in social relations, through subjects performing their roles in relation to others, recognizes that "power [is] vulnerable to disruption . . . because the 'powerless' always have the power to withhold or vary their performance."[53] An adequate theory of sexuality must also recognize that the normalizing aspects of power have real effects on subjects' ability and desire to resist, and must take into account the options, possibilities, and capacities afforded the individual by a given social order. While there can be creative rereadings of dominant norms, replacing the dominant norms of sexual citizenship with such rereadings takes more than imagination – it takes arduous political and social work. The function of a critical theory of sexuality, then, is not simply to assert that dominant norms of sexual citizenship are being repeatedly transgressed, but to locate the social, political, and legal conditions that will foster subjects' ability to subvert norms deemed oppressive in their everyday lives.

A revised theory of sexuality should also develop more nuanced readings of citizens' sexual performances. The fact that a citizen engages in sexual activity, it should be recognized, does not, in itself, transgress societal norms in any way that should

[52] Foucault, *History of Sexuality*, at 131.
[53] Steven L. Winter, "The Power Thing," 82 *Va. L. Rev.* 721, 787 (1996).

be considered liberatory, as queer theory sometimes takes it. By the same token, neither is all heterosexual sex equally as implicated in gender hierarchy, as some dominance feminists would have it. Instead, more complex analyses are necessary to tease apart the normalizing and transgressive strands of these performances. Brenda Cossman's chapter in this volume provides an excellent example of the more complex stories that need to be told.[54] Other feminist work during the past fifteen years, particularly that of Kathryn Abrams, also presents more nuanced models of power and agency that can be useful to developing such a sophisticated model of sexual citizenship.[55]

Moreover, an adequate critical theory of sexuality needs a well thought-out conception of the vision of the world it seeks to move toward. At this point, feminist theory has done a better job than queer theory of thinking through what a restructured society should look like.[56] Feminists, however, have not yet adequately theorized the role that sexual pleasure should play in constructing the norms of sexual citizenship.[57] Queer theorists, meanwhile, need to engage in a serious conversation about vision generally. The current conversation has been too focused on transgression of exising norms; while this may suffice as a short-term strategy, it fails as a long-term goal. A world with no norms (aside from transgression), it perhaps goes without saying, would not only be impossible, but morally unpalatable. At the very least, consent would seem to be one limiting norm that queer theorists should seek to hold on to, but it is not the only one. To the extent that queer theorists really seek such unbridled freedom, feminism offers ready objections. Lives directed only toward the goal of unbounded freedom ignore the condition of dependency that marks all human lives. A society that seeks only to maximize liberty may also impose significant costs on equality. This will be the case particularly where that liberty is directed toward sexual pleasure, and, as in our society, that pleasure is tied to gender hierarchy. An adequate theory of sexual citizenship must think about whether and how to incorporate other relevant goods as well, such as those that Linda McClain argues have heretofore been overlooked by queer theory, including safety and bodily integrity.[58]

And what about the issue of which lens should be used to consider existing norms of sexual citizenship – a feminist lens focused on gender, or a queer theory lens

[54] See Chapter 13.

[55] See, e.g., Abrams, "Sex Wars Redux"; Kathryn Abrams, "From Autonomy to Agency: Feminist Perspectives on Self-Direction," 40 *Wm. and Mary L. Rev.* 805 (1999); Wiseman et al., "Roundtable Discussion," at 150–51.

[56] See, e.g., Linda C. McClain, *The Place of Families: Fostering Capacity, Equality, and Responsibility* (Cambridge, MA: Harvard University Press, 2006) (arguing for goods of capacity, equality, and responsibility); Martha Nussbaum, *Sex and Social Justice* (New York: Oxford University Press, 1999) (arguing for developing human capabilities); Martha Albertson Fineman, "The Vulnerable Subject: Anchoring Equality in the Human Condition," 20 *Yale J. L. and Feminism* 1 (2008) (arguing for protecting vulnerabilities).

[57] See Katherine Franke, "Feminist Justice, at Home and Abroad: Women Imagining Justice," 14 *Yale J. L. and Feminism* 307, 311 (2002).

[58] Linda C. McClain, "Some ABCs of Feminist Sex Education (in Light of the Sexuality Critique of Legal Feminism)," 15 *Colum. J. Gender and L.* 63, 87 (2006).

focused on the marginalization of particular sexual practices? Clearly both have a place. Queer theory has demonstrated that there are significant insights to be reaped from analyses of sexuality that do not place gender front and center.[59] In addition, it has rightly called attention to the costs of feminist measures to end sex inequality that might be imposed on other groups.[60] With that said, while feminism cannot be the only lens through which to consider existing norms of sexual citizenship, the same is true for queer theory. Gender, although a discursive fiction that is inherently unstable and contested, and while always intertwined with other axes of power, remains an important axis of power in our society that affects the lived reality of citizens.[61] Foreclosing discussion of a possible gender axis would risk missing the ways in which these discursive constructions still demarcate fault lines in sexuality.

The answer, then, is that no single lens – whether gender, queer theory, or some third lens – should be deemed to have priority in assessing norms of sexual citizenship in contemporary society. Whether there are conceptual gains to be made through feminist or queer theory analysis can only be decided in the context of particular situations, by whether a particular lens yields insights. In addition, as Cossman notes, given the ways in which discourses regarding gender and sexuality often overlap in our society, the most productive points of analysis will frequently be those that interrogate the intersections and contradictions between these two strands.[62]

Insofar as feminists and queer theorists have been engaging in an argument about which is more primary, oppression based on sexuality or gender, this seems to be a particularly unproductive discussion.[63] Often this conversation proceeds by inquiring whether gender is the prime mover that creates sexuality, or sexuality the prime mover that creates gender, much like a scholarly version of the chicken-and-egg question. When we are talking about the way in which power works through social systems, there is no clear means to identify a prime mover or primary constitutive factor. A debate about which came first seems as pointless as were the discussions in the late 1980s and early 1990s about which type of oppression – based on sex, race, or ethnicity – was more fundamental.

Conclusion

Assessing the terms of sexual citizenship in the contemporary United States is a complex and demanding task. In an era in which dominant norms regarding sexual citizenship are regularly being contested and a multitude of discourses regarding these norms is endlessly proliferated, a critical theory of sexuality must be able to

[59] See, e.g., Brenda Cossman, *Sexual Citizens: The Legal and Cultural Regulation of Sex and Belonging* (Palo Alto, CA: Stanford University Press, 2007); Halley, *Split Decisions*, at 348–63.

[60] See Halley, Split Decisions, *passim*.

[61] See Susan Bordo, *Unbearable Weight: Feminism, Western Culture, and the Body* (Berkeley: University of California Press, 1993), at 222.

[62] Brenda Cossman et al., "Gender, Sexuality, and Power: Is Feminist Theory Enough?," 12 *Colum. J. Gender and L.* 601, 617 (2003).

[63] See, e.g, Halley, *Split Decisions*, at 123.

discern shades of gray, instead of simply black and white in interpreting these norms. It must also be sensitive to the multiple axes that run through these constructions of power, and be able to chart the intersections and conflicts among these axes. Furthermore, it must be able to identify the conditions that would undercut dominant norms deemed oppressive, which also requires it to develop some constructive vision of the world it seeks. In such a world, sexuality should be neither intrinsically a virtue nor a vice, but one possible piece in the rich, full lives of citizens.

15

Infertility, Social Justice, and Equal Citizenship

Mary Lyndon Shanley

I anticipate that the title of this chapter may be puzzling to many readers. Although infertility creates differences – inequalities – in people's opportunities to reproduce, these differences appear to be a misfortune, a source of private sorrow for those who wish to have children but not a matter to which considerations of justice or citizenship apply. Justice, after all, pertains not to the givenness of biology, but to social and political arrangements that are under human control. And citizenship has to do with a public status whose connection to the intimacy of reproductive life seems remote at best. But discourse that talks about infertility simply as a medical disability obscures the social, economic, and political factors that contribute both to the variations in the incidence of infertility and to the unequal resources available to different sectors of the population in attempting to overcome infertility. Nancy Hirschmann makes a similar observation about the discourses surrounding disability: a medical model of disability "conceptualiz[es] disability as a unique and discrete problem of particular individuals," while a social model of disability "views disability as a problem created *by* society," one that "encode[s] hierarchies of power and privilege."[1] Neither disability nor infertility, however, is simply a piece of personal bad luck whose remediation is the responsibility solely of the individual. Differences in the occurrence of and ability to treat infertility, combined with other differences in reproductive life influenced by state action, deeply implicate issues of both social justice and equal citizenship.

The ability to decide whether or not to have children has great importance to individuals for two reasons: one is the role that having and not having children plays in a person's identity and concept of the good life; the other is gaining respect as a full citizen in the United States. The first regards private dimensions of an individual's happiness – choosing the kinds of bonds of care and nurture, giving and receiving love, that are consonant with one's sense of self. The second regards what Judith Shklar spoke of as "recognition" by one's fellow citizens, that is, full membership in the civic community.[2] Not everyone must be a parent to have such standing,

[1] See Chapter 7.

[2] Judith N. Shklar, *American Citizenship: The Quest for Inclusion* (Cambridge, MA: Harvard University Press, 1991), at 100. Nancy Hirschmann and Joanna Grossman also write about the importance of

but public policy and social practices should not give unequal consideration and support to individuals who wish to parent or selectively withhold the social recognition and civic status that accompany parenthood. Respect for family relationships has particular significance in the United States, where slaves were denied legally recognized family ties, whether husband and wife or parent and child.

In the United States, the liberty interest in procreative freedom has, by and large, been seen as a negative liberty – the right of individuals to be free from government interference, whether in the form of restrictions on individual choice in birth control and abortion or of the imposition of birth control or sterilization. More recently, people have argued that this negative liberty entails allowing people access to reproductive technologies free from the governmental regulations found in other countries. But the focus on negative liberty and the exercise of individual decision making as all that is entailed in reproductive freedom obscures the social *context* that can impede and create inequalities in people's ability to make meaningful decisions about reproductive and family life.

Two causes of infertility reflect underlying relationships of power and privilege created by social and economic structures, although these structures affect different groups. Many cases of infertility arise from the inadequate state of sex education and public health available to many low-income women and women of color (who are overrepresented in the infertile population), and from the paucity of public supports for child rearing and job structures in business and the professions that lead to delayed childbearing among middle- and upper-middle-class women. Lack of services to the poor contributes to what Dorothy Roberts has called a two-tier system of reproduction in the contemporary United States – one for the middle and upper classes, one for the working class and the poor. The former group is disproportionately white, the latter disproportionately black and Hispanic, and so this tiered system is racialized. There is not, of course, a bright-line division between these groups, but a spectrum of opportunity that makes it far easier for the affluent than for the poor, for whites than for people of color, both to prevent unwanted pregnancy and birth, on the one hand, and to have access to reproductive technologies when they suffer infertility, on the other.[3]

In this chapter, I focus primarily on the incidence of preventable infertility and access to infertility treatment for those living in poverty, but I will, on occasion,

respect and social recognition to citizen status. Hirschmann writes of people with disabilities, "*Being* a citizen is based on factual and objective criteria, such as where you were born; disabled people who fit those criteria *are* citizens. But they are not *treated as if* they are." Chapter 7.

3 See Patricia Hill Collins, *Black Sexual Politics: African Americans, Gender, and the New Racism* (New York: Routledge, 2004); Dorothy Roberts, *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty* (New York: Random House, 1997); Lisa Ikemoto, "The In/Fertile, the Too Fertile, and the Dysfertile," 47 *Hastings L. J.* 1007 (1996); Laurie Nsiah-Jefferson and Elaine J. Hall, "Reproductive Technology: Perspectives and Implications for Low-Income Women and Women of Color," in Kathryn Strother Ratcliff et al., eds., *Healing Technology: Feminist Perspectives* (Ann Arbor: University of Michigan Press, 1989), at 93–118; see generally Iris Marion Young, *Justice and the Politics of Difference* (Princeton, NJ: Princeton University Press, 1990) (group difference and oppression).

draw attention to the issue of how workplace structures create a double bind for women who wish to combine remunerative work and caregiving. Structures that present some pregnant women with what Joanna Grossman identifies as the Hobson's choice to continue working in a dangerous job or forego employment or that lead some women to postpone childbearing until they suffer age-related infertility contribute to women's subordination in both family and civil society and are a denial of women's equal citizenship.[4] I begin by considering the meaning of reproductive freedom, and why the ability to choose whether to have a family is important to both personal happiness and "civic dignity" and equality.[5] I then present data showing that infertility disproportionately affects society's most marginalized groups – impoverished Hispanic and black minorities and other groups in the lowest tiers of socioeconomic status (SES) measures. I argue that the existence of these group differences in the ability to form families creates a public responsibility to take measures to lower the rate of infertility among the poor and provide access to (at least some) infertility treatment. It is not clear, however, that the frequently mentioned proposal to require medical insurers to include coverage for infertility treatment is the best way to narrow the gap in people's chances to have and raise children. Preventative measures – including education about risky behaviors, widespread screening and treatment for STDs and other diseases that cause infertility, and reduction of environmental toxins that adversely affect fertility (along with workplace reforms to ease the stress of combining child rearing and remunerative work) – not only may be effective, but may also shift the definition of the problem from an individual's medical condition to social practices and policies.

While the focus of this chapter is the effect of poverty as a contributing factor to infertility and an obstacle to obtaining medical treatment, my argument that there is a right to family relationship implies that withholding the use of infertility treatments and reproductive technologies from unmarried persons and same-sex couples is unjustifiable. Access to both reproductive technologies and insurance coverage should be available to individuals without regard to marital status or sexual orientation. As Judith Daar says in her discussion of "invisible barriers" to family formation, "intentional withholding of ART [assisted reproductive technology] services on the basis of personal characteristics" results not only in "a deprivation of parenthood, but [also in] a deprivation of the human dignity that is at the root of procreative decision-making."[6] Discrimination on the basis of sexual orientation should be prohibited, and government should promote measures reducing the impact of poverty on both fertility and access to infertility treatment.

[4] On the double bind, see Michele Goodwin, "Assisted Reproductive Technology and the Double Bind: The Illusory Choice of Motherhood," 9 *J. Gender, Race and Just.* 1, 2 (2005); on the forced choice between employment and risking fetal harm, see Chapter 10.

[5] Shklar, *American Citizenship*, at 100.

[6] Judith F. Daar, "Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms," 23 *Berkeley J. Gender L. and Justice* 18, 58–59 (2008).

Lying behind my argument that social justice and equal citizenship require measures to address inequalities in the incidence and treatment of infertility among various sectors of the population is a broader claim. It is that citizens' interest in having and raising children is sufficiently strong to require the state to take steps to ensure that no one is precluded by discrimination or by remediable or preventable poverty from these activities and that raising children does not result in unequal civic status for women and men. I cannot develop a defense of my assertion that society has an obligation to provide the preconditions for successful child rearing here,[7] but I contend that social justice requires that group inequalities that result from remediable structures and practices must be changed to create more equitable chances for family life. Despite the fact that most discourse tends to portray infertility as a result of natural processes gone awry and a personal tragedy, when infertility affects a citizen's opportunity to form a family, it is more than a natural misfortune – it is also a subject of justice and equal citizenship.

Reproductive Freedom and Equal Citizenship

Although infertility is often diagnosed and treated by medical procedures, these procedures are not directed at curing a disease or disability in the usual meanings of those terms; rather, infertility treatment is aimed at making it possible for someone to undertake the social role of parent. Advocates of increasing access to infertility treatment often do so under the rubric of equal rights to health care. But this framework obscures the fact that the goal of medical intervention is not combating disease or increasing longevity, but rather, increasing the ability to choose whether to become a parent. Only if this social goal is kept in mind will it be clear that a range of measures far broader than access to fertility drugs and technology is necessary to undermine the two-tier system of reproduction and to protect reproductive freedom for all.

Many ethicists who have considered the question of whether people have (or should have) a right to reproduce focus their attention on the importance of having and raising children to some people's life plans. Bonnie Steinbock thinks that a claim for a right to reproduce derives from "the importance to people of procreation, or more broadly, making one's own decisions regarding one's procreative ability." But she is quick to add that procreation is not valued "merely or primarily as a means of passing on one's genes. Rather, procreation is valued as the usual way to have and rear children, a life event 'so basic to human flourishing' that it merits the protection of a right." [8] Thomas Murray concurs, noting that many people regard children as "a

[7] For discussions of the respective responsibilities of parents and the state for children's well-being, see Linda C. McClain, *The Place of Families: Fostering Capacity, Equality, and Responsibility* (Cambridge, MA: Harvard University Press, 2006); Maxine Eichner, "Children, Parents, and the State: Rethinking Relationships in the Child Welfare System," 12 *Va. J. Soc. Pol'y and L.* 448 (2005); and Maxine Eichner, "Dependency and the Liberal Polity: On Martha Fineman's *The Autonomy Myth*," 93 *Cal. L. Rev.* 1285 (2005).

[8] Bonnie Steinbock, "Rethinking the Right to Reproduce" (working paper 98.05, Harvard Center for Population and Development Studies, Cambridge, MA, 1998).

vital part of our own flourishing." He, too, focuses not on biological procreation as an end in itself, but on the fact that for people who want to have children, "the main point in having a child is to initiate the relationships that will develop between that child, its siblings, and the adults in its life."[9] Such relationships are also at the center of Dan Brock's observation that people who want to reproduce usually are trying to "promote some typical objective components of the good such as the deep personal relations between parent and child."[10] Others point out that those relationships entail a long period of interaction and commitment: "the right to procreate is the right to produce one's own children to rear. . . . It is the objective of rearing the child – of establishing a family – that elevates the right to procreate to a lofty status."[11] In other words, procreative rights are not simply about contraception and abortion, but include "the right to participate in the basic human practice of raising and nurturing children."[12] In their different ways, all these authors contend that the desire to have and rear children stems from such a deep, widespread, and self-defining aspiration that it suggests the existence of a right not simply to procreate, but to engage in the long-term activity of raising a child to adulthood.

The ability to choose whether to have and raise children is not simply a source of identity and of personal well-being, however; in the United States, it is also an attribute of citizenship. Judith Shklar has argued that the American understanding of citizenship as "public respect," "civic dignity," and "recognition" by one's fellow citizens was shaped in profound and enduring ways by the national experience of slavery.[13] Slavery influenced Americans' sense of the attributes of citizenship: Shklar regards the right to vote and the right to earn as two fundamental pillars of U.S. citizenship in large part because the vote and the ability to earn were denied to slaves.[14] Shklar's description of "the right to earn" is apt as well for the right to form a family: it "may not be a constitutional right or one that the courts should enforce,

9 Thomas H. Murray, *The Worth of a Child* (Los Angeles: University of California Press, 1996), at 14, 18.

10 Dan W. Brock, "Funding New Reproductive Technologies: Should They Be Included in Health Insurance Benefit Packages?," in Cynthia B. Cohen, ed., *New Ways of Making Babies: The Case of Egg Donation* (Bloomington: Indiana University Press, 1996), at 213–30, 220.

11 Elizabeth S. Scott, "Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy," 5 *Duke L. J.* 806, 829 (1986).

12 Sonia Correa and Rosalind Petchesky, "Reproductive and Sexual Freedom: A Feminist Perspective," in Gita Sen et al., eds., *Population Policies Reconsidered: Health, Empowerment, and Rights* (Cambridge, MA: Harvard University Press, 1994), at 114.

13 Shklar, *American Citizenship*, at 3, 100.

14 During the Jacksonian era, advocates of universal (white) manhood suffrage pressed for the vote "because it meant they were citizens, unlike women and slaves, as they repeated over and over again. Their very identity as free males was at stake." Ibid., at 49. The right to earn is also a distinguishing mark of U.S. citizenship, although unlike the vote, it is not a right recognized in constitutional (or statutory) law. Jacksonian reformers saw themselves as "new men" situated between the equally unacceptable conditions of idle elites and unpaid slaves. They regarded the ability to earn, to be neither slave nor idle rich, as so important that "there may be an implicit right to work embedded in this enduring ideology," an ideology that could bolster the case of those striving to establish a national jobs program or universal employment. Ibid., at 65. See also Chapter 10 (on a pregnant woman's right to work as an aspect of social citizenship).

but it should be a presumption guiding our policies. Instead of being regarded as just one interest among others, it ought to enjoy the primacy that a right may claim in any conflict of political priorities."[15]

There are compelling reasons to regard the right to family as a third pillar of American citizenship. Slaves had no legally recognized family ties: they could not marry under the law, and they did not have legal custody of their children. Husbands and wives were separated, children were sold away from their parents, and some of the most heart-wrenching recollections of life under slavery recount the grief and trauma suffered by husband and wife, parent and child, at forced separation. Peggy Cooper Davis has demonstrated that in the wake of the Civil War, one of the rights that proponents of the Fourteenth Amendment hoped to secure was the right to establish a family. Denial of family rights was "a hallmark of slavery," and the "people who struggled for abolition and reconstruction regarded denial of family liberty as a vice of slavery that inverted concepts of human dignity, citizenship, and natural law."[16] Given the emotional devastation caused by the involuntary severing of family bonds, "it is not an accident that the establishment of families was seized upon by emancipated people as a badge of civil freedom."[17] This "badge of civil freedom" involves both self-definition and recognition by society that one counts as a member of civil society.

The fact that the ability to form a family gives people civic standing is most easily seen in those instances in which the state takes away or restricts that ability – for example, through measures like involuntary sterilization; refusal by prison authorities to allow an inmate to have his sperm sent to his wife for alternative insemination; birth control as a condition for parole or for welfare eligibility; and a "child cap" for recipients of welfare. Respect for reproductive freedom means that the removal of children from parental custody must be a last resort: "taking children away from their parents infringes procreative liberty, because rearing is a part of procreative liberty."[18] Those who lose the ability to bear or raise children because of state action are not only affected emotionally, but are also profoundly stigmatized. The fact that close to 60 percent of children in foster care are African American, a number far out of proportion to their presence in the population as a whole, is both a reflection of and a contributing factor to the cultural stereotype of black single mothers as not only unfit parents, but also unfit citizens.[19]

[15] Shklar, *American Citizenship*, at 99.

[16] Peggy Cooper Davis, *Neglected Stories: The Constitution and Family Values* (New York: Hill and Wang, 1997), at 9–10.

[17] Ibid., at 247; see Peggy Cooper Davis, "Neglected Stories and the Sweet Mystery of Liberty," 13 *Temp. Pol. and Civ. Rts. L. Rev.* 769 (2004); Peggy Cooper Davis, "Marriage as a 'Badge and Incident' of Democratic Freedom," in Anita Bernstein, ed., *Marriage Proposals: Questioning a Legal Status* (New York: New York University Press, 2006).

[18] Steinbock, "Rethinking the Right to Reproduce," at 16–17.

[19] See Roberts, *Killing the Black Body*; Dorothy Roberts, *Shattered Bonds: The Color of Child Welfare* (New York: Basic Civitas Books, 2002).

State action also structures the background conditions that affect people's chances successfully to form a family. The state may (or may not) fund research on reproductive technologies; require insurance coverage of infertility treatment; provide education, screening, and treatment for STDs that can lead to infertility; regulate environmental and workplace conditions that carry a risk for infertility; and mandate family leave and provide child allowances. Although infertility affects people in all racial and economic groups, these measures (or lack thereof) do not affect all segments of society equally: poor neighborhoods suffer higher rates of STDs and receive less treatment for them; the poor have far fewer opportunities to avoid environmental and workplace hazards; in the (few) states that require insurance companies to cover infertility treatment, only those with jobs that provide insurance receive the benefit; and only the well-to-do can afford to pay for use of new reproductive technologies (NRTs). While the state is not required to even out all life chances that stem from economic inequality, the fundamental nature of the interest in being able to choose whether to have children and the myriad state actions that affect that ability mean that government must do much more than it currently does both to prevent and to treat infertility.

The Demographics of Infertility

Infertility thwarts many people's desire to have a family. Medical authorities define *infertility* as the inability of a married couple to conceive after twelve months of unprotected sexual intercourse.[20] *Impaired fecundity* refers to a broader range of people and conditions; it applies to cohabiting as well as married couples, and it encompasses the inability to have a baby for any reason other than a sterilizing operation, the inability to carry a baby to term, or lack of success in achieving a pregnancy after three years of attempting to do so.[21] This difference in terminology complicates analyses and discussions of involuntary childlessness in the medical literature, but for my purposes, I can reasonably follow the layperson's practice of referring to both conditions as infertility.

A significant cause of infertility in women is pelvic inflammatory disease (PID), an infection of the female reproductive organs that affects approximately 1 million women each year and renders more than 100,000 women infertile annually. PID occurs when sexually transmitted bacterial infections, most notably Chlamydia and gonorrhea, remain untreated or inadequately treated. According to the Centers for Disease Control and Prevention's (CDC) STD surveillance data for 2004, Chlamydia rates rose 5.9 percent from 2003 to 2004, while the rate for gonorrhea

[20] Anjani Chandra et al., "Fertility, Family Planning, and Reproductive Health of U.S. Women: Data From the 2002 National Survey of Family Growth," Centers for Disease Control and Prevention, National Center for Health Statistics, Vital Health Statistics Report, ser. 23, no. 25 (U.S. Department of Health and Human Services, Washington, DC, 2005), at 22, available at http://www.cdc.gov/nchs/data/series/sr_23_025.pdf.

[21] Ibid., at 22, 154.

went down 1.5 percent. Both of these infections disproportionately affect minority groups in the United States; Chlamydia rates are seven times higher among African American females than white females, while female gonorrhea rates among African Americans, American Indian/Alaskan Natives, and Hispanics, respectively, are approximately nineteen, four, and two times greater than among whites.[22] Since these groups disproportionately represent the most impoverished members of society – recent data reveal a 24.7 percent poverty rate for African Americans and a 21.9 percent rate for Hispanics, compared to the 8.6 percent rate for the non-Hispanic white majority[23] – minority STD rates become a product of overlapping and linked racial and economic factors. Considering that 40 percent of Chlamydia cases result in PID, and that of those resultant PID cases, one in five becomes infertile, no discussion of infertility prevention in the United States can ignore the devastating role of STDs and their links to minority groups.

A complex network of socioeconomic, environmental, and educational factors affects people's ability to conceive and bear children, and have those children survive. Lack of educational programs about all STDs, including those (Chlamydia, gonorrhea, syphilis) that increase the likelihood of infertility through causing PID; limited access to diagnostic screening and treatment for STDs and HIV; and exposure to harmful chemicals in homes, neighborhoods, and workplaces all contribute to infertility.[24]

Ironically, the frequency of infertility within a given population is in inverse relationship to that population's use of infertility services. Poorer women, and those who lack health insurance, are less likely to go to a doctor for fertility assistance, and race, educational level, marital/cohabiting status, and SES all affect access to fertility services. The 2002 National Survey of Family Growth, published by the National Center for Health Statistics, revealed that only 8.2 percent of the Hispanic/Latina population and 8.4 percent of the African American population surveyed had utilized infertility services in the United States, compared to 13.8 percent of the white population. Those data also showed that 9.2 percent of the lowest poverty tier (defined as up to 149 percent of the poverty line) accessed infertility services, compared to

[22] Centers for Disease Control and Prevention, "STD Surveillance 2004, Special Focus Profiles: STDs in Racial and Ethnic Minorities," U.S. Department of Health and Human Services, Washington, DC, 2005, available at http://www.cdc.gov/std/stats04/minorities.htm/ (accessed May 5, 2009).

[23] Carmen DeNavas-Walt et al, "Income, Poverty, and Health Insurance Coverage in the United States: 2004," U.S. Census Bureau, Current Population Reports P60-229. U.S. Census Bureau, Washington, DC, 2005, available at http://www.census.gov/ (accessed Aug. 2005).

[24] On STDs, see Johannes L. H. Evers, "Female Subfertility," 359 *Lancet* 151 (2002); Nadereh Pourat et al., "Medicaid Managed Care and STDs: Missed Opportunities to Control the Epidemic," *Health Affairs*, June 2002; Robert L. Brent and Michael Weitzman, "The Pediatrician's Role and Responsibility in Educating Parents About Environmental Risks," 113 *Pediatrics* 1167 (2004) ("sexually transmitted disease can be life-threatening, cause infertility or sterility, and increase the risk of cervical cancer"). On HIV, see Marie Withers Osmond et al., "The Multiple Jeopardy of Race, Class, and Gender for AIDS Risk Among Women," 7 *Gender and Soc'y* 1, 99–120 (1993); Shari Margolese, "Fertility, Conception and HIV," *BETA*, summer 2004, at 45–47.

17.6 percent at the highest tier (300 percent of the poverty line or more). In other words, the very poor used fertility services only half as much as wealthier members of society. Other studies have demonstrated that African American and Hispanic women underutilize infertility services, and the majority of patients are white, highly educated, and well-to-do.[25] This is not surprising because "disparities related to race, ethnicity, and socio-economic status pervade the American healthcare system,"[26] and also perhaps, as some studies of African American family life have argued, there may be less emphasis on the genetic tie among African American families than among white families.[27]

The correlation of SES and educational level with use of infertility treatment reflects the extraordinary expense of high-tech infertility treatments like in vitro fertilization (IVF).[28] Treatments for infertility range from moderately costly to very expensive. Preliminary tests designed to locate the source of the difficulty in conceiving cost several hundred dollars. Drugs to stimulate ovulation cost between $1,050 and $5,600 per cycle.[29] In 2002, one authority estimated the cost of a single cycle of IVF as $9,547, which did not include medication costs, which run about $2,000 to $5,000. The median household income in the United States that year was $42,409, so a single cycle of IVF exceeded 30 percent of an average family's income, placing it virtually out of reach.[30] Use of donor eggs entailed additional expense; the lowest cost for donor eggs in 2003 was between $3,000 and $4,000, but prices could stretch up to $25,000 in some areas for eggs from particular kinds of donors.[31]

Differences in the distribution of household income among racial groups mean that "African American and Hispanic households are more likely to be shut out from access to IVF treatment" than white or Asian households.[32] In addition to

[25] Tarun Jain and M. D. Hornstein, "Disparities in Access to Infertility Services in a State With Mandated Insurance Coverage," 84 *Fertility and Sterility* 221, 221–23 (2005); Marianne Bitler and Lucie Schmidt, "Health Disparities and Infertility: Impacts of State-Level Insurance Mandates," 85 *Fertility and Sterility* 858 (2006); Tarun Jain, "Socioeconomic and Racial Disparities Among Infertility Patients Seeking Care," 85 *Fertility and Sterility* 876, 879–80 (2006).

[26] Agency for Healthcare Research and Quality, "National Healthcare Disparities Report" (2004) (cited in Jain and Hornstein, "Disparities in Access," at 800).

[27] Dorothy Roberts, "The Genetic Tie," 62 *U. Chi. L. Rev.* 209 (1995); Carol Stack, *All Our Kin: Strategies for Survival in a Black Community* (New York: Basic Books, 1997); bell hooks, *Salvation: Black People and Love* (New York: Harper Collins, 2002).

[28] Elizabeth Hervey Stephen and Anjani Chandra, "Use of Infertility Services in the United States, 1995," 32 *Fam. Plan. Persp.* 132 (2000); Bitler and Schmidt, "Health Disparities and Infertility," at 858–65.

[29] Debora L. Spar, *The Baby Business: How Money, Science, and Politics Drive the Commerce of Conception* (Cambridge, MA: Harvard University Press, 2006), at 24; see also Leslie King and Madonna Harrington Meyer, "The Politics of Reproductive Benefits: U.S. Insurance Coverage of Contraceptive and Infertility Treatments," 11 *Gender and Soc'y* 8, 8–30 (1997).

[30] Jain, "Socioeconomic and Racial Disparities," at 876; Debora Spar gives the average cost in 2003 as $12,400, a very similar figure. Spar, *Baby Business*.

[31] Spar, *Baby Business*, at 29.

[32] Jain, "Socioeconomic and Racial Disparities," at 877.

low earnings, low-income workers often lack insurance coverage.[33] Even those with insurance are rarely covered for infertility treatment. Poor women have greater rates of infertility than middle-class women, but they receive less treatment for fertility and are exposed to more risks to childbearing than more privileged women. Infertility is not only a medical problem requiring individual treatment, but also a reflection of group inequalities that call for rectification through public policy.[34]

Social Justice and Infertility

In a variety of ways, public policy aids the reproductive choices of those who are white and well-off and denigrates or thwarts the efforts of those who are poor. A just public policy with respect to infertility must incorporate attention both to *distributive* justice, which would address the enormous cost of NRTs and increase access to those technologies (probably through universal medical insurance), and to *social* justice, which addresses group inequalities in a broad range of measures supporting family formation and maintenance. Research on reproductive technologies and mandated insurance coverage of infertility treatment validates the reproductive desires of the well-to-do and the employed but are not much help to those unable to afford reproductive technologies or not covered by health insurance. At the same time, the burgeoning literature on mandatory insurance coverage of infertility treatment can divert attention from the need for comprehensive programs that address the *prevention* of infertility before it ever develops. There is a need for initiatives that illustrate "how new public health policies and community-oriented measures can complement or replace the current emphasis on expensive, high-tech interventions for the treatment of infertility"[35] as well as for greater access to infertility treatment, including IVF.

Preventing Infertility

The links among STDs, PID, and infertility mean that preventing infertility is best addressed by an array of public health measures, including screening for disease and education about the short-term and long-term risks of unprotected sexual activity. Since both Chlamydia and gonorrhea disproportionately affect women under the age

[33] "In 1983, 14 percent of whites, 21.8 percent of blacks, and 29.1 percent of Hispanics were not covered by health insurance of any kind." Jefferson and Hall, "Reproductive Technology." Currently approximately 47 million people in the United States (about 15.8 percent) are uninsured. Stacey Burling, "Health-Care Coverage: The Number of People Without Health Insurance Continues to Rise," *Philadelphia Inquirer*, Aug. 29, 2007, at A01.

[34] Helena Michie and Naomi Cahn, *Confinements: Fertility and Infertility in Contemporary Culture* (New Brunswick, NJ: Rutgers University Press, 1997), point out that infertility advice books almost always assume middle-class subjects and audiences, promote individual medicalized solutions, and are devoid of social and political analysis.

[35] Elizabeth Heitman, "Infertility as a Public Health Problem: Why Assisted Reproductive Technologies Are Not the Answer," 6 *Stan. L. and Pol'y Rev.* 89, 90 (1995).

of twenty-five, screening for sexually active adolescents is very important. Despite a CDC recommendation that both men and women receive annual screening for Chlamydia, a 2004 study found that "only one in five [of sexually active U.S. female adolescents] were receiving [STD] screening, even if they were receiving routine health care."[36] Meanwhile, another study found that "receipt of sexual health services was particularly rare for all boys and for girls whose primary language was not English."[37] These studies suggest large unmet needs in sexual health care for adolescents and young adults. Even when health care was available, then, it often was inadequate for the population served.

More aggressive spending and programming in terms of Chlamydia screening and treatment have succeeded in curbing PID rates in the past. A 1996 study of a health maintenance organization in the Northwest found that selective testing for cervical Chlamydia and subsequent treatment could result in a decreased rate of PID; in this case, the decline was 56 percent one year after screening and treatment.[38] Integrating screening into standard health care (physicals, annual check-ups, etc.) can serve as a method by which to combat further STD-caused PID and chances of subsequent infertility. This program avoids the damage done to those affected and is more cost-efficient than current programs that emphasize the treatment, not prevention, of STDs and STD-caused PID.[39]

This restructuring of health services must be accompanied by concerted efforts to educate about sexually transmitted diseases, their prevention, their treatment, and their effects. While most secondary schools across the country have some sort of "sex education" class, programs that receive federal funds "are prohibited from using their grants to advocate contraceptive use," despite research that shows that "public support for instruction on condoms and other contraceptives is almost as

[36] Lynne C. Fiscus et al., "Infrequency of Sexually Transmitted Diseases Screening Among Sexually Experienced US Female Adolescents," 36 *Persp. Sexual and Reprod. Health* 233, 236 (2004).

[37] William E. Lafferty et al., "Provision of Sexual Health Services to Adolescent Enrollees in Medicaid Managed Care," 92 *Am. J. Pub. Health* 1779, 1781 (2002).

[38] Delia Scholes et al., "Prevention of Pelvic Inflammatory Disease by Screening for Cervical Chlamydial Infection," 334 *New Eng. J. Med.* 1362 (1996). For summaries of other studies, see Susan DeLisle, "Preserving Reproductive Choice: Preventing STD-Related Infertility in Women," 25 *SIECUS Rep.* 18 (1997).

[39] Susan D. Hillis and Judith N. Wasserheit, "Screening for Chlamydia – A Key to the Prevention of Pelvic Inflammatory Disease," 334 *New Eng. J. Med.* 1399 (1996). A 2002 survey of Medicaid managed care organizations (MCOs), contracted medical groups, and primary care providers found that the most common barrier to effective STD prevention and treatment was a "lack of organizational priority." Primary care physicians "consistently cited financial constraints as barriers to following some guidelines," which included "the exclusion of medications . . . from the health plan or Medicaid formulary," "lack of payment for some procedures that were deemed unnecessary by MCOs, and the lack of funds for universal testing." Nadereh Pourat et al., "Medicaid Managed Care and STDs: Missed Opportunities to Control the Epidemic," 21 *Health Aff.* 236 (2002). STD treatment was hampered by both an infrastructure that did not adequately determine what was to be treated and what was not and an inadequately funded treatment program.

high as that for abstinence instruction."[40] The emphasis on abstinence education leaves adolescents with little knowledge about how to prevent STDs or where to receive treatment and screenings for STDs. This lack of information, coupled with an existing system of medical treatment that does not give priority to STD screening, contributes to the incidence of infertility.

A comprehensive approach to preventing infertility should also recognize that public health measures concerning the workplace and the environment may also affect infertility in both men and women. Studies have found "significantly higher rates of infertility . . . in women employed in several occupations, including dental assistants exposed to nitrous oxide, women exposed to glycol ethers in the production of silicon wafers in the semiconductor industry, and women exposed to organic solvents in a variety of occupations."[41] As job options decrease with declining SES, some individuals may be left without an alternative but to accept a job that threatens both their health and their capacity to form a family. Environmental toxins have also been linked to decreasing sperm counts; exposure "may occur through a variety of pathways, including exposure to pesticides [including DDT] or industrial emissions and/or ingestion of animal fat or contaminated drinking water."[42] Researchers need to ask who fills the jobs in which exposure to toxins is significant, and who lives in urban or rural settings that have more concentrated contamination than other areas. Understanding the relationships between exposure to harmful workplace and environmental toxins and infertility requires further research, but is nevertheless an essential component of a public health and social justice approach to preventing infertility.

Distributive and Social Justice Responses to Infertility

The unequal access to assisted reproduction created by its staggering cost has led some people to argue that access to fertility treatment, including both drug treatment and access to NRTs, must be equalized by mandating that at least some procedures be covered by either public or private insurance. The discussion around this question is extraordinarily complex because it involves the question, first, of whether there is a right to health care, and then of whether and in what ways infertility is comparable to medical conditions covered by insurance. I cannot cover these topics comprehensively, but I believe that the right to a chance to have and raise children entails (where it is economically feasible, as it is in the United States) a right to access to infertility treatment (including some IVF). However, the claim to receive such assistance should not be understood as a right to medical treatment per se, but as a right to assistance in family formation. Because the goal of infertility treatment

[40] David J. Landry et al., "Factors Associated With the Content of Sex Education in US Public Secondary Schools," 35 *Persp. Sexual and Reprod. Health* 261, 267 (2003).

[41] A. T. Fidler and J. Bernstein, "Infertility: From a Personal to a Public Health Problem," 114 *Public Health Rep.* 494, 500 (1999).

[42] Ibid.

is to help people form family relations, any benefits or supports for fertility treatment should be universal – that is, available to all – and should attach to adoption as well.

Many advocates of public provision of health care (some form of universal health insurance, whether public or a mixture of public and private) focus on the fact that health is a basic need or primary good of all members of society. Drawing on the work of John Rawls, ethicists Norman Daniels, Bruce Kennedy, and Ichiro Kawachi argue that health care must be part of a just society because health care protects individuals' access to the normal range of opportunities in their society.[43] Dan Brock joins Daniels in claiming that health and health care are parts of a theory of distributive justice because those suffering ill health are most likely to be deprived of other basic goods like wealth, position, opportunity, and security, and those deprived of these other basic goods are most likely to suffer ill health.[44] Amartya Sen, for his part, does not define justice as the proper distribution of basic goods, but rather as the fulfillment of society's obligation to provide people with those resources needed to develop essential human capabilities. His reorientation of the discussion from an income-centered to a capabilities approach is particularly relevant to the ability to establish a family because the capabilities approach understands the problem of poverty not as one primarily of inequality, but as the lack of freedom that inequality brings in its wake.[45]

Several theorists argue that procreation and parenting are of such central importance to an individual's identity and life goals that giving everyone equal opportunity to choose whether to parent a child means that insurance (public or private) should pay for infertility treatment. Brock, for example, asserts that when persons, through no fault of their own, cannot reproduce without assistance, "those means should be secured . . . as part of the basic welfare rights of all citizens and as necessary for equality of opportunity to construct and pursue one's own plan of life."[46] Also claiming that having and raising genetically related offspring is "a constitutive element of leading a good life" for many, Justine Burley argues that "justice demands that individuals be compensated for all or part of the assisted conception techniques that they undergo."[47] Mary Anne Warren agrees with those who claim that "distributive

43 Norman Daniels et al., "Why Justice Is Good for Our Health: The Social Determinants of Health Inequalities," 128 *Daedalus* 215 (1999); John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971).

44 Dan W. Brock, "Broadening the Bioethics Agenda," 10 *Kennedy Inst. Ethics J.* 21 (2000). "This is not just a vicious circle," says Patricia Smith, "it is a vicious downward spiral." Patricia Smith, "Justice, Health, and the Price of Poverty," in Rosamond Rhodes et al., eds., *Medicine and Social Justice* (New York: Oxford University Press, 2002), at 426–37, 302.

45 Amartya Kumar Sen, *Inequality Reexamined* (New York: Oxford University Press, 1992).

46 Dan W. Brock, "Procreative Liberty," 74 *Tex. L. Rev.* 187, 193 (1995) (reviewing John A. Robertson, *Children of Choice: Freedom and the New Reproductive Technologies* [Princeton, NJ: Princeton University Press, 1994]).

47 Justine Burley, "The Price of Eggs: Who Should Bear the Costs of Fertility Treatments?," in John Harris and Søren Holm, eds., *The Future of Human Reproduction: Ethics, Choice and Regulation* (New York: Oxford University Press, 1998), at 129. She draws on Ronald Dworkin's theory of liberal equality and distributive justice.

justice requires universal access to these medical services [for infertility], within the limits of the available medical resources and other social needs."[48] Covering the cost of NRTs is a mechanism by which equal opportunity with regard to a fundamental good (Rawls) or the capacity to exercise a fundamental human capability (Sen) can be achieved.

Whether to characterize infertility as a medical condition requiring medical treatment and warranting coverage by health insurance is a thorny question. Although the purpose of infertility treatment is not to cure disease, but rather, to form a family, diagnosing infertility often requires medical testing, and treatment, whether by drugs or reproductive technologies, requires doctors and medical treatment.[49] Moreover, if infertility treatment is not covered by insurance, the well-to-do will have access to reproductive technologies, while the poor will not. Most advanced infertility treatment is paid for out-of-pocket and so is available only to those who are well-off.[50] Including treatment for infertility in medical insurance seems to be a practical way to help the infertile across economic classes.

Requiring that health insurance policies include infertility treatment as a benefit, however, has not so far altered patterns of access significantly. An April 2006 study that examined the fifteen states that provide insurance mandates for infertility found "no evidence that these mandates have mitigated the disparities in treatment by race, ethnicity, or SES." One group did benefit from the mandates: highly educated women over thirty. The investigators concluded that "despite the rhetoric of expanded access accompanying passage of the mandates, these laws may not be reducing existing disparities in treatment." The explanation may lie in the fact that "highly educated women 30 and older are also the group most likely to have private insurance."[51] The indigent receive medical benefits under Medicaid, but no state offers infertility treatment as part of its Medicaid benefits.[52] Many of the near-poor, including those who work full time, have no health insurance. Treating infertility by mandating that insurers cover IVF and other NRTs creates greater equality of opportunity to form a family only under a system of universal health insurance.

[48] Mary Anne Warren, "Does Distributive Justice Require Universal Access to Assisted Reproduction?," in Rhodes et al., *Medicine and Social Justice*, at 426.

[49] One of the common treatments for infertility, alternative insemination, does not require medical administration to be safe and effective but has become a procedure performed by a doctor. When done without professional medical assistance, "the collection of sperm is performed by the donor. . . . Insertion is very simple and can be successfully and safely executed with a kitchen utensil such as a turkey baster. . . . A woman can obtain sperm directly from a sperm bank which screens donors for AIDS and other communicable diseases." Daniel Wikler, "Policy Issues in Donor Insemination," 6 *Stan. L. and Pol'y Rev.* 47, 49 (1995).

[50] Even though both infertility and impaired fecundity "are more common among non-white women, among less educated women, and among older women . . . use of treatment is less common among non-white women and women with lower levels of education, and much more common among older women." Bitler and Schmidt, "Health Disparities and Infertility," at 861.

[51] Ibid., at 864.

[52] King and Meyer, "Politics of Reproductive Benefits," at 17–18.

Universal coverage of (at least some) infertility treatment would, in all likelihood, not be prohibitively costly, despite the fact that IVF is expensive and that there are competing needs.[53] Maura Ryan asserts that "one of the most persistent and pervasive myths concerning the costs of treating infertility is that IVF is a *uniquely* expensive response to infertility, therefore that the costs of treating infertility can be controlled simply by excluding IVF."[54] But in fact, NRTs may be cost-effective compared to other techniques. There is general agreement that IVF is at least as cost-effective as tubal surgery as a way of treating infertility due to blocked fallopian tubes, but it is less frequently covered by insurance plans.[55] With respect to male factor infertility, intracytoplasmic sperm injection (ICSI) achieved a pregnancy rate of 24 percent per cycle, while donor insemination resulted in a pregnancy rate of 9 percent. However, the cost per delivery using ICSI-IVF was $89,009, significantly greater than that using donor insemination.[56] But for men whose religion prohibits using donor sperm (Islam is one such religion), ICSI may be the only way to have a genetically related child.[57]

A number of recent studies suggest that while the cost of treating any individual runs in the tens of thousands of dollars, when that expense is spread out over the population of the insured, coverage for infertility causes only a small increase in premiums. In 1995, an analysis of IVF services in the United States "estimated that the cost of adding IVF services to a health plan in 1995 would be $2.79 per person per year. This represents less than one tenth of one percent of the total health benefit cost of a typical policy." The University of Iowa is self-insured and has a fee-for-service health care plan that includes coverage for infertility treatment. An analysis showed that "infertility diagnoses and treatments accounted for 0.85% of the total health care costs. . . . Infertility costs in 1995 were $0.70 per member per month ($8.40 per member per year)." These costs were similar to those in the United Kingdom and New Zealand, where the costs for infertility treatment under national health insurance were estimated to be $4.62 and $2.35 per person per year, respectively.[58]

53 One study showed the cost per delivery at the University of Iowa Hospitals and Clinics in 1992 to be $44,200 for IVF, with somewhat lower costs for GIFT and ZIFT because of higher pregnancy rates with these procedures. Bradley J. Van Voorhis et al., "Cost-Effective Treatment of the Infertile Couple," 70 *Fertility and Sterility* 998, 998 (1998).

54 Maura A. Ryan, *The Ethics and Economics of Assisted Reproduction* (Washington, DC: Georgetown University Press, 2001), at 19.

55 Van Voorhis et al., "Cost-Effective Treatment," at 999–1000.

56 Ibid., at 1002.

57 Marcia C. Inhorn and Michael Hassan Fakih, "Arab Americans, African Americans, and Infertility: Barriers to Reproduction and Medical Care," 85 *Fertility and Sterility* 844 (2006).

58 Van Voorhis et al., "Cost-Effective Treatment," at 1003. In 1993, the American Fertility Society estimated that IVF represented as little as three-hundredths of 1 percent of total health care costs. American Fertility Society, Office of Government Relations, "Infertility and National Health Care Reform Fact Sheet" (1993) (cited in Peter J. Neumann, "Should Health Insurance Cover IVF? Issues and Options," 22 *J. Health Pol. Pol'y and L.* 1215, 1219 [1997]).

However, some people worry that if IVF were covered by insurance, more people would seek treatment and thus increase the cost to insurers.[59] But even with large utilization increases, premiums would not be likely to rise greatly, in part because treatments that are less cost-effective, such as tubal surgery, would very likely decrease. In addition, companies might set limits to the number of cycles the insurance would cover (many people mention three as a reasonable number), or cap lifetime benefits at some amount (say, $30,000), or permit the implantation of only three embryos per cycle to avoid the enormous expenses of multiple births. Such regulations make sense not only in terms of cost-effectiveness, but also in terms of social justice. They send the message that procreation is valuable to all persons and that society as a whole will provide some access to all members of the population.

Insurance coverage for infertility treatment is desirable not only if it is universally available, but also only if society has programs to pay for adoption expenses. While it might seem odd to mention adoption when considering a plan for medical insurance, doing so reflects the anomaly I have discussed with respect to infertility treatment: NRTs use medical procedures to resolve a social problem. In a thoughtful essay on the ethical demands of collaborative reproduction, Adrienne Asch reflects that "if founding families and raising children is thought crucial for many people's fulfillment, perhaps society should support collaborative reproduction and adoption through private insurance and thus aid people who would be parents."[60] Equal respect for all persons' reproductive freedom means that public as well as private insurance should cover such costs. Paying for expensive procedures like IVF, gamete intrafallopian transfer (GIFT), and zygote intrafallopian transfer (ZIFT) without paying adoption costs privileges biological procreation over other means of bringing children into a family and creates incentives for couples to use reproductive technologies, rather than adoption. We should "ensure that couples seeking treatment for fertility problems are cognizant of opportunities to adopt, and do not face disincentives to do so."[61] At the same time, it is vitally important to recognize the injustice of "freeing children for adoption" when provision of social services and supports would enable a family to stay together. The desire of infertile persons to raise children is not a sufficient reason to remove children from otherwise adequate homes that lack certain resources that society could supply. It is important that discussions of infertility always keep front and center the fact that the goal of

[59] In Ontario, Canada, and France, both of which support IVF by national health insurance programs, usage was three and five times higher than in the United States, respectively. Neumann, "Should Health Insurance Cover IVF?," at 1220 (citing J. A. Collins et al., "An Estimate of the Cost of In Vitro Fertilization in the United States in 1995," 64 *Fertility and Sterility* 538 [2002]).

[60] Adrienne Asch, "Parenthood and Embodiment: Reflections on Biology, Intentionality, and Autonomy," 2 *Graven Images* 229, 234 (1995).

[61] Neumann, "Should Health Insurance Cover IVF?," at 1232. Neumann suggests that employers could offer adoption benefits, including financial reimbursement, leave time, and information about adoption. The federal government already provides a tax credit of up to $5,000 for the expenses of adoption, and this could be supplemented by covering adoption expenses for federal employees and military personnel.

achieving a family can be met in a variety of ways, and that a social justice approach is required to evaluate their relationship to one another as well as to each individually.

Reimbursement for adoption expenses should be part of any insurance plan that covers infertility treatment. Adoption is good for those wishing to raise children, good for the children awaiting permanent homes, and good for a society that seeks to have all its children well cared for. It is important that discussions of infertility always bear in mind that the goal of achieving a family can be met in a variety of ways, and that a social justice approach is required to evaluate their relationship to one another as well as each individually.

Conclusion

Discussions of reproductive justice in the United States that focus only on the right to be free from governmental interference in the decision to conceive and bear a child miss the dimension of social justice that is involved in childbearing and child rearing and the ways in which those social justice concerns bear on citizenship. For many years, people who advocated so-called reproductive freedom thought of that freedom as entailing the right of access to contraception and abortion; more recently, various authors have extended the notion of reproductive freedom to argue that people should be free to use reproductive technologies like IVF with a minimum of government-imposed restriction or regulation.[62] But reproductive liberty must encompass not only the negative liberty of noninterference, but also the ability to effectuate one's decisions in the world. At present, in the United States, members of different socioeconomic and racial groups have significantly different opportunities to decide whether to have children, how many, and when.[63]

Access to reproductive technologies, along with access to resources to prevent and treat infertility, are crucial to securing the freedom to choose whether to have and raise children. As Laurie Nsiah-Jefferson and Elaine Hall note, "resources to prevent and treat infertility in nonwhite and poor women are a necessary part of a reproductive policy that genuinely increases all women's choices [concerning family formation]."[64] This means that local, state, and federal government must take aggressive measures to educate teenagers about the long-term risks to fertility of STDs and to provide adequate medical treatment for such diseases, as well as provide universal coverage for fertility drug treatment and access to reproductive technologies.

[62] John Robertson, *Children of Choice*. Naomi R. Cahn, *Test Tube Families: Why the Fertility Market Needs Legal Regulation* (New York: New York University Press, 2009), makes a thoughtful case for regulation.

[63] Joanna Grossman (Chapter 10) shows how lack of accommodation of pregnancy in the workplace can affect a woman's reproductive freedom by forcing a choice between continuing her employment or her pregnancy.

[64] Jefferson and Hall, "Reproductive Technology," at 111; see also Asian Communities for Reproductive Justice, "A New Vision for Advancing Our Movement for Reproductive Health, Reproductive Rights, and Reproductive Justice" (2005), available at www.reproductivejustice.org.

Compassion is an appropriate response to all who confront infertility, but examination of the incidence and treatment of infertility in the contemporary United States enables us to see that the ability (and inability) to have children and form families involves justice as well. Along with the ability to vote and to earn a living wage, the ability to have and maintain a family is one of the pillars of citizenship. When public policy creates or exacerbates inequalities among groups with respect to their ability to reproduce, those who suffer disadvantage are deprived of a fundamental human good and of the status of full and equal citizenship. More than being just powerless and poor, they are treated as less than full members of the polity. Infertility is more than a natural misfortune; rather, it is a subject of justice, and that realization should lead to public policy reflecting our commitment both to equal opportunity and to the equal value of citizenship due all Americans.

16

Reproductive Rights and the Reproduction of Gender

Barbara Stark*

Women's citizenship rights, that is, their rights to participate in social, economic, cultural, and political life on equal terms with men, are explicitly guaranteed in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, or the "Women's Convention").[1] These rights include the civil and political rights familiar to Americans from our own Constitution such as freedom of expression and freedom of association. These rights also include less familiar economic and social rights such as the right to work and the right to health. Under CEDAW, these rights are to be ensured in fact as well as in law. This means that CEDAW unequivocally bars what I refer to here as the *reproduction of gender*, that is, the perpetuation of gendered stereotypes. These include both the stereotype of "citizens" as male,[2] never pregnant, never breast-feeding, and the stereotype of women as exclusive caregivers, always subject to the endless demands of caregiving, even if not actually pregnant or breast-feeding. Rather, under CEDAW, men are expected to assume caregiving responsibilities, and the state is expected to encourage them to do so.[3]

Reproductive rights, including the right to decide when and whether to bear children, are a key component of the citizenship rights of women. Historically, however, reproduction has been viewed as a key component of women's duties as citizens. As Aristotle pointed out, women reproduce citizens, not only in the sense of rearing and raising them, but quite literally by producing them.[4] This notion has a

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1 Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180 (Dec. 18, 1979).

2 As Brenda Cossman explains earlier in this volume, "citizenship has always been sexed." See Chapter 13.

3 Convention, at Article 5 (Dec. 18, 1979). Article 5 provides in pertinent part that "States Parties shall take all appropriate measures . . . to ensure . . . the recognition of the common responsibility of men and women in the upbringing . . . of their children."

4 See D. Brendan Nagle, *The Household as the Foundation of Aristotle's Polis* (Cambridge: Cambridge University Press, 2006). See also Joan Judge, "Citizens or Mothers of Citizens? Gender and the Meaning of Modern Chinese Citizenship," in Merle Goldman and Elizabeth J. Perry, eds., *Changing Meanings of Citizenship in Modern China* (Cambridge, MA: Harvard University Press, 2002), at 23.

contemporary iteration in state natalist policies. States with burgeoning populations, such as China and South Africa, have adopted anti-natalist policies. States with plunging fertility rates, such as Germany and Greece, have adopted pro-natalist policies. Some state natalist policies infringe on women's reproductive rights. Some promote other aspects of women's citizenship rights. Some do both, violating reproductive rights even as they promote other rights.

This chapter examines the tensions between state natalist policies and women's citizenship rights, including their reproductive rights. My thesis is that while state natalist policies need not violate women's other citizenship rights, they often do so in fact, especially when they draw on unacknowledged notions of women's citizenship duties. Careful analysis is necessary, accordingly, to assess whether a particular policy measure is likely to violate reproductive rights or to reproduce gender, thus violating other citizenship rights, in a particular context.

The following section sets out women's citizenship rights in general, and their reproductive rights in particular, under international law. The third section examines anti-natalist policies, particularly those that also seek to promote women's citizenship rights. The fourth section examines pro-natalist policies, focusing on those that attempt to influence women's choices by a range of incentives. I conclude that strong-arm policies that violate rights may have impressive results in the short run, but such policies are apt to backfire over time. Approaches that promote women's reproductive rights as well as their other citizenship rights are more effective in the long run. State natalist policies, whether pro-natalist or anti-natalist, may well be most effective when they incorporate rights; they may well be disastrous when they do not. Rather, fostering women's fuller participation in public life, promoting equality, and making it possible for women (and men) to accommodate reproduction and paid work are more likely to contribute to the long-term success of state projects.

Women's Citizenship Rights Under International Law

In General

Women's full participation as citizens is an explicit objective of the Women's Convention, which begins by defining the term *discrimination against women* to mean "any distinction, exclusion or restriction made on the basis of sex, which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women . . . of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."[5]

Article 2 of the Women's Convention further requires the state "to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women." This is an extremely broad formulation, effectively holding the state responsible for all

[5] Convention, at Article 1 (Dec. 18, 1979).

discrimination on the basis of gender, whether through state policy, culture, or private prejudice.[6] No showing of an intent to discriminate is required. Thus the Women's Convention imposes an affirmative obligation on the state to take whatever steps are necessary to ensure women's full participation as citizens. These include special affirmative measures to bring women up to the starting line.

Reproductive Rights

In general, reproductive rights are not as well established in international human rights law as other citizenship rights because they focus on issues – conception, pregnancy, childbirth – that affect women more directly than they affect men. Because men do not conceive, become pregnant, give birth, or breast-feed their infants, these experiences are not reflected in traditional rights discourse.

Civil and political rights, in contrast, have been championed by men for more than 200 years. When women seek formal equality, that is, when they demand the same rights as men to freedom of speech, for example, they can rely on well-developed equality jurisprudence. When women assert reproductive rights, they are in less well-charted territory. These rights address issues historically and almost universally relegated to the private sphere, left to the determination of the married couple. This both reflects and perpetuates women's subordination within marriage. The idea that women should have control over the number and spacing of their children has been controversial, especially in cultures where large families are viewed as desirable. Nevertheless, reproductive rights are increasingly recognized in international human rights law, as set out below. These rights, including education about family planning and access to contraception, are now widely recognized throughout the world. Almost every state allows access to contraception, and several states provide contraceptives as a free public health benefit.

While reproductive rights are widely recognized as a general principle, the implementation of reproductive rights in the context of state natalist policies raises two major questions. First, are reproductive rights to be exercised by a couple, or by each individual within a couple? If the individuals do not agree, how should the dispute be resolved? Second, under what conditions, and through what mechanisms, can the state seek to influence the exercise of these rights? More specifically, do the particular measures adopted to effectuate state natalist policies violate these rights?

The Civil Covenant

The International Covenant on Civil and Political Rights (or the Civil Covenant) addresses civil and political rights. Article 3 of the Civil Covenant requires states to "ensure the equal right of men and women to the enjoyment of all civil and political rights," but there is no explicit reference to reproductive rights. While Article 17

[6] In addition to state violence, women's reproductive rights may also be violated by domestic violence. See Elizabeth Schneider's analysis in Chapter 18.

recognizes a right to "privacy," unlike the right to privacy that the U.S. Supreme Court has found in the U.S. Constitution,[7] the international version has not been construed to include the right to reproductive privacy.

Article 23 of the Civil Covenant ensures the "right of men and women of marriageable age to marry and to found a family" and requires the state to "take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage, and at its dissolution." This applies to state family planning policies, as the Human Rights Committee has pointed out:

> The right to found a family implies, in principle, the possibility to procreate and live together. When States parties adopt family planning policies, they should be compatible with the provisions of the Covenant and should, in particular, not be discriminatory or compulsory.[8]

The Economic Covenant

The International Covenant on Economic, Social, and Cultural Rights (or the Economic Covenant) ensures basic economic and social rights, including the right to health and the right to an adequate standard of living. Unlike the Civil Covenant, it has no counterpart in U.S. jurisprudence. Article 2 and Article 3 of the Economic Covenant require states to "ensure the equal right of men and women to the enjoyment of all economic, social, and cultural rights."

Article 10 of the Economic Covenant requires states to ensure "family rights," and Article 12 requires states to ensure the "right to health." Reproductive rights are crucial to any meaningful understanding of either article. Without reproductive rights, parents cannot determine the most fundamental issues of family membership such as the spacing or number of children.

The right to health can also be invoked to argue against state limits on abortion. As the World Health Organization has noted, the absence of safe, dependable contraception and abortion presents grave risks to the health of women, whether through unsafe abortions (20 million annually), severe maternal morbidity (20 million cases annually), or perinatal deaths (7.2 million annually).[9]

While it is clear that state-sponsored or state-sanctioned coerced abortions or sterilizations violate the covenants, it is not clear what kinds of incentives and disincentives, short of brute force, amount to coercion. It has been suggested that any incentives or disincentives by the state should be considered impermissible.[10] This assumes a neutral background, a level playing field. Where there is strong social coercion,

[7] See *Griswold v. Conn.*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Roe v. Wade*, 410 U.S. 113 (1973).

[8] Human Rights Committee, General Comment 19 (1990), Article 23, at para. 5 (discussing the International Covenant on Civil and Political Rights).

[9] Sev S. Fuluss, "The World Health Organization and Women," in Kelly Askin and Dorean Koenig, eds., *Women and International Human Rights Law* (Ardsley, NY: Transnational, 1999), at 411.

[10] See Rebecca Cook et al., *Reproductive Health and Human Rights* (Oxford: Oxford University Press, 2003), at 113–14 (explaining providers' duty to promote patients' free decision making).

however, like the pressure on women in rural China to bear sons, it can be argued that some incentives, such as preferential treatment for small families with respect to housing, may be necessary as a counterweight. Where there are legitimate state interests in discouraging growth, similarly, some incentives for limiting family size might be acceptable. Such interests include the protection of other rights such as the right to an adequate standard of living set out in Article 11 of the Economic Covenant.

Articles 4 and 5 of the Economic Covenant, which address the nonderogation of economic, social, and cultural rights, suggest the parameters for such incentives. Article 4 provides that "the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society." As Philip Alston notes, this imposes a rigorous standard: "limitations must, in the first place be 'determined by law' in accordance with the appropriate national procedures and must not be arbitrary or unreasonable or retroactive. The limitations must also 'be compatible with the nature' of these rights."[11]

Article 5 extends the prohibition against derogation in three important ways. First, it extends this prohibition to nonstate third parties. Thus, while a violation under the Civil Covenant requires a showing of state practice, the state cannot avoid responsibility by blaming coercive practices on overzealous local officials. Second, it extends the prohibition to activities indirectly aimed at derogation. A monetary inducement for a late-term abortion, at significant risk to the mother's health, would arguably violate this standard. Third, it prohibits derogation from any other rights on the pretext that the covenant requires such derogation. Thus, where other rights are clearly at risk, such as a child's right to be registered, the covenant does not permit derogation.[12]

The Women's Convention

The Women's Convention sets out the clearest protection for reproductive rights. Article 11.2 prohibits the state from penalizing women for pregnancy. Article 12 explicitly requires the state to "ensure access to healthcare services, including those related to family planning," and, more specifically, to "ensure to women appropriate services in connection with pregnancy, confinement in the postnatal period, granting free services when necessary, as well as adequate nutrition during pregnancy and lactation." Article 14 reiterates the right to family planning services for rural women in particular. Article 16, relating generally to women's rights within marriage, again emphasizes that women have "the same rights [as men] to decide freely and responsibly on the number and spacing of their children."[13]

[11] Philip Alston, "The International Covenant on Social, Economic, and Cultural Rights," in *Manual on Human Rights Reporting* (Geneva, Switzerland: United Nations, 1991), at 48.

[12] See n. 3 (explaining state responsibility for private actors under CEDAW).

[13] As Rebecca Cook has observed, Article 16 received an unprecedented number of reservations. Rebecca Cook, "Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women," 30 *Va. J. Int'l L.* 643 (1990). The United States is not a party to the Women's Convention.

While the Women's Convention provides a clear statement of reproductive rights, and measures to be taken to ensure them, enforcement in domestic courts is a separate issue. Although some countries, such as the Netherlands, adopt international human rights treaties as domestic law upon ratification, many, including China, do not. Although such states may have ratified the Women's Convention, it is not enforceable as domestic law. This means that women in these states cannot claim their rights under the convention in their national courts. Nor is there any international tribunal before which they may do so. An Optional Protocol to the Women's Convention enables individual women to file complaints before the CEDAW Committee, which is responsible for implementation of the convention. This is not an option for Chinese women because China is not a party to the protocol. Thus Chinese women cannot rely on the formal guarantees of reproductive rights under the Women's Convention.

Anti-natalist Policies

Burgeoning populations impose intolerable strains on developing states. The problems of inadequate infrastructure – including the lack of roads, hospitals, schools, access to clean water, and electricity – are exacerbated by deeply entrenched cultural preferences for large families. In China, for example, large families have long been the ideal, especially for the vast majority of the population living in rural areas.[14] As in most agrarian, preindustrial societies, children were valued as laborers. Boys were considered more important to their parents, in part because girls joined their husbands' families upon marriage. Sons were their parents' social security and old age insurance.[15] The birth of a boy was regarded as a "big happiness"; the birth of a girl was viewed as a "small happiness."[16]

By 1980, however, China's Communist leadership viewed the rapidly multiplying population as a major national crisis,[17] jeopardizing all other national policies, including those regarding modernization and economic stability.[18] Fertility rates of over five live births per woman would make it impossible to improve, or even maintain, the dismal standard of living. The country faced imminent disaster, including widespread famine.

[14] Mark Savage, "The Law of Abortion in the Union of Soviet Socialist Republics and the People's Republic of China: Women's Rights in Two Socialist Countries," 40 *Stan. L. Rev.* 1027, 1069, 1081 (1988).

[15] Ibid.

[16] See Barbara Jones, "A Small Happiness," Families With Children From China, available at http://www.fwcc.org/ (accessed Oct. 11, 2008).

[17] China's first modern census in 1953 put the population at 583,000,000. This figure more than doubled in less than fifty years to 1,260,000,000 in 1999. "China's Population Growth 'Slowing,'" *BBC News*, available at http://news.bbc.co.uk/ (accessed Oct. 11, 2008).

[18] Edwin A. Winckler, "Re-enforcing State Birth Planning," in *Transition From Communism in China: Institutional and Comparative Analyses* (Boulder, CO: Lynne Rienner, 1999), at 181.

Although later analyses challenged the statistics compiled by the government, they became the basis for China's infamous one-child policy. The state mobilized its vast bureaucracy to cope with the perceived emergency and crafted a comprehensive population control policy. As Susan Greenhalgh explains,

> China presents the world's most conspicuous and consequential case of a top-down, demographic-targeting approach to population control. . . . Unlike the more familiar family planning program, in which the individual couple is enjoined to plan its family, China has created a state birth planning program, in which social engineers in the state planning apparatus effectively plan the birth(s) of every couple in the nation.[19]

There is some flexibility. Couples in rural areas are permitted to have a second child if their first child is a girl, for example. But China's one-child policy was clearly compulsory and thus a violation of the Civil Covenant.[20] In addition, the methods adopted to enforce this policy were often harsh, including forced abortions and sterilizations, public humiliation, onerous fines, and the refusal to register unauthorized children, rendering them ineligible for state health care or public education. China was widely condemned for these measures, which it, in fact, denied. Rather, according to China, such measures were the unauthorized acts of "over-zealous local officials." At the same time, China defended the one-child policy as crucial for the assurance of other human rights, especially the right to an adequate standard of living. As the State Council has explained,

> Some people who censure China's family planning policy as "violating human rights" and being "inhuman" do not understand or consider China's real situation. China has only two alternatives in handling its population problem: to implement family planning policy or to allow blind growth in births. The former choice enables children to be born and grow up healthily and live a better life, while the latter one leads to unrestrained expansion of population so that the majority of the people will be short on food and clothing, while some will even tend to die young. Which of the two pays more attention to human rights and is more humane? The answer is obvious.[21]

In times of "public emergency," states may derogate from certain rights, including reproductive rights, under the Civil Covenant. As explained previously, China certainly viewed the population crisis in the early 1980s as a public emergency. While forced abortions or sterilizations should be prohibited even under this standard, fines for unauthorized children might be acceptable, if they are not onerous. Even if the

[19] Susan Greenhalgh, "Fresh Winds in Beijing: Chinese Feminists Speak Out on the One-Child Policy and Women's Lives," 26 *Signs* 847, 852 (2001).

[20] See sup. n. 8 and accompanying text.

[21] Information Office of the State Council of the People's Republic of China, *Human Rights in China*, ch. VIII, available at http://www.china.org.cn/ (accessed Sept. 3, 2008) (hereinafter referred to as "State Council Paper").

population crisis is no longer considered a public emergency, international human rights laws permit states to limit some rights, if necessary, to ensure "the public welfare." Even if incentives are viewed as limits on rights, accordingly, they would arguably be permissible under this standard. Such permissible limits might include incentives for families with only one child, such as preferred housing or bonuses like those currently offered in some regions.

As codified in China's Law on Population and Family Planning,[22] the one-child policy remains in effect. It is to be implemented through "publicity and education, advances in science and technology, comprehensive services and the establishment and improvement of the incentive and social security systems."[23] Indeed, officials violating human rights are now subject to civil and criminal penalties. It is unclear whether this new emphasis on rights is a response to international criticism or to the growing evidence of the ways in which the one-child policy has failed.[24]

In addition to halting population growth, the one-child policy was explicitly intended to promote women's citizenship rights, or women's equality.[25] China's gains in this regard have been impressive, as summarized in a recent white paper:

> Women's status has been raised distinctly. . . . Currently women amount to over one-third of all government functionaries, managerial personnel in state-owned enterprises and institutions and professionals of all trades. In 1999, employed women amounted to 46.5% of the entire workforce in China, compared to the world level of 34.5%, and women's income accounted for 80.4% of men's.[26]

At the same time, the one-child policy has led to millions of "missing" baby girls, that is, baby girls presumably born but no longer alive. In an influential 1990 article, "More Than 100 Million Women Are Missing," Nobel Prize–winning economist Amartya Sen explains that although more boys are born than girls, girls have better survival rates if they receive the same care.[27] He then calculates the number of women "missing" in countries where, given the birth ratios, they would be expected to survive if they received the same medical care, food, and social services as men. In China alone, he concludes, 50 million women are missing. Adding this to the numbers missing in south Asia, west Asia, and north Africa, he concludes that over 100 million women are "missing" – women who could have been expected to survive had they had the same access to resources as men. It is unknown how many of these

[22] Population and Family Planning Law of the People's Republic of China (Dec. 29, 2001), available at http://www.unescap.org/ (accessed Sept. 3, 2008).

[23] CEDAW, Article 3.

[24] See inf. n. 27 and accompanying text (explaining how the policy has resulted in "missing" baby girls) and inf. n. 42–43 (describing the consequences of the shortage of young women).

[25] Greenhalgh, "Fresh Winds."

[26] Information Office of the State Council of the People's Republic of China, "China's Population and Development in the 21st Century," available at http://www.china.org.cn/ (accessed Sept. 3, 2008).

[27] Amartya Sen, "More Than 100 Million Women Are Missing," *New York Times Review of Books*, Dec. 20, 1990, at 61–66.

girls are aborted, which is viewed as a "cleaner" alternative to female infanticide. Sex-selective abortions are illegal in India and China but widely available.

Sex-selective abortion is not a universal problem. In Canada, for example, there is no strong preference for boys or girls.[28] Sex-selective abortion is not illegal in Canada. Indeed, a ban on such abortions could be viewed as an unwarranted restriction on reproductive choice. Sex-selective abortion becomes a problem only when there is a strong preference for boys, as in India and China. And it becomes an intractable problem when that preference is grounded in brutal economic realities that in fact are violations of core economic rights. In China, for example, the state concedes that social security is inadequate and often nonexistent. The difficulties of establishing such a system are heightened by the aging population.[29] Without state support, the only hope for aging parents is the support that can traditionally be expected from a son. As women enjoy greater citizenship rights, including greater access to better jobs, this may change. But many Chinese parents are reluctant to bet their futures on the possibility.

Thus, recognizing that either sex-selective abortion or its denial may violate human rights is only the beginning of the analysis. The next step is to consider the broader citizenship rights implicated, including, crucially, the economic right to social security. As many commentators have observed, the Indian law against sex-selective abortion is a failure.[30] Rather than focusing on enforcement, or increasing penalties, it would be more constructive to focus on the underlying economic realities, especially those that implicate the violation of citizenship rights.[31]

Like the Chinese government, the South African government considers the fertility rate to be too high. Its goal is to reduce the fertility rate to the replacement rate of 2.1 children per woman by 2010. Unlike the Chinese government, the South African government has attempted to do so in a manner compatible with women's reproductive rights. Rather than imposing criminal or other sanctions on women, the government supports family planning services and provides free contraceptives at all government medical establishments. This approach has been effective, resulting in a steady decline of fertility from 5.6 in 1970, to 3.6 in 1990, to 2.7 in 2007.[32]

Iran, which is not a party to CEDAW, is probably the most successful example of an anti-natalist state that respects reproductive rights. Iran has shown that population growth can be reversed without violating human rights. Spurred by the 1979 Islamic Revolution, and the exhortation of the Ayatollah Khomeini to "produce soldiers for

[28] Cook et al., *Reproductive Health*, at 365.

[29] Information Office of the State Council, China's Population and Development, "Targets and Principles," at II (explaining that "sex ratio at birth is expected to gradually become normal [as] China would redouble its efforts to solve the problem of ageing of population") (on file with author).

[30] Cook et al., *Reproductive Health*, at 368.

[31] Indeed, the selective imposition of the norm of gender equality in this context, to deny Indian or Chinese women sex-selective abortion while allowing Canadian or American women to abort a fetus on the basis of sex, arguably smacks of colonialism. See Deborah Weissman's warnings about colonialism in Chapter 20.

[32] Unicef, "Statistics," available at http://www.unicef.org/ (accessed Sept. 3, 2008).

Islam," the population doubled from 27 million in 1968 to 55 million in 1988.[33] In December 1989, the government reinstated family planning, encouraging couples to space their children and to limit family size. In 1993, a national family planning law was enacted that encouraged women to have fewer children by restricting maternity leave after three children. On its face, this violates Article 11.2, which requires states to provide "maternity leave with pay or with comparable social benefits." Because Iran is not a party to CEDAW, however, it is not in violation. Even if Iran were a party to CEDAW, it is unlikely that this restriction would be deemed a violation. Affirmative obligations under CEDAW, like affirmative obligations under the Economic Covenant, are necessarily subject to reasonable resource constraints, and a noncoercive disincentive to have more than three children would probably be considered reasonable.

This disincentive, moreover, is part of a comprehensive program that often makes such disincentives superfluous. As part of this program, the state-controlled media have raised public awareness about population issues and family planning. The state pays 80 percent of the family planning costs, and birth control is free. A network of clinics and 15,000 "health houses" provides services to 80 percent of the rural population. Religious leaders, importantly, support family planning and have issued fatwas (edicts) encouraging the use of contraceptives. In addition, Iran has taken steps to directly involve men in family planning. It is the only country in the world that requires men as well as women to take a class on contraception before receiving a marriage license.

Finally, family planning is not an isolated initiative. Under a major literacy campaign, for example, women's literacy has increased from less than 25 percent in 1970 to more than 70 percent in 2000.[34] The United Nations currently projects that fertility in Iran will drop to replacement level by 2010.[35]

Iran is not China, of course, and it is difficult to compare their programs. The cooperation of religious leaders in Iran has been crucial to the success of its program, for example, and there is no comparable authority in China. But forced abortion and sterilization violate human rights; drawing on religious culture to support family planning does not. Iran's program shows that impressive reductions in fertility can be achieved without egregious violations of human rights.

Pro-Natalist Policies

In southern Europe, fertility rates below the 2.1 necessary to replace the population are a source of growing concern.[36] The German government, for example, considers

[33] Janet Larsen, "Iran's Birth Rate Plummeting at a Record Pace: Success Provides a Model for Other Developing Countries," Earth Policy Institute, available at http://www.earth-policy.org/ (accessed March 3, 2009).

[34] Ibid.

[35] Ibid.

[36] Pro-natalist policies generally focus on incentives for fertile couples, rather than support for reproductive technologies to enable couples to overcome infertility. See Mary Lyndon Shanley's analysis of infertility and social justice in Chapter 15.

the fertility rate of 1.3 children per woman too low. Reflecting both respect for women's reproductive rights under international human rights and German law, as well as the lack of consensus among the German political parties on this issue, the government has not intervened with respect to fertility levels, although it does provide indirect support for contraceptive use.

Pro-natalist policies have been criticized for casting women as breeders and consigning them to the private sphere of the home and the family. From Hitler's "medals for mothers" in the 1940s to the Ayatollah's exhortation to Iranian women to produce "soldiers for Islam" in the 1980s, pro-natalist policies have tended to undermine women's citizenship rights.

Sometimes such policies blatantly violate reproductive rights, like the virtual ban on abortion and contraception in Romania under Nicolae Ceausescu. In 1966, Council of State Decree 700 criminalized abortion and radically restricted access to contraceptives. Birth rates soared, as did maternal mortality, mostly from illegal abortions. According to one source, there were "over 10,000 deaths from illegally performed abortions and approximately 5.2 million cases of permanent sterility resulting from faulty . . . procedures."[37] The law was rescinded by the new government in 1989, but there were grim consequences, including a sizable cohort of unwanted, neglected, and abandoned children. In other cases, reproductive rights may still be ensured, and the violation of citizenship rights is more subtle. In Italy, for example, stipends for birth, and special allowances for mothers (especially in the absence of maternity leaves and other workplace accommodations), discourage women's "full participation in economic, social, and cultural life" and perpetuate stereotypes in violation of CEDAW.[38]

Recent research, moreover, suggests that such measures may also be counterproductive. Rather, European demographers have shown that fertility rates are in fact higher in Europe when women are more equal; that is, women who enjoy greater citizenship rights, including, but not limited to, reproductive rights, are more likely to have children than women who do not enjoy such rights. When caregiving responsibilities are viewed solely as women's responsibilities, and mothers are effectively precluded from participating in the work force, fewer women opt to be mothers, and those who do have fewer children. Thus, in northern Europe, where women participate more fully in public life and enjoy greater equality, fertility rates are higher than in southern Europe, which has what demographers call "lowest-low" fertility rates, that is, below 1.3. At this rate, the population is reduced by half every forty-five years.[39] As demographer Hans-Peter Kohler and his coauthors note, this is a response to stereotypical gender roles within families: "fertility falls to very low levels when gender equity rises in . . . the labor market, while it remains low" in

[37] See D. Marianne Blair and Merle H. Weiner, *Family Law in the World Community* (Durham, NC: Carolina Academic Press, 2003), at 970 (citing Paula Abrams, "Population Politics: Reproductive Rights and U.S. Asylum Policy," 14 *Geo. Immigr. L. J.* 881, 887 [2000]).

[38] Russell Shorto, "No Babies?," *New York Times Magazine*, June 29, 2008, at 36.

[39] Hans-Peter Kohler et al., "The Emergence of Lowest-Low Fertility in Europe During the 1990s," 28 *Population and Dev. Rev.* 641, at 642 (2002).

families.[40] The key, according to Kohler and his colleagues, is to ensure that childbearing is compatible with female labor force participation.[41]

Conclusion

State natalist policies do not necessarily violate women's reproductive rights or their other citizenship rights. But such policies, evocative of earlier views of women as the reproducers of citizens, should be considered warily. Such policies may violate rights overtly, like the criminalization of abortion in Romania or coerced sterilizations in China. They may also violate rights by channeling women into domesticity, foreclosing other opportunities and reproducing gender, directly and indirectly. They may violate rights by failing to take deeply entrenched forms of gender subordination into account, like the cultural preference for sons. They may violate rights by failing to take long-range consequences into account, like the probability of destitution for old couples in China without sons. Natalist policies, finally, may have rights implications for future generations, such as the young men in China unable to marry because there simply are not enough young women,[42] or the young girls in China who are kidnapped from their homes for the same reason.[43] The protection of reproductive rights is necessary, but not sufficient, to safeguard against the reproduction of gender in the context of state natalist policies. Rather, as Maxine Eichner suggests with respect to theorizing sexual citizenship, "no single lens . . . should be deemed to have priority" given the intertwining of gender with "other axes of power."[44] By situating women's reproductive rights in the broader context of women's citizenship rights, this chapter has shown why state natalist policies should promote both.

[40] Ibid.

[41] As Joanna L. Grossman explains, accommodation for pregnant workers is another way in which the labor market can support women's citizenship rights. See Chapter 10.

[42] Therese Hesketh, Li Lu, and Zhu Wei Xing, "The Effect of China's One-Child Family Policy After 25 Years," 353 N. *Eng. J. Med.* 1171, 1173 (2005).

[43] Ibid.

[44] See Chapter 14.

PART

V

GLOBAL CITIZENSHIP AND GENDER

17

Women's Unequal Citizenship at the Border: Lessons From Three Nonfiction Films About the Women of Juárez

Regina Austin

Illusive Borders, Illusive Citizenship

It is widely assumed that the citizenship of American women is only tested at the territorial borders of the country, and then only occasionally, when they attempt to return from abroad. As travelers with American passports, American women are allowed to enter many other countries without visas. Moreover, a majority find it as easy to reenter the United States as to leave it. For a minority, however, getting back into the country has proven difficult.[1] Consider the African American women who, because of their race and gender, were stopped and intrusively patted down or strip-searched at airports upon their return from the Caribbean.[2] Something as silly as a hat purchased on an island vacation could trigger scrutiny. Because these women were profiled as possible drug couriers, their U.S. citizenship provided them no security from intrusive surveillance as they stood at the gates of their country.

In fact, the vulnerability of American women to having their citizenship challenged when on U.S. soil changes along with the operative nature of the border. While borders are thought of as fixed, formally recognized, well-settled boundaries that are drawn on maps, demarcated by barbed wire fences and patrolled by soldiers or government agents,[3] current events indicate that the borders are actually more

[1] Historically, women's reentry into the country has been harder than men's because women's American citizenship has been subject to greater divestiture on account of marriage. See Linda K. Kerber, "Toward a History of Statelessness in America," in Mary L. Dudziak and Leti Volpp, eds., *Legal Borderlands: Law and the Construction of American Borders* (Baltimore, MD: Johns Hopkins University Press, 2006), at 135, 142–46. Until roughly after World War II, an American woman who married a foreigner and lived abroad with him might lose her U.S. citizenship and essentially become stateless. Ibid.

[2] See *Bradley v. United States*, 164 F. Supp. 2d 437 (D.N.J. 2001), aff'd, 299 F.3d 197 (3d Cir. 2003); *Anderson v. Cornejo*, 199 F.R.D. 228 (N.D. Ill. 2000), 255 F. Supp. 2d 834 (N.D. Ill. 2002), 284 F. Supp. 2d 1008 (N.D. Ill. 2003), rev'd in part and remanded, 355 F.3d 1021 (7th Cir. 2004).

[3] The controversy surrounding the building of an actual fence along parts of the Mexican–American border is well known. Less attention has been paid to the controversy over the physical border between the United States and Canada. Herbert and Shirley-Ann Leu have erected a four-foot retaining wall that infringes the ten-foot corridor on either side of the forty-ninth parallel that the International Border Commission (IBC) maintains must be kept free of trees and other obstructions. David Bowermaster, "Blaine Couple Fight to Retain Backyard Wall Near Canada Border," *Seattle Times*, April 11, 2007, at

indeterminate and illusive. Contemporary American immigration regulation has both shifted U.S. borders well into the nation's interior and extended them way beyond the nation's territory.[4] Furthermore, internal borders dividing this country from others are popping up everywhere and triggering "border conflicts" all over. Believing themselves compelled to act because the federal government is incapable of doing so, state, county, and municipal governments are pursuing anti-immigrant and pro-immigrant policies that smack more of international relations than domestic affairs. These border control efforts are ensnaring documented immigrants and full-fledged citizens alike. Controversies roiling small towns like Farmingville, New York (where residents fought over an outdoor hiring site for day laborers),[5] and Hazleton, Pennsylvania (which is litigating in federal court its right to enforce local ordinances aimed at landlords who rent to illegal immigrants and employers who hire them),[6] are calling the true value of American citizenship into question.

The immediate aftermath of Hurricane Katrina provided another example of the chimerical nature of borders. Residents of New Orleans were forced to leave their homes and hospital beds to seek higher ground after the levees broke. A great many of them were poor minority women, including mothers and grandmothers with small children, who lacked the cars, resources, good health, and wherewithal to escape the city prior to the storm. The Katrina disaster was extensively televised; in some instances, news reporters had a better gauge on the extent of human suffering than public officials. Although they never left the territory of the United States, the inhabitants of New Orleans who were all over the small screen looked like impoverished refugees who had been forced to take flight on account of the inept or hostile action of a "failed" state. A few commentators even referred to these Americans as "refugees," until sharp criticism shut them up. For some of these people, the denaturalization was literal. Tired and weary residents and visitors fleeing New Orleans were turned back on the bridge to Gretna, Louisiana, by armed police

B5. The Leus, who assert that they were free to build on their property because they were not given notice that the fence might violate law, have brought suit in federal court in Seattle to enjoin the destruction of their wall. The Bush administration agreed with the Leus and attempted to fire the U.S. representative to the IBC, Dennis Scharnack. Sara Jean Green, "Judge Upholds Firing of Boundary Official," *Seattle Times*, Oct. 14, 2007, at B3.

4 See generally Ayelet Shachar, "The Shifting Border of Immigration Regulation," 3 *Stan. J. C.R. and C.L.* 165 (2007) (reviewing such border-shifting devices as expedited removal from within 100 miles of the external perimeter, the collection of biometric information from prospective entrants prior to their departure from foreign soil, electronic passports that track the movement of visitors and citizens alike, airline interdiction of unwanted visitors prior to departure, and the creation of migration zones that are excised from a country's territory for the purpose of containing unwelcome visitors and restricting their rights).

5 See generally *Farmingville*, directed by Carlos Sandoval and Catherine Tambini (New York: Camino Bluff Productions, 2004) (a fairly balanced presentation of the conflict over the establishment of a hiring site for day laborers).

6 See *Lozano v. City of Hazleton*, 459 F. Supp. 2d 332 (M.D. Pa. 2006) (granting plaintiffs a temporary restraining order); *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477 (M.D. Pa. 2007) (permanently enjoining the enforcement of ordinances that, inter alia, violate the supremacy clause and due process clause of the Fourteenth Amendment of the U.S. Constitution).

officers, who feared they were bringing with them the crime that was supposedly raging in New Orleans; for these people, the right to travel was suspended and the border closed.[7] American citizenship be damned; internal borders are a bulwark against (imagined) lawlessness.

In truth, though, the people of New Orleans we saw on television hardly resembled what we imagine when we think of American citizens. It was as if they had crossed some invisible international boundary or border and ceased to be the subjects of the strongest, richest nation of the "first" world. It was as if our leaders had forgotten that America's best and highest calling was to protect its citizens from disasters, natural and man-made. Technically, the residents of New Orleans who were driven from their homes because the levees broke were *internally displaced persons*, a designation drawn from international law, which appears to provide more expansive protection for people in their situation than the laws of the United States.[8] As internally displaced persons, they might have a right of return to their home city.[9] The displaced may possibly find comfort in the thought that if their forced exodus virtually stripped them of their American citizenship, it landed them in a larger global body politic. Yet I doubt that many of them would be sanguine about that. The shifting nature of borders can ensnare people in a confusing web of competing local, regional, national, and international governmental entities and leave them defenseless, isolated, and uncertain as to where they should direct their claims to equal citizenship.

As the border goes, so goes women's citizenship. Citizenship and its protections follow the location of the border, which is determined not only by where lines are drawn on the ground or on paper, but also by where the border is literally acted out or performed. Law is one of the discursive tools by which borders are marked, and law enforcement is among the performative acts by which borders are brought into relief. Thus, a border may be manifested through the operation of international law and immigration regulation, or it may be evident in the scope of domestic law enforcement. Women who live on or at the figuratively demarcated border may actually be subject to the impact of several competing and contradictory legal regimes and find themselves able to assert their rights as citizens with regard to none of them.

The Women of Juárez and Citizenship at the Border

The expanding cross-border flow of goods and people that is known as globalization has contributed to making borders seem more illusive and the rights and privileges

[7] See Gardiner Harris, "Police in Suburbs Blocked Evacuees, Witnesses Report," *New York Times*, Sept. 10, 2005, at A13.

[8] See Lolita Buckner Inniss, "A Domestic Right of Return?: Race, Rights, and Residency in New Orleans in the Aftermath of Hurricane Katrina," 27 *B.C. Third World L. J.* 325, 369 (2007).

[9] Ibid., at 370–71; see generally ibid., at 364–71 (providing an overview of the right of return in international law).

of citizenship less definite and, in some cases, less secure. For those who live at or on the border, in the borderland that is betwixt and between sovereign states and at the periphery of a nation as opposed to its core, gaps in law enforcement and governmental accountability can generate a vulnerability that politically marginalized citizens have a hard time effectively overcoming. This has been true for women who reside south of the Mexico–United States border, in the city of Ciudad Juárez, Mexico, which lies opposite El Paso, Texas.

Between 1993 and 2005, an estimated 300 young women were murdered in Juárez; more than one-third of them were kidnapped, tortured, mutilated, and sexually assaulted before they were strangled or stabbed and their bodies left in the desert or dumped in various locations around the city. An additional 50 to 100 young women went missing. Patterns among the killings led surviving relatives, journalists, and other investigators to believe that the murders were the work of one or more killers who belonged to groups identified with changes in the social landscape of the fast-growing Mexican border town.

During this time period, elevated threats to the safety and security of the young women of Juárez came from three sources: globalized industrial development, immigration, and narcotics trafficking.[10] The factories owned by foreign multinational corporations, known as *maquiladoras*, attracted large numbers of female workers from the interior of the country, whose fine motor skills and malleability made them attractive workers. This, in turn, caused a change in gender relations in the town, which put the women in circumstances of heightened vulnerability, especially in the bars and clubs they frequented after work. Moreover, the employment generated by the *maquiladoras* spurred a level of residential development that outpaced the provision of such municipal services as water, electricity, and transportation. The inadequate transit system made the environment especially dangerous for women who went to work well before sunrise and came back well after sundown.

The prospect of employment in the United States attracted to the region human smugglers and would-be undocumented border crossers from the rest of Mexico and the countries of Central America, and they contributed to a climate of lawlessness both as perpetrators and victims of crime. The murder victims, who were settlers to the city, by and large, shared the low status accorded transients in the estimation of the indigenous inhabitants and officials of Juárez. In addition, the competing cartels of drug traffickers drawn to the border by Americans' insatiable demand for illegal narcotics, a demand that tough antidrug policies could not obliterate, were a third source of increased peril.[11] The traffickers were aided by corrupt officials on both sides of the border, whose complicity in the drug trade undermined law enforcement in general. Both undocumented immigration and drug smuggling involved the extraterritorial effect of U.S. laws, about which Mexican citizens had little say. All of

[10] See generally Alan B. Bersin, "El Tercer País: Reinventing the U.S./Mexico Border," 48 *Stan. L. Rev.* 1413 (1996).

[11] Oscar J. Martínez, *Troublesome Border* (Tucson: University of Arizona Press, rev. ed. 2006), at 141–47, 151–52.

these systemic sources of danger strained governmental resources and undermined honest officials, some of whom also had reason to fear for their own safety. They and the government's lack of effective response disrupted civil society, promoted gender-directed violence, and imposed extra burdens on the female citizens of Juárez.

At first, state and local government authorities and the police, adopting a "blame the victim" strategy, dismissed the murders as private violence perpetrated by boyfriends and johns. As the toll mounted, the officials destroyed evidence, focused attention on scapegoats, and otherwise failed to investigate the deaths adequately so that the perpetrators could be brought to justice. As a result, the survivors of the young women were forced to mobilize to make the government reconsider its denigration of the victims and to accept responsibility for the many derelictions of duty committed by law enforcement and justice officials in regard to their loved ones' deaths.

The women of Juárez responded to their elected and appointed officials in two ways that are characteristic of feminist assertions of citizenship. First, they rejected the distinction between the public and private spheres insofar as the murders were concerned. The survivors asserted, in essence, that the deaths were "not a private matter but . . . rather a consequence of women's lack of political and socio-economic power and the roles and identities imposed upon them."[12] In maintaining this stance, the survivors and their allies also defended the character and good name of the victims. Furthermore, they linked the widespread violence inflicted on the young female victims to a threat to and denial of women's right to equality in general.[13]

Second, when the women of Juárez initially demanded competent criminal investigations and accountability from governmental actors in regard to the deaths, the women acted out of a sense of familial and personal responsibility; they spoke out as mothers, aunts, and sisters of the victims. They went on to build informal networks of mutual support and volunteer associations aimed at providing services to other women. Over time, their informal pressure groups achieved greater public visibility and political viability, while some of the women became recognizable leaders.[14] Along the way, they picked up valuable support and affirmation of their indictment of the state from international feminists, journalists, scholars, and documentary filmmakers.

This summary cannot do justice to the obstacles faced by the survivors of the murder victims of Juárez and the courage they displayed in struggling to get justice over the course of a decade or so. It threatens to squeeze what they said and did into a narrow Western feminist formula, which denies the unique, organic qualities of their activism and how it responded to a host of specific material conditions

[12] Geraldine Lievesley, "Women and the Experience of Citizenship," in Susan Buckingham and Geraldine Lievesley, eds., *In the Hands of Women: Paradigms of Citizenship* (Manchester, UK: Manchester University Press, 2006), at 6, 9. See Deborah Weissman's discussion, Chapter 20, on the use of human rights norms by the young women's families.

[13] Ibid.

[14] Ibid., at 8, 29.

that ranged from the local to the global. However, it is possible to arrive at a more nuanced understanding of the crisis of citizenship experienced by these women of Juárez and the way in which they were burdened by, yet responded to, the complex interaction of illusive borders, mass violence, and women's unequal citizenship by considering three documentaries dealing with the deaths of the young women who lived, worked, and died in Ciudad Juárez. Those films are *Performing the Border* (1999), *Señorita Extraviada* (Missing Young Woman) (2001), and *Battle of the Crosses* (2005). One could not ask for a more stimulating and challenging exploration of women's citizenship at the border than these films provide.[15] They offered the women of Juárez the opportunity to reach a broad audience with their stories, as told in their own words, and allowed them to undermine the ability of their allies (including the filmmakers) to speak for them. The women's "experiences and the knowledge gained from them are important. Academics, policy-makers and practitioners in the field [of law and feminist political theory] need to listen to them."[16]

The Juárez Documentaries

Performing the Border

Performing the Border is a 1999 film essay by Ursula Biemann, a Swiss artist and curator who has worked and studied in Mexico and the United States.[17] As a film essay, Biemann intended her work to be "experimental, self-reflexive and subjective," while being, at the same time, "socially involved and explicitly political."[18] *Performing the Border* begins with a postmodern deconstruction of the border that is eloquently stated by New York–based Mexican artist and critic Bertha Jottar. Jottar notes that "the border is always represented as this wound that has to be healed, that

[15] In addition to the three films reviewed here, there are at least three other full-length documentaries, in English or with English subtitles, about the wave of femicides that befell the women in Juárez over the past decade or so. See *On the Edge: The Femicide in Ciudad Juárez*, directed by Steev Hise (Los Angeles: Detritus, 2005); *Border Echoes*, directed by Lorena Mendez-Quiroga (Los Angeles: Peace at the Border Films, 2007); *Juárez: The City Where Women Are Disposable*, directed by Alex Flores (Toronto, Canada: Lasper Las Delmar Films, 2007). As for feature films, both *The Virgin of Juarez*, which stars Minnie Driver as an intrepid Los Angeles reporter investigating the murders, and *Bordertown*, which stars Jennifer Lopez as an intrepid Chicago reporter investigating the murders, had no American theatrical release but were distributed on DVD. *The Virgin of Juarez*, DVD, directed by Kevin James Dobson (Los Angeles: Las Mujeres, 2006); *Bordertown*, DVD, directed by Gregory Nava (Los Angeles: Mobius Entertainment Ltd., 2006). See generally Pat H. Broeske, "400 Dead Women: Now Hollywood Is Intrigued," *New York Times*, May 21, 2006, § 2, at 23 (describing numerous plays and feature and documentary film projects dealing with the Juárez killings; a correction indicates that Mexican law enforcement officials put the number of dead at ninety).

[16] Geraldine Lievesley, "Identity, Gender and Citizenship: Women in Latin and Central America and in Cuba," in Buckingham and Lievesley, *In the Hands of Women*, at 127.

[17] *Performing the Border*, directed by Ursula Biemann (Women Make Movies, 1999). The script of the film is included in Ursula Biemann, *Been There and Back to Nowhere: Gender in Transnational Spaces, Postproduction Documents 1988–2000* (Berlin: B Books, 2000).

[18] Ursula Biemann, "The Video Essay in the Digital Age," in Ursula Biemann, ed., *Stuff It: The Video Essay in the Digital Age* (New York: Springer, 2003), at 8.

has to be closed, that has to be protected from contamination and from disease . . . through various systems of militarization, purification, cleansing."[19] Instead, she says, the border should be seen as "highly constructed" and "highly performative." It is "a constructed place that gets reproduced through the crossings of people, because without the crossing there is no border, right? It's just an imaginary line, it's a river or it's just a wall. So you need the crossings of bodies to produce the discursive space of the nation state and also to produce a type of real place as a border."[20]

Jottar also observes that performances at/of the border reflect economic and political relationships and have economic and political consequences and import. Under the North American Free Trade Agreement, the transport of goods produced by the hundreds of *maquiladoras*, or golden factories, that dot the United States–Mexican border makes for happy crossings; the migration of undocumented people across the border does not. The corruption and excess that are associated with the border are not natural; they are a response to material conditions. According to director Biemann, borders shape women's lives through their institutionalization of power.[21] Yet, as women encounter and cross the border, happily or not, they continually engage in struggles with that power and thereby reshape the border.[22]

Performing the Border's focus on the border per se soon gives way to director Biemann's own postmodern analysis of gender relations on the Mexican side of the boundary. Biemann's scripted narration strains everything through a theoretical sieve of global capitalism's impact on women's bodies and their gender identities. The analysis seems particularly apt when applied to the jobs the women perform in the assembly plants and to their roles as leisure seekers in after-work venues like the bars and dance halls into which the camera takes us. This postmodern take on the fragmentation of the female body becomes problematic, however, when Biemann extends it to an examination of the feminicides or femicides of young women in Juárez. In the film, Biemann offers a social psychological profile of the serial killer that makes the murders a direct manifestation of the logic of globalization, with the

[19] Biemann, *Been There and Back*, at 89.

[20] The synthetic quality of the border is reinforced by the director's use of filmmaking techniques that suggest the constructed nature of reality. The film signals its own performative nature by employing nontraditional (for a documentary) elements like "nonsynchronized sound and images, time-lapse filming uncoupling the image from real time, image enhancement, and a meditative voice-over . . . [to] distance and disturb the viewer's relation to reality." Rosa Linda Fregoso, *MeXicana Encounters: The Making of Social Identities on the Borderlands* (Berkeley: University of California Press, 2003), at 13. In addition, the score is modern, futuristic, computer-generated; Biemann refers to it as an "electronic sound carpet." Biemann, "Performing Borders: The Transnational Video," in *Stuff It*, at 83, 86. Text – emphasizing points made in the voice-over, advancing the narrative, or simply dropping the names of multinational corporations and the complex products they employ the women of Juárez to assemble – is liberally used. The footage of Juárez makes it plain that the part of town where the workers live sprang up amid the dust of the desert. The houses are made of packing materials and scraps tossed by the *maquiladoras*. The hardscrabble home life of the workers is palpable.

[21] Doris Wastl-Walter and Lynn A. Staeheli, "Territory, Territoriality, and Boundaries," in Lynn A. Staeheli et al., eds., *Mapping Women, Making Politics: Feminist Perspectives on Political Geography* (New York: Routledge, 2004), at 145.

[22] Ibid.

murderer supposedly extending globalization's fragmentation of the female worker into the realm of gender relations.[23]

Latino studies professor Rosa Linda Fregoso has challenged Biemann on precisely this point: "although there is no doubt that the process of economic globalization is 'out of control,' globalism is a monolithic top-down analysis that neither captures nor explains the complexity of feminicide. Nor does conflating the *exploitation* of gendered bodies with their *extermination* offer us the nuanced account of violence that feminicide demands."[24] In Fregoso's view, that "nuanced account" would identify the crucial role that globalism plays "in deflecting attention away from the complicity of the state in creating a climate of violence"[25] and consider the "multiple sites where women experience violence within the domestic and public spaces that are local and national as well as global and transnational."[26] It is the "patriarchal state" that has "creat[ed] the conditions . . . for the proliferation of gender violence."[27] Moreover, according to Fregoso, *Performing the Border* employs "a discourse that produces [*sic*] the murdered women of Ciudad Juárez solely as objects of global capitalism."[28] Like other treatments of the circumstances of so-called third world women by so-called first world feminists, Biemann's film also fails to document the efforts of the women to resist capital and patriarchy.[29]

Biemann's own assessment of her film confirms Fregoso's criticism of the filmmaker's directorial intent and narration: "all these relations that characterize the underlying order of this border town speak about global forces that are much bigger than the place itself. This lousy little border town is the unassuming non-place across which many multidirectional strings of meaning can be narrated."[30] She sees her video essay as "extend[ing] the meaning of a particular place beyond its documentable reality."[31] Furthermore, she says of her narration,

> There is no particular subject behind the narration, even though this narration is highly subjective. It speaks from a particular position that I could describe as that of a feminist, white cultural producer who is in the process of moving from a Marxist to a post-Fordist, post-humanist place and trying to figure out how to transpose old labor questions into a contemporary aesthetic and theoretical discourse in a globalized context.[32]

[23] See Jessica Livingston, "Murder in Juarez: Gender, Sexual Violence, and the Global Assembly Line," 25 *Frontiers* 59 (2004) (attributing the killings to "macho backlash" or "the displacement of economic frustration onto the bodies of women who work in the maquiladoras").

[24] Fregoso, *MeXicana Encounters*, at 8; see also Amy Sara Carroll, "'Accidental Allegories' Meet 'The Performative Documentary': Boystown, Señorita Extraviada, and the Border-Brothel → Maquiladora Paradigm," 31 *Signs* 357, 377 (2006) (arguing that *Performing* "swerves into an allegorical interpretation of the women's deaths that reduces the victims to representations of a quantifiable and expendable workforce").

[25] Fregoso, *MeXicana Encounters*, at 17.

[26] Ibid., at 19.

[27] Ibid., at 20.

[28] Ibid., at 13.

[29] Ibid.

[30] Biemann, *Been There and Back*, at 85.

[31] Ibid.

[32] Ibid., at 86.

Nonetheless, the women of Juárez who are interviewed in the film do counter Biemann's postmodern thesis to a certain extent. When these women speak for themselves, drawing on their own experiences, they do what ordinary people in documentaries often do; that is, they subvert the filmmaker's best efforts to negate their subjectivity and their agency. The women speak past the filmmaker, directly at the audience. The interviewees, most of them activists, offer a measure of insight into the way in which women in Juárez reacted to and challenged the impact globalization had on the multilayered power relations at the border between Mexico and the United States.

By far the frankest informant is Juana Azua, a middle-aged former prostitute who dispenses condoms as part of an AIDS prevention program. She is interviewed wearing a pastel cotton nightgown in the surroundings in which she lives. She became a prostitute at age thirty-one (before there was social pressure on johns to use condoms), when her brother needed money to pay his medical bills and support his seven children. She described a Juárez "before the War" (i.e., before the crackdown at the border), when Americans crossed into Mexico to spend their money on sexual services. The *maquiladoras* have drawn an influx of young women to Juárez, who, according to *maquila* worker Sonia Auguiano, have turned to prostitution because they lack sufficient education to gain employment in the factories and do not have references with which to secure jobs as domestics. Juana Azua maintained that young *maquila* workers also engage in prostitution on the weekends because their factory salaries are inadequate. Azua's discussion of young prostitutes seems colored by her own class position, which aligns her with their older competitors. The viewer has to credit Azua's comments to some extent because they appear to be based on firsthand knowledge, given that she hands out thousands of condoms a month.

Fregoso objects to the editing decision that sandwiched Azua's interview between a segment dealing with *maquila* workers and the subsequent discussion of the femicides, which focuses on the psychopathology of a serial killer. According to Fregoso,

> Biemenn's [*sic*] film equates exploited bodies with exterminated bodies visually through a linear sequence of narrative elements that creates a chain of associations: maquila workers – sex workers – victims of feminicide. . . . In its metonymic association of globalization – nonnormative sexuality – feminicide, *Performing the Border* fails to disrupt the premise of the discourse of globalism, especially the notion that the extermination of women's bodies proceeds from the same logic as their exploitation: global capitalism.[33]

It is true that Azua directly links *maquila* workers to sex workers, and perhaps by sequencing, Biemann links *maquila* workers to the dead. Government officials made the same connections for reasons much less benign than Biemann's. It is clear, however, that prostitution predated the *maquiladoras*. The limited educational opportunities and employment choices open to women who became prostitutes in Juárez cannot be blamed exclusively on global capitalism, but can be placed at the feet of the state. At the same time, globalism as exemplified by the AIDS pandemic

[33] Fregoso, *MeXicana Encounters*, at 13.

is changing the nature of the so-called oldest profession. The spread of the disease and activism to fight it suggest that a purely local or national analysis of women's status in Juárez would be insufficiently complex.

Finally, there is the journalist Isabel Velásquez, who highlights the class implications of *maquila* labor. She says, "We believe there is a price for modernization but the price has to be shared. Working women don't have to pay that price. If you are producing progress you should also share in that progress."[34] While the narrator is fixated on the fragmentation of the assembly line worker and the stringent workplace regulation she endures with respect to her sexual and cultural integrity, Isabel Velásquez focuses on economic exploitation, not simply by the bosses, but by the Western female consumers of the products the worker produces:

> Take a lingerie maquiladora. A woman in Germany, Switzerland or the U.S. who buys some negligee has no idea that the women who made it had to get up at 4:30 in the morning and had no fresh water to bathe themselves before going to work. Everything should be shared, there is a social price that's not being shared and there is wealth that's not being shared. It's not enough to pay minimum wage. It is not enough to give breakfast to your workers. It's not enough. It's also an issue of time, because you sell your time to your company, you sell your life and you should get something back.[35]

Velásquez makes it clear that the femicides constitute a manifestation of the state's failure to protect *poor* young women:

> It is horrible. The form in which these women and girls are treated is cruel and horrible. But what it's saying is that as a society we have allowed this to happen. We haven't mobilized, we haven't protected our young women, and it's well known that all of these women are poor. A lot of them were workers, others were students but all of them were poor, that's their common denominator.[36]

These informants, Mexican women in Juárez, not only provide details, but also offer commentary, on women's lives at the border that is genuine and anchored in the lived contradictions of existing at an intersection of the local, regional, national, and international. They express an understanding of the history of women at the border, they are aware of their class position as poor women, and they are critical of the state that failed to protect them and other women as equal citizens. The interviewees' commentary is much smarter and grittier than the abstract analysis spouted by the director/narrator. It is somewhat amazing that the subjects' agency was able to shine through given that they were at the mercy of Biemann's misguided, self-involved attempt to focus on the metaphorical significance of Juárez and the lives that are lived there.

34 Biemann, *Been There and Back*, at 113.
35 Ibid.
36 Ibid., at 129.

Biemann's goal of bringing postmodernism to bear on the subject of women's lives on the border between Mexico and the United States may be ambitious, but I doubt that a documentary format using/exploiting the voices and images of real subjects was the most ethical tool for pursing it. Nonetheless, the viewer must be thankful that women from Juárez were given the opportunity to speak about their situations in the film and to subvert, if not sabotage, the filmmaker's agenda. One can only wonder why the filmmaker did not pay more attention to their message in scripting her narration and work up, as it were, from there, that is, from the local to the global.

Despite these criticisms, *Performing the Border* is, nonetheless, worth watching. It is insightful in its visual and conceptual deconstruction of the border. Furthermore, it is seminal in that its themes and visual effects are copied by other films about the women of Juárez. *Performing the Border* is ultimately disappointing because its reliance on Western meta-theory seems dismissive of the particular reality of a group of women living on the Mexican side of the border who have their own unique history, culture, and material circumstances. *Performing the Border* is appealing to viewers who oppose the excesses of globalized capitalism, but it fails to account for the crime and exploitation of border women that existed before there was such globalization and continues thereafter. It does not sift through the local information that might provide homegrown explanations of the women's marginality and their government's unresponsiveness to their physical vulnerability, explanations that are less likely to be of interest to a bourgeois American and European feminist audience prepared to see the deprivations endured by the women of Juárez only as a variation on the theme of their own oppression. Nor does the film thoroughly plumb what globalization means in an environment where significant aspects of the economy are illegal and multinational corporations offer a measure of liberation from the constraints of traditional female subordination and poverty. Wedded to a top-down analysis, with little interest in thoroughly pursuing self-critical reflection, the filmmaker never considers how the local might be global in a way that capitalists will not claim to have invented.

Señorita Extraviada (Missing Young Woman)

Señorita Extraviada is a requiem by the Chicana documentary filmmaker Lourdes Portillo for the young Mexican women who were murdered or who disappeared in and around Ciudad Juárez.[37] Portillo, a feminist artist of a more traditional activist stripe than Biemann, says at the outset of her film that she has come to Juárez "to track down ghosts and to listen to the mysteries that surround them." The somber mood evoked by these words is sustained throughout the film by its haunting musical soundtrack, which consists of Gregorian chants sung by a mixed chorus or played on a piano. The imagery, by contrast, is bright and awash in pastels. The young women

37 *Señorita Extraviada*, directed by Lourdes Portillo (New York: Women Make Movies, 2001).

of Juárez are lovingly captured in barely detectable slow motion, while shots of the traffic of Juárez are speeded up, as befits a city "spinning out of control." Crosses, especially black crosses on pink backgrounds painted on telephone polls, suggest that the victims are virgins/martyrs in a way, entitled to respect regardless of who they were and how they lived. Portillo is the narrator/investigator of the film, but she does little to bring attention to herself; her accented female voice maintains a subdued, "contemplative," "personal," or "intimate" tone.[38] The result, however, is a public memorial that turns the private grief of the young women's survivors into a cause for mass public sorrow.

The spirits of the dead and missing young women haunt the film in that their images are never far from the viewers' eyes. There are many, many photographs of the victims in life, most of them black and white. There are few, if any, photographs of the victims in death. In lieu of corpses or skeletons, there are shoes – lots of shoes – arrayed in store windows, being slipped off and on, or buried in the sand still on victims' feet. Portillo holds the victims' memories in esteem, unlike the government officials who initially accused them of being prostitutes or having the wrong kind of male friends. To the contrary, she tells the viewers that "in Juárez predators have no problem finding prey. The only facts about the victims that we're sure of [are that] they were all poor, slim, they were dark, and they had shoulder length hair." This signals what the photos may not reveal: the victims were, by and large, socially marginalized mestizas from the south of Mexico. The deaths of these internal immigrants thus bespeak xenophobia, racism, and classism as well as misogyny.[39]

Portillo is deferential, too, toward the victims' relatives, mostly mothers, and the stories they tell about the last time they saw their children, their interactions with the authorities, and the circumstances in which they identified the bodies. Portillo acknowledges the women's efforts to investigate their loved ones' disappearances and death. The hands the viewer sees taking notes at the beginning of the film belong not to Portillo, but to an interviewee, the mother of a victim. As a collaborator interested in showcasing the subjectivity of the women, Portillo lets them tell their stories their way. One mother describes how she was herself kidnapped and raped when she was pregnant with her disappeared daughter, but the mother escaped the fate to which her child succumbed years later. Another mother describes the signs that portended her daughter's death: one of the child's "prescient" parakeets died the same day she did, while the other flew from his cage on the day that her body was discovered. Finally, there is the activist who passes on the rumor that the victims were selected on the basis of the photographs for which they posed on Fridays after work.

[38] Rosa Linda Fregoso, "Devils and Ghosts, Mothers and Immigrants: A Critical Retrospective of the Works of Lourdes Portillo," in Rosa Linda Fregoso, ed., *Lourdes Portillo:* The Devil Never Sleeps *and Other Films* (Austin: University of Texas Press, 2001), at 81, 100 (describing Portillo's signatures as a filmmaker).

[39] Héctor Domínguez Ruvalcaba and Patricia Ravelo Blancas, "Battle of the Crosses: Crimes Against Women on the Border and Their Interpreters," *Descatos*, winter 2003, at 122 (translated by Craig Epplin) (on file with author).

The filmmaker does not present these women as objects of pity or bemusement. The viewer must respect them for their efforts to find out what happened to their children and loved ones, to push the authorities to act, and to identify the criminals who are responsible for their deaths or disappearances. Portillo shows how their personal pain set them on the path to demanding recognition of their rights as equal citizens.

The physical border and what lies beyond in the United States do not loom especially large in Portillo's account of the murders. It is noted in passing that a famous Federal Bureau of Investigation profiler suggested that the killer was an American who took advantage of the border by crossing over, committing the crimes, and then crossing back again, but that idea seems not to have enjoyed much traction. A more likely systemic source of physical danger to the women of Juárez was the material or economic relations between Mexico and the United States and the lawlessness they promoted at the boundary between the two countries. Early in the film, in describing the preexisting context in which the murders occurred, Portillo notes that Juárez was a hub of Mexican narcotrafficking, which is fueled by the massive demand for illicit drugs in the United States. The United States is the largest market for illegal drugs in the world. The suggestion that the demand side of the equation is implicated in the women's deaths is not explicitly drawn, though. There is also a hint of a connection among the U.S. corporate-owned *maquiladoras*, Mexican narcotrafficking, and the murders, but it, too, is very vague. Some of the victims worked for the *maquilas*, but most did not. There was drug use at the plants, but it was not investigated because it increased productivity, and the *maquilas* were immune from investigation because of their significance to the economy.

Toward the end of the film, Portillo lays the blame for the deaths squarely on the government. She pronounces the young women's murders deprivations of their rights as citizens: "justice has been corrupted at the highest levels and [as a result] the lives of hundreds of young women have been lost." Connections between government officials and narcotraffikers interfered with the investigation of their deaths, if not the prevention of the crimes. The scapegoating of suspects, some of whom were coerced or tortured into confessing, was part of the cover-up. Says Judith Galarza of the Latin American Federation of the Families of the Disappeared, "The government is through negligence, submissiveness, and participation wholly responsible. They're either covering it up or doing it. So they're the ones who must solve this because they're responsible in every way." She continues, "They're violating the right to safety, the right to justice, the right to move around, the right to peace . . . for families." Portillo nonetheless concludes the film on a positive note insofar as women's citizenship is concerned: the relatives of the missing and murdered young women of Juárez are shown mobilizing and forming organizations of support and protest, like the Argentine mothers of the Plaza de Mayo, who were the subjects of an earlier film by Portillo.[40]

[40] *Las Madres: The Mothers of Plaza de Mayo*, directed by Lourdes Portillo and Susana Muñoz (New York: Women Make Movies, 1986).

Señorita Extraviada is a model of the tactful and sensitive portrayal of the victims of sexual violence and their survivors. Portillo, whose film work is influenced by her cultural affinity, does not exploit her subjects to advance an agenda that is not compatible with their own. She does not use their grief to create vicarious sufferers or to exonerate the audience. Portillo made a film that has proven valuable for her subjects' efforts to inform and recruit others to join them in demanding justice for the dead and disappeared. Although she certainly could have done more to indict the audience on the American side of the border and government officials on the Mexican side of the border, that was not her object; rather, she forces the audience to understand that the young women of Juárez, whose murders were neither prevented nor investigated as they should have been, represented precious social, economic, and political resources. As a sine qua non to enforcing the claim that they were denied the benefits of equal citizenship by the state, Portillo is reconstructing/rehabilitating the image of the young women who lived, worked, and alas died or disappeared at the border, not simply the physical border between the United States and Mexico and northern and southern Mexico, but the metaphysical border that is artificially constructed by gender, race, ethnicity, class, and regional exploitation, discrimination, intimidation, and violence.

Battle of the Crosses

While *Performing the Border* draws its aesthetic sensibility from the humanities, *Battle of the Crosses*,[41] a film in Spanish with English subtitles,[42] invokes a realism that is grounded in sociology and anthropology, the academic disciplines of the film's investigators. Text at the beginning and end of the film indicates that it is intended to be a work of visual sociology. As such, it conveys sociological or anthropological data and theory, albeit in a documentary film format.[43] *Battle of the Crosses* offers its audience not a memorable story, but a visual, academically informed panorama that captures the complexity of the conflicts that resulted in and arose out of the

[41] *Battle of the Crosses* (*La Batalla de las Cruces*), directed by Patricia Ravelo Blancas and Rafael Bonilla Pedroza (Tlalpan, México: CIESAS and Campo Imaginario, 2005).

[42] The English-speaking American viewer is somewhat at a disadvantage in assessing *Battle of the Crosses* because allowance must be made for the limitations of subtitles. The film itself reveals little about its backstory or the circumstances surrounding its making such as how the social scientists/investigators came to make a film incorporating their scholarship and what relationship they had with the other people who appear in the film, particularly the victims' survivors. Two of the investigators have written a book and a scholarly article, both in Spanish, about the Juárez murders. See Patricia Ravelo Blancas and Héctor Domínguez Ruvalcaba, *Entre Las Duras Aristas De Las Armas: Violencia y Victimización En Ciudad Juárez* (México, D.F.: La Casa Chata, 2006); Héctor Domínguez Ruvalcaba and Patricia Ravelo Blancas, "La Batalla De Las Cruces: Los Crímenes Contra Mujeres En La Frontera y Sus Intérpretes," *Descatos*, winter 2003, at 122–33. This review of the film relies on a translation of the article procured by this author and deemed acceptable by one of the investigators.

[43] See generally Marcus Banks, *Visual Methods in Social Research* (London: Sage, 2001); Sarah Pink, *The Future of Visual Anthropology: Engaging the Senses* (New York: Routledge, 2006); Jay Ruby, *Picturing Culture: Explorations of Film and Anthropology* (Chicago: University of Chicago Press, 2000).

deaths of so many poor young mestiza women at the northern border of the country with the United States.

As befits a work of visual social science, *Battle of the Crosses* explores the social groups and institutions that were implicated in or impacted by the femicides, the discourses they employed to advance their positions in the public debates over the murders, and the economic and political power they had at their disposal. On the list of groups and institutions that sought to build a consensus in the public sphere around their claims to knowing the murders' true import were governmental authorities and functionaries, political parties, journalists, academics and intellectuals, the Roman Catholic Church, evangelical churches, citizens, the police, intelligence agencies, community leaders, businesspeople, and families of the victims.

Seeking to be an encyclopedic survey of the Juárez femicides, the film begins with an attempt to state the precise number of the dead and the precise number of cases that had been solved and cleared (although without convictions or sentences). It also contains lists upon lists: of the victims by status (little girls, young women, teenagers, *maquiladora* workers, students, mothers, dancers, sex workers), the official causes of their deaths (drugs, domestic violence, accidents, sexual assaults/rapes/murders), the likely perpetrators (serial killers, drug dealers, snuff movie producers, organ harvesters, street gangs, lone assassins, *rutera*/bus drivers, police and detectives), and the number of public officials whose inaction allowed the deaths to go unpunished (three presidents, two state governors, five state prosecutors, eight federal prosecutors, seven investigators, eight special prosecutors).

Some of the social institutions that are implicated in the femicides and the corruption and incompetence that allowed the perpetrators to escape punishment get more analysis than others. The film highlights the misogynistic culture of the *maquilas*, where at least thirty of the murder victims worked; the seedy world of bars and places of amusement, where the nightlife brought young women into contact with a broad spectrum of deviants, including pimps, sadists, perverts, and murderers; the underground economy; the corrupt police, who expended great effort in falsely accusing men who did not commit the crimes, while failing to arrest and prosecute those who did; and the border, or *frontera*, which has produced a city where women were in the majority but the local government had largely failed to meet their needs.

Battle of the Crosses reveals more detail than the other films about the price some of these residents of Juárez paid to claim the benefits of equal citizenship on behalf of themselves, their dead loved ones, and their loved ones' surviving children. As suggested earlier, involvement of the survivors in the public sphere was not so much a matter of choice on their part as it was a fulfillment of their responsibility as relatives of the murdered and disappeared. According to Rosario Acosta, who still exhibits the anguish she felt when her ten-year-old niece was kidnapped, strangled, and murdered, these were women for whom even filing a missing person's report was not easy: "there are cultural factors that dissuade you from going to lodge a complaint. They detain you, question you, and after all, questionings and guilt are what we women are made of. True? Besides, she was your daughter, so where the

hell did you leave her?" The grassroots activism of these women carried a high risk of danger; they were subjected to death threats, surveillance, physical assaults, and police harassment. They were also exploited by professional activists who attempted to displace them. According to the film, though the professional organizations did not train the Juáranese women to be self-empowering, the women nonetheless came to constitute "a genuine leadership recognized by society."

While many of the interviewees are familiar faces from the other two films, in *Battle of the Crosses*, they are presented as activists, spokespersons for organizations, and interpreters of the events surrounding the murders. There is a long list of local organizations that were formed to pursue justice on behalf of the victims; it includes Voices Without Echoes, Daughters Back Home Again, Coalition for Women's Rights, Justice for Our Daughters, Integration-Mothers of Juárez, and the Eighth of March. Furthermore, the organizations generated a list of demands: punishment of the killers and the government officials who shirked their responsibilities; reparations for the survivors' losses; implementation of scientific methods of investigation (suggesting the impact of the American *CSI* television shows); investigation of the murders by local, national, and international bodies, including the International Criminal Court in The Hague; and respect for women in government.

The women's quest for answers and accountability found support in the journalistic community. Diana Washington Valdez, an investigative reporter for the *El Paso Times* and the author of *The Killing Fields: Harvest of Women*, is probably the best known person interviewed in *Battle of the Crosses*.[44] She crisscrossed the Rio Grande/Rio Bravo del Norte, moving back and forth between El Paso, Texas, and Juárez, Mexico, following leads, to amass evidence of a trail of interconnected crimes and official corruption that impacted both sides of the border. Washington's contributions, in particular, provide the kind of contextualization of the Juárez femicides that Fregoso calls for in her critique of *Performing the Border*. Washington traces the corruption and practice of silencing defendants and their lawyers through extermination, something that occurred in connection with the femicides, back to the 1970s and Mexico's so-called dirty war against leftist dissidents. By her account, the government's possible involvement in the murders ranged from actual participation in the perpetration of the crimes to intentional cover-ups, incompetent forensic investigations of the women's deaths, and the use of torture to extract confessions from wrongfully accused men.

According to Washington, the cross-border trafficking of drugs was more significant to the femicides than the cross-border transportation of *maquila*-assembled goods or undocumented workers. In the film, she says that the sexual murders were

[44] Diana Washington Valdez, *The Killing Fields: Harvest of Women* (Burbank, CA: Peace at the Border, 2006). The book was also published in Spanish. Diana Washington Valdez, *Cosecha de Mujeres: Saferi en el Desierto Mexicano* (Barcelona: Océano, 2005). A documentary titled *Border Echoes* is said to focus more extensively on Diana Washington Valdez than *Battle of the Crosses* does. The former film has been screened in a few venues, but no general release date has been announced. It was reportedly shopped to HBO.

the work of "two or more serial killers, two violent gangs, some drug dealers who have killed women with impunity . . . , and a group of powerful, wealthy men." By far the most controversial aspect of her claims relates to "Los Juniors," the scions of wealthy Juárez families who allegedly engage in orgies that end in the death of young women. Los Juniors find protection from prosecution because of their links to the powerful Juárez drug cartels. Washington is most emphatic in blaming the murders on ordinary organized crime, as opposed to the *maquilas*. "This is a police story, she said flatly [in an interview in the *Columbia Journalism Review*]. It's not about socio-economic conditions in Juárez. It's not about the maquilas. It's about people killing women and getting away with it. When the police catch the killers, that's when the murders will stop."[45]

The social scientists/investigators also appear in the film and offer a theoretical reading of events. Typically, at the end of a segment, one or two of them drop a brief nugget of social science theory (drawing on feminism, cultural studies, and postmodernism) into the film; that is, she or he provides a short sound bite that interprets or relates to the documentary footage that preceded it. They make pronouncements like "In a society where men are socialized to rape, women harbor a fear of rape;" "Violence is a business; otherwise, it cannot be explained. Someone gains from killings;" the *maquilas* are "a machinery that consumes bodies. [The workers are] fodder for a global economy;" and "the Juárez society with the contradictory conservative split begins to view the women as *maquila* crazies, who come out to go wild with the nightlife, with the nightspots, and so a stigma begins to form around women from the *maquiladoras*, who are also associated with prostitution." The only bit of critical tension in this commentary comes when one of the directors, Patricia Ravelo Blancas, refers to the survivors' status as victims: "They don't break out of the framework of victimization; they don't want to because it's in their interest to continue being victims." Ravelo does not develop the point further, and Héctor Domínguez responds with remarks that seem corrective in nature. There was obviously much more that these academics/investigators might have said, and there were surely issues that they might have debated among themselves. The academics' theoretical contributions as a whole do not have the coherence of the sustained but flawed postmodern analysis that drives *Performing the Border* (some of which is echoed in *Battle of the Crosses*).

Battle of the Crosses does convey one lesson more emphatically than any other. Over and over again, it hammers on the linkage between the killings and the government's failure to protect the young female citizens of Juárez and to allow their killers to escape punishment. One term, repeatedly invoked, encapsulated the state's culpability: *impunity*. Impunity, or *impunidad*, means, in this context, a blatant and contemptible exemption or freedom from punishment for lawbreakers and law enforcers alike. It was used by nearly everyone seeking justice on behalf of the murdered young women. The sociologists/investigators Héctor Domínguez

45 John Burnett, "Chasing the Ghouls," *Colum. Journalism Rev.*, March/April 2004, at 12, 14.

Ruvalcaba and Patricia Ravelo Blancas offer a rich description of impunity in their article. They note that political action responding to the crimes against women was often followed by the discovery of more victims, which was read as a symbolic message from the killers. Domínguez and Ravelo continue,

> The sender of these messages, just like the recipient, is undetermined, yet directs our attention toward a sacrificial system carried out by a group with power and not by a pathological mind. It is important to emphasize the depathologization of the perpetrator in order to focus on the structural and symbolic conditions in which victimization is produced. To the end of sustaining the impunity, agreements were made, a web of procedures is woven, strategies of deception are practiced, and those with compromising information are threatened, disqualified, defamed, and eliminated. Precisely the traffic and possession of information is a factor that determines many crimes committed by this group with power that benefits from impunity.[46]

They conclude,

> The executions related to the drug-trafficking business, the disappearances of various people and the serial murders of women share the common denominator of having been committed by an organized armed class. Gangs, police, drug traffickers, and magnates are not strangers to each other, but are instead the beneficiaries of the system of impunity, in that common interests associate them, since besides enjoying access to arms, whose use is tolerated in Juárez, they have complete liberty to conduct their business outside of the law.[47]

Battle of the Crosses illustrates how the Juárez femicides occurred "within a mix of fetishism, xenophobia, racism, misogyny, and classism against the women who do not belong to the elite of local society – that is, they are poor mestiza immigrants."[48] Rather than enduring the poverty and limited life chances to which gender and geography relegated them, they made the escape to the border. Unfortunately, the border proved to be a place where young women's entitlement to the benefits of equal citizenship was extremely weak. Instead of being protected by law and order, they were doomed by lawlessness, disorder, and impunity, the product of what the film's academics/investigators believe is a strong social conspiracy involving the state, which citizens are powerless to break.

Conclusion

Each of the three documentary films dissected here examines a different aspect of the murders that befell the young women of Juárez: *Performing the Border* tweaks the viewer's imagination regarding the nature of borders and their impact on the citizenship of women who live at the intersection of local, regional, national, and

[46] Domínquez and Ravelo, "Battle of the Crosses."
[47] Ibid.
[48] Ibid.

international legal regimes; *Señorita Extraviada* is an intimate portrait of the victims that shows why the private grief of their survivors is a cause for public national mourning; and *Battle of the Crosses*, the product of the investigation of social scientists, educates its viewers by offering a panoramic description of the complicated social terrain on which the Juárez femicides occurred and over which their meaning was fought. Together, the films suggest how borders are constructed and performed through law and law enforcement in ways that jeopardize women's rights as citizens. The films also show how women, in turn, challenge law and law enforcement to transcend the limitations of social, political, and economic borders and assert their right to equal citizenship.

Confronted with state intransigence in the face of the murders of dozens of young females, the women of Juárez used their traditional female roles as a springboard to political engagement. Overcoming the debilitating effect of class and ethnic marginality, patriarchal mass violence, and governmental corruption and lack of accountability, the women turned back the state's effort to diminish the murders as private matters and the victims as deserving of their fate. The documentaries together provide a vivid case study that illustrates the importance of understanding the synthetic quality of borders and their relationship to women's rights to equal citizenship in a globalizing world, a world where borders can pop up anywhere and at any time.

18

Domestic Violence, Citizenship, and Equality

Elizabeth M. Schneider*

During the last decades, there has been no aspect of women's rights in which there has been as much dramatic change as in the law of domestic violence.[1] Fifty years ago, for example, domestic violence was not even recognized as a subject of study or as a legal problem – it was simply invisible. Marriage – the notion that husband and wife were one and that one was the husband – made domestic violence permissible and acceptable.

Today, intimate violence is recognized as a serious harm – a harm within intimate relationships that has an impact on every aspect of the law, from criminal law to torts, reproductive rights, civil rights, employment law, and international human rights, and especially family law. But we have also begun to recognize that intimate violence has profound consequences for women's right to full citizenship and equality and women's right to work, to economic independence, and to health, not only in this country, but around the world. Recognition of the international human rights dimensions of intimate violence is a first step to appreciation of global citizenship.

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[1] I use the phrase *domestic violence* here in the context in which we use it in our casebook: "the term 'domestic violence' has become the most often used legal characterization to describe and categorize battering relationships. 'Domestic violence' also reflects a growing recognition that while women abused by men are still the primary victims of abuse, battering occurs in same-sex relationships, and that, in some cases, men are abused by women. Furthermore, 'domestic violence' focuses our attention on the broader social and legal contexts of battering rather than on victims and their individual psychologies. It also includes material that reaches beyond the narrow phenomenon of physical battering to a definition of violence that includes all forms of power and control used by perpetrators, including sexual, financial, and emotional abuse." Elizabeth M. Schneider, Cheryl Hanna, Judith G. Greenberg, and Clare Dalton, Introduction to *Domestic Violence and the Law: Theory and Practice* (New York: Foundation Press, 2nd ed. 2008), at 1–2.

In this chapter, I briefly highlight some of the ways in which violence affects women's equality and citizenship. I first examine the tremendous changes in recognition of the problem and pervasiveness of intimate violence both in the United States and around the world. Given the profound nature of these changes, I only touch on themes that I have discussed more fully elsewhere.[2] I examine the importance of citizenship to an understanding of intimate violence. I explore some of the most important contradictions and conflicts in the field that present challenges for legal work going forward. I discuss the challenges in integrating an understanding of citizenship into work on domestic violence.

The Recognition of Intimate Violence

Not until the late 1960s or early 1970s was there discussion about and surfacing of the issue of domestic violence in law in the United States.[3] During that period of time, there was a burgeoning of feminist activism concerning domestic violence within the paradigm of women's rights. Since then, there has been exponential change on these issues. We have seen the formation of national advocacy organizations, such as the Family Violence Prevention Fund, and state coalitions and local organizations that provide service and develop policy on domestic violence. The proliferation of legal advocacy on domestic violence has resulted in pathbreaking case law, innovative legislation and legal scholarship, and the development of specialized law school courses, clinics, and casebooks on domestic violence. National legal organizations, such as the American Bar Association (ABA), have formed special projects, such as the ABA Commission on Domestic Violence, to promote legal education and law reform.[4] Congress first passed the Violence Against Women Act (VAWA) in 1994 and has reauthorized it many times to fund a wide range of legal, educational, and service programs to assist battered women.[5] Family justice centers, which provide legal and

[2] Elizabeth M. Schneider, *Battered Women and Feminist Lawmaking* (New Haven, CT: Yale University Press, 2000); Schneider et al., *Domestic Violence and the Law*: see also Symposium, "Confronting Domestic Violence and Achieving Gender Equality: Evaluating *Battered Women and Feminist Lawmaking* by Elizabeth Schneider," 11 *Am. U. J. Gender Soc. Pol'y and L.* 237 (2002); Elizabeth M. Schneider, "Transnational Law as a Domestic Resource: Thoughts on the Case of Women's Rights," 38 *New Eng. L. Rev.* 689 (2004).

[3] For the history of the early domestic violence movement, see Schneider, *Battered Women*, at 11–28.

[4] The ABA Commission on Domestic Violence provides support and resources to attorneys working with victims of domestic violence, sexual abuse, and stalking. These resources include research assistance, practice tools, model pleadings, and access to experts in the field. The commission has also sponsored conferences and published several reports on integrating domestic violence into the law school curriculum. The most recent report is *Teach Your Students Well: Incorporating Domestic Violence Into Law School Curricula* (Chicago: American Bar Association Commission on Domestic Violence, 2003). See generally ABA Commission on Domestic Violence, Home page, available at http://www.abanet.org/domviol/home.html (accessed Nov. 30, 2008).

[5] 42 U.S.C.A § 13701, 18 U.S.C.A. §§2261–2266 (1994). VAWA contains groundbreaking initiatives to improve crisis services for victims and efforts to improve law enforcement response to violence against women and support services for victims. These services include transitional housing and training for health care providers who treat victims of violence. Also, VAWA contains provisions for training and

social service help and counseling and one-stop shopping for legal representation on a variety of issues, have been developed.[6] There are now specialized family violence courts in some jurisdictions.[7] There has also been important international human rights advocacy by groups in the United States and around the world to seek recognition of violence against women as a human rights problem, and this has been reflected in many international documents, including *The Secretary-General's In-Depth Study on All Forms of Violence Against Women*.[8] An International Violence Against Women Act that would provide U.S. aid funds to help eradicate violence against women around the globe, administered by the U.S. Department of State, has been proposed in Congress.[9]

Yet there continue to be deep contradictions about what domestic or intimate violence is and who experiences it. Originally, the central idea was hitting and beating; physical abuse was central to the notion of battered women. Now we have a far more extensive understanding of the forms that abuse takes in addition to the physical. The core concept is the exercise of power and control, for domestic violence involves a wide range of behaviors, including physical abuse, verbal abuse, threats, stalking, sexual abuse and coercion, and economic control.[10] However, there are critical problems in translating these broader perspectives on abuse to lawyers, judges, and other professionals, who still tend to see a physical focus, minimize other aspects of abuse, and fail to see the more subtle aspects of power and control as abusive and connected with physical abuse. Although violence is still overwhelmingly a problem for women, there are efforts to argue that it affects both women and men

services specifically geared toward helping victims in rural areas and programs specifically to help women with disabilities and elder women. Rape prevention and education and grants to combat violence on college campuses are also included.

6 Family justice centers provide centralized community resources and services for victims of domestic violence in one location. These services may include speaking with an advocate, filing for a restraining order, or receiving medical attention. The first family justice center opened in 2002 in San Diego, and today, over thirty operational centers exist in the United States, with many others in the works. See generally Family Justice Center Alliance, Home page, available at http://www.familyjusticecenter.org/ (accessed Nov. 30, 2008); San Diego Family Justice Center, Home page, available at http://www.sandiego.gov/sandiegofamilyjusticecenter/ (accessed Nov. 30, 2008); Alameda County Family Justice Center, Home page, available at http://www.acfjc.org/ (accessed Nov. 30, 2008).

7 Bruce J. Castleton et al., "Ada County Family Violence Court: Shaping the Means to Better the Result," 39 *Fam. L. Q.* 27 (2005).

8 *The Secretary-General's In-Depth Study on All Forms of Violence Against Women*, United Nations Department of Economic and Social Affairs, available at http://www.un.org/ (accessed Nov. 30, 2008).

9 The International Violence Against Women Act seeks to address the global crisis of violence against women and girls. The act would apply the force of U.S. diplomacy and foreign aid over five years toward preventing abuse and exploitation by authorizing more than $200 million annually in foreign assistance for international programs that prevent violence, support health programs and survivor services, encourage legal accountability and change public attitudes, promote access to economic opportunity and education, and better address violence against women in humanitarian situations. The act would address violence in all its forms, including honor killings, bride burnings, acid burnings, dowry deaths, genital mutilation, mass rapes in war, and domestic violence. Senate legislation (S. 2279) was introduced by Senators Joseph Biden and Richard Lugar in October 2007, and legislation in the House of Representatives (H.R. 5927) was introduced by Foreign Affairs Committee chair Representative Howard Berman in May 2008.

10 See generally Schneider et al., *Domestic Violence and the Law*, at ch. 2.

equally.[11] Deep and pervasive attitudes affect every aspect of domestic violence, making the question, why don't they leave?, the central issue.[12] This reflects a deep failure in understanding. Separation assault is a critical dimension of violence, for separation from the abuser in any way, acts of independence like seeking work, having contact with friends or family, and actual physical separation or threat to leave, often precipitates and exacerbates abuse and puts women and children at risk of their lives.[13] Despite efforts to explain these dilemmas in a broader context, we see the pervasiveness of woman blaming.

We know that abuse does not just occur in heterosexual relationships, but in same-sex relationships. The development of lesbian, bisexual, gay, and transgender (LBGT) advocacy around violence has been important and opened the door to many new avenues of reform.[14] We also know that violence occurs across the board, among poor families as well as wealthy ones, cross-class, cross-race, and cross-ethnicity.[15] There are special problems of violence in LBGT communities, in communities of color, and among immigrant women.[16] Extreme pressures operate in these communities that restrict disclosure and identification and hamper intervention.[17]

Now we see intimate violence everywhere and recognize that it touches every aspect of women's lives. We have gone from invisibility to seeing the implications of violence in all aspects of the law: from no law to an explosion of law. In the last several years, for example, there have been numerous Supreme Court decisions on issues relating to domestic violence. Promising language in the Supreme Court's opinion in *Planned Parenthood v. Casey*[18] showed a sensitivity to the depth and pervasiveness of domestic violence and the degree to which domestic violence influenced other issues involving women's equality such as reproductive rights.[19] But in *United States v. Morrison*,[20] the U.S. Supreme Court held that the VAWA civil rights remedy was unconstitutional and that domestic violence was not a national problem that the commerce clause could regulate, but only a local one.[21] There are

[11] See ibid.

[12] See generally Sarah M. Buel, "Fifty Obstacles to Leaving, a.k.a. Why Abuse Victims Stay," 28 *Colo. Lawyer* 19 (1999).

[13] Martha Mahoney, "Legal Images of Battered Women: Redefining Issues of Separation Assault," 90 *Mich. L. Rev.* 1 (1991). For discussion of separation assault in the context of abuse, see generally Schneider et al., *Domestic Violence and the Law*, at ch. 2.

[14] See generally Schneider et al., *Domestic Violence and the Law*, at ch. 3.

[15] Ibid.

[16] Ibid., at chs. 3 and 15.

[17] Ibid.

[18] 505 U.S. 833 (1992).

[19] See discussion in Schneider, *Battered Women*, at 3–5.

[20] 529 U.S. 598 (2000).

[21] For discussion of *Morrison*, see Catharine A. MacKinnon, "Disputing Male Sovereignty: On *United States v. Morrison*," 114 *Harv. L. Rev.* 135 (2000); Sally F. Goldfarb, "The Supreme Court, the Violence Against Women Act and the Use and Abuse of Federalism," 71 *Fordham L. Rev.* 57 (2002); see also Julie Goldscheid, "The Civil Rights Remedy of the 1994 Violence Against Women Act: Struck Down but Not Ruled Out," 39 *Fam. L. Q.* 157 (2005).

intractable problems of protection of and safety for abused women and prevention of violence. Keeping women safe is the big issue. Major problems remain with the two primary remedies for protection that have been developed – civil protective orders and criminal sanctions – both of which, for different reasons, are problematic, unsatisfactory, and limited.

Despite extensive statutory developments seeking to make civil protection orders more effective, these orders are pieces of paper that are ordered by a court and are often difficult to enforce by police. Often when they are most needed to protect women and their children, they are not enforced. They are most difficult in situations where there is some need for ongoing contact between the individuals such as having children in common.[22] Cases like the recent U.S. Supreme Court decision in *Castle Rock v. Gonzales*, in which a woman who had a protective order was unable to get it enforced by the police in time to protect her children from being murdered by her abusive husband, and the Court held that there was no civil remedy against the police, are legion.[23]

Criminal sanctions reflect tremendous change. Advocates moved with trepidation into criminalization as a remedy and the state power to punish batterers because the state has not been historically friendly to women's rights.[24] On the symbolic level, the notion of intimate violence as a crime against the state was viewed as an important statement that violence within intimate relationships was a crime against the state – a public harm, not simply a private one. Given the historical context of invisibility, the move to a concept of public harm is a significant shift. Yet criminalization has proven to be very problematic. Criminal sanctions are often too crude a remedy, requiring too much from women who seek to end the violence but not necessarily end the relationship and who do not want to subject their partners or families to criminal sanctions. Criminal sanctions may also have problematic impacts on women's ability to separate and obtain custody. The move to criminalization has engendered criticism from advocates on a variety of grounds, some of whom emphasize the problems for women of color and immigrant women in obtaining police protection, and others who resonate with concepts of family privacy that have historically prevented intervention.[25] Many advocates are genuinely concerned with the way in which criminalization appears to be the focus of U.S. domestic violence advocacy, particularly with the advent of VAWA, and the range of criminal justice programs that are funded under VAWA.[26] Public policy has not emphasized a broader range

[22] Sally F. Goldfarb, "Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help the Abuse Without Ending the Relationship?," 29 *Cardozo L. Rev.* 1487 (2008).

[23] 545 U.S. 748 (2005).

[24] See Schneider, *Battered Women*, at ch. 10.

[25] See Jeannie Suk, "Criminal Law Comes Home," 116 *Yale L. J.* 2 (2006).

[26] See generally Kristin Bumiller, *In an Abusive State: How Neoliberalism Appropriated the Feminist Movement Against Sexual Violence* (Durham, N.C.: Duke University Press, 2008); Emily J. Sack, "Battered Women and the State: The Struggle for the Future of Domestic Violence Policy," 2004 *Wisc. L. Rev.* 1657.

of efforts that include education, job training, employment, and a more human rights–focused set of programs, instead of criminalization.

Despite state involvement on the criminalization front, states have not assumed responsibility to protect victims of abuse and have not been held liable for failure to protect victims. Courts have consistently held that state officials, such as police officers, are not responsible for abuse, even when they fail to enforce civil protective orders. *Castle Rock* is the most recent example, and it is significant that it has now been taken to the Inter-American Human Rights Commission on the ground that the United States has committed human rights violations in failing to protect Jessica Gonzales from abuse.[27] Prevention of abuse is very difficult. Violence is deeply tied in with gender socialization and the proper roles of men and women. Abusers are very charismatic and manipulative; they are commonly attentive and intensely devoted to the women they abuse, and to the relationship at first. Abuse occurs within a gendered context: the tremendous importance of intimate relationships for women and the cultural and psychological significance of romance. Given the pervasiveness of teen dating violence,[28] there is a need for outreach and education to assist women to recognize the signs of abuse and not confuse abuse with romance and the desire for intimacy.

Domestic Violence and Dimensions of National and Global Citizenship

Much of my work on violence has focused on the links between violence against women and women's equality.[29] I have argued, along with others, that a focus on the material aspects of women's equality is critically important. Violence limits women's education, employment, independence, and capacity for autonomy. Indeed, one of the arguments made in the legislative history of the VAWA Civil Rights Remedy in Congress was that violence had this enormous and daily impact that restricted women's ability to work, their freedom to walk and travel, and their capacity to live full and independent lives. However, in *United States v. Morrison*, the U.S. Supreme Court held the VAWA Civil Rights Remedy unconstitutional on the grounds that violence was not really a national, but a local problem. The decision in *Morrison* reflected "resistance to the 'public' nature of the problem, to the link between violence and equality, violence and autonomy, violence and women's full participation and citizenship."[30]

[27] *Gonzales v. the United States of America and the State of Colorado*, P-1490-05, Inter-Am, C.H.R., Report 52/07, OEA/Ser.L/V/II.128, doc. 19 (2007). The Inter-American Human Rights Commission heard this case on October 22, 2008. On March 29, 2009, Gonzales submitted a Post-Hearing Brief to address the questions posed by the Commission during the October 22, 2008 hearing.

[28] Pamela Saperstein, "Teen Dating Violence: Eliminating Statutory Barriers to Civil Protection Orders," 39 *Fam. L. Q.* 181 (2005).

[29] See generally Schneider, *Battered Women*.

[30] Elizabeth M. Schneider, "Battered Women, Feminist Lawmaking, Privacy and Equality," in Sybil A. Schwarzenbach and Patricia Smith, eds., *Women and the United States Constitution: History, Interpretation and Practice* (New York: Columbia University Press, 2003), at 214.

This resistance pervades U.S. society, public policy, and culture. I am constantly struck by the degree to which violence against women and women's equality are viewed as distinct issues, as though problems of domestic violence have nothing to do with discrimination in the workplace, for example, or women voting, or the small number of women in leadership positions in government. To the contrary, violence against women, equality, and citizenship are inextricably linked. In this volume, Rogers Smith rightly argues that issues of gender and citizenship have been marginal to constitutional treatment of gender and that "the civic and constitutional consequences of disproportionate everyday burdens" that women face must be viewed as more central.[31]

The full impact of violence on women's citizenship has not been explored in the United States, although it is recognized in some other countries around the world. There are, of course, many dimensions of citizenship, some of which Linda McClain and Joanna Grossman identify in their introduction to this volume.[32] One of the most important aspects of citizenship is what Jennifer Gordon and Robin Lenhardt call *belonging*, or the "full acceptance within the local and national community."[33] They observe:

> "Citizenship" is a concept with many dimensions. Its meanings encompass the formal status of being a citizen, the possession of certain rights or benefits, the exercise of political participation, and inclusion in a collective social and cultural identity. Although at first glance citizenship appears to function as a unitary package, upon closer inspection it is clear that these aspects of citizenship can and do operate independently of each other.[34]

These various dimensions of citizenship are crucial to women who experience violence. But belonging is a particularly important facet of citizenship for such women, because they are so often isolated, at home, from families and friends, from other women who share their experiences, and from any larger sense of community. Citizenship has a broader meaning for women who experience violence. Often the home is a prison, and so getting outside the home at all is a manifestation of freedom. Any kind of separation from the total control of the abuser, any act of independence or self-assertion – whether getting a job, meeting with friends, or any manifestation of autonomous action – can be viewed as a threat to the abuser and provoke extreme violence.[35] Whether it is being able to get an education, go to work, participate in civic or self-help activities, exercise the right to vote, or attend a meeting, the various forms of citizenship and aspects of broader participation in civil society are important to women but enormously threatening to the battering relationship.

[31] See Chapter 1.
[32] See the introduction to this volume.
[33] Jennifer Gordon and R. A. Lenhardt, "Rethinking Work and Citizenship," 55 *UCLA L. Rev.* 1161 (2008).
[34] Ibid., at 1185.
[35] Mahoney, "Legal Images," at 13.

Broader definitions of violence in international human rights frameworks, such as torture, have begun to be recognized. Violence has begun to be understood as a problem that involves economic and social rights. But we cannot forget the daily ways in which violence operates. Violence impacts women's ability to get an education, to work, to participate in government, to vote, to be active in civic organizations such as parent-teacher organizations or block associations, and to be part of civil society more generally. Violence against women enforces women's isolation and so cuts them off from activism on behalf of themselves or other women, for their children, and for the larger society. In working on the United Nations *Secretary-General's In-Depth Study*, I read reports from countries around the world about exciting and innovative efforts being developed by nongovernmental organizations, often working in partnership with other sectors of civil society or with government, to address some of these daily problems. In many countries, there was much more of an explicit understanding of the link between women's equality and violence and the way in which violence had an effect on women, economic development, and women's participation in civil society.

Thus, intimate violence is deeply linked to issues of women's equality and citizenship.[36] Women who experience violence are not able to be full participants in society. In the United States today, we do not understand this link, and domestic violence is largely understood through a criminalization lens. But, as my work on the *Secretary-General's In-Depth Study* on the problem of global violence against women confirmed for me, other countries have begun to recognize that violence is tied in with all aspects of women's equality, education, employment, economic well-being, and social supports. Ironically, even the proposed International Violence Against Women Act seems to recognize those connections in the argument for U.S. funds for work on violence against women around the world, yet we ignore these approaches in work in the United States. This approach needs to be reflected in U.S. policy around domestic violence. We need the development of a strengthened national commitment and political will to address these needs. We need to bring this public dimension of violence, lost in *Morrison*, more affirmatively back into the picture. The new administration of President Obama in the United States has opened the doors for change in political will.

The idea of citizenship in its narrow form often implicates the notion of membership or inclusion in a particular nation-state. But in the broader definition of *belonging*, it can connect to international human rights perspectives that have been crucial in the *Secretary-General's In-Depth Study* and other reports. Links between violence and economic development have been critical to expanding this concept of citizenship to broader notions of belonging and commonality that have a global dimension. This is where we begin to see the concept of global citizenship. Yet at the same time that we see the larger, as it were, macro picture of violence and citizenship, we also need to turn to the micro picture in U.S. law to see how far we

[36] See Schneider, *Battered Women*, at 2.

are from that broader vision and to see how an expanded view of citizenship could make a difference.

Domestic Violence and Family Law

The intersection of domestic violence and family law is a good study of the problem of domestic violence on a micro level and of the enormous obstacles that operate to prevent women from participating as full citizens. It is critical to recognize the pervasiveness of violence in intimate relationships and families and the degree to which every aspect of family law has to be rethought in light of violence.[37] Family court judges are often hostile to and disbelieving of claims of domestic violence. The many professionals who may be involved in the family court system, not only judges, but guardians *ad litem*, for example, need focused education. Lawyers who handle family law cases are often ill equipped to identify abuse and thoughtfully represent clients where there are issues of domestic violence.

Domestic violence affects grounds for divorce and strategic questions of whether victims of abuse should seek divorce on no-fault or fault-based grounds. It affects distribution of assets in divorce. It must be taken into consideration in determining custody, especially joint custody, relocation, and visitation.[38] It affects issues of divorce mediation and parent education.[39] It shapes the panoply of laws with an impact on women who might need to flee with their children from an abuser. Domestic violence affects the child protective system as well as issues of race and class.[40] Violence is often a part of the lives of poor mothers and can result in neglect and/or abuse petitions or termination of parental rights, resulting in children being sent to foster care. For undocumented women who experience violence, immigration issues pose tremendous barriers.

Even where there has been change in law on the books, there has not been change in the application of law on the ground. Custody decisions in cases involving domestic violence are an example of the uneven nature of change.[41] Custody is an area in which there has been a considerable degree of statutory reform and revision respecting domestic violence. The classic "best interests of the child" standard allows for judicial discretion, including, in some states, taking a history of violence into consideration. Some jurisdictions have now made presumptions against custody to batterers explicit in their custody laws. Yet even with these presumptions, it appears that many abusers are awarded custody, even in situations where they have allegedly been responsible for the mother's death. Judges often do not recognize or acknowledge abuse or tend to minimize it. Even though there may be a statutory bar, judges do not take claims of abuse seriously where they are presented, or even,

37 See generally Schneider et al., *Domestic Violence and the Law*, at ch. 10–12.
38 See ibid., at 514–98.
39 See ibid., at 617–44.
40 See ibid., at ch. 12.
41 See ibid., at 517–98 (for discussion of the issues discussed in this paragraph).

perhaps, see them where they are subtle, and do not factor that abuse into custody determinations.

A similar theme runs though the issue of mediation.[42] Many family courts specifically preclude mediation where there is a history of domestic violence. But many mediators are not trained or sensitive enough to issues of violence to recognize signs of abuse and apply these protocols in a thoughtful way.[43] Similarly, the move toward more purportedly cooperative parenting can lead to battered women being viewed as problem parents when they will not go along. It is difficult to work out visitation when there is a history of abuse, not only because the child may be at risk of violence or sexual abuse, but also because contact between the parents needs to be limited. Family visitation centers have opened up to facilitate visitation, and other complicated methods are used. Parent education is another example of the way in which new approaches that favor cooperative parenting in divorce are often impossible where there is a history of violence. Parents simply cannot work together when there is a history of violence, and various adjustments have needed to be made.

There are special problems involved in child protection and domestic violence.[44] Efforts of battered women's advocates to educate family courts about the inappropriateness of an abusive parent having custody led to the development of standards by child welfare agencies that "engaging in domestic violence" could result in abuse or neglect petitions being brought against a parent, termination of parental rights, or criminal prosecution. Since mothers are largely primary caretakers, the impact of this rule has had a disproportionate impact on abused mothers. While the problems of child protection often pit battered mothers against the welfare of their children, and there are mothers who are unable to parent because of violence, the application of these rules has historically led to children being taken away from their mothers and placed in foster care. The *Nicholson* litigation in New York brought these issues to the fore and highlighted the very difficult problems and the need for child welfare workers to be educated about violence.[45] Further, women who have experienced violence need resources to assist them with education, employment, and parenting. A broader citizenship perspective brings added weight to advocacy for these needs.

These problems are pervasive because family court personnel are often not sufficiently knowledgeable about violence or thoughtful in their application of legal standards when violence is involved. Throughout these various aspects of family law is the underlying theme of, and overwhelming need for, state-funded legal representation for lawyers who can systematically represent battered women and more consistently educate judges. Another major problem is what has been called "Civil Gideon" – the need for battered women to have lawyers provided by the state in

[42] See ibid., at 617–37.

[43] Jane C. Murphy and Robert Rubinson, "Domestic Violence and Mediation: Responding to the Challenges of Crafting Effective Screens," 39 *Fam. L. Q.* 53 (2005).

[44] See generally Schneider et al., *Domestic Violence and the Law*, at ch. 12.

[45] *Nicholson v. Williams*, 203 F. Supp. 2d 153 (E.D.N.Y. 2002) and *Nicholson v. Scopetta*, 820 N.E.2d 840 (N.Y. 2004) are discussed in Schneider et al., *Domestic Violence and the Law*, at ch. 12.

civil and family law matters.[46] Battered women are often forced to rely on pro bono lawyers or law students in clinical or volunteer programs, particularly around civil protection orders. This is better than no representation, but most abused women need lawyers who are knowledgeable about and sensitive to issues of violence.[47] Their cases involve very complicated family law issues. Issues in one area have an impact on every other area and have tremendous consequences for women's lives down the line. They are far too difficult for a lawyer or law student without a background or experience in such cases to deal with. While family justice centers are often helpful and useful in assisting with the range and interrelated nature of legal problems that have an impact on violence, there is an urgent need for state-funded legal representation. Perhaps if we recognized the links between these micro aspects of family court and the larger issues of women's citizenship, there would be greater pressure for and success in arguing for state-funded legal representation.

The Importance of Citizenship

There has been much progress in making the problem of domestic violence visible in the law over the last fifty years, but much work remains. Tremendous misunderstanding persists concerning the dynamics of abuse among lawyers, judges, professionals, and laypeople as does deep resistance to seeing it as a multifaceted problem. Women are blamed for failing to leave, and the problem of violence is often minimized. But even judges who work hard to understand domestic violence may be frustrated because of the complexity of the problems and because intimate violence is not the same as stranger violence. The legal issues that are presented by violence are by definition complex and involve difficult human relationships. Even the most thoughtfully developed legal reforms can be problematic. Issues of violence tie in with other issues, so reform in many other areas of the law has an impact on violence. As a result, recent evidence and confrontation clause problems, the issues of *Crawford v. Washington*, and other U.S. Supreme Court decisions have had a huge impact on domestic violence prosecutions.[48]

Furthermore, there is a tremendous need for innovative legal work that can grapple with the complexity of battering and intimate violence, and for thoughtful and experienced judges, lawyers, other professionals, and advocates who can grapple with these issues. Although some legal reform efforts have not been successful, we cannot

[46] For discussion of Civil Gideon, see generally Laura R. Abel, "A Right to Counsel in Civil Cases: Lessons From *Gideon v. Wainwright*," 15 *Temp. Pol. and Civ. Rts. L. Rev.* 527 (2006); Russell Engler, "Shaping a Context-Based Civil Gideon From the Dynamics of Social Change," 15 *Temp. Pol. and Civ. Rts. L. Rev.* 697 (2006).

[47] Margaret Drew, "Lawyer Malpractice and Domestic Violence: Are We Revictimizing Our Clients?," 39 *Fam. L. Q.* 7 (2005).

[48] Deborah Tuerkheimer, "Exigency," 49 *Ariz. L. Rev.* 801 (2007) (examining the differences in the treatment of domestic violence in Fourth Amendment warrant clause versus Sixth Amendment confrontation clause contexts). See *Crawford v. Washington*, 541 U.S. 36 (2004); *Davis v. Washington*, 547 U.S. 813 (2006).

give up when battered women fail to act in ways in which the legal system wants them to. We need a greater understanding of the significance and pervasiveness of violence, but we also must recognize that it happens in the context of complex human relationships that often involve sharing children as well as economic and emotional dependence, and yes, even love. That means that we need legal solutions that are sufficiently nuanced to recognize the violence as well as the human connections.

Crucial to the innovative legal work that must be developed is greater attention to the problem of citizenship and the ways in which violence impacts women's capacity to be active members of civil society. Attention to the broader issues of citizenship is an important missing piece of work on domestic violence in the United States. This means much more assertive linking of violence to equality and the ways in which violence limits women's participation in and capacity to belong to larger communities. It means bringing back a larger, public dimension to the problem of violence. The advocates, lawyers, and judges who do work on the micro levels of violence need to be educated in these public dimensions and the links between violence and citizenship.

We have made important first steps to recognize and integrate understandings of violence into the law. But we have much work to do to translate these understandings into law reform that is effective for all women. Citizenship is an important piece of the equation. Recognition of the links among violence, equality, and citizenship is essential to progress in work on violence against women.

19

On the Path to Equal Citizenship and Gender Equality: Political, Judicial, and Legal Empowerment of Muslim Women

Anisseh Van Engeland-Nourai

Never again will I whisper in the shadows of intimidation. They will kill me but they will not kill my voice, because it will be the voice of all Afghan women. You can cut the flower, but you cannot stop the coming of spring.[1]

Equal citizenship is often declared in the constitutions of Muslim countries, but it is not enforced in practice. Despite formal declarations of gender equality, Muslim women are not yet considered as being equal to men. A male-centered approach to Islam has produced this result. Male clerics issue patriarchal interpretations of Islam, which undermine the formal guarantee of equal citizenship for women. According to some hard-line interpretations of Islamic law, women and men are different in essence and therefore in rights. For example, an interpretation of Islamic law states that the testimony of a woman in court is worth only half that of a man.[2] Interpreters rely on alleged hadiths such as "women are naturally, morally and religiously defective,"[3] despite the existence of verses of the Koran that state equality between men and women.[4] These hard-line interpretations create the perception of women as second-class citizens. Therefore, the first and foremost struggle is to ensure that women are considered equal.

The notion of citizenship in Muslim countries is not necessarily consonant with the liberal approach to citizenship: it is the group, rather than the individual, that matters. In addition, this is a communalism that favors men over women, which

[1] Malalai Joya, Home page, available at http://www.malalaijoya.com/ (accessed Aug. 28, 2008).

[2] This is based on verse 2:282 in the Koran, which clearly states that during transactions (contracts), one should "get two witnesses out of your own men. And if there are not two men [available], then a man and two women, such as you agree for witnesses, so that if one of them [two women] errs, the other can remind her." See Jamal A. Badawi, *The Status of Women in Islam*, available at http://www.islamfortoday.com/ (accessed Aug. 28, 2008).

[3] Internet Sacred Text Archives, "Muhammad Ismâ'îl al-Bukhârî: A Compilation of Hadiths," available at http://www.sacred-texts.com/ (accessed Aug. 28, 2008).

[4] For example, verse 4:124 says, "If any do deeds of righteousness – be they male or female – and have faith, they will enter Heaven, and not the least injustice will be done to them"; verse 3:195 states, "And their Lord hath accepted of them, and answered them: 'Never will I suffer to be lost the work of any of you, be he male or female: Ye are members, one of another.'" Yusuf Ali, "Translation of the Quran," Compendium of Muslim Texts, University of Southern California, available at http://www.usc.edu/ (accessed Aug. 28, 2008).

results in a paternalistic approach to law and resulting inequality.[5] Islamic law is used to justify the discrimination. Ending the double standard that allows male family members in Muslim societies to control the destiny of female ones is an essential part of the struggle for citizenship. Citizenship should be defined in relation to the state and not through the mediation of a male family member.

Muslim women are very aware that equal social status and rights are a precursor to equal citizenship. They struggle against this gendered approach of the law, going straight to the root of the problem, which is Islamic law, its making, its interpretations, and its rulings. Male and female scholars propose new interpretations of Islam to set up a balance between women's Islamic identity and women's rights. In addition to legal changes, hearts and minds have to be conquered as well: Muslims have to be convinced of gender equality.

This chapter will illustrate the different treatment of women and men and explain the gaps. It will also analyze the means and strategies women use to change the situation: some women have chosen to become political actors, while others are judges and interpreters of Islamic legal sources. The diversity of Islamic countries creates a mixture of situations and laws; each country deals differently with laws pertaining to women. This chapter offers an overview of what is taking place in five countries: Egypt, Syria, Jordan, Afghanistan, and Iran. These five nations were chosen because they are representative of the challenges women face and the struggle to combat paternalism. They also represent the two main branches of Islam: Sunnism and Shiism. At the outset, it should be stressed that the gendering of legislation and discrimination against women are not inevitably the outcome of Islam. Though it happens everywhere, the issues Muslim women face deal with distorted interpretations of Islam aimed at keeping them under control.

Gender and Citizenship in Islamic Countries: An Overview

In the constitutions of the five countries analyzed, male and female citizens are declared equal. In each, however, there is a double standard resulting in the different treatment of men and women. Women struggle to balance the relationships between men and women by stressing the need to respect equal citizenship as outlined in their nations' constitutions.

The Clash of the Titans: The Principle of Equality Versus the Respect of Sharia Principles

In most Muslim countries, the law openly discriminates against women, except for Afghanistan, where there is legal renewal largely influenced by Westerners.

[5] Mary-Ann Tetreau, "Gender, Citizenship, and the State in the Middle East," in Nils Butenshøn et al., eds., *Citizenship and the State in the Middle East: Approaches and Applications* (Syracuse, NY: Syracuse University Press, 2000), at 87.

Paradoxically, all these countries affirm gender equality and equal citizenship in their constitutions. However, these principles are limited by Sharia principles (the body of Islamic religious law): they exist as long as they do not contradict Sharia law. Since Sharia is partly made up of interpretations, hard-liners, who often control or at least heavily influence the process of interpretation, can easily present Sharia principles that limit gender equality.[6]

For example, Article 3(14) of the Iranian Constitution claims gender equality and equal citizenship. However, interpretations have barred women from occupying the functions of president of the republic. The debate is about the use of masculine terms within the constitution. Article 115 describes who can be president and uses the Arabic word *redjâl*, which means "man." In Arabic, it can also mean "personality," but Iranian hard-liners have decided the word refers to a man, and therefore only a male can become president. Likewise, in Egypt, men benefit from privileges that are denied to women when it comes to marriage, divorce, and child custody.[7] A good example of legal discrimination is the divorce procedure: a woman can only obtain a financial remedy if she earns a fault-based divorce, for which she must provide proof and corroboration, even when she has suffered physical violence and rape during the marriage. With a no-fault divorce, she loses all financial rights and has to repay the dowry. Women seeking a divorce must undergo mediation, but men need not.[8] Moreover, men have the unilateral and unconditional right to divorce and do not have to go to court to end the marriage. Women have no alternative to going to court to ask for a divorce, which is strictly regulated because women have to fulfill certain conditions to get a divorce.[9] These are illustrations of how one group limits another through the use and misuse of law and Islam.

In addition to hard-line interpretations of Islamic law, there are also political and social pressures from Islamists. In most Muslim countries, and in Islamic law, women are perceived as the vehicle or bearer of tradition and cultural values, which tempers their equality.[10] Egypt is a country where Islamists have an influence, and it shows

[6] It is not only hard-liners who control the process of *ijtihad* – interpretation of the sources of Islamic law – because there are also reformist interpreters. However, as this chapter will explain, one complicating factor is that in Sunni countries, it is said that the gates of interpretation (*bab al-ijtihad*) were closed in the tenth and eleventh centuries, which renders new and creative interpretations very difficult. This situation opens up the path to traditional, conservative, and hard-line interpreters to maintain the tradition. In Shia countries, the doors were not closed, and conservative and reformist interpreters (*mojtaheds*) struggle to have the upper hand.

[7] Deniz Kandiyote, "Islam and Patriarchy: A Comparative Perspective," in Nikkie Keddie and Beth Baron, eds., *Women in Middle Eastern History: Shifting Boundaries in Sex and Gender* (New Haven, CT: Yale University Press, 1991), at 5.

[8] For more about Egyptian women and divorce, see, e.g., Human Rights Watch, "Divorced From Justice: Women's Unequal Access to Divorce in Egypt," 16 *Hum. Rts. Watch* 8 (2004); Dawoud El Alami and Doreen Hinchcliffe, *Islamic Marriage and Divorce Laws of the Arab World* (London: Kluwer Law International, 1996).

[9] Nathan J. Brown, *The Rule of Law in the Arab World: Courts in Egypt and the Gulf* (Cambridge: Cambridge University Press, 1997).

[10] Ibid., at 69.

in Article 11 of the Egyptian Constitution: "the state shall guarantee coordination between a woman's duties toward her family and her work in society, considering her equal to man in the political, social, cultural and economic spheres without detriment to the rule of Islamic jurisprudence." While it affirms equality, the article reminds women of their special duties to society. In a similar vein, Article 4 of ministerial decree 864 provides that a woman cannot travel without the agreement of her husband or legal representative.[11] The justification for this policy is that women are the mother of Pharaoh (despite the fact that some women were pharaohs themselves)[12] and have to stay home to bring up future male citizens. Therefore a woman's social role is linked to the family: she brings up the citizens of tomorrow. The same limitations appear in Jordan: Sharia law has to be respected and Islamists have an impact on lawmaking. According to family law set up in the Personal Status Law of 1976, repudiation of the wife by the husband still exists (Article 87). Polygamy is still accepted, as long as men inform the first wife when they take an additional one.

There have been small legal improvements: women can now petition for divorce without their husbands' agreement. Yet other laws show clear inequality: a man who kills a woman can still get a reduced sentence for acting under anger. The advantage that Iranian women and organizations fighting to reverse these discriminations and reach equal citizenship have over their Jordanian and Egyptian counterparts is that Iranian *mojtaheds* can make new interpretations of Islamic law that would lead to equality.[13] Sunni *mojtaheds* are limited by the debate about the closure of the gates of *ijtihad*.[14]

In the countries analyzed, although constitutional law states gender equality and citizenship, it defers to Sharia law, as interpreted mostly by hard-liners. Islamic law thus supersedes the rights granted. Islamists act as watchdogs to ensure that legislation respects Islamic law as they understand it.

When the Enforcement of the Law Is Discriminatory: A Tale of Conquering Hearts and Minds

In countries like Afghanistan, Syria, or Jordan, there is wide state support for women's participation in society as equal citizens; however, people are not convinced of equality between men and women, which leaves room for discrimination, mostly in courts. The Afghan Constitution is an example of state-supported integration of women in the public sphere: Afghan women benefit from gender equality and have equal citizenship guaranteed in the Afghan Constitution. However, in practice,

[11] Marlyn Tadros, *Rightless Women, Heartless Men: Egyptian Women and Domestic Violence: A Report on Domestic Violence in Manshiet Nasser, an Informal Settlement in Cairo* (Cairo: Legal Research and Resource Center for Human Rights, 2001), at 3.

[12] David E. Jones, *Women Warriors* (Washington, D.C.: Brassey, 2000).

[13] A *mojtahed* is a learned cleric well versed in Islam and Islamic law who interprets sacred laws.

[14] See sup. n. 6.

women are far from equal: Afghan males have difficulty accepting equality because women have been treated as second-class citizens for decades, a trend that was underlined during the time of the Taliban. The proof that Afghan women are not equal citizens is that they are victims of sexual abuse, violence, beatings, forced marriages, burning, and death. Rapists and killers are often powerful people such as officials, policemen, landlords, or merely husbands. They are rarely arrested, and when they are, most are released after payment.[15] In addition, Afghan women suffer from the power male judges have to interpret Islamic law and to gender it, if they wish. There have been some legal, civil, and constitutional gains for Afghan women since the fall of the Taliban, but in practice, especially for women living outside Kabul, the situation remains difficult. The situation for women in Afghanistan is increasingly difficult, as is evident from the recent attempt of the Karzai government to have a law allowing for marital rape in Shia areas and women's protests of this law. This demonstrates not only the uneven progress of legal advances in women's equality, but also that women's rights are sacrificed in the name of higher political goals, in this case the reelection of President Karzai.[16] One of the main issues is the existence of a parallel legal system: local authorities, such as *shuras* (gatherings of representatives of all tribes for consultation) and *jirgas* (tribal assemblies of elders, which make decisions by consensus, a system peculiar to Pashtun tribes), reinforce this state of informal justice by agreeing with the punishments and discriminations against women. This cultural legacy remains from the time of the Taliban, which strengthened informal justice.[17]

These violations of universal human rights instruments such as the Universal Declaration of Human Rights (UDHR) clearly show why declaring that men and women are equal citizens does not suffice and why the intervention of Westerners in the name of the rule of law is of little help.[18] Minds have to be changed as well: people have to take gender equality to heart for the concept to work.

Most of these double standards in treatment and forms of discriminations are the result of hard-line interpretations of Islamic law and the revival of old customs. The case of Syria is enlightening: the Arab Ba'th Party has promoted gender equality, but, although Syria is a secular country, a strong Islamist revival influences women's rights. Islamic law is the source for personal status law, which has an impact upon women's rights. Women live under legal tutelage, which means

[15] Sarfaz Qadiri et al., "Violence Against Women on the Rise in North of Afghanistan," available at http://www.rawa.org/ (accessed Aug. 27, 2008).

[16] "Women, Extremism and Two Key States," *New York Times*, April 15, 2009, at A26; Dexter Filkins, "Afghan Women Defy Convention, and Crowds, to Protest New Law on Home Life," *New York Times*, April 16, 2009, at A1.

[17] Integrated Regional Information Networks, "Afghanistan: Rally to Stop Violence Against Women," *IRIN*, Nov. 24, 2004.

[18] In Chapter 20, Deborah Weissman argues that recognizing women's equality as a human rights norm reflects real progress, but urges caution about U.S. invocation of women's equality to justify foreign intervention.

that they do not enjoy full legal personality. For example, they cannot sign legal documents alone and need the cosignature of a male member of the family. This situation of legal tutelage encourages violence against women. Males believe in the differences between men and women, a belief that is not only societal, but reinforced through religious justifications.[19] These are only more examples that show that even though gender citizenship is officially declared, the hearts and minds of the Muslim populations have not been won, and citizenship is still mediated by men.

A good illustration of the struggle for hearts and minds is the practice of honor killing: a woman who is considered to have dishonored her family because of a flirtation, a refusal to marry a man chosen for her, or a rape is sometimes killed in some parts of the Muslim world. The reason for the killing is that the woman brought dishonor upon the family and society and has to be punished. She is not, as such, a victim of the rape or a victim of the violation of her rights in the way Westerners understand the concept; she committed or was compelled to commit a sin. The family, the real victim of the crime, claims reparation, and too often does it through the killing of the girl, relying on tribal customs. If women and men were considered equal before the law because they were equal citizens, there would no such violation. The practice of honor killing and its acceptance means that conservative interpretations of Islam must be challenged.

The case of Zahra, who was killed in her sleep after being abducted and raped before marriage, became the rallying point for women in Syria to ask again for honor crimes to be punished as regular crimes (*rejet*) and not as crimes of passion under the Article 242 Penal Code.[20] The real issue, however, is with Article 548 of the code, which says that a man who kills a woman after witnessing her acting in an immoral fashion will go free.[21] This rule directly contradicts Article 45 of the Syrian Constitution, which affirms equal citizenship. Women are said to enjoy the same social status as men, but old practices and hard-line interpretations have led to toleration of honor killings as part of the local Syrian culture. Zahra's husband took legal action to obtain reparation for the murder of his wife, an action that could end with a legal decision condemning honor killings and asserting equality between the sexes.

[19] Sev'er Aysan, "Culture of Honor, Culture of Change: A Feminist Analysis of Honor Killings in Rural Turkey," 7 *Violence against Women* 964 (September 2001).

[20] Zahra was abducted and raped before the marriage by a family friend. Later, a man proposed to her, despite this incident, and she got married. Her brother still believed it was necessary to "wash away the shame" (*ghasalat al arr*) by killing her. See Katherine Zoepf, "A Dishonorable Affair," *New York Times*, Sept. 23, 2007.

[21] Article 192 of the Syrian Penal Code states, "Judge excuses or reduces the punishment if a person commits a crime under honor." Article 548.1 states, "Anyone who catches his wife, one of his female ascendants or descendants, or his sister committing adultery or engaging in illegitimate sexual relations with another person and who, without intending to do so, murders, beats or injures his relative and her accomplice, is exempt from punishment."

The Myth of Sisyphus? Gender Equality as an Aim

Although constitutions in many Muslim countries proclaim gender equality and equal citizenship, the situation, in reality, is far from satisfying any international women's rights standards. It is difficult for Muslim women to complain about discrimination because their opponents always state that equal citizenship exists in the constitution and that the rest is left to the judges to decide by looking at Islamic law. Women seeking to bring reform while retaining their Islamic identity have entered the political and legislative arenas to enforce their citizenship-based rights; they aim to change law either at the top, as legislators, or at the heart of the interpretation system, as *mojtaheds* qualified to interpret Islamic law, or as judges issuing legal decisions.

"I am a candidate, therefore I am"[22]

One strategy to have an impact on legal discrimination and to change hearts and minds is the seeking of elected office at the national or local level. By being political actors, women become masters of their destinies and promote equality from a position of power. Some countries employ gender quotas that make it easier for women to end up with elected positions.

The new Afghan Constitution encourages women to participate in political life by voting and entering the political arena. It not only declares gender equality, but also ensures a minimum representation of women in both houses of Parliament. Twenty-seven percent of the seats are reserved for women in the lower house (Wolesi jirga).[23] Fifty percent of the seats in the House of the Elders (Meshrano jirga) are reserved for women. The quota was exceeded in the government's first parliamentary elections in 2005.[24] Women can also run for president, which is not the case in Iran. The first Afghan female presidential candidate stood for election in October 2004. In January 2005, the first woman was appointed governor of a province. The Afghan Constitution secures seats for women in the houses and ensures their political participation because women's emancipation also includes an active role in the public sphere. In addition, women have to be given some public legitimacy by being elected to prove that their cause has support within the population. The results so far in elections in Muslim countries are promising: the populations of cities are often ready to be led by women, while the elites are lagging behind.[25] The

[22] Mehrnoush Najafi, candidate to municipal elections in Iran. See "Noght-e sar-e Khat," available at http://noghtehsarekhat.blogsky.com/ (accessed Aug. 27, 2008).

[23] Amnesty International, "Afghanistan: Women Still Under Attack – A Systematic Failure to Protect," *Amnesty International Report*, May 2005.

[24] Womankind Worldwide, "Taking Stock: Afghan Women and Girls Five Years On," available at http://www.womankind.org.uk/ (accessed Aug. 27, 2008).

[25] Women posted impressive results in the 2007 elections for the city council of Tehran. See, e.g., Shahram Rafizadeh, "Impressive Performance of Women in City Council Elections," *Rooz*, Jan. 7, 2007, available at http://www.roozonline.com/ (accessed Aug. 27, 2008).

Constitution of Afghanistan is fairly recent and clearly tries to draw lessons from the legal loopholes in other Muslim countries. It pushes women to play a role in public life so that they can have an impact. However, very few new laws on equality are presented to Parliament. It is too early yet to witness legal changes regarding equal citizenship in Afghanistan.[26]

Being elected is also crucial because women then gain enough leverage to influence decisions and legislation regarding equal citizenship. Once elected to Parliament, women can present, amend, or vote against laws pertaining to women's status. They can lead campaigns at the local level to inform citizens of their rights and of gender equality, which should lead to greater understanding from men and greater awareness by women. As an Iranian lawyer summed up the importance of women's participation in political life, "I am a candidate, therefore I am. . . . Why don't women want to have a larger share of participation? We shouldn't wait until they give us a share. We should go forward ourselves and be involved. Standing aside will do no good."[27]

Egyptian women members of Parliament (MPs) have shown their influence. They have taken many initiatives pertaining to gender equality and, in particular, equal citizenship: Egyptian women married to foreigners are now able to pass their citizenship on to their children.[28] The new law is based on equality between fathers and mothers, a novelty in an Islamic country. Though most bills proposed by female MPs are not passed, they demonstrate the expectations of society.

In addition, several women's rights organizations have called upon Egyptian parliamentarians to amend existing laws and develop tougher legislation to stop violence against women. This came in reaction to a recent rape and murder case, in which one of the accused was sentenced only to two months' imprisonment. The judge referred to Article 17 of the penalties code, which gives judges discretion to take mercy and reduce the degree of the crime.[29] Laws like this are an inheritance from the past and from hard-line interpretations of Islam, but the female MPs have not been able to eradicate them yet.

In Jordan, state support has been important in encouraging women's participation in the public sphere. In 2003, King Abdullah dissolved the upper house of Parliament and appointed seven women (out of fifty-five members) to the new one. Women elected in Parliament and appointed to the upper house are expected to take new legal initiatives to support women's rights. The most famous Jordanian

[26] Pam O'Toole, "No 'Real Change' for Afghan Women," *BBC News*, Oct. 31, 2006.

[27] This lawyer's blog is available at http://noghtehsarekhat.blogsky.com/ (accessed Aug. 27, 2008).

[28] Nationality Law 154 of 2004.

[29] "In the provisions of felonies [*jinayat*], where the circumstances of the crime which is the basis of the prosecution require the compassion of the court, it is permissible to replace the penalty as follows: the death penalty with hard labour for life or for a fixed term; hard labour for life with a fixed term of hard labour or a prison sentence; fixed term of hard labour with a prison or detention sentence [*sijn* or *habs*] of not less than six months; prison sentence with a detention sentence of not less than three months."

female MP, Toujan al-Faisal, made a case for women's rights that influenced other parliamentarians, who passed some of the bills she introduced.[30] After her, female MPs have set up a methodology designed to pass as many laws as possible. They also lobby Parliament before a bill is voted upon and rely on outside support, in particular from the media.[31] However, the situation of Jordanian female MPs is not easy. For example, in 1997, the government reportedly interfered so that Toujan al-Faisal would not be reelected. Her political career has been full of obstacles because of her activism.[32]

Since the 1970s, successive Syrian governments have made gender equality a priority. Dozens of Syrian feminist activists are now cabinet ministers and diplomats. In 1973, there were only 4 women in Parliament out of 186 elected members. Today, 30 of 250 legislators are women.[33] President Bashhar al-Asad appointed Dr. Najah al-Attar as vice president, the first Syrian woman to hold such a position. There are two women in the thirty-person cabinet. Syrian women are consequently supported by the political system itself. There have been efforts by male and female MPs to work together on family issues such as the presentation of a law in 2006 to increase the age of mothers' guardianship over their children to twelve for boys and fifteen for girls. A draft law is under consideration to enable Syrian women who marry non-Syrians to pass their nationality to their children.[34] Despite major improvements, however, Syria has not achieved full equality between men and women in the political arena. Despite continuing obstacles, Syrian women, like their Egyptian and Iranian counterparts, are "in search of political power."[35]

Threats and Intimidation: *"D*o not be afraid. I will restore back my freedom very soon."[36]

These are the words Toujan al-Faisal spoke to her daughter, who burst into tears when her mother was sentenced to prison for undermining the sovereignty of the Jordanian state. Al-Faisal was the victim of her own political campaign seeking to denounce corruption of the male prime minister. This is one of many events in

[30] Gehan Abu Zayd, "In Search of Political Power – Women in Parliament in Egypt, Jordan and Lebanon," in IDEA, ed., *Women in Parliament: Beyond Numbers* (Stockholm: International IDEA, 1998).

[31] Ibid.

[32] See, e.g., Nancy Gallagher, "Women's Human Rights on Trial in Jordan: The Triumph of Toujan al-Faisal," in Mahnaz Afkhami, ed., *Faith and Freedom: Women's Human Rights in the Muslim World* (London: I. B. Tauris, 1995), at 209–31.

[33] United Nations Development Programme Gender and Citizenship Initiative, "Gender and Citizenship," available at http://gender.pogar.org/ (accessed Aug. 27, 2008).

[34] Integrated Regional Information Networks, "Syria: Interview With MP Huda al-Homsi al-Ajlani," *IRIN*, March 8, 2005. The issue of citizenship passed by the mother is an issue in Muslim countries. See "Gender and Citizenship Initiative" http://gender.pogar.org/ (accessed Aug. 27, 2008).

[35] Abu Zayd, "In Search of Political Power," at 1.

[36] "Jordan Sentences Toujan al Faisal to 18 Months for Speaking Out," Arabicnews.com, available at http://www.arabicnews.com/ (accessed Aug. 28, 2008).

her life: in 1989, a case for apostasy was brought against her as well as a demand that she should be divorced from her husband. Many saw her trials as a way to intimidate and silence her.[37] The question remains whether a male politician in similar circumstances would have had to face similar hardship.

Despite the support of the state for gender equality, as in Syria or Jordan, there are several obstacles for women in politics. Once elected, women often face threats from their male counterparts as well as violence and intimidation. Some women in Iran who wanted to be part of the elections and were turned down left the country after being hassled by the authorities. Egyptian female MPs face harsh opposition in Parliament, even from their own political parties and male MPs, who consider women's issues to be secondary.[38] In Afghanistan, suspended MP Malalai Joya has received so many death threats that she is compelled to sleep in a different place every night. She has declared that "Parliament is just a showpiece for the West" to show her discontentment and the limits of the new political permissiveness in Afghanistan.[39] Some MPs are even physically attacked in Parliament by male MPs when they try to speak. Joya had to be brought under the United Nations security forces the day she made an extraordinary and daring speech in 2005.[40] Those who are in the best situation to promote gender equality are therefore endangered by their positions, circumscribing the possibility for change.[41]

There are also constant attempts to limit women's actions in Parliament. In Afghanistan, in 2006, there was talk of a bill that would have required female MPs to come to Parliament accompanied by a male chaperone (*mahram-e sharaii*). It was not passed, but it demonstrates the limits of the tolerance of the presence of female MPs in Parliament. Another technique to prevent women from working effectively in Parliament is to make them feel inferior and weak: in Syria, families prevent girls from entering into politics and say that a woman's reputation will suffer and her chances of marriage will decrease.[42]

In the Afghan parliament, vote buying often occurs and prevents any reform in favor of women's rights. Women parliamentarians do not control a network as such and therefore have limited capacities in initiating new bills. Female MPs also practice self-censorship because of fear, as many members of Parliament are affiliated with warlords.[43]

37 Ibid.

38 Farida al-Naqash, *Tatawur al-Musharaka al-Siyasiya li-l-Mar'a al-Misriya* [The Development of Women's Political Participation] (Cairo: Faculty of Political Science and Economics, 1994), at 12.

39 Christina Lamb, "They'd Rather Die: Brief Lives of the Afghan Slave Wives," *Sunday Times*, Nov. 5, 2006, at 5.

40 Malalai Joya, "The Woman Who Defies Warlords," *World Pulse*, Jan. 5, 2005.

41 Deniz Kandiyoti, "The Politics of Gender and Reconstruction in Afghanistan" (Occasional Paper 4, United Nations Research Institute for Social Development, Geneva, Switzerland, 2005).

42 Integrated Regional Information Networks, "Syria: Workshops Aim at Female Political Empowerment," *IRIN*, Nov. 13, 2005.

43 Womankind Worldwide, "Taking Stock."

Women elected at the local level often have a limited impact, too. They try to raise awareness of women's issues but are limited by tribal structure like the *shuras* in Afghanistan. There are no mixed-gender *shuras* in Afghanistan, and discussions and decisions taken in women's *shuras* are often not taken seriously by male *shuras*. Women's representation in the government remains low, and women rarely hold senior or managerial positions in district offices.[44]

In addition, not all women elected to Parliament in Muslim countries work in favor of women's rights. For example, the Iranian MP Fatima Allia does not consider women's rights to be relevant.[45] There is still work to do in the Muslim world, especially regarding women as political actors: women are being limited by the image men have of them and by gendered legislation. They are still perceived as being the object of Sharia. This notion has to be changed now that women have entered the political arena and work in favor of women's rights in many countries. Even if they face intimidation and violence, Muslim women are in Parliament, and the low number of their presence as MPs does not affect their determination to amend the laws.

Attempts by Muslim Women to Shape Law and Change Legal Interpretations: The Daughters of Aisha?[46]

Discrimination is often justified by referring to old Islamic traditions, values, or hard-line interpretations, which infuse law with patriarchal standards.[47] Judges and *mojtaheds* tend to uphold old interpretations of Islamic law that side with males. For example, Jordanian judges end up almost justifying honor killing and therefore contributing to its persistence.[48] For women to struggle effectively against these types of discrimination, they need direct influence on law. Being a legislator is one strategy, but gaining involvement in jurisprudence (*fiqh*) or interpretation of Islamic law is another. As a judge or *mojtahed*, women can influence the law directly.

[44] Ibid.

[45] "Two Women, Two Sides to the Elections," *Persian Journal*, Feb. 24, 2004, available at http://www.iranian.ws/ (accessed Aug. 28, 2008).

[46] Aisha was considered to be the favorite wife of the Prophet. She played an important role in the Revelation period, encouraging her husband. She used to lead women in prayer. She also played a major political role in the armed resistance against Ali by rallying people. Aisha, the only woman on the battlefield, led thousands of men into the Battle of the Camel. She eventually played a major role in setting up the Sharia by reporting hadiths. See, e.g., Fatima Mernissi, *The Forgotten Queens of Islam* (Minneapolis: University of Minnesota Press, 1993); Jan Goodwin, *Price of Honour: Muslim Women Lift the Veil of Silence on the Islamic World* (London: Little, Brown, 1994).

[47] Chahla Chafiq and Farhad Khosrokhavar, *Femmes sous le Voile face à la République Islamique* (Paris: Félin, 1995).

[48] Reem Abu Hassan and Lynn Welchman, "Changing the Rules? Developments on 'Crimes of Honour' in Jordan," in Lynn Welchman and Sara Hossain, eds., *Honour: Crimes, Paradigms, and Violence Against Women* (London: Zed Books, 2005), at 199–208.

Fighting the Status Quo Through New Interpretations of Islamic Law: The Battle for New *Fiqh* and *Ijtihad*

There is a movement in the Muslim world to change legislation through new interpretations of Islamic law to fight traditional, conservative, and hard-line interpretations. This is why, in Afghanistan, a country in full legal renewal, there have been debates since the fall of the Taliban about the uses and misuses of religion as an excuse to limit women's rights. In the end, despite a liberal constitution, Afghan advocates of hard-line interpretations of Islam were successful in restricting women's rights.[49] This has not dimmed women's mobilization to struggle for their rights. Despite this mobilization at the costs of their lives,[50] however, most Afghan women seem to ignore that these interpretations of Islam can be discussed, and they believe that if they do offer discussion, they would become nonbelievers. It is therefore urgent to educate all Muslim women not only in universal human rights standards, but also in Islam and Islamic law. They should know that if they have the required knowledge, they can strive to be *mojtaheds*; in addition, they have to acquire the sense of being equal to men.[51]

Women and ijtihad

In a Shia country like Iran, women advertise the fact that they can practice *ijtihad*. This is a major issue because Shiism has not closed the doors to *ijtihad* and is open to new interpretation. However, Iranian women are barred from being *mojtaheds*, according to the interpretation of the word *rajul* as meaning "man" in Article 162 of the constitution.[52] They have nonetheless influenced male clerics, therefore enduring the wrath of conservative clerics. Through the mobilization of some women, Iran has witnessed the emergence of modernist interpretations of Islam, which have a positive impact on women's rights.[53] The urgency is to reform the law, preferably in accordance with universal standards, to reach gender equality. Women have a role to play in this process of interpretation, and this is why intellectuals like Ayatollah Mohaghegh Damad request the existence of female interpreters (*mojtaheds*) of sacred legal texts. Iranian women are supported in this fight by many male *mojtaheds*, clerics, and intellectuals. Muslim feminist scholars and activists underline the paradigm shift in Islamic law. Their approach to religious texts can open the way

49 O'Toole, "No 'Real Change' for Afghan Women."

50 Sayed Salahuddin, "Gunmen Kill Another Afghan Woman Journalist," *Reuters*, June 6, 2007.

51 Amy Zalman, "Women, Citizens, Muslims," available at http://www.womenforafghanwomen.org/ (accessed Aug. 27, 2008).

52 Faustina Pereira, "Post Divorce Maintenance for Muslim Women and the Islamist Discourse," *Women Living Under Muslim Laws*, Jan. 2000.

53 Azadeh Kian Thiébaut, "L'islam Est-il Incompatible avec la Démocratie?," *Etudes*, Sept. 1995, at 161–67.

for radical and positive changes in Islamic law to accommodate concepts such as gender equality and human rights.[54]

However, this is happening mainly in Iran, where Shiism allows for new interpretations. In Sunni countries, changes have occurred despite the opposition of clerics arguing that the gates of *ijtihad* have been closed and that new interpretations are limited.[55] Women carry on with claims for a new *ijtihad*. These activists have to struggle at two levels: first, they argue that the gates of *ijtihad* were not closed and that they have the right to present other interpretations of law; then, they have to argue that they are as qualified as males to be *mojtaheds*. This legal difference between Shia Islam and Sunni Islam regarding the notion of *ijtihad* explains, in part, why Iranian women have been able to push for more legal changes to hard-line interpretations of Islamic law than Sunni women. It also might explain why, in Sunni countries, women have been granted the limited right to present creative interpretations, while Iranian women are barred from this exercise. Female *mojtaheds* in Iran could fundamentally alter Iranian law because there is no obstacle to new interpretations of Islam and Islamic sacred texts.

The reason why some Muslim women decide to do a new exegesis of the Koran, rather than opting for secularism or liberal democracy, is because this segment of the population wishes to reform Islam while upholding their values.[56] Women then gather under the flag of "gender jihad"[57] and the Islamic feminism movement.[58] They search for and collect evidence that Islam and its history included gender equality and strong female characters like Aisha, who was considered to be the favorite wife of the Prophet. They work on a new hermeneutics of the Sharia. Amina Wadud focuses on the Koran and analyzes it word by word to provide a more positive interpretation.[59] Fatima Mernissi focuses on the hadiths to demonstrate how unreliable they are.[60] Their aim is not to alter Islam, but to enable it to tackle contemporary issues.

It is in Sunni countries, where new interpretations of Islamic law are more restricted, that women have been permitted to play a greater role, precisely because they cannot deeply alter the structure of the law as long as the gates of *ijtihad* (and therefore interpretations) are closed. Egyptian women have been very active since the nineteenth century in interpreting Islamic law regarding women's

54 Ziba Mir Hosseini, "The Quest for Gender Justice: Emerging Feminist Voices in Islam," *Women Living Under Muslim Laws*, Oct. 2004.

55 The claim that the doors were closed is opened to debate. See, e.g., Wael Hallaq, "Was the Gate of Ijtihad Closed?," 16:1 *Int'l J. Middle East Stud.* 3 (1984); Ghunam Nabi Falahi, "Ijtihad," UK Islamic Mission, available at http://www.ukim.org/ (accessed Aug. 27, 2008).

56 Beverley Baines considers the relationship between religion and feminism in Chapter 4.

57 Farid Esack, *Quran, Liberalism and Pluralism: An Islamic Perspective of Interrelation Solidarity Against Oppression* (Oxford: Oneworld, 1997), at 107.

58 The Islamic feminism movement answers, in a way, the question raised by Baines in Chapter 4.

59 Amina Wadud-Muhsin, *Qur'an and Women* (Kuala Lumpur, Malaysia: Fajar Bakti, 1992).

60 Fatima Mernissi, *The Veil and the Male Elite: A Feminist Interpretation of Women's Rights in Islam* (Reading, MA: Addison-Wesley, 1991).

issues.[61] Women have been preaching, and in 1999, Cairo's al-Azhar University opened a special section to train them. There are many candidates to become preachers in women-only prayer meetings. There are, however, limits: the day Amina Wadud preached to a gender-mixed crowd in New York, al-Azhar showed discontentment. There are also female *muftis*, and these women practice *ijtihad* and pronounce fatwas, which are published by state-owned newspapers, to solve people's problems by looking at Sharia. They did this without official recognition by the Mubarak administration, until they obtained acknowledgment: in 2006, the first female preachers and religious guides were officially named.[62] The outcome has been that women have been appointed deans at al-Azhar, on the Islamic studies faculty.

Syrian women play a crucial role in the phenomenon of Islamic revival. Some are members of the Qubaisiate, which is a secret women's society where women learn Islam to influence or challenge males' interpretations of Islamic law.[63] The old tradition of *sheikas*, women as religious scholars, is revived because girls outnumber boys in madrasas. These women have become very influential in the interpretations of Islamic law and influence their relatives. The leader of the Qubaisiate, Sheikha Munira al-Qubaisi, organized her movement like a sisterhood, with levels of knowledge. This movement has a strong hold on politics.[64] This is how Syrian women influence not only the interpretations of Islamic law, but also the highest political authorities. The message women send is clear: they have chosen to be in charge of their destinies by turning actively toward a new Islam. Holding such prominent positions enables them to obtain the power and authority that belong in Islam to the king and the *mojtahed*. Women are now able to advise and guide the country on Islamic issues, including matters related to women's rights; they strive for such rights and for women's equality. The main issue remains the closure of the gates of *ijtihad*, which limits creativity. However, this movement is not supported by all feminists and women activists. Secularists do not wish to refer to an Islamic frame. Consequently, there is no unanimity regarding strategies to promote gender equality.

Women and fiqh: Changing jurisprudence

There are female judges in most Muslim countries, positions that give them the power to change, or at least influence, *fiqh* (jurisprudence). In Jordan, where Queen Rania insists on women's role in the public sphere, several women hold judgeships. They have been appointed since the late 1990s and so far have mainly tackled cases dealing with mediation, family law, and juvenile issues in civil courts. These women are trying to push the younger generation to turn toward new specialties to widen

[61] Wendy Kristiansen, "Egypt: Islamic Sisters Advance," *Le Monde Diplomatique*, Sept. 2005 (noting popular female preacher Shirin Sathy).
[62] "Egypt: First Women Preachers Named," *ADN Kronos*, Dec. 10, 2006.
[63] Katherine Zoepf, "Islamic Revival in Syria Is Led by Women," *New York Times*, Aug. 25, 2006.
[64] Ibid.

their scope of action in courts. A fund was created in 2007 to make sure there would be training available for female judges.[65] There are no women sitting on Sharia courts, which is paradoxical because these courts deal with personal status laws.[66] The reason is that appointing women to Sharia courts would alter the nature of decisions issued by these courts, and the system is not ready for that. Consequently, women are only tolerated in what is perceived to be their natural area of skill: family law. There are also female judges, prosecutors, and attorneys in Afghanistan, but no women members of the Supreme Court.[67] Again, women judges are limited to family and juvenile courts.

In Egypt, the government made the decision to facilitate the integration of women into the judiciary. For example, Tahani el-Gebali was made a justice on the Supreme Constitutional Court, which has the power to control legislation. Thus, she has the power to limit legislation violating women's right to equality. Other female judges, usually in family law, hand out rulings dealing with private matters. The first women to be appointed to the Supreme Judicial Council, the highest legal authority, faced controversy.[68] The Grand Mufti Sheikh Ali Gomaa supported that decision by stating that the appointment of women to judicial positions is not in contradiction with Sharia principles. In Iran, women are still barred from that function.

The rationale for preventing women from being judges or limiting them to family law courts is that women are too emotional to issue objective rulings. They are said to know family issues best and have the necessary sensitivity to deal with such matters. There is thus a debate over the right of a woman to be a "full" judge sitting in all types of courts, a right that would entitle her to seek to ensure respect for gender equality in rulings. Although the grand sheikh of al-Azhar, Mohammad Sayed Tantawi, has ruled that nothing in Islamic law prevents women from being judges, there is still controversy in Egypt and elsewhere. Religion again appears as an obstacle, with hard-liners arguing that Sharia principles do not permit female judges.

The Struggle for Equal Citizenship: Civil Society

In an era of globalization, falling back on communitarian values that ignore the needs of part of the population – women – is not an option. The resistance organized by advocates of gender equality has met with success among women: there is nowadays a "gender conscious drive to change."[69] Indeed, laws in the Muslim world have to

[65] "Women Judges Share Concerns With Queen," *Jordan Times*, March 14, 2007.

[66] Amira El Azhary Sonbol, *Women of Jordan: Islam, Labor and the Law* (Syracuse, NY: Syracuse University Press, 2003), at 116.

[67] United Nations Development Fund for Women, "Fact Sheet 2007," available at http://www.unama-afg.org/ (accessed Aug. 27, 2008).

[68] Andrew Morrow and Khaled Moussa al-Omrani, "Egypt's First Ever Women Judges Stir Controversy," *Mail and Guardian*, April 16, 2007.

[69] Azadeh Kian Thiébaut, "Women and Politics in Post-Islamist Iran: The Gender Conscious Drive to Change," *Women Living Under Muslim Laws*, Sept. 1998, at 4.

adapt to social reality and the new roles of women in public and private life. Many laws enforced in Muslim countries are at odds with universal human rights standards as laid out, for example, in the UDHR.

Women have undertaken various initiatives and strategies to change this situation and fight effectively for gender equality and equal citizenship. While female MPs struggle in Parliament and educated women reinterpret Sharia, women also gather in nongovernmental organizations (NGOs) (organizations for rural women, for beaten women, for education, for sexual education, etc.). Women's engagement in civil society to bring about change is evident, even in a country that is still at war, like Afghanistan.

Despite discriminations and difficulties of everyday life in Afghanistan, women are becoming more and more aware of the urgency to be considered equal citizens. Women are beginning to complain about the violations of their rights to organizations such as the local Afghan Independent Human Rights Offices, which then tries to attract national attention.[70] There are even important cases of rape and murder that have reached courts and await judgment. This is a strong signal sent to the authorities that women expect to be treated equally to a male victim. However, Afghan women's rights defenders are often intimidated, hurt, or even killed. Their activities are perceived as challenging cultural, religious, or social norms regarding the role of women in Afghan society. In September 2004, a human rights activist speaking against forced marriages was attacked with acid.[71] This shows that women are for now tolerated, rather than equal.

The situation is less dire in other countries. The Egyptian women's movement is considered by many in the Arab world to be one of the first movements in favor of women's rights. It began early and has been very active since. For example, in 1951, Doria Shafiq entered Parliament with 1,500 women to demand full political rights, a reform of the personal status law, and equal pay for equal work.[72] There are today 1,600 NGOs working on empowering women.[73] However, despite this mobilization, women have had troubles putting gender equality issues on the government's agenda. Equality in rights and citizenship are often the casualties of "reforms" adopted to muzzle women and affirm the Islamicity of the Egyptian state.[74] Therefore, just like in Iran in the 1970s, when the Shah had to struggle with the Islamists, the Egyptian government has passed strict laws limiting women's rights to control Islamist groups.[75] The aim of this strategy is either to fight the Islamists in their own field or to negotiate with them. Women who warn of the dangers of such reforms

[70] Amnesty International, "Afghanistan: Women Still Under Attack."

[71] Ibid.

[72] Cynthia Nelson, *Doria Shafiq: Egyptian Feminist – A Woman Apart* (Cairo: American University in Cairo Press, 1996), at 168–77.

[73] Mona Zulficar, *The Political Rights of Women in Egypt* (Cairo: Shalakany Law Office, 2003), at 6.

[74] Denis Sullivan and Sana Abed-Kotob, *Islam in Contemporary Egypt: Civil Society vs. the State* (Boulder: Lynne Rienner, 1999), at 97–100.

[75] Ibid.

have been tagged anti-Islamic and pro-Westerner.[76] Thus women are the victims of everyday politics, and gender equality is perceived as less urgent than controlling rogue elements that could seize power. The fact that asserting gender equality and equal citizenship would strengthen the current regime and government and their will to be democratic does not seem a strong part of the Egyptian political discourse. This reinforces the stigma that women are second-class citizens and that the government cannot afford to lose ground to the Islamists by granting them equality. This has affected the struggle Egyptian women lead. In 2000, there was a proposal to amend the law preventing a woman from traveling freely, but the Egyptian government did not accept this provision in a draft law, so as not to irk religious conservatives.[77]

The fight for change, however, continues. For example, Sheikh Muhammad Sayyid Tantawi supported the provision to amend the law on women's travel rights. There was a reform of citizenship law in 2003, but women did not obtain the right to pass on their nationality to their children when they are married to foreigners.[78] Several women's organizations have mobilized to lobby the parliamentarians to amend the laws about violence against women.[79] However, as a result of a new law on NGOs,[80] many women's NGOs were closed down or had their activities restricted.[81] The Egyptian government has created a National Council for Women, through which it tries to control any women's rights activity in the country.

While Syria is officially a secular state, there is an Islamic revival. Just as in Egypt, this development increases discrimination. Women, for example, cannot pass their nationality directly to their children, so when a foreigner marries a Syrian woman, the child does not have Syrian citizenship. This affects children born from dual-citizenship parents and living in Syria, as they cannot work in the public sector. Many women's organizations lobbied for a reform of this law to ensure equality for all, but clerics refuse to amend the law. According to clerics, these women are un-Islamic because the personal status law comes from Islamic law and cannot be debated. The same groups have sought to amend the laws pertaining to divorce as well as custody rights. The result of their efforts was a reform of personal status law in 2003 to allow divorced mothers four years of extra custody of their children.

In 2005, the death of a young female Druze killed by her brother after marrying a man from another religion mobilized civil society. A campaign called "Stop Honor Killings" began. The Syrian parliament and the justice ministry were asked to change

[76] Diane Singerman, "Rewriting Divorce in Egypt: Reclaiming Islam, Legal Activism, and Coalition Politics," in Robert W. Hefner, ed., *Remaking Muslim Politics: Pluralism, Contestation, Democratization* (Princeton, NJ: Princeton University Press, 2004), at 161–88.

[77] Human Rights Watch, "Divorced From Justice."

[78] See Citizenship Law 26 (1975).

[79] Integrated Regional Information Networks, "Tougher Laws Needed to Stop Violence Against Women, Activists Say," *IRIN*, July 13, 2005.

[80] This law was passed by the People's Assembly on June 3, 2002 and provides criminal penalties for unauthorized NGO activities (Article 76).

[81] Sherifa Zuhur, "The Mixed Impact of Feminist Struggles in Egypt During the 1990s," 5:1 *Middle East Rev. Int'l Aff. J.* 79 (2001).

the criminal code. As a result, Grand Mufti Cleric Ahmad Hassoun was compelled to condemn the crime publicly and call for legal reform. President Bashar al-Assad also promised to do something.[82] This was a major step toward winning hearts and minds, as was Zahra's husband's action for remedy. These and other changes and achievements in Syria are the result of Muslim women's mobilization and hard work. Women have become "essential partners in the development process and giving them the right of equality in social services and wages, and the right of making political and economic decisions."[83]

In 1999, in Jordan, feminist organizations led a national campaign, supported by the royal family, to end honor killings.[84] The campaign called for amendment of the penal code. Just like in Syria, Article 98 allows mitigation and reduction of a sentence for a rapist.[85] Article 340 even exonerates the killers of women in certain circumstances. Women have been unsuccessful in amending this law, despite the support of the king. It is said that female MPs prefer to wait and make political gains before tackling such difficult issues.[86]

In Iran, mobilization has paid off. An example of the power of civil society is custody law, which has evolved thanks to the involvement of women. Article 1169 of the civil code gave the custody of girls after seven and boys after two to the father. In 1998, the then-conservative Majles had to amend the law in response to a sad circumstance:[87] a little girl was placed with her father, who had remarried. The mother-in-law and her family hit the infant. The mother complained, but the authorities paid no attention to her as she had lost custody. The child was eventually killed by her new relatives. The feminist press and civil society pressured the government so much that the female MPs proposed an amendment so that custody would not be given automatically to the father; instead, the facts of the case would be studied carefully.[88] This does not mean that women have won the children's custody, but that the children's interests are eventually taken into account by the courts. In addition, as of December 2003, Iranian women can keep their sons until the age of seven. Iranian women decided to take up the challenge and to restore women's rights using women's means. Mobilization of women striving for equal citizenship, therefore, seems to have positive results. Women work at several

[82] Elass Rasha, "Murder of 16-Year-Old Spurs the Grand Mufti of Syria to Call for Legal Reform," *Christian Science Monitor*, Feb. 15, 2007.

[83] Integrated Regional Information Networks, "Syria: Workshops Aim at Female Political Empowerment."

[84] Alan Philips, "Princes Oppose Murder of Unfaithful Wives," *Daily Telegraph*, Feb. 16, 2000.

[85] Article 98: "Whosoever commits a crime in a state of extreme rage resulting from an unrightful [*ghayr muhiqq*] and dangerous act on the part of the victim shall benefit from the mitigating/extenuating excuse."

[86] Integrated Regional Information Networks, "Jordan: Honour Killings Still Tolerated," *IRIN*, March 11, 2007.

[87] Scott McLeod, "One Woman's Way," *Times*, Sept. 2, 2005.

[88] Homa Hoodfar, "The Women's Movement in Iran: Women at the Crossroads of Secularization and Islamization" (working paper, History on Podium, 1999), available at http://www.iranchamber.com/ (accessed Aug. 28, 2008).

levels at the same time, pressuring existing structures to integrate them. The situation remains critical in Iran, where women are barred from being *mojtaheds* and judges, two positions that are key to women's ability to enact change and institute reforms for equal citizenship.

Conclusion

Women in the Muslim world face many challenges. Most analysts agree, however, that their determination will help them in changing laws. Being legislators is also crucial. Islamic law is the backbone of Muslim society, as it regulates not only legal bodies, but also government and society. This is why reforming interpretations of Islamic law is so important. One has to be aware, however, that talking of women's rights is like walking on a red line: women are at the very core of Islam, bearers of the traditions and religious values. They are often limited in their rights because a women's rebellion would threaten the Islamic system as it is interpreted today. This reinforces the idea that major changes in Islam will come from women.

Cases like the one of Nojoud Muhammed Nasser, a Yemenite girl married by force at the age of eight, who ran away from her husband's home to seek protection with the court, give hope to advocates struggling for gender equality. Nojoud went to court and prosecuted her father because of a forced marriage. She also asked for divorce on the grounds of sexual and domestic abuse. Despite the fact that she is underage, the judge listened to her claims, and Nojoud was granted divorce, while both men were temporarily arrested.[89] The fact that Nojoud's claim was listened to on an equal footing to the claims of men is crucial. Indeed, equality in courts is essential to the respect of women's rights and is a dimension of equal citizenship. Reforming the law and its interpretations is the other step essential to combating inequality.

[89] Hamed Thabet, "For the First Time in Yemen, Eight Year Old Girl Asks for Divorce in Court," *Yemen Times*, April 10, 2008.

20

Gender and Human Rights: Between Morals and Politics

Deborah M. Weissman

Introduction

The phenomenon of globalization and its attending imaginary representations of one world raise issues regarding legal norms that are as vast as they are complex. The premise of global integration raises implications for the women's movement and its legal claims and has necessitated a rethinking about gender and justice. The issue of women's equality has undoubtedly assumed a place of prominence in the debates on globalization and international law and, in the context of globalization paradigms, has motivated efforts to develop universal norms to guide the conduct of public life as well as private realms.[1]

The project to improve the condition of women has assumed multiple forms, from local grassroots organizing to national and international movements. Women's organizations and human rights groups have frequently relied upon legal approaches and rights-based claims. Feminist scholars have proposed gendered theories of citizenship and human rights as a means to advance norms of women's equality within an international framework.[2] Indeed, the degree to which the international community incorporates legal norms of gender equality provides a standard by which to take stock of the progress made toward human rights generally.

The advances made in adopting international legal standards that benefit women are noteworthy precisely because they have been registered in an environment subject to the constraints of market mechanisms so often detrimental to the condition of women and under circumstances of ethnic tensions, political violence, and foreign invasion. Human rights gains have been substantial and in many instances sustained and have contributed to the dialectical circumstances in which the possibility of change actually serves as the motivation for change.[3] To the extent that the feminist

[1] See generally Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester, UK: Juris, 2000).

[2] See Dimensions of Women's Equal Citizenship, "Statement of Purpose," available at http://www.hofstra.edu/ (accessed Aug. 5, 2008).

[3] Beverly Balos, "The Wrong Way to Equality: Privileging Consent in the Trafficking of Women for Sexual Exploitation," 27 *Harv. Women's L. J.* 137, 141–43 (2004) (reviewing developments at the United Nations).

human rights project serves as a claims-making endeavor, demands for justice may confront and conquer the otherwise deadening reality of our permanent subordinate status.[4]

These gains are a consequence of transnational activism that has successfully impacted international institutions. International tribunals have determined that genocide and crimes against humanity include sexual violence.[5] The International Criminal Court adopted substantive protections, procedural safeguards, and administrative structures that are gender-sensitive and designed to incorporate the needs of victims of gender-based crimes. The United Nations prioritized the issue of human rights for women in terms of programmatic, administrative, and methodological approaches to international relations.[6] Feminist legal scholars have developed a body of scholarship that demonstrates the emergence of a body of customary international law that requires governments to expand protection for women, particularly against gender-based violence.[7] These developments would seem to lay the groundwork to advance women's equality both within a national context and an international setting.

But it is more complicated. The process of securing women's equality is itself often a microcosm of the larger debate about globalization, specifically the degree to which old paradigms of colonialism are being reproduced in the guise of global integration. The call for women's equality – a summons to which people of goodwill cannot but be sympathetic – must therefore be received warily, perhaps even at times skeptically, to be examined for hidden agendas and ulterior motives. Transnational feminism cannot yet be unhinged from national interests, especially where one nation – the United States – so dominates global dynamics. Caution is warranted if the pursuit of women's equality is not as an end unto itself but a means by which to enhance U.S. relative advantages, including access to strategic resources and defense of its hegemonic position.

This chapter explores the dilemma faced by the feminist human rights project. It recognizes the benefits of normative assessments of rights-based claims and feminist transnational activism but also seeks to call attention to the ways that such strategies may serve to underwrite the exercise of unjust power. The following section offers new insights about the ways in which feminist scholars and activists successfully use international standards and clarifies the circumstances where human rights norms are likely to achieve improved circumstances for women. It links theory to practice

4 Derrick Bell, *Faces at the Bottom of the Well* (New York: Basic Books, 1992), at 12 (discussing the history of racial oppression and the permanent and pernicious character of racism).

5 Llezlie L. Green, "Gender Hate Propaganda and Sexual Violence in the Rwandan Genocide: An Argument for Intersectionality in International Law," 33 *Colum. Hum. Rts. L. Rev.* 733, 734 (2002).

6 See Hilary Charlesworth, "Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nation," 18 *Harv. Hum. Rts. J.* 1, 6 (2005); Julie Mertus and Pamela Goldberg, "A Perspective on Women and International Human Rights After the Vienna Declaration: The Inside/Outside Construct," 26 *N.Y.U. J. Int'l L. and Pol'y* 201 (1994).

7 Elizabeth M. Schneider, "Transnational Law as a Domestic Resource: Thoughts on the Case of Women's Rights," 38 *New Eng. L. J.* 689, 691–712 (2004). See "Brief for Amici Curiae on Behalf of International Law Scholars and Human Rights Experts for Petitioners," *United States v. Morrison*, 529 U.S. 598 (2000).

by examining the use of the human rights project, with a focus on feminist projects in Cuba, feminist transnational networks in Latin America, and the grassroots struggles for gender rights in Ciudad Juárez. These examples demonstrate that such norms function best when they create a framework to imagine the spaces of autonomy, that is, where legal norms act to make an ideal readily accessible to women's struggles.

The third section applies a critical perspective to the human rights project. Efforts to achieve full global citizenship rights for women function principally within the framework of U.S. hegemony, both as a historical condition and an actual circumstance. Without attention to American power, exercised within domains of politics, economics, and culture, the project of achieving equal citizenship for women may in fact serve the United States' quest for global dominance, instead of the very goals it seeks to accomplish.

The exploration of the prevailing tensions within the human rights discourse is an endeavor that avoids allowing theory to stand in for political action, while at the same time emphasizes that action is subject to power.[8] It is thus possible to imagine transnational feminist legal activism creating standards for international gender equality. However, at the same time, those very standards of international norms can provide the United States a pretext for intervention. The nature of these contradictory possibilities must thus be both historicized and contextualized as a means to arrive at some appreciation of circumstances most propitious for development of usable human rights norms for women.

Discursive Purpose and Power: Claiming Gender-Based Rights

Gendered international legal standards framed as human rights protections, whether embedded in state constitutions or treaties, are often first grasped at the discursive level. Globalized legal standards in the area of human rights symbolize modernity and progress. Even as mere symbols, though, they create incentives for states to appear as abiding by global standards of appropriateness, including standards affecting women.[9] Women often take advantage of opportunities and political space created by these norms to make claims and raise issues both in domestic and international fora, asserting their own identities in their own voices.[10]

Progressive Possibilities: International Legal Standards as a Marker of Civilization

Human rights norms function to create the spaces of autonomy that can be adapted to the material and political conditions of those who seek to invoke their rights. First,

[8] Martha T. McCluskey, "Thinking With Wolves: Left Legal Theory After the Right's Rise," 54 *Buff. L. Rev.* 1191, 1200 (2007).

[9] Alex Geisinger and Michael Ashley Stein, "A Theory of Expressive International Law," 60 *Vand. L. Rev.* 77, 99 (2007). But see Oona Hathaway, "Do Human Rights Treaties Make a Difference?," 111 *Yale L. J.* 1935, 1946 (2002) (noting that the adoption of norms may be nothing more than cheap talk and signaling to investors).

[10] Hathaway, "Do Human Rights Treaties Make a Difference?," at 1941.

human rights norms function as a signpost of a civilized government's international obligations.[11] By framing human rights violations as transgressions that occur internationally and to which all nations in good standing must respond, activists create strategic opportunities to mediate the tension between gender interests and group or nationalist consciousness that may otherwise discourage public claims of harm. Second, harms that are defined as universal in nature encourage activists to expand their advocacy beyond the national to use in transnational networks to redefine democratic participation and create democratic structures in a globalized world.

Human rights as political opportunity structures: Cuba and domestic violence

Particular country conditions at any given time directly influence whether gender-based reforms will be successful. For example, during times of political turmoil that threaten the stability of state regimes, when governments experience pressure – particularly in the form of external hostility – women may be reluctant to mount criticisms that target state practices.[12] Under these circumstances, women are often forced to choose between defending their personal welfare or protecting their community or national well-being. For many complex reasons, they often choose the latter.[13]

When the issue of women's inequality is reframed as a global issue, activists can more easily raise concerns that might otherwise be relegated to the background, or perhaps even abandoned, than if such issues were articulated as a problem arising within the modern territorial state.[14] Activists who express human rights violations as global concerns help to minimize the tension between the need to critique internal state practices, on one hand, and defend against external threats, on the other.

An example of this is the situation in Cuba with regard to domestic violence. In the 1990s, during the post-Soviet "special period," when the United States increased its sanctions against Cuba, women's groups and scholars were beginning to examine the problem of domestic violence.[15] Because U.S. sanctions were perceived as a threat to national security, efforts to critically examine state practices were dampened by the perceived need to maintain national consensus in the face of an external threat.[16]

[11] Ibid.

[12] Nadera Shalhoub-Kevorkian, "Law, Politics, and Violence Against Women: A Case Study of Palestinians in Israel," 21 *Law and Pol'y* 189, 201–04 (1999); Penelope Andrews, "Violence Against Aboriginal Women in Australia: Possibilities for Redress Within the International Human Rights Framework," 60 *Alb. L. Rev.* 917, 918, 932 (1997).

[13] R. Ray and A. C. Korteweg, "Women's Movements in the Third World: Identity, Mobilization, and Autonomy," 25 *Ann. Rev. Soc.* 47, 55–58 (1999).

[14] See, e.g., Gonzalo Bacigalupe, "Family Violence in Chile: Political and Legal Dimensions in a Period of Democratic Transition," 6 *Violence Against Women* 427 (2000) (explaining that Chilean women during the Pinochet regime temporarily abandoned the issue of domestic violence).

[15] Cuba Democracy Act, 22 U.S.C. §§ 6001–6010 (1992); Helms-Burton Act, 22 U.S.C. §§ 6061–6067 (1996).

[16] Louis A. Pérez Jr., *Cuba Between Reform and Revolution* (New York: Oxford University Press, 2006), at 317.

Cuban scholars continued to address the issue of domestic violence but began to frame it as a global problem of epidemic proportions, to which the Cuban people could not be immune.[17] Cubans writing on the topic of gender-based violence therefore attributed the obligation to address domestic violence as arising from international solidarity and participation in the global realm, rather than a response to a problem within the boundaries of the state.[18]

Discussion of domestic violence in Cuba often points to the commitments arising out of the United Nations International Conferences on Women and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) as the basis for Cuban feminist and scholarly inquiry and suggestions for reforms. In fact, when *Granma*, the official government newspaper, discussed the problem of domestic violence in Cuba, the lead paragraph reported global statistics and noted that such violence affected women in every country throughout the world.[19] Thus, by framing the problem of women's equality as a global dilemma that transcends territorial borders – unquestionable as a problem that permeates every country without exception – Cuban scholars and activists found the means to address rights violations without taking on dissident characteristics that might be readily assigned to them, particularly by the United States, which is committed to depicting Cuba as a rogue state that routinely violates human rights. These strategies reduced the possibility of creating a false dichotomy between national interests/identities and gender interests/identities.

Human rights and democratic processes of globalization

Rights-based claims often act to galvanize individuals and groups around specific issues. When such campaigns are globalized, they can serve as a flashpoint for developing broad international support in organizing transnational networks. Thus, framing women's inequality as an issue to be contested on the international stage expands the community of activists who can engage in such contestation and has the potential to include the vast numbers of women affected by gender-based harms. These transnational organizations enlarge the scope of politics and representation beyond the boundaries of the territorial state and give structure to the theory of

[17] Clotilde Proveyer Cervantes, "A Self-Help Group for Battered Women, The Results of a Work Experiment," in Roberto Dávalos Domínguez et al., *Social Work in Cuba and Sweden* (Goteborg, Sweden: Department of Social Work, Goteborg University; Havana: Department of Sociology, University of Havana, 2005) at 211 (describing the global problem of domestic violence and noting that Cuba "has not escaped this reality").

[18] See Celeste Bermúdes Salvón and Mirta Rodriguez Calderón, "Laws and Aspects of Domestic Violence" (1993) (referencing the United Nations Conferences on Women, International Tribunals, and the global condition of women as the basis for the paper on domestic violence in Cuba) (on file with author); Caridad Navarrete Calderón, "A Study of the Characteristics of Female Criminals Who Commit Acts of Violence: City of Havana," at 1, 21 (2004) (contextualizing the problem as one that exists in "any society" around the world) (on file with author).

[19] Ana Ivis Galán, "El Estado Protege a la Familia," *Granma*, Dec. 24, 2002.

"post-Westphalian democratic justice" by providing a means for global democratic participation.[20]

The Encuentros in Latin America provide an example of this type of transborder organizing and participatory framing.[21] Beginning in 1981, every three years, Latin American feminists from throughout the region have held a series of meetings (Encuentros) to explore the globalization of feminism, feminist organizing, and new forms of resistance to gender and sexual oppression. The Encuentros have been described as "productive transborder sites that not only reflect but also reshape local, national, and regional movement discourses and practice," which have "fostered new modalities of transborder activism."[22] As a result of the publicity and attention to the meetings registered most notably in host countries, and the feminist-created regional solidarity networks, the Encuentros improved the opportunities for activists to achieve local and regional reforms.[23]

Through these meetings, a discourse developed that helped to shape the relationship of feminism to socialism and class struggle, racism, and homophobia.[24] Women throughout the Western Hemisphere argued about the co-optation of the feminist movement as a consequence of institutionalization and dependence on funding from North Americans, at the same time as they devised strategies to support independent grassroots movements.[25] Many significant disagreements about the dangers of ethnocentrism and professionalized, Westernized feminism surfaced and remain unresolved.[26] The Encuentros have been the venue of political debate about critical issues related to the condition of women in the local and international realm.

The Encuentros serve as an opportunity to devise local strategies that benefit from expanded political and strategic networks to promote human rights for women and provide for new forms of collective action to respond to harms women suffer.[27] The gatherings have functioned as transnational participatory structures that sustain feminist thought and action. In these ways, they have been a model for achieving democratic justice in a globalized world.

[20] Nancy Fraser, "Reframing Justice in a Globalized World," 36 *New Left Review* 69, 70, 87 (2005) (noting that globalization has caused social and political processes to overflow territorial borders and create conditions that render former frames of the Westphalian systems of states inapplicable).

[21] Sonia Alvarez et al., "Encountering Latin American and Caribbean Feminisms," 28 *Signs* 537, 538 (2003). For an overview of the Encuentros held thus far, see "History of Feminist Encounters," available at http://www.10feminista.org.br/node/16/ (accessed Aug. 5, 2008).

[22] Alvarez et al., "Encountering Latin," at 539.

[23] Ibid., at 540.

[24] Lynn Stephen, *Women and Social Movements in Latin America: Power From Below* (Austin: University of Texas Press, 1997), at 16–21.

[25] Ericka Beckman, "Latin American Feminisms: Expressing Political Differences," available at http://findarticles.com/ (accessed Aug. 5, 2008) (describing debates about autonomy vs. institutionalism in the women's movement).

[26] Ibid.

[27] Alvarez et al., "Encountering Latin," at 571.

The Human Rights Discourse in Practice

Human rights norms often function best when adapted to the local and specific and when they are accessible and thus mediated by the very people in whose interests they are promulgated. Domestic litigation strategies framed around specific and local rights violations that are based on international human rights norms have yielded concrete gains for women, particularly when coupled with the efforts of a grassroots social movement. Such litigation has also contributed to local legislative changes and social reform.[28] Moreover, questions of universalism and cultural relativism are often resolved when the political urgency of rights violations moves these issues from theoretical abstractions to action, that is, when resistance by individuals to the exploitative practices they have experienced form the basis for a course of action.[29]

Two related examples of the creative and local use of international norms to advance the condition of women involve the efforts to address the murders of hundreds of women in Ciudad Juárez, Mexico. In the first instance, families of victims, together with local grassroots organizations and transnational nongovernmental organizations, relied on the Istanbul Protocol, which governs the documentation of torture, to obtain competent investigations of the murders of their loved ones.[30] The tangible gains that resulted from efforts to put international standards to work in the context of a concrete struggle contributed to a heightened awareness about gender violence and state impunity that transcended the local circumstances of Juárez. In the second example, the same groups invoked the very same protocol to investigate the torture of those accused of having committed the crimes. That the campaign to end violence against women joined with the project to end torture of the accused serves to invigorate the political imagination of feminist projects and counters the disabling tendencies of a narrow feminist approach to human rights that focuses predominantly, if not exclusively, on women as victims. Each of these examples demonstrates the way in which human rights ideals are successfully employed when they are translated into particular social and cultural contexts.[31]

Ciudad Juárez and the Istanbul Protocol: The right to competent and unbiased investigations of atrocities

Shortly after the signing of the North American Free Trade Agreement in December 1992, the murder rate of women in Juárez began to soar.[32] Estimates vary, but perhaps

[28] Vedna Jivan and Christine Forster, "What Would Gandhi Say? Reconciling Universalism, Cultural Relativism and Feminism Through Women's Use of CEDAW," 9 *S.Y.B.I.L.* 103, 114–23 (2005) (describing litigation in India, Bangladesh, Japan, the Philippines, Fiji, Pakistan, and Korea).

[29] Ibid., at 123.

[30] "Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Istanbul Protocol," available at http://www.ohchr.org/ (accessed Aug. 5, 2008) (hereinafter referred to as Istanbul Protocol).

[31] See Regina Austin's analysis of these murders in Chapter 16.

[32] Debbie Nathan, "Work, Sex and Danger in Ciudad Juárez," 33:3 *North Am. Cong. for Latin Am. Rep. Am.* 24, 25 (1999). Amnesty International USA, "Murdered With Impunity: End the Killings and Violence in Chihuahua and Ciudad Juárez!," available at http://www.amnestyusa.org/ (accessed Aug. 5,

as many as 400 women have been murdered in the fourteen years that followed.[33] These murders assumed a discernible pattern: serial killings of young women, mostly migrants, employed in the northern *maquilas* and often discovered as grotesque, mutilated bodies and victims of torture.[34] Various theories have circulated about the causes related to deviancy, backlash, and state impunity.[35]

Human rights campaigns have emerged in response to the Mexican government's failure to protect women and solve these crimes. The state's response has been described as the worst form of state impunity and gender discrimination.[36] Government officials initially dismissed demands for an investigation into the murders, suggesting that the victims were prostitutes or otherwise blameworthy.[37] The investigations that did ensue failed to meet requisite forensic standards: victims' clothing and remains were not properly collected, evidence was fabricated, and body parts and bones were misidentified.[38]

The failure of law enforcement to identify victims properly and return proper remains to the families caused immeasurable suffering.[39] Families acted in desperation, willing to claim remains that they could not be sure were those of their daughters.[40] DNA tests were delayed, mishandled, repeated, conflicting, and misinterpreted.[41] Families could not properly bury their dead, could not begin a grieving process, and endured constant trauma each time a new body was found.

In 2003, many of the families decided to look outside of Mexico and to the international community for justice and requested assistance from the Washington Office in Latin America (WOLA) to obtain the services of international forensic experts to conduct DNA and other forensic testing.[42] The request met with resistance from the Mexican government, which asserted that under Mexican law, the Office of Public Ministry had sole authority over criminal investigations.[43] WOLA, working

2008); Amnesty International USA, "Mexico: Intolerable Killings," available at http://web.amnesty.org/ (accessed Aug. 5, 2008).

33 See Amnesty International USA, "Stop Violence Against Women," available at http://www.amnestyusa.org/ (accessed Aug. 5, 2008).

34 *Maquila* is a shortened version of the word *maquiladora* and refers to factories that assemble imported parts for reexport. See "Maquilas: What Is a Maquila?," Maquila Solidarity Network, available at http://en.maquilasolidarity.org/ (accessed Aug. 8, 2008). For a fuller discussion of the murders, see Deborah M. Weissman, "The Political Economy of Violence: Toward an Understanding of the Gender Murders of Ciudad Juárez," 30 *N.C. J. Int'l L. and Com. Reg.* 795, 801 (2005).

35 Weissman, "Political Economy of Violence," at 805–09.

36 Juan Forero, "Rights Group Faults Police in Deaths of Women in Mexico," *New York Times*, Aug. 12, 2003, at A6.

37 Debbie Nathan, "Missing the Story," *Texas Observer*, Aug. 30, 2002 (noting comments by Francisco Barrio, governor during the 1990s).

38 Amnesty International USA, "Mexico: Intolerable Killings," available at http://www.amnesty.org/ (accessed Aug. 5, 2008) (describing the planting of evidence in the case of the murder of Paloma Angélica Escobar Ledesma).

39 Ibid.

40 Said one mother, "I said, I can't take any more. Whether it's my daughter or not, I want this body." Ibid.

41 Ibid.

42 Olga R. Rodriguez, "Mexico Closes Probe of 14 Border Killings," *Washington Post*, July 26, 2006.

43 Interview with Laurie Freeman, Associate for Mexico and Security Policy, Washington Office on Latin America, Feb. 2005 (on file with author).

with the families, Mexican human rights groups, and a legal team, used the terms of the Istanbul Protocol to demand an independent investigation by the Argentine Forensic Anthropology Team (EAAF).[44]

International human rights laws are often regarded as soft even when in treaty form.[45] In this instance, however, treaty provisions articulated specific and persuasive bases to support the families' demand for an investigation by the EAAF.[46] In particular, the Istanbul Protocol requires states to pursue investigations through independent entities selected for their "recognized impartiality, competence, and independence" in circumstances when the state itself cannot adequately carry out investigative procedures as a result of the lack of resources, expertise, appearance of bias, or the apparent existence of a pattern of abuse.[47]

The campaign for investigations by the EAAF brought together a well-regarded human rights organization of families of the victims and community groups to perform a critical task relative to uncovering violence and torture committed against women. By invoking human rights standards, the families and their supporters were successful in convincing the Mexican government and the state of Chihuahua to allow the EAAF to conduct its forensic examinations.[48] The EAAF is well known for its investigations into the dirty war in Argentina, the torture and disappearances of South African citizens during apartheid, the mass graves in Namibia, and other places where atrocities have taken place.[49] It is fitting that they would include in their human rights forensic missions the murders of women in Juárez. By gaining the attention and assistance of the EAAF, victims' families succeeded in elevating the issue of gender violence to the scale of some of the most urgent contemporary human rights issues.

Tortured confessions

A second category of human rights violations, relating to the use of torture on suspects to exact confessions to the murders, also occurred in Juárez.[50] In 1995, just a few years after the murders began, law enforcement authorities had announced that the

44 EAAF, Equipo Argentino de Antropología Forense, is a nongovernmental, nonprofit organization that applies forensic sciences to the investigation of human rights violations worldwide. See EAAF, Home page, available at http://www.eaaf.org/ (last accessed Aug 5, 2008); see also Mary Holsenbeck, Toolsi Gowin, and Christina Medlin, "Proposal for an Independent Investigation" (March 2005) (on file with author).

45 Dinah Shelton, "Normative Hierarchy in International Law," 100 *Am. J. Int'l L.* 291, 319 (2006) (describing soft law as nonbinding pronouncements).

46 Holsenbeck et al., "Proposal for an Independent Investigation," at 3–13 (citing various provisions from the American Convention on Human Rights as well as other inter-American treaties and norms).

47 Istanbul Protocol, at paras. 4, 81.

48 Theresa Braine, "Argentine Experts Study Juarez Murder Remains," available at http://www.womensenews.org/ (accessed Aug. 10, 2008); see also EAAF's 2005 annual report, "Mexico," available at http://eaaf.typepad.com/ (accessed Aug. 10, 2008).

49 Argentine Forensic Anthropology Team, Home page, available at http://eaaf.typepad.com/ (accessed Aug. 10, 2008).

50 Ginger Thompson, "In Mexico's Murders, Fury Is Aimed at Officials," *New York Times*, Sept. 26, 2005, at A1; Alma Guillermoprieto, "A Hundred Women; Why Has a Decade-Long String of Murders Gone Unsolved?," *New Yorker*, Sept. 29, 2003, at 84, 88.

crimes had been solved and that the events that earned Juárez the title of "capital of murdered women" were events of the past.[51] But the murders continued, despite the detention of key suspects who reportedly confessed to the crimes. Further problems arose with emerging evidence of police impropriety regarding the detained suspects. The National Commission on Human Rights in Mexico estimated that the police used torture in eighty-nine cases related to the Juárez murders.[52] The families of the murdered women as well as the communities that support them have protested the torture of the men who have been arrested and have been distrustful of the confessions that were elicited by the police.[53] Local support groups for the families of missing and murdered women, such as Nuestras Hijas de Regreso, were angered by the conviction of one of the tortured accused, describing it as "another insult."[54] Families of victims joined with families of the tortured suspects in denouncing the criminal process.[55] In one case, the father of a missing young woman, presumed dead, appeared as a witness for the defendants who were tortured into confessing to a murder, and in another case, a group of the families of the victims celebrated the release of one of the accused individuals who was tortured.[56]

In an important move, the very same groups who have framed the demand for an end to impunity and who invoked human rights standards in seeking protection for women in Juárez have similarly initiated a human rights campaign to stop the torture of suspects for the purposes of gaining confessions to the crimes.[57] These same groups again relied on the Istanbul Protocol to call for an independent investigation into the torture allegations and to allow independent human rights groups, once again, to enter into the criminal process.[58] Experts working under the protocol guidelines have substantiated torture of the accused in each instance they were able to investigate and for which they were able to produce forensic results.[59]

[51] Weissman, "Political Economy of Violence," at 803.

[52] "Crying Out, WOLA Memo on the Case of Victor García Uribe," WOLA, available at http://www.wola.org/ (accessed Aug. 10, 2008); see also Sean Mariano García, "Scapegoats of Juárez: The Misuse of Justice in Prosecuting Women's Murders in Chihuahua, Mexico," available at http://www.lawg.org/ (accessed Aug. 10, 2008).

[53] García, "Scapegoats of Juárez," at 12; Diana Washington Valdez, "Who's Guilty? A Look at Suspects," *El Paso Times*, June 24, 2002, at 1A; Sam Dillon, "Rape and Murder Stalk Women in Northern Mexico," *New York Times*, April 18, 1998, at A3.

[54] Laurie Freeman, "Still Waiting for Justice," WOLA, available at http://www.wola.org/ (accessed Aug. 10, 2008).

[55] Ibid., at 3; Amigos de las Mujeres de Juárez, "A Reply to the Mexican Government's 'Information Document on the Situation in Ciudad Juárez,'" available at http://amigosdemujeres.org/ (accessed Aug. 10, 2008).

[56] Guillermoprieto, "A Hundred Women," at 89. Juan Carlos Carreón, "David Meza Is FREE!," Amigos De Las Mujeres De Juarez, available at http://www.amigosdemujeres.org/ (accessed Aug. 10, 2008).

[57] Amnesty International, "Mexico: Justice Fails in Ciudad Juarez and the City of Chihuahua," available at http://www.amnesty.org/ (accessed Aug. 10, 2008).

[58] Freeman, "Still Waiting for Justice," at 8.

[59] García, "Scapegoats of Juárez," at 10–14 (noting that the Istanbul Protocol has only been permitted in the most well-publicized cases).

The families of the victims pressed for an end to the torture of the suspects for the purpose of ending impunity for gender violence. But their demands have meaning beyond the instrumental purpose of assuring that the true criminals carrying out these atrocities are found. Facilitating the truth in these circumstances has normative value to be sure, but there are additional benefits gained in the duality of these campaigns. The campaign to end gender violence was inextricably bound to the campaign to end the torture of those accused of atrocities by the same human rights commitments that overlap, inform, and reinforce each other. The movement to achieve justice for women, articulated locally and specifically around crimes against women, incorporated an integrated and balanced understanding of human rights.

The intersecting efforts to claim international human rights standards for both the female victims of the crimes and the male suspects enlarge feminist concerns beyond those injuries suffered predominantly, if not exclusively, by women.[60] The campaigns address a critique of a particular form of feminist narrative that renders women as individuals incapable of resisting injuries to themselves and indifferent to the injuries of others.[61] By addressing both harms, the human rights activists of Juárez help to transform a type of feminist discourse, criticized for its construction of the cult of victimhood for women and for creating a "diffuse, muddled culture of resentment" that divides the world into woman as victim and man as perpetrator.[62]

The Moral as Political

As the previous section suggests, women have benefited from the use of the international human rights framework as a means to obtain equality and justice. It is also true, however, that human rights claims on behalf of women have often provided the intellectual logic for U.S. hegemony. From the early period of U.S. expansion in the Pacific and Caribbean to the current occupation and wars in Afghanistan and Iraq, the United States has often invoked the condition of women as a humanitarian pretext for intervention, at times with the complicity of women's organizations, usually with devastating consequences for gender equality and human rights.

Moreover, the United States uses the discourse of human rights to emphasize civil liberties, political rights, and the promise of the market as a way to advance its own national interests.[63] Such distortions obscure the sources of gender inequality and

[60] Janet Halley, "The Politics of Injury: A Review of Robin West's *Caring for Justice*," 1 *Unbound* 65, 68 (2005) (critiquing a type of feminist understanding that creates a hierarchy of harms limited to those that women suffer).

[61] See Karen Engle, "Feminism and Its (Dis)Contents: Criminalizing Wartime Rape in Bosnia and Herzegovina," 99 *Am. J. Int'l L.* 778, 811 (2005) (criticizing images, often created by feminist human rights advocates and scholars, that render women as powerless victims without the means to prevent harms).

[62] See generally Elizabeth M. Schneider, "Feminism and the False Dichotomy of Victimization and Agency," 38 *N.Y.U. L. Rev.* 387 (1993).

[63] See Victoria de Grazia, *Irresistible Empire* (Cambridge, MA: Harvard University Press, 2005), at 463 (noting that the 1975 Helsinki Accords promoted a type of human rights that emphasized consumption and market interests).

compromise the effectiveness of human rights standards generally. Feminist projects that fail to acknowledge the absence of economic, social, and cultural rights within the human rights framework risk a diminished capacity to respond to the harms women endure.

Human Rights for Women: Historical Accounts and the "Colonial Present"[64]

The use of human rights to justify colonialism is a familiar theme, as is the view of the "colonized woman," whose circumstances frequently have been used as motive for "enlightened" intervention.[65] The usefulness of these motifs as a cautionary tale is evident from the repeated misuses of the human rights project. Geographer Derek Gregory's reference to current global circumstances as "the colonial present" serves as a means to call attention to the continuities between past and contemporary practices with regard to the relationship between the United States and other parts of the world.[66]

Historical accounts

During the years spanning the nineteenth and early twentieth centuries, Americans justified military intervention in the Pacific and the Caribbean by appealing to the need to uplift and civilize the women of the region. They made the case for intervention by relying on gendered imagery of women who needed saving. Americans depicted Cuban women as sexual prey of the Spanish, Filipina women as suffering victims at the hands of barbaric Filipinos, and Haitian women as unruly sinners given to sexual excesses, and characterized Hawaiian society as a weak female in need of protection.[67] Armed intervention and military occupation, claimed the Americans, would be the means by which to deliver the goods of human rights, particularly in the form of the rule of law.[68] The United States imposed constitutions, drafted national laws, defined citizenship, and established suffrage rights in the territories it occupied.[69] The sweeping legal changes that benefited U.S. military

[64] See Derek Gregory, *The Colonial Present* (Oxford: Blackwell, 2004), at 251 (arguing the ways in which "colonialism is rehabilitated into our own present").

[65] See Kristin L. Hoganson, *Fighting for American Manhood* (New Haven, CT: Yale University Press, 1998), at 11.

[66] Gregory, *Colonial Present*, at 65.

[67] Hoganson, *Fighting for American Manhood*, at 11, 135–37; Mary A. Renda, *Taking Haiti: Military Occupation and the Culture of Imperialism* (Chapel Hill: University of North Carolina Press, 2001), at 10, 16, 178; Sally Engle Merry, *Colonizing Hawai'i: The Cultural Power of Law* (Princeton, NJ: Princeton University Press, 2000), at 21; Calvin G. C. Pang, "Slow-Baked, Flash-Fried, Not to Be Devoured: Development of the Partnership Model of Property Division in Hawai'i and Beyond," 20 *U. Haw. L. Rev.* 1, 13 n. 46 (1998).

[68] William Alford, "Exporting the Pursuit of Happiness," 113 *Harv. L. Rev.* 1677, 1678–79 (2000).

[69] James B. Scott, "The Origin and Purpose of the Platt Amendment," 8 *Am. J. Int'l L.* 585, 588–91 (1914) (imposing terms in the Cuban constitution); Hans Schmidt, *The United States Occupation of Haiti, 1915–1934* (New Brunswick, NJ: Rutgers University Press, 1971), at 97 (mandating a U.S.-friendly

and economic interests to the detriment of colonized states were imposed as a condition of subsequent "independence" and "sovereignty."[70]

Despite the rhetoric about the condition of women used to justify intervention in the Caribbean and Pacific, these legal measures did not improve the circumstances for women. To the contrary, women fared poorly under U.S. rule. Cuban women, once recognized for their heroic acts during the Cuban war of independence, found themselves restricted in family arrangements and deprived of ownership and control of property as a result of U.S.-imposed law.[71] They experienced a loss of the status they had gained during years of fighting for Cuban independence.[72] Once under U.S. influence, the doctrine of coverture was introduced in Hawaii, along with laws that disenfranchised women, effectively eliminating once powerful and active women from economic and political life.[73] In Puerto Rico, the colonial regime intensified efforts to accept the legitimacy of workplace gender roles by which the value of women's labor was suppressed.[74] Citizenship rights granted to Puerto Ricans denied women suffrage.[75] Many "saved" women experienced "humanitarian" intervention as rape and sexual harassment by American soldiers.[76]

The colonized woman has functioned as a trope that has long animated American women's efforts to rescue other women – usually women of third world nations.[77] During the 1890s, U.S. women's groups urged the United States to go to war against Spain to free Evangelina Cossío y Cisneros, a Cuban woman who had been captured by the Spanish, and focused on the narratives of Cuba as "damsel in distress" in their demands for intervention.[78] Certain elite women who made efforts to influence

Haitian constitution); Anthony Anghie, "Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations," 34 *N.Y.U. J. Int'l L. and Pol'y* 513, 556 (2002) (influencing the drafting of the Filipino Constitution in 1935); Lisa Napoli, "The Puerto Rican Independentistas: Combatants in the Fight for Self-Determination and the Right to Prisoner of War Status," 4 *Cardozo J. Int'l and Comp. L.* 131, 141 (1996) (controlling the drafting of the Puerto Rican Constitution in 1952).

70 U.S.-imposed laws were enacted to favor U.S. investors. Pedro A. Cabán, *Constructing a Colonial People* (Boulder, CO: Westview Press, 1999), at 154 (Puerto Rico); Georges Anglade, "Rules, Risks, and Rifts in the Transition to Democracy in Haiti," 20 *Fordham Int'l L. J.* 1176, 1184 (1997) (Haiti); Merry, *Colonizing Hawai'i*, at 86 (Hawaii).

71 K. Lynn Stoner, *From the House to the Streets: The Cuban Woman's Movement for Legal Reform, 1898–1940* (Durham, NC: Duke University Press, 1991), at 13.

72 See Jorge Ibarra, *Prologue to Revolution* (Boulder, CO: Lynne Rienner, 1998), at 135.

73 Sally Engle Merry, "Law, Culture and Cultural Appropriation," 10 *Yale J. L. and Human.* 575, 595–96 (1998).

74 Cabán, *Constructing a Colonial People*, at 136.

75 Ibid., at 205; Manuel Del Valle, "Puerto Rico Before the Supreme Court," 19 *Rev. Jur. U. Inter-Am. P.R.* 13, 50 n. 165 (1984).

76 Hoganson, *Fighting for American Manhood*, at 186–87 (quoting a Filipino, "The people of the United States want us to kill all the men, fuck all the women, and raise up a new race in these Islands"); Renda, *Taking Haiti*, at 163 (noting that "in one night alone, in . . . Port-au-Prince, nine little girls from 8 to 12 years old died from the raping by American soldiers").

77 Ratna Kapur, "The Tragedy of Victimization Rhetoric: Resurrecting the 'Native' Subject in International/Post-colonial Feminist Legal Politics," 15 *Harv. Hum. Rights J.* 21, 26 (2002).

78 James Creelman, *On the Great Highway* (Boston: Lothrop, 1901), at 179–87; Walter Millis, *The Martial Spirit* (Boston: Houghton Mifflin, 1931), at 82–84 (describing a gendered story line in the

U.S. foreign policy in the Philippines couched their concern for Filipinas who were likely to suffer if Spain were to maintain control of the territory.[79] Their arguments often served as moral cover for the efforts to expand markets in the region.[80] Also in the late 1800s, a number of U.S. women's groups demanded intervention on behalf of women living under Muslim laws, who, the Americans claimed, were victims of a host of human rights atrocities.[81] In formulating their charges against so-called heathen societies, these women relied on a discourse of stereotypes and demeaning characterizations of everyday life designed to denigrate the conditions of women living in Muslim countries. By invoking one-dimensional descriptions about the lives of non-Christian women, these American women failed to see similarities in the limitations that Christian women living in the United States experienced in domestic life.[82]

The particular history of women's complicity reveals the ways in which colonial modalities were constructed during the period of U.S. expansionism. It portrays the troubling role of women who, during the nineteenth century, entered the public realms, not necessarily as feminists, but as activists engaged in so-called human rights work. As Joan Jacobs Brumberg has explained, women's reliance on degrading stereotypes served "to define themselves by what they were not" and, in the end, limited their own prospects for developing a feminist political movement.[83]

The "colonial present"

Concern for human rights continues today to function as a master narrative of U.S. imperialism. Historian Emily Rosenberg notes that at the end of the twentieth century, public commentators and scholars promoted "America's 'empire' as capable of delivering a host of public goods including freedom and democracy and the uplift of women."[84] The same missionary discourse focusing on saving Arab women that originated with women in the nineteenth century continues to stereotype issues related to veils, polygamy, and women's seclusion, despite Arab feminist resistance to such formulaic depictions.[85]

news so as to "Enlist the women of America!" to take up the cause of intervention in Cuba); Emily S. Rosenberg, "Rescuing Women and Children," in Joanne Meyerowitz, ed., *History and September 11th* (Philadelphia: Temple University Press, 2003), at 85.

79 Joan Jacobs Brumberg, "Zenanas and Girlless Villages: The Ethnology of American Evangelical Women, 1870–1919," 69 *J. Am. History* 347, 368 (1982).

80 Ibid., at 368 (describing this particular sector of women, who were connected to wealthy elites as wives and daughters).

81 Ibid., at 348–49; Katharine Viner, "Feminism as Imperialism," CommonDreams.org, available at http://www.commondreams.org/ (accessed Aug. 10, 2008) (noting Leila Ahmed's observation that feminism has served as the "handmaid to colonialism").

82 Brumberg, "Zenanas and Girlless Villages," at 355.

83 Ibid.

84 Emily S. Rosenberg, "Bursting America's Imperial Bubble," 53 *Chron. of Higher Educ.* B10 (2006).

85 Kriemild Saunders, Introduction to *Feminist Post-development Thought: Rethinking Modernity, Post-colonialism and Representation* (London: Zed Books, 2002), at 6.

The United States emphasized the liberation of Afghan women as a dominant reason for intervention in Afghanistan in 2001, in addition to claims of retribution and national security. The use of the condition of women in Afghanistan as cause for intervention was not without historical antecedents, nor was it likely to produce remedy or relief for human rights violations.[86] The stated goal of liberation from the Taliban provided women with no cover during the bombing campaigns, which brought more misery to those who could not flee.[87] The U.S.-supported Northern Alliance government was known to be, and proved to be again, brutal in its treatment of women, a fact noted by feminists in Afghanistan before and since the U.S. invasion.[88]

Given the documented excesses committed by the Taliban government against Afghan women, feminists celebrated its removal from power. This response, however, functioned as a gendered imperative to legitimize a war orchestrated by the United States, which had been uninterested, if not implicated, in the Taliban's reign of terror against women.[89] The United States continues to seek support for the war in Afghanistan through the creation of gender dichotomies as well as neocolonial representations of savage Muslims, without acknowledging the devastation occasioned by its own foreign policy.

In Iraq, the improvement of human rights generally, and the condition of women specifically, were offered as reasons for the U.S. invasion, particularly when allegations of weapons of mass destruction proved unfounded.[90] But the U.S. occupational forces have refused to protect women's rights in Iraq, where circumstances have deteriorated for all civilians, but particularly for women.[91] For example, the Coalition Provisional Authority (CPA) refused to train security forces to help prevent violence against women or prosecute gender-based crimes.[92] The CPA, in violation of international legal obligations, ignored women's organizations' demands for inclusion and representation in the construction of a new government.[93]

[86] Lila Abu-Lughod, "Do Muslim Women Really Need Saving? Anthropological Reflections on Cultural Relativism and Its Others," 104 *Am. Anthropologist* 783, 788–89 (2002); Karen Engle, "Liberal Internationalism, Feminism, and the Suppression of Critique: Contemporary Approaches to Global Order in the United States," 46 *Harv. Int'l L. J.* 427, 431 (2005).

[87] Ratna Kapur, "Un-veiling Women's Rights in the 'War on Terrorism,'" 9 *Duke J. Gender L. and Pol'y* 211, 220 (2002).

[88] Statement of the Revolutionary Association of Women of Afghanistan, "The People of Afghanistan Do Not Accept Domination of the Northern Alliance," available at http://www.rawa.org/ (accessed Aug. 10, 2008).

[89] See M. Jacqui Alexander, *Pedagogies of Crossing* (Durham, NC: Duke University Press, 2005), at 98.

[90] Balakrishnan Rajagopal, "Counter-hegemonic International Rights Law: Rethinking Human Rights and Development as a Third World Strategy," 27 *Third World Q.* 767, 773 (2006); see also Hilary Charlesworth, "The Missing Voice: Women and the War in Iraq," 7 *Or. Rev. Int'l L.* 5, 13 (2005).

[91] Iraqi women were considered "more liberated" prior to the war than their counterparts in the region, a fact often cited as a tragic irony. Hannibal Travis, "Freedom or Theocracy? Constitutionalism in Afghanistan and Iraq," 3 *Nw. U. J. Int'l Hum. Rts.* 4, 112 (2005).

[92] Yifat Susskind, "Promising Democracy, Imposing Theocracy, Gender-Based Violence and the U.S. War on Iraq," Madre, available at http://www.madre.org/ (accessed Aug. 10, 2008).

[93] Ibid.

A recent report on the war in Iraq has documented the gendered nature of ongoing violence and observed that "women are especially hunted" and suffer rape, torture, and murder in shocking numbers. The report also describes gendered violence committed against men, including the sexualized torture of Iraqi men by U.S. soldiers in Abu Ghraib and atrocities committed against men suspected of being gay. It notes that the United States contracted with a U.S. private security corporation to train Iraqi police with full knowledge that the company had a history of exploiting and abusing women in the Balkans. The report lays blame for the sectarian and gender violence on the United States, which has destroyed the fabric of Iraqi society, created the very conditions associated with the widespread killing of women, and brought to power a government that has steadily curtailed women's rights.[94]

In comparison to concerns about Islamic law, human rights activists have paid less attention to the role of the United States in creating the conditions under which fundamentalism flourishes. As Lila Abu-Lughod has observed, few feminists who "felt good about saving Afghan women from the Taliban are also asking for a global redistribution of wealth" as a means for achieving "the right to freedom from the structural violence of global inequality."[95] Nor has there been sustained criticism from human rights quarters about the U.S. subversion of the Iraqi economy, through orders issued by the CPA allowing foreign investors to own up to 100 percent interests in Iraqi companies in all sectors of the economy.[96] Iraqi women have been particularly affected by the U.S. economic policies implemented in Iraq, including the U.S. decision in 2003 to fire all public-sector workers, 40 percent of whom were women.[97] As James Thuo Gathii has observed, "the United States has also invented a postwar role for women in reviving the Iraqi economy, all of course consistent with the free market vision of the U.S.-led coalition."[98]

The United States historically has justified its hegemonic policies in the name of a higher morality and a discourse of a "special responsibility" to share the blessings of civilization with less fortunate people.[99] Such ideological constructs permeated women's groups in the nineteenth century and those feminist and human rights groups in the twenty-first century that have shared the politics of "saving women." The Feminist Majority that was so prominent in publicizing the Taliban's treatment

94 Ibid.

95 Abu-Lughod, "Do Muslim Women," at 787.

96 James Thuo Gathii, "Foreign and Other Economic Rights Upon Conquest and Under Occupation: Iraq in Comparative and Historical Context," 25 *U. Pa. J. Int'l Econ. L.* 491, 530, 538–39 (2004).

97 Susskind, "Promising Democracy," at 16.

98 Gathii, "Foreign and Other Economic Rights," at 533; see also Ghali Hassan, "How the US Erase Women's Rights in Iraq," CounterCurrents, available at http://www.countercurrents.org/ (accessed Aug. 10, 2008) (noting that Iraqi women have suffered significant setbacks in the realm of gender equality due to the alliance of U.S. occupation forces with religious fundamentalists, who limit Iraqi women's roles in society).

99 Michael H. Hunt, *Ideology and U.S. Foreign Policy* (New Haven, CT: Yale University Press, 1987), at 124.

of women failed to denounce U.S. policies for past support of the Taliban.[100] Afghan women have criticized the U.S.-based organization for rendering them as passive victims by its focus on the burqa as a symbol of oppression.[101] Noah Feldman has also noted that some feminist organizations chose to ally themselves with neoconservatives who defined the problem in Iraq as a "clash of civilizations" and who sought to impose terms in the Iraqi Constitution that would eliminate any role for Islamic law.[102] Such alliances are useless, if not harmful, to the local feminist project and undermine local approaches that seek to contest and reinterpret Islam to accommodate a progressive role for women under Muslim laws.[103]

The historical record of the purported humanitarian intervention for the purpose of exercising power over other people cannot be ignored.[104] It is not sufficient to recall the history; rather, one must make use of it. The historical record is bound up with current events and suggests that there is little different about U.S. actions in Afghanistan or Iraq, where the condition of women was invoked as justification for intervention, than from colonialist intervention in the nineteenth century. Such politics have reinforced cultural stereotypes and disrupted social, political, and economic structures for ends unrelated to the well-being of women.[105]

Human Rights, Global Markets, and Inequality

Human rights projects that focus on saving women may be further undermined when we consider the purposes for which women are being saved. The United States has largely defined human rights as individual political rights, while ignoring those rights pertaining to social justice.[106] The disparity between the emphasis on civil and political rights and the dismissal of economic and redistributive rights results in two distinct but intersecting fault lines that act to weaken human rights efforts and produce baneful conditions for women.

The failure to focus on economic rights

The first deficiency pertains to the failure of the human rights project to focus on economic rights. The U.S. emphasis on human rights on norms that facilitate

[100] Zillah Eisenstein, *Against Empire: Feminism, Racism and the West* (Melbourne, Australia: Spinifex Press, 2004), at 165–67.

[101] Ibid.

[102] Noah Feldman, "Imposed Constitutionalism," 37 *Conn. L. Rev.* 857, 865–69 (2005).

[103] Madhavi Sunder, "Piercing the Veil," 112 *Yale L. J.* 1399, 1410, 1434–35 (2003); Isobel Coleman, "Women, Islam, and the New Iraq," *Foreign Affairs*, Jan./Feb. 2006.

[104] Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (Cambridge: Cambridge University Press, 2003), at 106 (describing humanitarian intervention as a "new form of imperial domination").

[105] Eisenstein, *Against Empire*, at 165–67.

[106] Randall Peerenboom, "Human Rights and Rule of Law: What's the Relationship?," 36 *Geo. J. Int'l L.* 809, 824 (2005); Makau Wu Mutua, "The Ideology of Human Rights," 36 *Va. J. Int'l L.* 589, 619–20 (1996).

free market economics often exacerbates wealth inequalities and hardship.[107] As a consequence of global market integration and the political economic developments that accompany market expansions, transnational corporations have assumed new forms of power that are often outside of the paradigm of state-as-human-rights-violator and thus may fall outside of enforcement efforts.[108]

Human rights initiatives targeted at women's equality have, at times, functioned as a form of instrumental feminism, where support for women's rights is a means to enhance the development of market economies.[109] Women are a dominant component of the globalized workforce moving across international borders.[110] Gender inequalities that create obstacles to the free movement of women and inhibit their ability to enter the low-paid workforce are inimical to the interests of transnational corporations that rely on an abundant supply of cheap female labor. Women, according to the World Bank, are viewed as "a new type of economic actor" whose presence in the marketplace promotes the bank's economic policies with little regard for social justice concerns.[111] The World Bank has focused on claiming rights for women in developing countries in part because such women have been recognized to possess market potential to enhance the bank's development initiatives.[112] These developments suggest that one purpose of the export of the rule of law as a human rights good to developing countries is to promote individualistic and neoliberal values unrelated to themes of justice and equality.[113]

In recent years, in Latin America and other developing countries, European and North American nonprofit organizations and foundations have funded women's organizations for the purpose of empowering women through programs designed to further individualism and the principles of a market economy.[114] Included in these programs are technical trainings and workshops to enable women to engage the market for solutions to income inequality, while ignoring root causes of poverty and gender exploitation in the workplace.[115] These developments compromise feminists for "acting as 'advisors' to the neoliberal micro-management of social problems."[116]

[107] Orford, *Reading Humanitarian Intervention*, at 89.

[108] Smita Narula, "The Right to Food: Holding Global Actors Accountable Under International Law," 44 *Colum. J. Transnat'l L.* 691 (2006).

[109] Sophie Bessis, "International Organizations and Gender: New Paradigms and Old Habits," 29 *Signs* 633, 641 (2004); Anne Orford, "The Subject of Globalization: Economics, Identity and Human Rights," 94 *Am. Soc'y Int'l L. Proc.* 146, 147 (2000).

[110] J. Ann Tickner, "The Gendered Frontiers of Globalization," 1 *Globalizations* 15, 16 (2004).

[111] Bessis, "International Organizations and Gender," at 641.

[112] Ibid.

[113] Joel M. Ngugi, "Policing Neo-Liberal Reforms: The Rule of Law as an Enabling and Restrictive Discourse," 26 *U. Pa. J. Int'l Econ. L.* 513, 558–59 (2005); Paul O'Connell, "On Reconciling Irreconcilables: Neo-Liberal Globalisation and Human Rights", 7 *Hum. Rts. L. Rev.* 483, 496–97 (2007).

[114] Jean Franco, "The Long March of Feminism," in *NACLA Report on the Americas*, at 31(4) 10, 14–15 (1998); see also "Calvert Foundation Boosts Microlending to Women–Owned Businesses in Middle East," World Resources Institute, available at http://www.nextbillion.net/ (accessed Aug. 11, 2008).

[115] Verónica Schild, "Gender Equity Without Social Justice: Women's Rights in the Neoliberal Age," in *NACLA Report on the Americas*, 34(1) 25, 27 (2000).

[116] Erika Beckman, "The Eighth Encuentro," in *NACLA Report on the Americas*, 34(5) 32, 33 (2001).

They also exacerbate the conditions under which human rights violations flourish and subvert local efforts to gain social citizenship and a full complement of rights that go beyond the civil and political.[117]

Economic inequality and human rights (un)enforcement

A second deficiency occurs when the normative structures of international law are imposed under conditions of economic inequality. Human rights paradigms assume the duty of the state to enforce standards as well as the obligation to punish offenders.[118] In a review of 185 CEDAW reports, the most frequently noted human rights reform pertaining to gender equality was the enhancement of criminal penalties.[119] Many of these reforms were modeled after legal developments in the United States.[120] Indeed, some feminists engaged in human rights work appear to have ended their work on establishing norms relating to gender-violence and turned their attention to enforcement and penalty efforts.[121]

Enforcement and punishment remedies, particularly those modeled after U.S. criminal intervention, may poorly serve women. For example, state interference in the private realm of family or within local communities is problematic where the state itself poses a threat to human rights.[122] Criminal justice remedies may have little transference value in cultures where punishment for purposes of deterrence or retribution is not the norm.[123] Less attention has been paid to the difficulties that occur when state enforcement mechanisms are invoked under circumstances of indigence and inequality. Under such conditions, the implementation of state enforcement mechanisms often serves to encourage the arbitrary exercise of power.

Human rights violations are often the result of social conditions and inequality.[124] Poor countries may lack the resources to establish control over repressive forces.[125] The stranglehold of economic liberalization policies and conditions attached to the use of international lending institutions that require cuts in public spending and the privatization of public functions diminishes the capacity of the state to carry out its responsibilities for public safety and protection of human life.[126] As the authority of the state weakens, an "alternative state" develops that includes repressive police

[117] See Martha McCluskey's argument in Chapter 12.

[118] Margareth Etienne, "Addressing Gender Based Violence in an International Context," 18 *Harv. Women's L. J.* 139, 153 (1995).

[119] Julie Goldscheid, "Domestic and Sexual Violence as Sex Discrimination: Comparing American and International Approaches," 28 *T. Jefferson. L. Rev.* 355, 388 (2006).

[120] Ibid., at 388–89 (describing broader definitions of gender-based crimes, harsher punishments, and the development of approaches designed to bring women in to testify).

[121] Engle, "Feminism and Its (Dis)Contents," at 784.

[122] Andrews, "Violence Against Aboriginal Women," at 918.

[123] Shalhoub-Kevorkian, "Law, Politics, and Violence," at 201–04.

[124] Michael Mann, *Incoherent Empire* (London: Verso, 2003), at 56 (describing state repression as "a response to real social conditions").

[125] Ibid.

[126] Orford, *Reading Humanitarian Intervention*, at 89; Michel Chossudovsky, *The Globalization of Poverty: Impacts of IMF and World Bank Reforms* (London: Zed Books, 1997), at 15.

tactics and state impunity as a response to social chaos and increased violence.[127] Without attention to economic rights and social justice as human rights, there is little likelihood of meaningful enjoyment or enforcement of civil and political rights. The enforcement paradigm, moreover, exacerbates the possibility of greater human rights violations.

Conclusion

Feminist theory must connect to material practice and take stock of the benefits of the human rights discourse on behalf of women's equality. International human rights establishes a framework that allows women to speak in their own voice and in their own words, to articulate their positions and assert their identities, and, as the Encuentros demonstrate, to create structures for democratic participatory justice. In short, it creates agency of the type that allows one to consider strategies along with the means to implement them to improve the well-being of women.[128] Human rights claims must be appreciated as a means to defy power, even as a temporary disruption, particularly when they disrupt U.S. rhetoric of human rights and the hollow assurances of good intentions on behalf of women.[129]

The examples in Cuba and Juárez illustrate that the human rights project has greater promise when norms function locally and specifically and are mediated by the very persons and communities in whose interests they are promoted. In Cuba, feminists relied on an emerging global consensus about the need to eradicate domestic violence to develop strategies for social and legal reform for women. By claiming international precepts as the context for their advocacy, they avoided the appearance of threatening national consensus during a period when Cubans experienced "external pressures and hostile acts which threaten national sovereignty."[130] In Juárez, the community conferred legitimacy on international human rights norms by giving them specific purpose and using such rules for that purpose.[131] In their reliance on the Istanbul Protocol, they used human rights law as a catalyst for justice for the families of the murdered women as well as the tortured suspects. These forms of rights-claiming endeavors enhance women's citizenship on multiple levels – social, political, and civil.

However, it is not a straightforward endeavor. The United States often exploits the desire to improve global circumstances for women for purposes inimical to the

[127] Anthony W. Pereira and Diane E. Davis, "New Patterns on Militarized Violence and Coercion in the Americas," 27 *Latin Am. Persp.* 3 (2000).

[128] See Kathryn Abrams and Hila Keren, "Law in the Cultivation of Hope," 95 *Cal. L. Rev.* 319, 312 (2007).

[129] See Slavoj Zizek, "Against Human Rights," 34 *New Left Rev.* 115, 121 (2005); see also R. J. Vincent, *Human Rights and International Relations* (Cambridge: Cambridge University Press, 1986), at 17 ("rights are thus a weapon of the weak against the strong").

[130] Pérez, *Cuba Between Reform and Revolution*, at 16 (quoting the special rapporteur for Cuba of the United Nations Human Rights Commission Carl-Johan Groth in 1996).

[131] See Anthony Lang Jr. et al.,"The Role(s) of Rules: Some Conceptual Clarifications," 20 *Int'l Rel.* 274, 284 (2006).

human rights project. Moreover, American exceptionalism functions as an obstacle to progress for women when human rights standards get in the way of U.S. interests.[132] In their endeavors to harness international human rights norms on behalf of women's equality, feminists must be wary of U.S. power that insists on intervening in the affairs of other states to uphold the rights of women but refuses to accept comparable obligations domestically or internationally. The challenge is to fashion an approach that acknowledges and supports the norms and values of the feminist human rights project and the material benefits to be gained by their use, but that also allows us to recognize the danger in their misuse.

[132] "Turning Back the Clock on Rape," *New York Times*, Sept. 23, 2006, at A10 (describing efforts of the Bush administration to narrow the definition of rape and sexual violence so as to insulate U.S. military personnel from prosecution of gender-based crimes).

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