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Beyond Culture: Human Rights Universalisms Versus Religious and Cultural Relativism in the Activism for Gender Justice

Cyra Akila Choudhury

Florida International University College of Law, cyra.choudhury@fiu.edu

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Beyond Culture: Human Rights Universalisms Versus Religious and Cultural Relativism in the Activism for Gender Justice

Cyra Akila Choudhury†

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† MA (Columbia), JD, LLM (Georgetown), Associate Professor of Law, Florida International University College of Law. Many thanks to Penelope Andrews, Dean of Albany Law School, for giving me the opportunity to present these ideas at the Conference on Human Rights, Gender and the Law held on April 11–12, 2013.

INTRODUCTION

The topic of “culture” and its influence on and interaction with law, politics, and gender has been a preoccupation of many scholars for decades, if not centuries. Particularly in those countries that have experienced waves of immigration from various parts of the globe, questions of assimilation, culture, and identity have been a perennial source of concern and inquiry. In the United States, where the dominant culture has been a product of European immigration, notions of race and national origin have shaped the question of citizenship and belonging, often playing a critical role in the granting or withholding of rights. Indeed, certain kinds of racial and cultural difference were deemed so immutable and so unassimilable that they led not only to the denial of citizenship, but also to the stripping of citizenship from those to whom it had been granted.¹ Furthermore, religious difference also played a role in the ongoing attempts by the federal government to regulate minority religions, as is starkly evident in the ongoing regulation of Mormon polygamy.²

Today, one would be hard-pressed to find a Supreme Court opinion baldly expressing the kind of cultural and religious supremacy articulated by the 1878 *Reynolds* Court when it claimed that polygamy was a feature of “Asiatic and

1. See *United States v. Thind*, 261 U.S. 204, 214–15 (1923) (canceling a certificate of citizenship on the grounds that the Indian applicant did not qualify as “white” as that term is “popularly understood”); see also IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 56–77 (2006) (describing the evolution of race in the law by exploring early cases granting or denying citizenship based on racial classifications).
2. For instance, from the mid-1800s to the early 1900s, the federal government repeatedly passed legislation aimed at the prevention of polygamy by Mormons. See, e.g., SARAH BARRINGER GORDON, *THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN THE NINETEENTH CENTURY* (2002) (documenting the regulation of polygamy at the federal level). In Supreme Court cases challenging these laws and arguing that they violated the First Amendment, the Court made plain that polygamy is not a culturally or religiously acceptable practice in a civilized nation in which democratic principles governed:

Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people. At common law, the second marriage was always void . . . , and from the earliest history of England, polygamy has been treated as an offence against society. . . . [P]olygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy.

Reynolds v. United States, 98 U.S. 145, 164–66 (1878). In one broad sweep, the Court in *Reynolds* jettisoned the practice of Mormon polygamy from the dominant culture, politics, and religion of the United States. Tying it to patriarchal, despotic Asians and Africans, the Court asserted that its practice in the United States threatened the very foundations of the social contract. See *id.* at 164. Furthermore, as Sarah Barringer Gordon argues, much of the public outcry and subsequent justifications for legal regulation of Mormon polygamy was based on the need to protect women and girls from the depredations of Mormon men—a justification that has been revived and used in the War on Terror. See Sarah Barringer Gordon, *A War of Words: Revelation and Storytelling in the Campaign Against Mormon Polygamy*, 78 CHI.-KENT L. REV. 739, 765 (2003).

African people.”³ In fact, a recent case dealing with de facto polygamy in Utah cites Edward Said’s *Orientalism* at length⁴—something the *Reynolds* court was engaged in, but of which it was entirely unaware. In the United States, concepts of equal protection and religious freedom have progressed in the past century. From a period in which assimilation was simply expected and accommodation of difference was not considered needful let alone legally required, we moved rather rapidly to the 1980s and 1990s—a period in which multiculturalism and tolerance became the bywords of liberal society. Dominant culture and religion enshrined in public practices were challenged through cases brought against state-directed school prayer,⁵ against public displays of religion in government buildings,⁶ and in support of accommodation of minority religions.⁷ But questions about how much difference ought to be allowed and what kind of accommodations would be required remained, and their limits continued to be unresolved. Even while the dominant religion and culture were being questioned from the 1970s to the 1990s, racial inclusion and diversity were facing their own challenges. The more recent trend has been a swing back in the direction of an assimilationist approach, as articulated by the *Reynolds* Court in the mid-1800s.⁸ The concept of culture that prevailed during much of US history was largely untouched in the law until the latter part of the twentieth century, and the brief heyday of multiculturalism now appears to be over.

For feminists of any persuasion, the question of difference and culture has been a particularly vexing feature of the US women’s movement from its very inception. The critiques raised by black women, which consistently point to problems of white universalism and hegemony, follow the history of dominant liberal feminist movements almost like a shadow.⁹ Black feminism, critical race feminism, postcolonial feminism, and even religious feminism have staked out epistemological authority and ground in the last three decades, demanding inclusion in feminist debates and questioning dominant liberal feminist representations.¹⁰ Thus, as debates were going on about multiculturalism, the

3. See *Reynolds*, 98 U.S. at 164.

4. See *Brown v. Buhman*, 947 F. Supp. 2d 1170, 1182 (D. Utah 2013).

5. See, e.g., *Engel v. Vitale*, 370 U.S. 421 (1962) (holding that government-directed prayer in public schools violates the Establishment Clause of the First Amendment).

6. See, e.g., *McCreary Cnty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844 (2005) (holding that a preliminary injunction prohibiting the display of the Ten Commandments in a courthouse was adequately supported by evidence that the display violated the Establishment Clause).

7. See, e.g., *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811 (2014) (finding that a prayer opening town board meetings did not have to be nonsectarian to comply with the Establishment Clause).

8. See *supra* note 2 (discussing cultural assimilation in the context of Mormon polygamy).

9. See, e.g., *CRITICAL RACE FEMINISM: A READER* (Adrien Katherine Wing ed., 2d ed. 2003) (offering a range of critiques of dominant liberal feminism and its erasing of race from women’s experiences).

10. See Karen Knop et al., *From Multiculturalism to Technique: Feminism, Culture, and the Conflict of Laws Style*, 64 *STAN. L. REV.* 589, 609 (2012) (“[C]hanging conceptions of culture have made it more difficult for feminists to keep their bearings in the

very concept of “women” as the subject of feminism was also being interrogated.¹¹

With the acceleration of globalization in the 1990s, feminists from the Global South were pushing back against the generalizations of feminists in the Global North.¹² The politics of representation, both of gender and culture in their essentialist, reified forms, became a seemingly Gordian knot from which there was no escape. Feminists worldwide needed to stake out some normative positions shared between different strains of feminism—some set of universal goals that transcended cultural difference. But at the same time, difference became an important category of analysis within feminism, with postcolonial, queer, and critical race feminists resisting heterosexual, white, liberal feminist universals increasingly expressed in human rights idioms.¹³ And in turn, postcolonial and critical race feminists were charged with cultural relativism.¹⁴ Both sides used culture as the culprit for women’s subordination albeit at the hands of different oppressors.¹⁵ While significant work has been done to bridge the oppositional way that culture and feminism have been positioned, culture continues to be used by some feminists to articulate the subordination of minority women as well as by some minorities as a shield to demand protection from assimilation.¹⁶

Internationally, as the domestic debates were unfolding, these decades saw transnational movements for human rights grow and replace socialist and nationalist movements.¹⁷ Human rights universalism, very much like feminist universalism, had to contend with particularity in societal structure and cultural practices on the ground. Abstract ideas in the theoretical realm fractured on the practical differences in each locale. As such, the explanation for the lack of progress in human rights protection and gender justice was laid at the doorstep of

feminism/culture debate. The normative clarity of those who frame the conflict as equality versus culture is met with layer upon layer of cultural complication.”)

11. See, e.g., DENISE RILEY, *AM I THAT NAME?: FEMINISM AND THE CATEGORY OF “WOMEN” IN HISTORY* (2002) (discussing the social construction of the category of “women” and the problem this poses for feminism).
12. See, e.g., INDERPAL GREWAL, *TRANSNATIONAL AMERICA: FEMINISMS, DIASPORAS, NEOLIBERALISMS* 136–38 (2005) (discussing feminist critiques of universalizing “women’s rights” from the perspective of rich Northern countries).
13. See Martha Minow, *About Women, About Culture: About Them, About Us*, 129 *DAEDALUS* 125, 130 (2000) (“Culture defenders [argue] that Western liberals wrongly criticize other cultures for gender oppression and other injustices while neglecting the form such oppression takes in their own culture.”); see also *id.* at 134–35 (listing the iterations of the normative challenges to liberal feminists from culture defenders).
14. See Azizah Y. al-Hibri, *Is Western Patriarchal Feminism Good for Third World/Minority Women?*, in *IS MULTICULTURALISM BAD FOR WOMEN?* (Joshua Cohen et al. eds., 1999) (presenting a range of essays that debate the effect of multiculturalism and accommodation of cultural difference on women’s rights).
15. See Knop et al., *supra* note 10, at 600–01 (describing how both sides of the culture debate view the other side as perpetuating female subordination).
16. See *id.* at 597–98 (explaining the tension between equality concerns and self-determination by minority groups).
17. See SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* 2–3 (2010).

culture. But what is meant by “culture,” and how do we know what to do about it when it becomes oppressive?

Culture appears so often in conversations about women’s status and the law that it has become a go-to explanation for any manner of event or belief. Culture has at times encompassed both religion and ethnicity to provide a sort of umbrella term. But just as most generalizations have limited explanatory power when used in this way, culture is a similarly thin concept. It fails to shed light on how certain choices about the law and society’s priorities are made, or on who holds the power to decide. As such, when culture is used as a rationale for legal or political decisions, it requires careful unpacking and scrutiny. It also requires skepticism. While cultural defenses are often alibis for political choices and distributions, the use of culture as a justification for intervention must also be treated with skepticism. And here, dominant human rights feminism must come to terms with its own complicity in the use of “cultural” gender subordination as justification for the extinction of those illiberal cultures. Furthermore, it is important to note that the local and the global often become elided when speaking of culture and religion insofar as the problem of liberal rights versus culture is theorized from the perspective of liberal, multicultural societies in the Global North. In order to bridge the divide between feminism and culture, we must pay attention to context: feminists challenging cultural accommodation within a liberal democratic state cannot assume that the same strategies will work globally, even if they are certain that their normative commitments are ones worth fighting for.

This Article explores the tensions, cleavages, and possible reconciliations between and within feminism and religion/culture.¹⁸ It proceeds in four parts: first, culture and its religion are often used as a justification for avoiding gender law reform. However, what is often hidden behind such usage is a highly particular and discreet set of political choices about how to arrange the rights and obligations within society. These choices are not determined a priori by a cultural script, but rather are arrived at through a political process of setting priorities. While postcolonial and critical race feminists have resisted attacks based on culture by white feminists, they have also had to articulate and fight for change against dominant cultural norms within their communities. It is an uncomfortable position to defend one’s “cultural” group from denigration from outsiders on one hand while critiquing the very same use of culture from within. In this Section, the Article suggests that the best way to overcome the power of the cultural sword and shield and to effect change is through a politics of solidarity—one in which feminists come together to engage in unflinching

18. Although there are critical differences in culture and religion, they are coupled here because, when discussing Islam and Muslims, they have become increasingly entangled and sometimes interchangeable. While such entanglements need to be resisted and examined, the project of this Article is to look at neutral universalism on one side and religion and culture on the other. One might say that I am exploring religion and culture as the “Other” of universal rights that are purported to be devoid of culture or religion.

critique from positions of equality rather than civilizational superiority.

Second, those who justify doing little or nothing by way of gender law reform as well as those who seek sweeping reforms demanding radical assimilation (whether into the dominant culture or into the international legal human rights norms) view “culture” very similarly. That is, they take as given the bounded, unchanging, and settled nature of culture and understate or ignore altogether the contestations within cultural groups. Moreover, they do not interrogate the authority of those who purport to speak for the group, or challenge the right to represent and shape culture. This mirroring of relativists and universalists is an old construction that has roots in the colonial period. This history is important in understanding the present dilemmas of feminism.¹⁹ In this Section, the Article will explore some of the arguments that culture should be viewed as more fluid in order to assess whether this approach can be more useful to feminists in achieving gender justice.

Third, the mirrored understanding of culture as a static set of practices, beliefs, and identities also results in a seemingly intractable oppositional tension between traditionalists/relativists who seek to preserve culture and the universalists who seek to overcome it.²⁰ This tension is very present in legal feminist thought, where practical legal tradeoffs between competing rights claims seem inevitable, as well as in feminist activism, making transnational coalitions and support more complicated. While it is impossible to fully map that tension as it manifests in the literature or in its negative effects on feminist activism and agenda-setting, this Article does examine two situations in which it can be clearly observed: the veil controversy in France and the recent activism by FEMEN to “free” Muslim women from Islam. By grounding the theoretical observations in these two phenomena, the Article hopes to show more clearly the maddening nature of the impasse and make the argument that, unless the impasse is overcome, the full potential of emancipatory feminist thought and activism will never be realized.

Fourth, in this era during which the War on Terror continues to be prosecuted in ever-expanding locations across the globe, culture and civilization have been resuscitated as justifications for intervention and violence for the sake of human rights.²¹ We are all too familiar now with the misleading use of women’s rights as justifications for the use of force in Afghanistan.²² In Iraq,

19. See, e.g., MARY DALY, *GYN/ECOLOGY: THE METAETHICS OF RADICAL FEMINISM* 153–77 (1978) (discussing the modern day feminist dilemmas presented by cultural practices such as female genital cutting).

20. See Kimberly Younce Schooley, *Cultural Sovereignty, Islam, and Human Rights—Toward A Communitarian Revision*, 25 CUMB. L. REV. 651, 678–79 (1995) (comparing various forms of cultural relativism with universalist ideals).

21. See David A. Bosworth, *American Crusade: The Religious Roots of the War on Terror*, 7 BARRY L. REV. 65, 103–04 (2006) (discussing American imperialism in the context of the War on Terror).

22. Cyra Akila Choudhury, *Empowerment or Estrangement?: Liberal Feminism’s Visions of the “Progress” of Muslim Women*, 39 U. BALT. L. FORUM 153, 153 (2009).

while gender repression was less present, Saddam Hussein's human rights violations against the Kurds, the Shi'a, and dissenters, together with the alleged existence of weapons of mass destruction, provided the justification for the invasion.²³ Given the uses to which culture has been put by women's rights and human rights hawks, it is important to interrogate their representation of both the cause for intervention (culture and gender subordination) and its goals (promotion of democracy and human rights). The final part of the Article grapples with some of the difficulties of feminist human rights universalism and considers how feminists can retain their political agendas without becoming myrmidons in support of imperialist and repressive state action. In this endeavor, postcolonial feminists, critical race feminists, and liberal feminists must come to terms with the problematic uses of culture and universalism in the current global context, clarify the goals of their feminisms, articulate the common ground and epistemological equality among them in order to build true solidarity, and move beyond the burdens of culture and the hegemony of falsely neutral liberal rights elevated to the universal.

I. CULTURE AS AN ALIBI: POLITICS, LAW, AND CHOICES REGARDING GENDER LAW REFORM

Feminists have long had to contend with arguments against law and rights reform based on culture.²⁴ The literature in almost every feminist field is replete with examples of culture used to push back on claims of equality and rights.²⁵ Basing their arguments on tradition (a respect for past practice) and religion (adherence to divine commandments), those who wish to retain the status quo that subordinates women and sexual minorities give the impression that change is undesirable, dangerous, or impossible.²⁶

This Section interrogates the use of culture as an alibi for preventing reform and contrasts this approach with feminist calls for contextual analysis. In

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23. See J.M. Spectar, *Beyond the Rubicon: Presidential Leadership, International Law & the Use of Force in the Long Hard Slog*, 22 CONN. J. INT'L L. 47, 53 (2006) ("Al Qaeda's plans to obtain weapons of mass destruction as well as their record of effectuating mass civilian casualties strengthened [President] Bush's ability to paint a clear case of good against evil.").
 24. See generally IS MULTICULTURALISM BAD FOR WOMEN?, *supra* note 14 (presenting a range of essays that debate the effect of multiculturalism and accommodation of cultural difference on women's rights).
 25. See, e.g., Leti Volpp, *(Mis)Identifying Culture: Asian Women and the "Cultural Defense"*, 17 HARV. WOMEN'S L.J. 57 (1994) (discussing contexts in which criminal defendants have used culture to explain or excuse their behavior); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1257 (1991) (explaining how cultural factors further isolate domestic violence survivors in minority communities).
 26. See Cyra Akila Choudhury, *(Mis)Appropriated Liberty: Identity, Gender Justice, and Muslim Personal Law Reform in India*, 14 COLUM. J. OF GENDER & L. 45, 93-97 (2008); Leti Volpp, *Migrating Identities: On Labor, Culture, and Law*, 27 N.C. J. INT'L L. & COM. REG. 507, 511-13 (2002) ("Specific cases of abuse are conceptualized not as reflecting the behavior of a few individuals, but are thought to characterize the cultures of entire nations.").

the first instance, states and those who wield authority in both society and politics argue that adherence to culture or religion bars certain forms of gender law reform.²⁷ These “traditionalists” assume the power to determine which interpretations of culture and religion will be given state preference in a manner that almost occludes the very existence of multiple competing readings and interpretations of culture.²⁸ Moreover, they tend to rely on textual and highly formal conceptions of culture, religion, and law, ignoring the normative messiness that actually exists in people’s communal lives. Most feminists, on the other hand, have made it a part of their method to theorize from the ground up. As such, women’s lived experience provides much useful raw material to the kinds of reform proposals that some feminists make.²⁹ Calls for contextual analysis made most often by minority women embedded in a majority-dominant culture, or made by women in the Global South to transnational partners in the North, are not deploying a cultural defense in the same way that traditionalists do. Rather they are articulating that there may be different ways of “being” a woman than the essentialized variant presupposed by many liberal feminists.³⁰ Moreover, women may want very different things that make no sense to feminists situated differently. But respect for autonomy—no matter how problematic the concept—requires feminists to consider these demands seriously on their own terms and not as forms of false consciousness. Requests for nuance, anti-essentialism, and even cultural or religious sensitivity, then, are not merely a defense of culture, but also a call to attend to the express desires of women and their articulations of freedom and thriving *even if we disagree*. Surely, this is better than imposing a version of freedom that does not resonate or patronizing women who wish to live differently. These demands may be as much about authority and the distribution of power among women as they are about minority rights and accommodation.

A. Traditionalists: Protecting “Culture” over Women

Domestic claims to cultural protection are often made when women

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27. See *infra* notes 33–52 and accompanying text. Martha Fineman suggests that culture changes very slowly even if it is not immutable. Martha Albertson Fineman, *Feminist Theory in Law: The Difference It Makes*, 2 COLUM. J. GENDER & L. 1, 3–4 (1992) (“Culture and society are not easily manipulated and change occurs slowly if at all. Even what appears to be progress is often the superficial adjustment of institutions undertaken to maintain old hierarchies in the face of challenges.”).
 28. See Nomi Maya Stolzenberg, *The Return of the Repressed: Illiberal Groups in a Liberal State*, 12 J. CONTEMP. LEGAL ISSUES 897, 898 (2002) (“In the name of state neutrality and individual freedom of choice, subcultures are pushed out of the public realm of law and politics, denied the powers of (self-)governance, and restricted to a private realm of strictly voluntary association and individual confessions of faith.”).
 29. See, e.g., CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 157–234 (1991) (deriving a theory of state from the lived experiences of women’s sexual subordination, including rape, abortion, and pornography).
 30. See Jeanne L. Schroeder, *The Taming of the Shrew: The Liberal Attempt to Mainstream Radical Feminist Theory*, 5 YALE J.L. & FEMINISM 123, 175 (1992).

demand changes to family law, inheritance, and other discriminatory regulations.³¹ While culture is rarely invoked in US jurisprudence, tradition plays a very large role in the constitutional analysis of fundamental rights and in the weighing of calls for reform.³² Cultural arguments to prevent gender law reform continue to hold salience even though they are not understood to be “cultural” as such. For instance, in the 1873 case *Bradwell v. Illinois*, the stereotypes of womanhood were used to deny a female applicant admittance to the bar.³³ In that case, the Supreme Court opined that:

[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman’s protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The Constitution of the family organization, which is founded in the divine ordinance as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interest and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband.³⁴

The stereotypes prevalent in this reasoning reveal a culture of male dominance and the segregation of women into separate spheres, a culture that demands women’s submission to male authority within the family and their adherence to forms of behavior that conform to expected female roles of wife and mother. Moreover, these biological roles are essentialized to make women unfit for other occupations. Unfortunately, women continue to struggle with these cultural constraints. Although feminists have made large strides in equalizing the opportunities for men and women, and in challenging the stereotypes that prevent women from achieving full equality and justice, the prevailing culture remains patriarchal.³⁵ In addition to this, American culture

31. See *infra* notes 33–52 and accompanying text. See, e.g., Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1345 (1988) (discussing the impact of culture on discrimination law).

32. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702 (1997) (holding that the asserted right to commit suicide, which itself includes the right to assistance in doing so, has no place in the nation’s traditions for the purposes of substantive due process analysis; consistent and almost universal tradition has long rejected the asserted right, and continues to reject it explicitly today, even for terminally ill, mentally competent adults).

33. *Bradwell v. Illinois*, 83 U.S. 130 (1872).

34. *Id.* at 141. The use of generalizations and stereotypes has been eroded by ongoing constitutional challenges, the most significant of these being *United States v. Virginia*, 518 U.S. 515 (1996) (holding the Virginia Military Institute’s gender-based admission policy unconstitutional because it treated women unequally based on stereotypes).

35. See Knop et al., *supra* note 10, at 597.

remains resolutely racist.³⁶ For minority women then, the dominant culture and the role of white women in maintaining parts of it make solidarity particularly difficult. In a relatively recent article in *Time*, the author of a book that claims the rise of women is rendering men infants makes the following claim:

After decades of antidiscrimination laws, diversity initiatives and feminist advocacy, such [gender inequality] data leads to an uncomfortable question: Do women actually want equality? The answer seems transparently, blindingly, obvious. Do women want to breathe fresh air? Do they want to avoid rattlesnakes and fatal heart attacks?

But from another perspective, the answer is anything but clear. In fact, there's good reason to think that women don't want the sort of equality envisioned by government bureaucrats, academics and many feminist advocates, one imagined strictly by the numbers with the goal of a 50-50 breakdown of men and women in C-suites, law-school dean offices, editorial boards and computer-science departments; equal earnings, equal work hours, equal assets, equal time changing diapers and doing the laundry.³⁷

And the voice of one of the most enduring anti-feminist traditionalists, hearkening back to *Bradwell*, reminds us all that there are biological imperatives at work that determine what women and men get in their pay packet.

Another fact is the influence of hypergamy, which means that women typically choose a mate (husband or boyfriend) who earns more than she does. Men don't have the same preference for a higher-earning mate.

While women prefer to HAVE a higher-earning partner, men generally prefer to BE the higher-earning partner in a relationship. This simple but profound difference between the sexes has powerful consequences for the so-called pay gap.³⁸

These conservative authors are articulating traditionalist views of women and what they believe women *really* want. Of course, feminists have always supported women's right to choose lower paying jobs in exchange for greater flexibility and the opportunity to stay home with children. Yet, the purveyors of cultural arguments would suggest that legal protections that protect these choices and ensure fairness by requiring equal pay for equal work (in time, skills, and seniority) are not necessary. Rather, these, like other traditionalist positions, rely

36. See Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), available at <http://www.theatlantic.com/features/archive/2014/05/the-case-for-reparations/361631/>.

37. Kay Hymowitz, *Do Women Really Want Equality?*, TIME (Sept. 4, 2013), <http://ideas.time.com/2013/09/04/do-women-really-want-equality/>.

38. Phyllis Schlafly, *Facts and Fallacies About Paycheck Fairness*, CHRISTIANPOST (Apr. 15, 2014), <http://www.christianpost.com/news/facts-and-fallacies-about-paycheck-fairness-117959/>.

on constructions of biological inferiority and then argue tautologically that those who are biologically inferior can never actually do equal work by dint of their biology. This is subsequently translated into a political agenda of not reforming the laws or enacting legislation that substantively ensures an equal playing field for women and minorities.³⁹ In reality, in spite of legislation creating causes of action for discrimination based on sex and race, the culture of white male, heterosexist, capitalist supremacy rests on the view that women and minorities are both inherently inferior and unable to perform at the same levels as white males. This culture further promotes the idea that women and minorities are in situations of their own making and therefore unequal by choice. These assumptions make bringing lawsuits—let alone winning them—extraordinarily difficult.⁴⁰

A similar kind of traditionalism is at work in a number of countries that retain religious family laws. For instance, attempts at changing the Muslim personal law in a number of countries have been met with stiff resistance from religious and cultural conservatives based on arguments about religious adherence and orthodoxy.⁴¹ The rationale given is that humans cannot change the divinely mandated roles of men and women. Reforming laws governing inheritance, polygamy, or women's right to divorce, traditionalists argue, is illegitimate because these rights and obligations have been set in stone by God and humans have no authority to change these relationships. These arguments are advanced against feminists who have demanded greater equality both from within and from outside of Muslim communities.

In India, for example, the debate has taken on a particularly complex cast due to the large Muslim minority population ensconced in a non-Muslim majority. Muslim women activists in India have had to deal with the twin pressures of intracommunity struggles regarding gender justice and the experience of being a minority in a sometimes-hostile country in which there is a majoritarian Hindu nationalist power.⁴² Hindu nationalists have demanded the legislation of a uniform civil code (UCC) that eliminates religious-based family law and forces assimilation into a “neutral” (but not necessarily secular) family code.⁴³ The UCC had at times been a cherished endeavor of secular, liberal

39. See Anne L. Alstott, *Neoliberalism in U.S. Family Law: Negative Liberty and Laissez-Faire Markets in the Minimal State*, 77 L. & CONTEMP. PROBS. 25, 29–32 (2014).

40. See, e.g., *DeGraffenreid v. Gen. Motors*, 413 F. Supp. 142, 143 (E.D. Mo. 1976) (holding that the plaintiffs bringing a suit on behalf of black women must choose between a claim for “race discrimination, sex discrimination, or alternatively either, but not a combination of both”).

41. See VRINDA NARAIN, *RECLAIMING THE NATION: MUSLIM WOMEN AND THE LAW IN INDIA* 7 (2008).

42. See Shalina A. Chibber, *Charting A New Path Toward Gender Equality in India: From Religious Personal Laws to A Uniform Civil Code*, 83 IND. L.J. 695, 696 (2008).

43. INDIA CONST. art. 44 (“The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.”). This is a directive principle enshrined in the Constitution by the predominantly secularist framers. At the time India’s governing charter was drafted in the 1950s, the UCC was to be drafted and legislated in the future.

feminists in India because it was one way to deal with the codified gender inequality in religious law.⁴⁴ But with the capture of this reform project by the Hindu right, and its subsequent use to browbeat Muslims and criticize them for the mistreatment of Muslim women, secular feminists could no longer profess support for a uniform civil code without also becoming aligned with a divisive communal or religious politics. At the same time, traditionalists from within Muslim communities were demanding that the religious-based family code be protected as a critical accommodation for minority rights. They asserted that the law could not be changed because of its divine provenance. Meanwhile, Muslim women, working from within their communities and in solidarity with other Indian women, pushed for both the UCC (until it became politically difficult) and for internal reforms.⁴⁵ Of course, there were also traditionalist women who resisted change in alliance with male traditionalist authority.

In the Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), one can find similar examples of cultural/religious reasoning inhibiting law reform in Muslim-majority countries. The following comes from Egypt:

Reservation to the text of article 16 concerning the equality of men and women in all matters relating to marriage and family relations during the marriage and upon its dissolution, without prejudice to the Islamic *Sharia's* provisions whereby women are accorded rights equivalent to those of their spouses so as to ensure a just balance between them. This is out of respect for the sacrosanct nature of the firm religious beliefs which govern marital relations in Egypt and *which may not be called in question* and in view of the fact that one of the most important bases of these relations is an equivalency of rights and duties so as to ensure complementary which guarantees true equality between the spouses. The provisions of the *Sharia* lay down that the husband shall pay bridal money to the wife and maintain her fully and shall also make a payment to her upon divorce, whereas the wife retains full rights over her property and is not obliged to spend anything on her keep. The *Sharia* therefore restricts the wife's rights to divorce by making it contingent on a judge's ruling, whereas no such restriction is laid down in the case of the husband.⁴⁶

These are political choices given an alibi by culture and religion. Muslim countries vary in practice, and different rules governing marriage and divorce exist. Some states, like Turkey and Tunisia, have gone so far as to equalize

44. See Chibber, *supra* note 42, at 701.

45. See Srikanth Reddy, *What Would Your Founding Fathers Think? What India's Constitution Says—and What Its Framers Would Say—About the Current Debate over a Uniform Civil Code*, 41 GEO. WASH. INT'L L. REV. 405, 418 (2009).

46. *Declarations, Reservations and Objections to CEDAW*, UN WOMEN (emphasis added), <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm> (last visited, Mar. 15, 2015). All countries' reservations to CEDAW, including Egypt, can be found at the United Nations website.

divorce, while others like Saudi Arabia and Iran adhere to a strict interpretation of tradition.⁴⁷ Afghanistan is now infamous for Islamicizing Pashtun cultural and customary legal practice to the exclusion of minorities like the Hazaras and Uzbeks.⁴⁸ There is no single approach to family law even though each iteration of the law is oftentimes justified by reference to religion. When one digs below the surface—beyond the formal laws to the normative practice—the heterogeneity of all that is encompassed as legal can become bewildering. Culture cannot explain the pluralism in religious laws or the choice of which interpretation or range of interpretations the state chooses to elevate to the formal and to enforce.

As Lama Abu-Odeh demonstrates in her work on Egyptian family law, Egyptian male elites made calculated political choices with regard to modernizing family law.⁴⁹ In both enacting new laws and adjudicating them, which rules “ought” to be passed or applied were not self-evident without a political or ideological agenda of appeasing the different political groups in Egypt. That agenda drove the elites to split the difference with religious factions, liberal elites, and feminists, and to modernize some parts of the Egyptian code. The choice to modernize some aspects of the law, to qualify traditional rules with modern requirements, was not a cultural choice but a political one that reveals the exigencies of a new state and the relative bargaining power of the political players in it (secular male elites, feminists, religious groups).⁵⁰ Naturally, although broader social and cultural norms have effects on the ideological commitments of the players, simply declaring culture as their primary motivation underestimates the political context.

B. Feminist Calls for Context

Given the heterogeneity within cultures, many critical feminists have called for greater contextual analysis.⁵¹ On occasion, this call for nuance and appreciation of difference has been misread, either conflated with traditionalist moves to protect culture over women or reduced to a sort of cultural essentialism

47. See Amira Mashhour, *Islamic Law and Gender Equality—Could There Be a Common Ground?: A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt*, 27 HUM. RTS. Q. 562, 571–72 (2005) (positing that while the Prophet Muhammad denounced divorce and advocated reconciliation, divorce under Shar’ia law was permissible).

48. See Michael N. Schmitt, *Xi Targeting and International Humanitarian Law in Afghanistan*, 85 INT’L L. STUD. 307, 308 (2009).

49. See Lama Abu-Odeh, *Modernizing Muslim Family Law: The Case of Egypt*, 37 VAND. J. TRANSNAT’L L. 1043, 1050 (2004).

50. *Id.* at 1043–1146.

51. See generally Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617 (1990) (“If, as critical feminists generally maintain, women’s experience has been shaped through culturally contingent patterns of subordination, no particular experience can claim universal authentic status.”).

in opposition to gender essentialism.⁵² Certainly, there are women who are firmly within the traditionalist camps.⁵³ Conservative women have also claimed the feminist mantle and come out in support of political candidates who stand for a politics at odds with the historical concerns of liberal, critical race, and postcolonial feminisms, not to mention queer advocacy.⁵⁴ But to conflate minority feminists and feminists from the Global South with these traditionalists is to do a grave disservice to the commitments of minority feminists and also to foreclose solidarity in a number of shared projects, such as legal reform toward greater gender equality. Moreover, such conflation elevates the cultural commitments of minority feminists (to the extent that they exist) above their gender justice commitment by fiat, and does so in contravention of their own priorities. It obscures the fact that everyone in a heterogeneous society is negotiating multiple identities and hybridity—not just minorities. While many feminists have moved beyond equating minority and Global South feminists with cultural relativists, there remains an ardent faction of universalists who continue to point out the problems of accommodating minority cultures or “eroding” human rights by admitting heterodox interpretations.⁵⁵

This brings me to the next Section and an observation about the very nature of religion and culture as they are understood by both universalists and cultural relativists/apologists: both consider culture to be immutable. That is to say that one can positively claim a particular practice or belief as “cultural,” and also claim that it has remained unchanged over time. This view prevents arguments that get at the political decision-making behind either abandoning or preserving “cultural” practices and moves the argument onto much less contestable terrain.

II. RELATIVISTS AND UNIVERSALISTS: A VIEW OF RELIGION/CULTURE AS MIRROR IMAGE

While the assertion that culture is an unchanging set of social arrangements usually comes from relativists, a mirror image assumption is made by rights universalists.⁵⁶ For instance, claims that culture or religion prohibit the reform of gender-iniquitous laws are contested precisely as though those *assertions were true*. An argument that religion prevents equal access to divorce is met with calls

52. Bhabani Shankar Nayak, *Challenges of Cultural Relativism and the Future of Feminist Universalism*, 6 J. POL. & L. 83, 83–85 (2013).

53. See Nancy Leong, *Dissenting In and Dissenting Out*, 89 CHI.-KENT L. REV. 723, 731 (2014).

54. Kathleen Parker, Op-Ed., *Can Conservative Women be Feminists?*, WASH. POST (Dec. 9, 2014), http://www.washingtonpost.com/opinions/kathleen-parker-can-feminism-see-the-right/2014/12/09/7f572a1c-7fd7-11e4-9f38-95a187e4c1f7_story.html.

55. For instance, the late Susan Moller Okin is an example of a rights universalist in that she failed to situate her particular commitments to a liberally configured set of rights within any kind of culture. See, e.g., Susan Moller Okin, *Feminism, Women's Human Rights, and Cultural Differences*, in *DECENTERING THE CENTER: PHILOSOPHY FOR A MULTICULTURAL, POSTCOLONIAL, AND FEMINIST WORLD* 26 (Uma Narayan & Sandra Harding eds., 2000).

56. *Id.* Martha Nussbaum takes a more nuanced universalist approach. See MARTHA NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* (2001).

for the abandonment of any engagement with religion and a demand for a move into the culturally neutral space of universal human rights.⁵⁷ A cultural defense that asks for judicial leniency for forced marriage is met with a feminist demand that such a cultural defense be viewed as entirely irrelevant to the judicial disposition of such a case.⁵⁸ Once culture is fixed, bounded, and reified in this manner, the conflicts arising between traditionalists and universalists become more intractable, and the strategies to deal with culture become much more akin to the kind of civilizing mission familiar to ex-colonies and subject peoples. On the other hand, attempts at defending culture from the civilizing mission solidify it into precisely the unchanging “thing” that it is claimed by both sides to be.

To unpack the above arguments, it is important to think through the relationship between “backward cultures” and colonialism. The concentration of efforts by universal rights activists to privatize or progress out of culture or religion is a well-established strategy with antecedents in the colonial civilizing mission.⁵⁹ Universalists espouse the view that but for the cultural baggage they are burdened with, people in these traditional societies would realize the benefits of universal human rights and women’s rights. Progress is made in spite of the burdens imposed by religion and culture, particularly when culture is pushed back in favor of universal rights. Moreover, culture is something women preserve, but do not create. So women may become passive victims of their culture but they are rarely the agents of and within their culture.⁶⁰ Thus, culture is seen as a totality from which women must exit in order to be truly free.

The colonial notion of a discernible and fixed culture was in some measure a disciplinary exercise in administering subject peoples. The need to administer colonies efficiently drove the creation of taxonomies, classifications, and codification of information gathered by Oriental scholars sent to the field to learn about the natives. Immutable cultural and civilizational difference was not a product of the self-awareness and self-description of native subjects. But they became much more so once the colonial authorities differentiated between groups and attached rights and privileges to them based on that difference. For example, as Ayesha Jalal notes, the creation of a Muslim electorate and a politically significant separation between Hindus and Muslims in India gave rise to an identity politics that resulted to some extent in the partition of the subcontinent.⁶¹ Indeed, the very notion of “subcontinent” and “India” with its cultural particularity and geographical boundedness itself is a colonial artifact. In the post-independence state, Muslims have had that identity both reified for them by a majoritarian communal politics that continues to castigate them as fifth columnists, and have reified it themselves in order to protect their “religious”

57. See, e.g., IS MULTICULTURALISM BAD FOR WOMEN?, *supra* note 14.

58. ANNE PHILLIPS, MULTICULTURALISM WITHOUT CULTURE 73–99 (2009).

59. Choudhury, *supra* note 22, at 170.

60. Madhavi Sunder, *Piercing the Veil*, 112 YALE L.J. 1399, 1469 (2003).

61. See Ayesha Jalal & Anil Seal, *Alternative to Partition: Muslim Politics Between the Wars*, 15 MOD. ASIAN STUD. 415, 415–17 (1981).

rights, legal rights, and their political identity—sometimes their physical safety as well.

The tragedy of this history is that culture has been used as a shield to protect minorities and subject peoples from interference by colonial authorities, majorities, the postcolonial state and, increasingly, the international universalists. The more culture is used in this manner, treated as transcending challenge and trumping universals, the more it appears that universalists assume authority and demand that culture be made mundane and open to contestation by “them.” Nothing is sacred, not even the sacred. The power dynamic that resides in this conflict will be discussed in greater detail below, but it is important to point it out here. The colonial distributions of power in this conflict make it very difficult to resolve to everyone’s satisfaction. And women are often left to make shift for themselves between the universalists who denigrate their religion or culture and the male traditionalists who denigrate their gender. Both universalists and traditionalists may discount the work of feminists engaged in reinterpreting religion as either unauthorized by tradition or ineffective as a form of apology. And, of course, there are women who choose one side over the other rather than inhabiting an increasingly uncomfortable middle ground. But this is not to say that those who refuse to simply choose a side are passive bystanders while the conflict rages. As the Article shall posit below, those in the middle positions, negotiating multiple identities and political commitments, are integral contributors to the debate.

The second point that must be made here is that by shifting the idea of culture onto the terrain of the Global South, universalists mask the cultural content in their own articulation of women’s rights and present their own struggles as culturally neutral.⁶² The liberal notions of human rights and women’s rights did not emerge fully formed in a vacuum. Rather, they developed within the cultural and historical context of a Europe wracked by religious intolerance and warfare and saw their legal culmination in declarations and conventions that were enacted after the genocidal violence of the Second World War. Curiously, the genocidal violence of colonialism was insufficient to create a global consensus around combatting violence against religious and cultural “Others,” in spite of the numerous claims by subject peoples to universal humanity and its attendant rights. The independence leaders of colonies from India to Africa and the Middle East used liberal and universal notions of citizenship, justice, and the rule of law to demand freedom and recognition of human rights. And yet the universality of these concepts never seemed to stretch quite far enough to cover subject peoples of color. Amongst thinkers articulating theories of liberty and equality, Mahatma Gandhi stands out as articulating an indigenous basis for rights based not on Liberalism but Hinduism and Indian philosophy. Certainly that philosophy articulated an alternative that

62. See Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT’L L.J. 201, 204–06 (2001).

encompassed the entire world's colonized population.⁶³

The rather obvious observation here is that universal rights may be theoretically "universal," but the way they are put into practice does involve cultural and perhaps even religious substructures.⁶⁴ For instance, women's rights most often attach to individual women and seek to enhance their autonomy from other humans. What is considered important is the ability to make individual decisions and to control one's own physical being and social and work prospects without the *undue* influence of others. This is a very particular notion of autonomy with a historical and geographical provenance. It is a conception of human thriving that may make little sense to more communitarian people who operate both individually but also in far more interdependent and integrated ways than Western liberal societies.

To be clear, the argument is not that autonomy and equality are of lesser value than community and complementarity. Indeed, this Article advances no such normative position. Women's lack of agency and the argument that uses their deep embeddedness in family structures as justification to prevent reform are very problematic even in liberal societies. But ignoring the *reality* of embeddedness, community, and substantive equality that takes seriously the differing roles and desires of women is equally troubling.⁶⁵ Moreover, rights agendas that require women to behave as though these realities are unimportant or that require the realities to change radically before women reap any benefits afforded by rights are unlikely to succeed.⁶⁶ A discussion of this point appears in greater detail in the next Section, but the point here is that universal rights already have a cultural and political valence that is often obscured by universalists who only talk about culture in oppositional terms and with an assumption that rights will only work in a secular framework.⁶⁷ Moreover, universalists do not account for the critique that "rights" alone will not yield the kind of full emancipation that women desire. Rather, their acquisition may mask certain distributions of power and resources that elevate some women over others. That cultural valence, the underlying assumptions, and the distributional

63. John Leubsdorf, *Gandhi's Legal Ethics*, 51 RUTGERS L. REV. 923, 933 (1999).

64. See generally THE PRACTICE OF HUMAN RIGHTS: TRACKING LAW BETWEEN THE GLOBAL AND LOCAL (Mark Goodale & Saly Engle Merry eds., 2007) (exploring the local mediations of international human rights).

65. See Eva Feder Kittay, *Searching for an Overlapping Consensus: A Secular Care Ethics Feminist Responds to Religious Feminists*, 4 U. ST. THOMAS L.J. 468, 477 (2007); Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 WIS. WOMEN'S L.J. 149, 189 (2000).

66. Furthermore, there are other vernaculars that might be used to express a desire for greater gender justice other than human rights. We have lost a great deal of that capacity through the hegemony of human rights talk. For instance, we might couch our desire for justice and equality through the language of redistribution and material feminism. See, e.g., MATERIAL FEMINISM: A READER IN CLASS, DIFFERENCE AND WOMEN'S LIVES (Rosemary Hennessy & Chrys Ingraham eds., 1997).

67. The religious valence of secularism is similarly obscured by most secularists. See, e.g., TALAL ASAD, FORMATIONS OF THE SECULAR (2003).

impact of rights *matter* when it comes down to the practical implementation of reforms in a particular context.

Furthermore, universalists do not pay adequate attention to the contests over cultural meaning and practice that continue to take place within various societies that allowed for legal reform. For example, reproductive rights battles that have been an ongoing source of struggle for feminists in the United States have been construed as part of a culture war.⁶⁸ However, US feminists tend to see the fight as more of a political rather than a cultural one, whereas a similar fight in Afghanistan is construed as the reverse.⁶⁹ Uma Narayan points to this distinction in her observation about the rhetoric of dowry deaths.⁷⁰ She imagines a reversal of the gaze in which an Indian journalist reports on the manifold cases of domestic violence against women in the United States as a consequence of culture.⁷¹ As “Hindu culture” is deployed as an explanation,⁷² so might “Christian” or “American” culture be used as an explanation in the American context. Certainly, we have begun speaking more about “gun culture” and “rape culture” in the United States, but these are cast as part of an aberrant subculture that cuts against the norm—not as part of *the* culture in its totalized and singular form.

The point is that arguments from universalists regarding culture very often mimic those of traditionalists: both assume that culture as a social construct is essential and immutable. By assuming the homogeneity of the “religious” position, they both obscure dissenting views that might be more fruitfully engaged and foregrounded as counternarratives and interpretations that the state could choose to adopt as a basis for reform. Moreover, universalists often focus on the culture of “Others” while obscuring their own cultural commitments.⁷³ A pro-universal human rights position is normalized as the neutral secular position devoid of any cultural or religious baggage. In other words, it is a totalized representation sans culture that externalizes culture as all *theirs*. From this space, critiques of culture and religion that seem eerily familiar to post-colonial scholars are launched against people in the Global South burdened with both. On the other hand, traditionalist defenses assert the same kind of cultural purity and totality that demands protection and preservation. Both sides’ constructions of

68. See Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 196 (2001).

69. See Melanie M. Brookes, *Reproductive Rights in Afghanistan: Considerations of Abortion Regulation in Light of the Afghan Reconstruction Process*, 18 CONN. J. INT’L L. 595, 596 (2003).

70. Uma Narayan, *Cross-Cultural Connections, Border-Crossings, and “Death by Culture”*: *Thinking About Dowry-Murders in India and Domestic-Violence Murders in the United States*, in DISLOCATING CULTURES: IDENTITIES, TRADITIONS, AND THIRD WORLD FEMINISM 81 (1997).

71. *Id.*

72. *Id.*

73. See, e.g., Patricia A. Broussard, *Female Genital Mutilation: Exploring Strategies for Ending Ritualized Torture; Shaming, Blaming, and Utilizing the Convention Against Torture*, 15 DUKE J. GENDER L. & POL’Y 19, 40 (2008).

culture are deeply troubling, particularly when they are used to understand particular subjects such as “Muslim women” or “Muslim men.”

III. A COMMON THREAT: THE LIBERAL FEMINIST-IMPERIALIST ALLIANCE IN THE WAR ON TERROR

Though colonial powers engaged in civilizing subject populations in the Global South did not shy away from claiming cultural superiority, that claim has become far less acceptable in the postcolonial world. Explanations of the distribution of wealth and power that are grounded in culture, race, or other identity claims, while still made, are often called out as forms of discriminatory thinking.⁷⁴ Nevertheless, these explanations have made an alarming comeback to rationalize a number of structural and distributional inequalities.⁷⁵ One of the most acceptable uses of cultural claims is as an explanation for violence and gender oppression in Muslim communities.⁷⁶ The War on Terror has resuscitated and normalized the use of religion and culture as an explanation for violence by Muslims worldwide through the “clash of civilizations” theory.⁷⁷ Furthermore, the mirroring referred to above has been a consistent feature of the War on Terror, with groups of Muslims themselves asserting an essentialized cultural and religious difference from the “West.” Indeed, while cultural or religious defenses might be met with skepticism and even derision when deployed against some communities or used by those communities to demand accommodation, they are entirely acceptable, if not expected, from Muslims.⁷⁸ In fact, Muslims are readily believed when they claim a religious/cultural defense because that cultural essentialism is integral to the growing phenomenon of Islamophobia⁷⁹

74. DIPESH CHAKRABARTY, PROVINCIALIZING EUROPE: POSTCOLONIAL THOUGHT AND HISTORICAL DIFFERENCE 3–6 (Sherry B. Ortner et al. eds., 2000); Palma Joy Strand, *Inheriting Inequality: Wealth, Race, and the Laws of Succession*, 89 OR. L. REV. 453, 478 (2010).

75. See generally NIALL FERGUSON, CIVILIZATION: THE WEST AND THE REST (2011) (arguing that the West has progressed because of the development of six “killer applications” that failed to develop in other parts of the globe).

76. See Sahar F. Aziz, *From the Oppressed to the Terrorist: Muslim-American Women in the Crosshairs of Intersectionality*, 9 HASTINGS RACE & POVERTY L.J. 191, 238 (2012).

77. Dennis J.D. Sandole, *The “Fog of War” on Terrorism: U.S. Policy, Deception, and the Continuing Slide into the “Clash of Civilizations,”* 13 ILSA J. INT’L & COMP. L. 149, 161–62 (2006).

78. See Volpp, *supra* note 25.

79. While there has been some resistance to the term “Islamophobia,” I use it to denote the prejudices and discriminations faced by people because they are Muslim and also the fear of the spread of Islam and Muslims into the West. It differs from racism, which often overlaps or intersects with Islamophobia when a Muslim subject is also a racial minority. However, white Muslims who are not observably Muslim are also affected by the dominant negative stereotypes and discourse about Islam even if they are not faced with racism per se. To deny the existence of this form of prejudice is to yet again exceptionalize Islam and Muslims given that other religious communities such as Christians, Buddhists, Jews, and atheists can readily claim discrimination on the basis of belief or nonbelief. Having said that, not every criticism—internal or external—of Islam or adherents of Islam amounts to Islamophobia and its use to silence such critique, particularly of right-wing Islamists, is highly problematic. See

that has marked the War on Terror.⁸⁰ The effect is to reinforce the mistaken view of a monolithic religion across cultural differences (conflating religion and culture as it so often happens) in order to use both religion and culture to create a thoroughly cultured Muslim who is entirely incapable of independent decision-making, fungible with all other believing Muslims, and entirely and deterministically motivated by the same set of beliefs in Islam.

Because many universalists consider Islam to be the archetypical patriarchal religion mired in the gender inequalities and prejudices of the Dark Ages, they view Muslim men as agents while Muslim women remain the passive objects of male action and power.⁸¹ Similarly, traditionalists wish to maintain or reintroduce just such a distribution of power regardless of the progress that has been made. It is necessary to complicate the uses of culture by both sides—universalists as well as traditionalists—by exploring the ways in which they both fail to explain what is actually happening in many Muslim contexts. This failure becomes evident, first, by looking at the caricatured subjectivity of Muslim males who have become the feminist nightmare and juxtaposing this caricature to the vulnerable Muslim man; and, second, by unsettling the assumptions about the power inequalities between men and women in the War on Terror and underscoring the interdependence of Muslim women and men. As a corollary to the exploration of gender roles among Muslims, it is also useful to highlight the role of Western women in the prosecution of the wars in Iraq and Afghanistan, and the gender reversals that are often present in these contexts of invasion and occupation. Ultimately, the very category of “ally” in gendered terms needs to be questioned carefully when alliances are complicated by the War on Terror. In other words, Muslim women have been pitted against Muslim men in the War on Terror; oppression of these women is daily reported in the news and has garnered sympathy from women in the West.⁸² However, Muslim women are also imperiled by imperialist violence in places like Afghanistan, Iraq, Yemen, Pakistan, and other places subject to drone strikes.⁸³ The violence experienced at the hands of Muslim men as well as foreign armed forces makes for uneasy and uncertain alliances across gender and geographic lines.

The emphasis on Muslim male violence against women and the specific reliance on religion and culture as the determinants of that violence allow some

Defining “Islamophobia”, CENTER FOR RACE & GENDER, <http://crg.berkeley.edu/content/islamophobia/defining-islamophobia> (last visited Mar. 19, 2015).

80. Karen Engle, *Constructing Good Aliens and Good Citizens: Legitimizing the War on Terror(ism)*, 75 U. COLO. L. REV. 59, 75 (2004).
81. See Roxane Davis, *Women on the Front Line of Reform in Post-Revolutionary Iran: The Role of Female Political Activism in Lifting the Veil of Cultural Relativism & Exposing the Democratic Will Beyond Patriarchal Interpretations of Islam*, 15 GONZ. J. INT’L L. 52, 59–60 (2011).
82. See Aziz, *supra* note 76, at 228.
83. See Holly Taylor, *The Constitutions of Afghanistan and Iraq: The Advancement of Women’s Rights*, 13 NEW ENG. J. INT’L & COMP. L. 137, 143 (2006).

feminist activists to evade their own complicity in imperialism.⁸⁴ The acceptance of the “bad guy” subject is not without serious consequence for Muslim women. What is defined as Islamic terrorism, attributed to religion and culture, invites much harsher punishment and regulation of Muslims in general, feeds into an ongoing justification for collective punishment, and creates an increasingly fearful and marginalized group made up of *both men and women* who often do not support Islamist groups or their political agendas.⁸⁵ This, in turn, complicates the response to the very real violence that is done to women within their communities.

A. The Problem of Violent/Vulnerable Muslim Men

From Nigeria to Afghanistan, Somalia, and the United States, male violence is often attributed to Islam even when not self-avowedly Islamist or ideological.⁸⁶ As such, preoccupations with women’s oppression under Islamic patriarchy put some feminists on the same side as imperialists who cynically justify therapeutic violence on the basis of universal values and rights. The feminist-imperialist alliance based on this common threat divides men and women in a perpetrator/victim paradigm and fails to account for the much more complex reality of vulnerability and power that exists among Muslims.⁸⁷

The construct of the violent Muslim male hardly needs elaboration. The media is replete with examples from wife-beating husbands, to honor-killing fathers, jihadist terrorists, and Islamist politicians who seek to control women’s bodies and lives.⁸⁸ Even secular dictators like Saddam Hussein are made to fit the barbaric Muslim mold as reflections of the inability of Arabs and Muslims to rule themselves without violence and oppression.⁸⁹ Instructed by his religion, the Muslim male is always on the verge of violence. Recent concerns about the potential dangers posed by Muslim men are reflected in state attempts to counter

84. See Kathleen Kennedy, *Manhood and Subversion During World War I: The Cases of Eugene Debs and Alexander Berkman*, 82 N.C. L. REV. 1661, 1662 (2004) (“[S]ince the early 1980s American citizenship has undergone a remasculinization that rehabilitates the citizen-soldier as the quintessential symbol of American values and protector of American freedoms. . . . [B]oth policy and cultural images increasingly regenerate militarized manhood, linking it to a violent, aggressive, and often misogynist defense of the nation and the heterosexual family. . . . against an irrational, repressive, wantonly violent, and uniquely pernicious enemy—the Muslim male terrorist.”).

85. See Kenneth Lasson, *Bloodstains on a “Code of Honor”: The Murderous Marginalization of Women in the Islamic World*, 30 WOMEN’S RTS. L. REP. 407, 434 (2009).

86. *Id.* at 431–33.

87. DEEPA KUMAR, ISLAMOPHOBIA AND THE POLITICS OF EMPIRE 41–60 (2012).

88. See generally Brendon Tagg, *Jihad, Race and Western Media, Post-September 11*, 4 SOCIETIES WITHOUT BORDERS 317 (2009), available at <http://societieswithoutborders.files.wordpress.com/2010/01/tagg.pdf> (discussing Western media representations of Muslims).

89. See Aaron M. Herzig, *In Defense of Terrorist States: Acree v. Republic of Iraq and the Bush Administration’s Attempts to Shield Iraq and Saddam Hussein from Suits by American Citizens and Soldiers*, 73 U. CIN. L. REV. 771, 772 (2004).

“radicalization.”⁹⁰ As Arun Kundnani points out, the theory of radicalization that has gained currency in both the United States and the United Kingdom posits a slippery slope from the practice of Islam to outright jihad.⁹¹ According to law enforcement, the first signs of radicalization are a change in clothing and a greater adherence to Islamic practice.⁹² From there, once Muslims are on the “conveyer belt” of practice, it is a short ride to committing acts of violence in their own communities or leaving to fight in the Middle East.⁹³ Thus, any outward signs of Islamic practice prompt greater scrutiny and regulation.

From the first days of the War on Terror, when Muslim men were interrogated for just being Muslim, to the latest revelations that the National Security Agency has been monitoring Muslims without probable cause and based only on identity, the justification for this treatment of Muslims has been a generalized belief that Muslims are a threat.⁹⁴ Theatrical hearings on Capitol Hill and pronouncements from political leaders keep the fear palpable.⁹⁵ For example, London mayor Boris Johnson asserted that children should be removed from “radical” Muslim families.⁹⁶ To be clear, since practicing conservative forms of Islam is often conflated with radicalism, it seems likely that Johnson is suggesting an Orwellian intervention into the families of many Muslims. In the United States, this possibility became a reality when the daughter of a Muslim couple ran away from home and claimed to fear honor killing if she told her parents that she wanted to convert to Christianity.⁹⁷ Both parents declared publicly that she could choose any religion she desired, and even though no evidence of violence or threat of violence was presented to the courts determining her removal from the home, the child was not returned to the parents.⁹⁸ The connection between Islam and violence is so strong that even

90. ARUN KUNDNANI, *THE MUSLIMS ARE COMING!: ISLAMOPHOBIA, EXTREMISM, AND THE DOMESTIC WAR ON TERROR* 115–150 (2014) (describing the assumption made by numerous counterterrorism experts of progression from practicing Islam conservatively to radicalization).

91. *Id.*

92. *Id.*

93. *Id.*

94. Scott Michelman, *Who Can Sue over Government Surveillance?*, 57 *UCLA L. REV.* 71, 99 (2009).

95. See William Saletan, *Muslim McCarthyism*, *SLATE* (Mar. 9, 2011, 8:47 AM), http://www.slate.com/articles/news_and_politics/frame_game/2011/03/muslim_mccarthyism.html (describing the King hearings on Muslim radicalization); see also Linda E. Fisher, *Guilt by Expressive Association: Political Profiling, Surveillance and the Privacy of Groups*, 46 *ARIZ. L. REV.* 621, 631 (2004).

96. *Boris Johnson: Children at Risk of Radicalisation Should Be in Care*, *BBC NEWS* (Mar. 3, 2014), <http://www.bbc.com/news/uk-26413024>.

97. See Tim Padgett, *A Florida Culture-War Circus over Rifqa Bary*, *TIME* (Aug. 24, 2009), <http://www.time.com/time/nation/article/0,8599,1918228-1,00.html>

98. See *id.*; John Couwels, *Police: No Evidence Teen Was Threatened over Christianity*, *CNN* (Sept. 14, 2009), <http://www.cnn.com/2009/US/09/14/florida.muslim.convert/index.html#cnnSTCText> (“The girl had told investigators her father never saw her in her school cheerleading outfit because she feared his disapproval. But investigators stated in the report they saw pictures of the girl

vehement disavowals are insufficient to quiet the fear and anxieties that are invoked through the signifier of “honor killing.”⁹⁹

The construction of Muslim masculinity as essentially violent not only provokes state regulation and surveillance but also conceals the vulnerability of Muslim men and boys. From 9/11 onwards, Muslims and those *looking like* Muslims have been subject to racialized, physical violence.¹⁰⁰ The violence has ranged from the shocking torture of Muslim men in Iraqi and Afghan detention centers, such as Abu Ghraib or Camp Delta,¹⁰¹ to the more mundane domestic murder or brutal beating at the hands of citizens in the United States. Perversely, Muslim men are depicted as barbarians, and, as a result, they can be subjected to brutal forms of violence to reform that barbarity.¹⁰² Violence done to them is justified by their own supposedly innate violence and through the Orientalist trope of “they only understand violence.” As Judith Butler notes in her work on Palestinians, Muslim men and boys then become disposable and utterly ungrievable—always a threat.¹⁰³ A stark example of the callousness with which Muslim lives are treated is the categorization of all Muslim men and boys between the ages of fifteen and thirty-five as “military age males” and, therefore, legitimate targets of drone strikes.¹⁰⁴ This definition works to criminalize all males in that age range without due process or any evidence of their actual activities or affiliations and to dramatically reduce the number of “civilians” in drone strikes through an act of simple redefinition. If the United States government uses guilt by association, then it hardly comes as a surprise that certain people in the United States would read this as an authorization for vigilante justice and violence against Muslims.

B. Complicating the Narratives: Men/Women/Allies/Enemies

The depiction of Muslim men as violent terrorists serves to justify their brutal treatment in the War on Terror. So do the stories of Muslim male violence against women. However, these accounts conveniently mask the ongoing victimization of women by the violence of foreign troops engaged in a military mission to eradicate terrorists. Undoubtedly, Muslim women suffer at the hands

in her cheerleading uniform *prominently displayed* in the living room of the Bary’s Ohio home.” (emphasis added)).

99. See Cyra Akila Choudhury, *Globalizing the Margins: Legal Exiles in the War on Terror and Liberal Feminism’s War for Muslim Women*, 9 INT’L REV. OF CONSTITUTIONALISM, no. 2, 2010, at 1, 5–6.
100. See Ming H. Chen, *Alienated: A Reworking of the Racialization Thesis After September 11*, 18 AM. U. J. GENDER SOC. POL’Y & L. 411, 416–17 (2010).
101. See Atif Rehman, *The Court of Last Resort: Seeking Redress for Victims of Abu-Ghraib Torture Through the Alien Tort Claims Act*, 16 IND. INT’L & COMP. L. REV. 493, 495–97 (2006).
102. See KUMAR, *supra* note 87.
103. See JUDITH BUTLER, FRAMES OF WAR: WHEN IS LIFE GRIEVABLE? 31 (2009).
104. Glenn Greenwald, “Militants”: Media Propaganda, SALON (May 28, 2012, 9:32 PM), http://www.salon.com/2012/05/29/militants_media_propaganda/.

of abusive men and patriarchal structures just as women do in any other male-dominated state. But, their vulnerability is exacerbated by foreign intervention and the violence of war.¹⁰⁵ For instance, in states like Afghanistan, where women in some areas are already subject to strict regulation because of the gender policing of the Taliban and the conservatism of society, foreign military intervention that places male family members at risk clearly jeopardizes the security of the family.¹⁰⁶ As a result, feminists who have championed the use of intervention to bring change for Afghan women have also been in the uncomfortable position of allying with the US political establishment in its imperialism and violence against Afghans. Moreover, it is unclear that any lasting change or security can be guaranteed for Afghan women once the United States and allied troops leave the country.¹⁰⁷

If feminist alliances with imperialism were problematic in Afghanistan, the revelation of women human rights abusers and torturers in Iraq made the “sisterhood is global” slogan even more difficult to accept.¹⁰⁸ The juxtaposition of the stereotypical violent Muslim male with the violent American female soldier disarranged the gendering of victimhood. Women as oppressors—reminiscent of the women of Empire in the Orient and Africa and the plantation mistresses of antebellum America—made the concept of a “shared” subjugation impossible to sustain. The gendered nature of the torture and the feminization of Iraqi prisoners as subjects of rape and sexual humiliation also made the neat divisions of women and men into victim/perpetrator roles unsustainable.¹⁰⁹ These expressions of imperial violence and the reality that Iraqi women fared quite well in terms of gender equality and opportunity under Saddam Hussein cut against the simplistic feminist rhetoric that rests on universal ideals of women’s shared oppression and against the bases of the demand for intervention to secure women’s human rights.¹¹⁰ Furthermore, these contradictory distributions of gender power raise the question of how and with whom alliances within this complex matrix of power relations form. Can feminists who support women’s rights *and* the use of force to secure it be allies of the same women who stand to

105. See Lasson, *supra* note 85, at 434.

106. Nancy Gallagher, *The International Campaign Against Gender Apartheid in Afghanistan*, 5 *UCLA J. INT’L L. & FOREIGN AFF.* 367, 372 (2001).

107. See generally Nusrat Choudhury, *Constrained Spaces for Islamic Feminism: Women’s Rights and the 2004 Constitution of Afghanistan*, 19 *YALE J.L. & FEMINISM* 155 (2007) (discussing the 2004 Constitution of Afghanistan and the difficulty Islamic feminists may face in promoting women’s rights through law).

108. The phrase “Sisterhood is Global” comes from *SISTERHOOD IS GLOBAL: THE INTERNATIONAL WOMEN’S MOVEMENT ANTHOLOGY* 329 (Robin Morgan ed., 1984).

109. See generally Johanna Bond, *A Decade After Abu Ghraib: Lessons in “Softening Up” the Enemy and Sex-Based Humiliation*, 31 *LAW & INEQ.* 1 (2012) (describing the gendered nature of the abuses at Abu Ghraib and analyzing how the perpetration of those abuses by women created an ambiguous public narrative).

110. See Stephen Kinser, *End Human Rights Imperialism Now*, *THE GUARDIAN* (Dec. 31, 2010), <http://www.theguardian.com/commentisfree/cifamerica/2010/dec/31/human-rights-imperialism-james-hoge>.

lose the male members of their families to such violence? Does imperial violence make activism on issues of violence against women harder in local contexts? Can secular, liberal feminists who are committed to gender justice form alliances with women who have a radically different conception of what it means to be free from that envisioned by Liberalism? Treating Muslim women as primarily subordinated by males acting on religious authority requires ignoring or oversimplifying the complexities which underscore the reality that women are not always allies, that men are not always enemies, and that culture and religion (Islam) cannot explain the problems of gender inequality and oppression when liberal ideology propels imperial intervention.

IV. "CULTURAL" DIFFERENCES, AGENCY, AND AUTHORITY IN LIBERAL FEMINIST ACTIVISM

Liberal feminism in its universalist mode has yet to come to grips fully with its own cultural particularity and exclusionary history. And it has yet to fully appreciate that it cannot and does not represent "women" as an abstract subject without history, context, or particularity. Second-wave feminism has relied on an increasingly challenged assumption of shared subordination based on gender, and sometimes sex, to advance its agenda while continuing to ignore the implications of difference.¹¹¹ Over the course of its history, critical feminists (including postcolonial and race feminists in particular) have repeatedly confronted mainstream, second-wave feminism with its omissions, elisions, and obfuscations.¹¹² This Section explores two concepts that underscore the tension in liberal feminist thought as it relates to Muslim women and difference.

The first locus of tension involves ideas of women's autonomy. Much has already been written problematizing autonomy as a feminist value.¹¹³ Further, there has been heated debate about whether Muslim women have the autonomy to choose their life paths.¹¹⁴ While there can be no expectation that the questions will be settled here, examining the work autonomy does as a basis for legal reform when directed at Muslims is important in furthering the discussion on difference and accommodation. Does the elevation of autonomy as a value obscure the actual complexities of individuation and relational or familial realities that most women face in society? To highlight the debate about

111. See JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 1–6 (1990).

112. See Aya Gruber, *Neofeminism*, 50 *HOUS. L. REV.* 1325, 1329–31 (2013).

113. See, e.g., *id.* at 1354–57 (describing the problematic nature of the agent-object dichotomy that characterizes women as either autonomous agents or passive objects); Jane E. Larson, "Women Understand So Little, They Call My Good Nature 'Deceit'": *A Feminist Rethinking of Seduction*, 93 *COLUM. L. REV.* 374, 424–31 (1993) (discussing the complexity of the concept of autonomy in the context of sexual consent and sexual fraud). *But see* Lindsay K. Charles, *Feminists and Firearms: Why Are So Many Women Anti-Choice?*, 17 *CARDOZO J.L. & GENDER* 297 (2011) (advocating for women's gun ownership as a means of advancing women's autonomy).

114. See Aziz, *supra* note 76, at 225.

autonomy, this Article revisits the enduring questions about veiling, which has become the iconic symbol of arguments about autonomy, choice, and oppression.

The second locus of tension is authority and the power to represent. Here, the gap between claims made by members of the social and economic elite on behalf of all women, on the one hand, and the particular needs of subaltern women who may not be able to voice their desires to a global audience, on the other, must be reexamined. In particular, it is important to explore how narratives produced by some women speaking about Islam and Muslims are elevated over others, reinforce the feminism/culture divide, and justify liberal imperialism. The subsection below discusses two examples: the writer and neoconservative activist, Ayaan Hirsi Ali and the women's group FEMEN.

Ayaan Hirsi Ali, who has been championed as a feminist advocate and elevated well above most other Muslim scholars and activists working toward gender justice, has assumed the authority to speak, and her words carry weight in the public discourse about Muslim women.¹¹⁵ While Ali presents herself as an insider with special knowledge who has since left the fold, FEMEN offers us a contrasting view. The advocates of FEMEN, best known for their bare-breasted tactics, assert that they need no insider knowledge to recognize and challenge Islamic misogyny.¹¹⁶ While there are many other liberal feminist groups that have worked tirelessly for women's rights, FEMEN presents an interesting case because of its use of social and conventional media,¹¹⁷ and its ability to reach across borders through its spectacular tactics.¹¹⁸ As such, its mode of activism is particularly reductionist in ways that more sustained efforts inevitably cannot be. Yet, FEMEN has been hailed as bringing attention to women's rights even if the content of its work is problematic.¹¹⁹ Both types of activists represented by Ali and FEMEN offer opportunities to examine who assumes authority to speak about the issues facing Muslim women and the result of such representational politics. In reconciling the artificially created and apparently enduring divide

115. See, e.g., AYAAN HIRSI ALI, *THE CAGED VIRGIN: AN EMANCIPATION PROCLAMATION FOR WOMEN AND ISLAM* (2008).

116. See Sara C. Nelson, *Inna Shevchenko Responds To Muslim Women Against Femen's Open Letter In Wake Of Amina Tyler Topless Jihad*, HUFFINGTON POST U.K. (Aug. 4, 2014), http://www.huffingtonpost.co.uk/2013/04/08/inna-shevchenko-muslim-women-femens-open-letter-amina-tyler-topless-jihad_n_3035439.html; see also Dialika Neufeld, *The Body Politic: Getting Naked To Change the World*, SPIEGEL ONLINE INT'L (May 11, 2012), <http://www.spiegel.de/international/europe/femen-activists-get-naked-to-raise-political-awareness-a-832028.html>. FEMEN, an infamous women's activist group known for its public nudity displays, realized that such protests create scandal, and such scandal can quickly translate into power. See *About*, FEMEN, <http://femen.org/about> (last visited Mar. 15, 2015).

117. See *id.*

118. See *id.*

119. See Alessandro Bianchi, *Women's Rights Group Femen at the Venice Film Festival*, CHI. TRIB., <http://www.chicagotribune.com/news/nationworld/sns-celebrity-pix-506-photo.html> (last visited Mar. 15, 2015).

between feminism and culture/religion, Ali and FEMEN are an integral part of the logic and practices of liberal feminism that make the problem seem intractable.

These two loci of autonomy and authority also point to a central problem that has increasingly troubled women's rights activism in liberal societies: the rise of women who assert the seemingly liberal right to *choose* illiberal and restrictive practices and represent these as consistent with women's rights. Examining both prompts further questions of whether we should accommodate these women within the fold of feminism and, if we do admit them as feminists, how to accommodate their beliefs and practices. Accommodation of difference, of course, depends on the context: minorities within liberal, democratic societies are necessarily different than women belonging to a majority in illiberal states. Feminists must develop increasingly nuanced approaches to this sort of heterogeneity and location in women's global aspirations to gender justice.

A. Autonomy: Liberal Societies/Restrictive Choices

The right to decide the course of one's own life is surely one of the most important capabilities afforded to human beings. The feminist movement, in its varying strands, has fought a common battle for the right of women to be seen as individuals, more than merely appendages of males or members of a family, tribe, or nation.¹²⁰ Individuality and a "room of one's own"¹²¹ have been critical in the advancement of women's rights and protections. Yet, the questions about how that autonomy is actually lived, operates in women's lives, and reflects their experiences of relational entanglement remain a complexity that liberal feminists often gloss over.¹²² Furthermore, some feminists assume that they can perceive autonomy across locations, socioeconomic class, group identities, and time without explaining how they are able to do so. The veil debate, and its entanglement with concerns about autonomy, has become an example of the variety of conflicts and fissures that have only been exacerbated after September 11. As Vasuki Nesiah so aptly points out:

Veiling practices become a fraught site where women's bodies hover in (dis)location between being flattened as the terrain on which we act, and being animated as agents actively engaging the terrain of colonial and anti-colonial struggle. On the one hand, women's bodies are mythologized as the passive

120. See generally ESTELLE B. FREEDMAN, *THE ESSENTIAL FEMINIST READER* (2007) (compiling the writings of feminists from various countries and generations about women's rights); see also Elizabeth M. Schneider, *Hearing Women Not Being Heard: On Carol Gilligan's Getting Civilized and the Complexity of Voice*, 63 *FORDHAM L. REV.* 33 (1994) (discussing the difficulty that women have with their voices being "heard").

121. VIRGINIA WOOLF, *A ROOM OF ONE'S OWN* 188 (1934).

122. *RELATIONAL AUTONOMY: FEMINIST PERSPECTIVES ON AUTONOMY, AGENCY, AND THE SOCIAL SELF* 3-5 (Catriona Mackenzie & Natalie Stoljar eds., 2000) [hereinafter *RELATIONAL AUTONOMY*].

terrain of cultural tradition and narratives of progress. Simultaneously, however, women's bodies are mobilized as agents, with veiling practices read as expressive of agency, acting for and against these same terrains, be it to defend colonialism, or contest it.¹²³

These are two competing views of how women come to veil. The first asserts an unthinking adherence to tradition or the coercion of culture, while the second posits a proactive assertion of agency. Either of these views may be vigorously proclaimed as the truth. For instance, many conversations with friends and colleagues in the "West" reveal a deep-seated commitment to autonomy and personal rights. Most of them, as liberal feminists, believe that they are able to decide what to wear freely (this is the autonomy extreme). However, illiberal choices to dress conservatively, when made by Muslim women, are not considered *choice* per se. Those women are coerced by culture (this would be the cultural determinism extreme). The conversation, which is likely familiar to many, typically goes like this:

Liberal Feminist: Women should have *the right* to wear whatever they want.

Muslim Woman: Yes, and that ought to include the veil.

LF: Well, yes, but the veil is an oppressive article; it connotes patriarchal oppression, not freedom. Women should be free to not wear anything at all if they so desire. Covering up one's body is hardly a celebration of freedom.

MW: So, the choice to wear a veil is the internalization of oppression while the choice to be naked is liberation?

LF: European women can wear whatever they like. But Muslim women cannot, and that's the problem.

MW: So, European or American Muslim women who veil present no problem.

LF: Except that they are not exercising a free choice but are driven to veil by a patriarchal religion. If they weren't, they would be wearing bikinis at the beach.

Over and again, the meaning of the veil is "settled" by some liberal feminists (and, indeed, by some conservative Muslims).¹²⁴ Even in the context of Europe and the United States, where state laws guarantee the right to certain personal freedoms, the choice to wear a veil is seen not as a free *choice* but as a

123. Vasuki Nesiah, *The Ground Beneath Her Feet: "Third World" Feminisms*, 4 J. INT'L WOMEN'S STUD. 30, 32 (2003).

124. See Adrien Katherine Wing & Monica Nigh Smith, *Critical Race Feminism Lifts the Veil?: Muslim Women, France, and the Headscarf Ban*, 39 U.C. DAVIS L. REV. 743, 759–62 (2006) (discussing the rationales behind wearing the scarf and the religious meaning of the hijab).

compulsion of religion. I am not denying that for *some* women the choice is constrained by internalized patriarchal norms or even external pressure. But it is far from self-evident that for *all* women, the choice to veil is driven by compulsion or even religion.¹²⁵ Indeed, even in the face of evidence that some veiled women have chosen to adopt the covering against the wishes of their parents, their husbands, or other family members, such choice is dismissed.¹²⁶ In a move all too familiar to students of Islamophobia, the particular is generalized.¹²⁷ Women in Saudi Arabia become the stand-ins for Muslim women everywhere, much as Arabs become the archetypical Muslim, and, more recently, as I argue above, the violent Muslim male becomes paradigmatic of Islam itself.

Again, as Nesiah points out: “The meanings of the veil are hardly transcendental.”¹²⁸ Rather, differences in state regulation, class, age, ethnicity, and history all have layers to add in terms of why women may or may not veil.¹²⁹ One cannot equate Saudi Arabia with Malaysia, or a woman working in a paddy field in Bangladesh with a hijabi Turkish college student. Yet, for many, the heterogeneity, equivocality, and complexity of the practices of modesty are reduced to matters of some abstract and common religion or culture.¹³⁰

Further, the equation of wearing nothing or next to nothing, of inviting the male (or female) gaze with “freedom,” is equally reductionist. Perhaps it is *felt* as freedom for some women, but it may also be driven by deeply sexist norms that commodify women’s bodies and a society that demands access to female bodies.¹³¹ And such access or denials of access are embedded within state regulation of subjects.¹³² Certainly the demand for access to women’s bodies has a sordid colonial history, as Joan Wallach Scott has described in her work on the French veil ban.¹³³ Colonial powers deployed the unveiling of women as a tactic of control and subordination.¹³⁴ With such a history, the modern French laws seem more a continuation of a colonial past than commitments to secularism. As a counterpoint, mandates to veil in countries like Saudi Arabia, Iran, and Afghanistan deprive women of choice and are, among other things, continuations

125. See Mariam Gomaa, *American Hijab: Why My Scarf is a Sociopolitical Statement, Not a Symbol of My Religiosity*, TIME (Nov. 11, 2014), <http://time.com/3576827/american-hijab-scarf-sociopolitical-statement-religion/>.

126. See JOAN WALLACH SCOTT, POLITICS OF THE VEIL 151–74 (2010); Wing & Smith, *supra* note 124, at 767.

127. See KUMAR, *supra* note 87, at 42–44.

128. Nesiah, *supra* note 123, at 32.

129. See Wing & Smith, *supra* note 124, at 766.

130. See Ziba Mir-Hosseini, *Hijab and Choice: Between Politics and Theology*, in INNOVATIONS IN ISLAM: TRADITIONS AND CONTRIBUTIONS 190–212 (Mehran Kamrava ed., 2011).

131. See SCOTT, *supra* note 126, at 87–88. In the United States, the pornography debate and its effects on women is an example. See Catharine A. MacKinnon, *Not a Moral Issue*, 2 YALE L. & POL’Y REV. 321, 326 (1984).

132. See Mir-Hosseini, *supra* note 130.

133. See SCOTT, *supra* note 126, at 45–50.

134. *Id.*

of the policing of female sexuality and female presence in the public sphere.

Even in states where negative liberties protect “choices” to be seen or not seen, autonomy and agency are only comprehensible as fragmented and partial within a broader context of the dominant social norms.¹³⁵ Even a cursory examination of the porn, diet, and fashion industries throws up contradictions about “freedom” and choice.¹³⁶ It seems as though liberal feminists espousing beliefs about autonomy are willing to indulge themselves in the fantasy of choice, refusing to unpack the many layers of influence that make up subjectivity and inform choice, rather than confront the structural impediments to freedom.¹³⁷

Like women in liberal societies, there are a variety of pressures on Muslim women whether in liberal or repressive societies. It is too simplistic to place Muslim women primarily or only at the mercy of their religious norms. And it is similarly disingenuous to assume that religion and culture do not exert pressures on non-Muslim women. Furthermore, even if women’s constraints come from different sources, they may have similar results. A freely choosing subject and an ideal consumer can be shaped by the needs of capitalism and the economy. Is it really a free choice to dramatically alter one’s appearance because a certain industry elevates a specific norm of beauty? Women “choose” to undergo costly and brutal forms of plastic surgery or to starve to meet dangerous standards of beauty. Billions are spent on beauty and diet products that are known not to work, providing large profits for corporations that take advantage of coercive cultural norms of physical appearance.¹³⁸ Does this consumption, and the industries that create the need for it, reflect women’s freedom? The fact that some women get pleasure and satisfaction from wearing makeup and walking in four-inch heels is not disputed here.¹³⁹ However, the provenance of these choices ought to be interrogated more thoroughly because they reflect the gender norms that dominate every beauty magazine.¹⁴⁰

Ultimately, the decisions about how to live as a woman—whether consciously made or not—are bound up in a complex web of formal laws, societal norms, and personal motivations.¹⁴¹ Moreover, context matters. It is one thing to be speaking about women who live in states that enforce particular dress codes (like France and Saudi Arabia where choice is constrained by state power),

135. See WENDY BROWN, *REGULATING AVERSION: TOLERANCE IN THE AGE OF IDENTITY AND EMPIRE* 48–77, 189–99 (2008).

136. See generally SHEILA JEFFREYS, *BEAUTY AND MISOGYNY: HARMFUL CULTURAL PRACTICES IN THE WEST* (2005) (analyzing the negative effects and profitability of the diet, porn, and fashion industries in the West).

137. See BROWN, *supra* note 135, at 189–99.

138. *Id.*

139. See Meg Gehrke, *Is Beauty the Beast?*, 4 S. CAL. REV. L. & WOMEN’S STUD. 221, 248 (1994).

140. See KATHLEEN WOODWARD, *FIGURING AGE: WOMEN, BODIES, GENERATIONS* 43–46 (1999).

141. See generally Cecil VanDevender, *How Self-Restriction Laws Can Influence Societal Norms and Address Problems of Bounded Rationality*, 96 GEO. L.J. 1775 (2008) (explaining how self-restriction laws can constrain individual behavior and influence the values of society).

and another to be speaking about women in the United States who might be housewives, college students, scientists, or porn stars, but whose choices are driven more subtly by institutions that are not necessarily evident. To assert simplistically that Muslim women who wear the veil suffer from false consciousness and to construe their choice to dress modestly as a symbol of gender oppression is to miss the complexity of their lives and the relationships between individual, society, religion, and state.¹⁴² Many feminists continue to point out the shifting parameters of this debate, calling for more nuance than is typically available in the public discourse.¹⁴³ Undoubtedly, the discussions about the veil will continue to include challenges to the reductionist accounts of Muslim women and the thin conceptualizations of autonomy and agency that are cast as feminist values.

B. Authority: Who Gets to Speak?

The second locus of tension in discussions of feminism and difference is the authority to speak. In the War on Terror era, there has been a multiplicity of voices attempting to represent Muslims, and the population of experts on Islam has burgeoned.¹⁴⁴ In this throng, a subset of women has emerged as dissident voices who have then been elevated to prominence by mainstream media and by many liberal feminists as well.¹⁴⁵ These women have captured the public imagination because they are able to reflect the dominant narratives of Islamophobia that have circulated from even before the attacks of September 11, 2001, while seemingly evincing a concern for women and equality.¹⁴⁶

There are two kinds of spokeswomen-become-activists that require some scrutiny. First, there are those who purport to provide an authoritative insider account of the “Islamic” oppression of women and its causes. Ayaan Hirsi Ali and Irshad Manji are examples.¹⁴⁷ Second, there are activists who, from an outsider perspective, assert the ability to articulate subordination on behalf of Muslim women because they have also faced similar gender subordination and know what it looks like. FEMEN is a recent example of this category of activists.¹⁴⁸ Both the insider account and the outsider account dismiss the

142. See Aliah Abdo, *The Legal Status of Hijab in the United States: A Look at the Sociopolitical Influences on the Legal Right to Wear the Muslim Headscarf*, 5 HASTINGS RACE & POVERTY L.J. 441, 446 (2008).

143. See e.g., Narayan, *supra* note 70; Nesiah, *supra* note 123.

144. MUSLIM PUB. AFFAIRS COUNCIL, NOT QUALIFIED: EXPOSING THE DECEPTION BEHIND AMERICA’S TOP 25 PSEUDO EXPERTS ON ISLAM, *available at* <http://www.mpac.org/assets/docs/publications/MPAC-25-Pseudo-Experts-On-Islam.pdf> (last visited Mar. 15, 2015).

145. See Lasson, *supra* note 85, at 434–35.

146. *Id.*

147. See, e.g., ALI, *supra* note 115; IRSHAD MANJI, *THE TROUBLE WITH ISLAM TODAY: A MUSLIM’S CALL FOR REFORM IN HER FAITH* (2004).

148. See, e.g., *FEMEN Is Collecting Donations*, FEMEN (June 13, 2013), <http://femen.org/news/id/425#post-content>.

heterogeneity of Muslim voices articulating sometimes overlapping and sometimes discordant accounts of being Muslim women and the role of religion in subordination. In the War on Terror era, the authority to speak about Islam and women has been assumed by activists and intellectuals who reinforce the dominant narratives about the “problem” of Islam.¹⁴⁹

In her book, *Do Muslim Women Need Saving?*, Lila Abu-Lughod explores a genre of autobiographical writing that recounts the abuse experienced by the authors growing up in a patriarchal Muslim family.¹⁵⁰ Combining lurid details and eroticism with violence and abuse, these accounts provide a formulaic arrangement of characters that women in the West can relate to easily.¹⁵¹ Abu-Lughod notes in her survey of the genre that these authors repeatedly employ sex and force, from child abuse to marital rape, in a way that is pornographic.¹⁵² Moreover, the villain is the observant Muslim male and it is religious mania that drives his violence and desire. Religious women in the narratives are mute and subordinated, acquiescing to the violence perpetrated by the men. The victim who eventually triumphs is rebellious and unwilling to be put down.

Here we can see most clearly how these memoirs are meant to inspire horror and pity, followed by admiration for the heroine survivors’ escape to freedom. Freedom means escaping not just the Muslim men who torment them by their own communities and cultures. The memoirists confess their rage, self-loathing, and suicide attempts; they often describe themselves as having been rebellious teenagers. This is the feminist difference of the late twentieth century and into the twenty-first, where brown women seem to want to be rescued by their white sisters and friends, to adapt Spivak’s famous formulation. If these Muslim girls and women were not portrayed as wanting what we want—love, choice, and sexual freedom (even Christianity or atheism. . .)—preferring instead to be dutiful daughters living in the bosom of their families, virgins at marriage, devoted wives partnering with their husbands, or pious individuals seeking to live up to the moral ideals of their religion and living according to its laws, it would be hard for Western readers to identify.¹⁵³

By wanting what “we” want and sharing our ideals of a good life, these victim-survivors tell us all that is wrong with Islam and Muslim men and make themselves legible as sisters in a common fight against patriarchy. Mukhtaran Mai, Malala, and Ayaan Hirsi Ali, among others, are authorized to speak for Muslim women generally and to reaffirm the common understanding of Islam as

149. Hossein Esmaeili, *On A Slow Boat Towards the Rule of Law: The Nature of Law in the Saudi Arabian Legal System*, 26 ARIZ. J. INT’L & COMP. L. 1, 36 (2009).

150. LILA ABU-LUGHOD, *DO MUSLIM WOMEN NEED SAVING?* 113–42 (2014).

151. *Id.*

152. *Id.*

153. *Id.* at 101.

a brutally oppressive religion—as long as what they say follows the script.¹⁵⁴ These stories combine with the constant terror of Islamist politics to make the narrative that supports Islamophobia nearly seamless.¹⁵⁵ Drawing on this common sense, in the legal context, a well-known defense strategy has been to deploy an explanation of violence using culture or religion as though the violence in question is *not a crime* in Islam or is commonly sanctioned and accepted. Attempts to articulate different accounts of the violence or to point out that these are indeed crimes under dominant interpretations of Islam may then be dismissed as apology from Muslims or even “identity politics.”¹⁵⁶

While activists like Manji and Ali assert special knowledge based on their experiences inside Muslim families and communities, insider knowledge is not necessary in order for activists to “know” that gender oppression is taking place or what to do about it.¹⁵⁷ Further, women who share certain histories, such as belonging to previously colonized states, invasion, or dislocation, can assert these experiences and histories as “shared.”¹⁵⁸ FEMEN claims to evade the difficulties created by colonial history between Liberal European women and women in the Global South because, as Eastern Europeans, women in FEMEN were also “colonized.”¹⁵⁹ Without arguing about the accuracy of such a characterization, equating several hundred years of political subordination and economic exploitation justified by civilizational and racial superiority with the oppression of Communism and Soviet control is unsupportable. Further, a shared experience of oppression cannot be abstracted from its particulars and used unproblematically to form the basis of knowledge about another group in another context. Such easy generalizations and universalizations of particular viewpoints epistemologically privilege some feminists and allow for an assumption of understanding. Moreover, such claims to knowledge obscure the privilege and power that dominant feminist groups have to shape the debate.

154. See Marie Brenner, *The Target*, VANITY FAIR (Apr. 2013), <http://www.vanityfair.com/politics/2013/04/malala-yousafzai-pakistan-profile>. It should be noted that there are significant differences among these now-famous Muslim women. Some have left Islam while others consider themselves faithful Muslims.

155. See Sonali Kolhatkar, *The Impact of U.S. Intervention on Afghan Women's Rights*, 17 BERKELEY WOMEN'S L.J. 12, 17 (2002).

156. See Jeffrey Taylor, *Reza Aslan's Atheism Problem: "Fundamentalist" Atheists Aren't the Issue, Apologists for Religions Are*, SALON (Oct. 25, 2014, 7:00 AM), http://www.salon.com/2014/10/25/reza_aslans_atheism_problem_fundamentalist_atheists_are_not_the_issue_apologists_for_religions_are. Indeed, from Mr. Taylor's article it is hard to imagine any nuanced discussion of Islam that is not reducible to an “apology” simply because it disagrees with his agenda.

157. See ALI, *supra* note 115, at ix-x; MANJI, *supra* note 147, at 1–26 (describing how she became a Muslim “refusenik”).

158. See Bim Adewunmi, *Sexualized Femen Protest "Naive and Foolish at Best"*, CNN (Apr. 22, 2013, 11:25 AM), <http://www.cnn.com/2013/04/22/opinion/opinion-bim-adewunmi-femen>.

159. See Agata Pyzik, *White Does Not Always Mean Privileged: Why Femen's Ukrainian Context Matters*, NEW STATESMAN (Apr. 18, 2013, 12:24 PM), <http://www.newstatesman.com/voices/2013/04/white-doesnt-always-mean-privilege-femens-ukrainian-context>.

Like some feminist groups in France and the United States, FEMEN has shown that it presumes to know what is wrong in women's lives in the Global South because FEMEN women have also been oppressed.¹⁶⁰ They have come to understand women's subordination from Saudi Arabia to Senegal, and it boils down to religion.¹⁶¹ And they have also figured out how to free everyone from this oppression.¹⁶² Their totalizing judgments are not restricted to the disease but also include the cure. In other words, FEMEN and its ilk not only want women to be free, they also want to be able to dictate to women—regardless of where they are and what webs of relationships inform their lives—how that freedom is to be experienced. For a good dose of this stance, one need only visit FEMEN's website, which states the following:

Dear FEMEN friends! As you are already aware, the repressive Tunisian Court tossed in jail our peaceful activists Pauline, Margarit and Josephine. The three heroes, who dared to protest topless in the Islamist dictatorship, got a prison sentence of 4 months. They helped their companion Amina which were [sic] arrested early, and now they need our protection and support! We are collecting donations for next immediate and urgent actions: legal proceedings to the appeal and release the girls; [list omitted]; drive public campaign against official Tunisian authorities to pressure and discredit Islamists, *who has [sic] ignored generally accepted norms of democracy and freedom!* These four girls are early birds of *upcoming female Arab revolution*, women struggling for the East liberty and *civilized standards of personal freedom and human rights*.¹⁶³

We may be able to write off FEMEN as a spectacle rather than a valid political movement because of its use of nudity, but its activism underscores the polarization between universal rights and the liberal ideas of civilization and progress that are embedded in those rights, on the one hand, and a “regressive” culture, on the other. It also points specifically to the tension between liberal feminism in its governmentalist/imperialist form (we will tell you how to be free), and real women's messy, lived experiences and alternative desires (we will articulate for ourselves what it means to be free). FEMEN continues to wage its gender jihad against what it calls “Islamists” without offering even a modicum of comprehension of the heterogeneity within Muslim societies, any sensitivity

160. See *FEMEN Is Collecting Donations*, *supra* note 148.

161. *Id.*

162. See Jeffrey Taylor, *Topless Jihad: Why Femen is Right*, ATLANTIC (May 1, 2013), <http://www.theatlantic.com/international/archive/2013/05/topless-jihad-why-femen-is-right/275471/>. Taylor reduces the problem of gender inequality to a simple matter of right and wrong tactics or beliefs. The founder of FEMEN herself provides ample evidence of this kind of reductionist and, indeed, supremacist viewpoint: “*We demand* human rights for all women, for Arab women and American women The idea of a Muslim feminist is oxymoronic.” *Id.* (emphasis added). Unfortunately, it does not seem clear to either Taylor or Shevchenko that forcing their idea of liberation on women is also oxymoronic, among its other faults.

163. *FEMEN Is Collecting Donations*, *supra* note 148 (emphasis added).

toward the importance of religion in the fabric of the societies FEMEN hopes to change, or an understanding of the ways in which FEMEN's activism might have real consequences for women working to advance their status through other strategies. A well-known feminist, Maya Jribi, articulates the problem quite clearly in an interview with Rania Salloum:

"We in Tunisia have a different cultural and political context than in Germany," says Jribi. "Here, Islamists try to explain women's issues in terms of identity politics." The 'emancipated woman' is a concept of the permissive, debauched West, she says, and it doesn't work in Tunisia. "We Tunisian feminists are trying to steer the discussion away from identity. Women's rights are a social and political issue," says Jribi.¹⁶⁴

The topless jihad plays right into this trope of the debauched, permissive West and undermines much of the work done by local groups. This is not to say that Tunisian feminists who decry FEMEN represent *all* Tunisian women, but it does raise the question of who gets to speak and be heard and which means are used to achieve the ends. Should the priority not be given to Tunisian feminists to articulate the parameters of solidarity and to demonstrate the best means for securing gender justice? FEMEN may have partnered with some Tunisian women, but it clearly set the agenda and dictated the means of a topless demonstration that is its signature.¹⁶⁵

V. ON LAYING DOWN THE CULTURAL BURDEN, TAKING DIFFERENCE SERIOUSLY, AND NOT BECOMING IMPERIALIST TOOLS

Much of the thinking regarding the role of culture and religion as it interacts with liberal rights-oriented law comes from those scholars who are working in societies with minorities demanding accommodation and recognition.¹⁶⁶ The question of adherence to universal human rights and religion/culture that occurs in the global context presents quite a different problem. Within majority liberal cultures, background norms and values are already in place. Immigrant minorities in particular are in the position of trying to convince the majority to cede rights and recognition that will allow some differences in communities to be acceptable. To do so, they can use a democratic

164. Raniah Salloum, *Tunisian Feminist Leader: 'Femen, Please Leave Us Alone,'* SPIEGEL ONLINE (June 13, 2013, 6:09 PM), <http://www.spiegel.de/international/zeitgeist/tunisian-feminist-leader-criticizes-topless-femen-activists-a-905603.html>.

165. *Id.*

166. See generally PHILLIPS, *supra* note 58 (arguing that it is possible to have multiculturalism without protecting illiberal cultures); AYELET SHACHAR, *MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS* (2001) (rejecting prevalent solutions to the paradox of multicultural vulnerability and arguing for minority autonomy that is sensitive to intragroup subordination); SARAH SONG, *JUSTICE, GENDER, AND THE POLITICS OF MULTICULTURALISM* (2007) (arguing that egalitarian justice must accommodate culture while remaining committed to gender justice).

process; indeed, some scholars have asserted that accommodation should be balanced against the rights of all individuals to participate in the political process and against the right to dissent and be represented.¹⁶⁷ Minority culture or religion is pitted against democratic rights with a majority culture already firmly in place.¹⁶⁸ As such, minorities are required to integrate to some degree.¹⁶⁹ Liberal feminists in such contexts have to be sensitive to who their chief allies are in the struggle for gender justice. For instance, taking the veil case in France, the question arises whether liberal feminists, who assumed the meaning of the hijab through an assumption of epistemological superiority, were acting to consolidate their own power vis-à-vis the state and their position in the dominant culture or whether they were truly trying to distribute power to their “oppressed” Muslim sisters.¹⁷⁰ Certainly, the rhetoric and tactics used by some organizations raise questions of whether there were sufficient attempts to build solidarity or coalitions across difference.¹⁷¹

Feminists in multicultural societies cannot solve the global problem of gender inequality if they continue to be blind to their own privilege. They cannot assume that the issues of culture that exist within their own state can be generalized to the global system. In multicultural societies, liberal feminists are part of a majority that is already constituted as the authority, wielding legal, political, and epistemological power.¹⁷² The liberal solutions for the “problem” of multiculturalism—consisting mostly of encouraging “tolerance” and “accommodation”—are laudable, but as Wendy Brown points out, these strategies work to maintain the hegemonic position of liberal feminists in each solution instead of democratically distributing power.¹⁷³

This is not to say that liberal feminists cannot engage in debate about the gender issues raised by Islam and other cultures or support international action to improve women’s status merely because they do not belong to these communities or countries. Nor are they foreclosed from doing so by dint of their adherence to liberal values. But when these feminists intervene from a position that celebrates and elevates their “outsideness,” a position of such moral and tutelary authority as to comparatively diminish their own cultural and gender problems at the expense of the subjects of their critique, liberal feminists’ actions can be read as humiliating and subordinating—decidedly “unfeminist.” Moreover, they cannot intervene as the voice of “women,” as though the liberal, universalist feminist, speaking from an Archimedean point, represents an entire category of gender fabricated based on an increasingly contested biological

167. See *supra* note 166; Mark D. Rosen, “*Illiberal*” Societal Cultures, Liberalism, and American Constitutionalism, 12 J. CONTEMP. LEGAL ISSUES 803, 808 (2002).

168. See PHILLIPS, *supra* note 58.

169. *Id.* at 21–22.

170. See SCOTT, *supra* note 126.

171. See Salloum, *supra* note 164.

172. See generally PHILLIPS, *supra* note 58.

173. See BROWN, *supra* note 135, at 189–99.

sameness.¹⁷⁴ And certainly, feminists who belong to the elite, politically dominant groups or nations should not have an uncontested epistemological power to define the limits of cultural and religious accommodation domestically. Nor should they be able to call for state-led military violence towards vulnerable populations as a means of achieving their feminist goals, as some liberal feminists have done under the guise of humanitarianism.¹⁷⁵

What then can be done to build bridges between groups of women from vastly different contexts? In a documentary on Afghanistan, ordinary women protesting the passage of a gender-biased rape law expressed that women of the world must be united.¹⁷⁶ Quite apart from the sophisticated critiques of gender that have become commonplace in academia, these women recognize that their subordination comes from a basic gender difference that sets them apart from men.¹⁷⁷ Yet at the same time, while calling for solidarity, they eschew foreign intervention.¹⁷⁸ Moreover, they do not necessarily see their oppression as being rooted in their religion (although certainly they recognize culture as something to be changed).¹⁷⁹

These women's observations and comments reflect three critical requirements that move us forward toward greater gender justice for women globally. First, they acknowledge their difference from women in other contexts even while also asserting their sameness. They demonstrate that there are different ways of being a woman and that essentialist views that elevate some experiences over others, or that overstate gender versus religion and race, can come to be oppressive, much as Kimberlé Crenshaw has theorized.¹⁸⁰ Women in the Global South—the part of the world where culture is supposedly problematic—do not necessarily experience the matrix of cultural, religious, and gender norms as uniformly problematic. As Saba Mahmood has shown in her work on the Egyptian piety movement, women are agents of a new form of Islamic piety that includes reading sacred texts for themselves and interpreting religion.¹⁸¹ They are not simply living out the requirements of men.¹⁸² Religion

174. See, e.g., BUTLER, *supra* note 111; RILEY, *supra* note 11.

175. Catharine MacKinnon, *Women's September 11th: Rethinking the International Law of Conflict*, 47 HARV. INT'L L.J. 1, 22 (2006). But see Karen Engle, "Calling in the Troops": *The Uneasy Relationship Among Women's Rights, Human Rights, and Humanitarian Intervention*, 20 HARV. HUM. RTS. J. 189, 190 (2007) (cautioning against the use of force to secure women's rights).

176. See Robert Greenwald & Brave New Foundation, *Rethink Afghanistan Part 5: Women of Afghanistan*, YOUTUBE (July, 7 2009), <http://youtu.be/R7jAT0FAGBc>.

177. *Id.*

178. *Id.*

179. LINA ABIRAFEH, GENDER AND INTERNATIONAL AID IN AFGHANISTAN: THE POLITICS AND EFFECTS OF INTERVENTION 91 (2009).

180. See Crenshaw, *supra* note 25.

181. SABA MAHMOOD, THE POLITICS OF PIETY: ISLAMIC REVIVAL AND THE FEMINIST SUBJECT 99 (2012).

182. *Id.*

is an important part of these women's identities.¹⁸³ Furthermore, progress itself is conceived of within an Islamic framework such that ideas of progress that include the shedding of religious adherence are unappealing.¹⁸⁴ Even if we are skeptical of "Islamic feminism," Muslim women *are* taking the initiative in theorizing and building a form of feminism that demands rights for women while remaining solidly within the religious framework of Islam.¹⁸⁵ Such activism provides an opportunity to create solidarity and advance women's well-being with women similarly committed.

Many Muslim women are unwilling to take a one-sided approach choosing between apologists/relativists and universalists: rather, they maintain that culture and religion are open to interpretation, contestation, and reformulation. This brings me to the second point of recognizing dissent. Just as theorists from Mary Wollstonecraft to Gloria Steinem built on liberal philosophy, expanding it and pushing society to accept gender-inclusive interpretations of rights, Muslim women are doing the same with Islam.¹⁸⁶ They are articulating a very important critique of how Islam has been interpreted. These women and men present a vibrant dissent from traditionalist positions and challenge their subordinations from within their communities. Is it necessary for them to exit these communities in order to advance gender justice? Should women and men abandon this "irrational" attachment to patriarchal culture? Fighting the battle on religious grounds and from within produces a sort of liberal bafflement for many outsider women who cannot understand why anyone would want to partake of a

183. *Id.* at 1–5.

184. For examples of Islamic feminism, see MARGOT BADRAN, *FEMINISM IN ISLAM: SECULAR AND RELIGIOUS CONVERGENCES* (2009); MIRIAM COOKE, *WOMEN CLAIM ISLAM: CREATING ISLAMIC FEMINISM THROUGH LITERATURE* (2000); ELIZABETH WARNOCK FERNEA, *IN SEARCH OF ISLAMIC FEMINISM* (2010); SHERINE HAFEZ, *AN ISLAM OF HER OWN: RECONSIDERING RELIGION AND SECULARISM IN WOMEN'S ISLAMIC MOVEMENTS* (2011); MAI YAMANI, *FEMINISM AND ISLAM: LEGAL AND LITERARY PERSPECTIVES* (1996). To expect that the only way that Muslim women can actually attain rights or equality is by leaving Islam altogether—as some atheist, ex-Muslim feminists seem to suggest—is to reflect the same binary thinking as right-wing Islamophobes. By that token, the only women able to pursue equality and rights are those who profess no religion. Extending that argument, one could also assert that such women would have to disavow any cultural attachments as most societies remain to a degree patriarchal. The end point of such a position is radical separatism. Certainly, atheist women have every right to challenge Islamic feminism or any other variant, but when those challenges are based on the view that patriarchal religions cannot be reformed, the arguments begin to merge with right-wing narratives that are often racist and Islamophobic. For examples of women leaving Islam, see Max Oppenheimer, *Leaving Islam for Atheism, and Finding a Much-Needed Place Among Peers*, N.Y. TIMES (May 24, 2014), <http://www.nytimes.com/2014/05/24/us/leaving-islam-for-atheism-and-finding-a-much-needed-place-among-peers.html>.

185. See, e.g., BADRAN, *supra* note 184; FERNEA, *supra* note 184.

186. See generally ASMA BARLAS, *BELIEVING WOMEN IN ISLAM: UNREADING PATRIARCHAL INTERPRETATIONS OF THE QUR'AN* (2002) (arguing that the dominant interpretations of the Qur'an are unnecessarily gender-biased); AMINA WADUD, *QUR'AN AND WOMAN: REREADING THE SACRED TEXT FROM A WOMAN'S PERSPECTIVE* (1999) (providing a gender-equal reading of the Qur'an).

religion that oppresses them.¹⁸⁷ But for religious believers, faith is not something to be chosen as part of an individualistic liberal persona.¹⁸⁸ Conscious choice to believe or not believe may not even be understood as a possibility and this is particularly true for subaltern women in rural communities. Those women, for whom feminists purportedly work, may not have a choice of exit, but may nevertheless be invested in the betterment of their own lot and that of their daughters. Moreover, I would venture to say that women do not experience Islam as uniformly oppressive but rather find comfort in its ritual practices and beliefs—this is no different from any other belief system.¹⁸⁹ Rather than encouraging exit, feminist allies can support religious feminists even while being skeptical and offering critiques of their positions. Solidarity with ordinary women who practice Islam but are not part of a restrictive and patriarchal Islamist movement is becoming increasingly important. In contexts like Pakistan and Turkey, where traditionalists and right-wing Islamic leaders are increasingly seeking to curtail the rights of women, it is important to make distinctions between right-wing women who support these efforts and Muslim women who, even if not self-avowedly feminist, resist them.¹⁹⁰ In other words, a feminism that *requires* Muslim women to give up Islam entirely provides very little ground upon which to build coalitions or solidarity and is unlikely to have much purchase in the majority of Muslim communities, wherever they may be found.

Finally, the third requirement for building these bridges is an active renunciation of epistemological and civilizational superiority in favor of solidarity. Most women in the Global South live in societies that still bear the scars of colonialism and Western imperialism. Women from colonizing countries were active participants in subjecting native populations to colonial discipline.¹⁹¹ Even now, the term *memsahib* (white mistress) is used derogatorily to describe someone who thinks herself very superior.¹⁹² In the United States, Southern white women were pitted against slave women because they were the direct beneficiaries of slave labor.¹⁹³ Structural relationships of oppressor/oppressed in colonial and slave times continue to haunt our ability to form coalitions to

187. Seval Yildirim, *Global Tangles: Laws, Headcoverings And Religious Identity*, 10 SANTA CLARA J. INT'L L. 45, 51 (2012).

188. See RELATIONAL AUTONOMY, *supra* note 122, at 33.

189. See *supra* notes 184 and 187 and accompanying text.

190. See, e.g., Sarah El-Rashidi, *Egyptian Women Campaign for Larger Role in Parliament*, AL-MONITOR (Apr. 24, 2014), <http://www.al-monitor.com/pulse/originals/2014/04/egypt-women-dostour-parliament-rights.html> (last visited Jan 18, 2015); *Local Government Polls: Empowering Women at the Grass-roots*, EXPRESS TRIB. (Feb. 19, 2014), <http://tribune.com.pk/story/673451/local-government-polls-empowering-women-at-the-grass-roots/>.

191. See MARGARET MACMILLAN, *WOMEN OF THE RAJ: THE MOTHERS, WIVES, AND DAUGHTERS OF THE BRITISH EMPIRE IN INDIA* xviii, 161 (2007).

192. GEORGE ORWELL, *BURMESE DAYS* 69 (Harcourt Brace 1962).

193. DEBORAH GRAY WHITE, *AR'N'T I A WOMAN?: FEMALE SLAVES IN THE PLANTATION SOUTH* 7 (1999).

combat sexism and gender oppression.¹⁹⁴ The practice of solidarity becomes harder when those who already bear the history of privilege take the position of “knowing what’s best” or setting the priorities for women in the Global South. Perhaps unwittingly, that positioning invokes and revives the specter of colonial oppression, the white privilege of the antebellum South and Jim Crow.¹⁹⁵ In order for women to overcome these divides, there must be equality within and among communities of women and respect for difference—not mere tolerance of it from a position of hegemony. This requires those with histories of class, race, and geographic privilege to actively renounce those unearned benefits in order to fully engage at an equal level. By carefully listening, respecting difference, elevating the voices of those who are subordinated, and acknowledging their own advantages, feminists who enjoy privilege can work to level the playing field even while they engage in vigorous and informed debate or challenge patriarchal Islamists or Islam.

Recognizing and repudiating positional privilege, acknowledging the cultural content of seemingly neutral positions, and being sensitive to the ways in which gender issues can be co-opted by an imperial state in its efforts at maintaining power are critical to forging better transnational solidarities. While there is much to be learned from liberal democracies that are struggling with cultural and religious pluralism, it is important to remember that such societies are not necessarily redistributing power through multicultural accommodations.¹⁹⁶ They are tolerating the “Other.” They are managing populations.¹⁹⁷ The structural inequalities between communities remain and can even be exacerbated through multicultural politics.¹⁹⁸ Uneven distributions of power are also in place on a global level, and the use of human rights and other international norms are used similarly but with a critical difference: disagreements can play out both among states and internal heterogeneous populations. Resistance from undemocratic leaders can prevent human rights norms from taking root, and culturally and religiously different populations may also resist, reinterpret, and transform these norms locally.¹⁹⁹ It is difficult to impose these norms from outside. For transnational gender activists, the terrain becomes particularly difficult if they attempt to push change from a condescending position.

194. See CHANDRA TALPADE MOHANTY, *FEMINISM WITHOUT BORDERS: DECOLONIZING THEORY, PRACTICING SOLIDARITY* 18–20 (2003).

195. *Id.*

196. See BROWN, *supra* note 135, at 37.

197. *See id.* at 93.

198. *See id.*

199. *See generally* Choudhury, *supra* note 22 (describing differences in conceptions of human rights that exist at local levels).

CONCLUSION

The ongoing stalemate between a universalist, liberal feminism and an immutable cultural patriarchy has led to a great deal of energy lost that might have been better used to promote gender justice. Take the example of FEMEN: an approach other than baring breasts with anti-Islamic slogans written on activists' bodies might have generated less conversation about what Muslim women wear on their heads, might not have provoked a counter response with Muslim women telling FEMEN that they were not in need of instruction on their emancipatory goals,²⁰⁰ and it certainly would have generated far fewer front-page media stories. The spectacle of the protest raises questions about the movement's true motives.

If FEMEN activists had taken the time to actually talk to women's groups working at the grassroots level, they might have understood what battles were really relevant to the lives of women in Tunisia, a country in which they had taken a particular interest, presumably because their colleague Amina Tyler and three others were jailed for protesting topless there.²⁰¹ If they had taken difference seriously and had not continued—as they still do—with the assumption that “we” all want the same thing, and that the same forces operate in each context, the stalemate might have been broken. Rather than requesting monetary donations to bail out their colleagues for a topless protest that most certainly increased FEMEN's notoriety and benefited its activists, those resources might have gone toward improving the lives of Tunisian women.²⁰² FEMEN, of course, does not reflect the vast majority of women's rights groups that are working transnationally. Its own position of superiority is so exaggerated that FEMEN becomes easy to dismiss, undoubtedly making it an extreme example. But it is also a useful one because many activist groups harbor similar positions, which—although more sophisticatedly packaged—are, at heart, equally condescending to local cultures.

Liberal feminism need not abandon its commitments to equality and human rights. But it must compete in the marketplace of ideas alongside other articulations of women's flourishing without tying into the colonial narratives of supremacy. If it wants to be relevant to the lives of women beyond the Westernized elite, it will have to take difference seriously and translate its ideas into ones that appeal broadly. It cannot rely on its hegemonic political position or superior knowledge. Liberal ideas have to deliver the goods. Secular, liberal feminists will have to compete on the terrain of politics, and, in order to succeed

200. Uzma Kolsy, *Put Your Shirts Back On: Why Femen Is Wrong*, ATLANTIC (May 6, 2013, 3:20 PM), <http://www.theatlantic.com/international/archive/2013/05/put-your-shirts-back-on-why-femen-is-wrong/275582/>.

201. See Milene Larsson, *We Spoke To Femen About Their Topless Tunisian Protest*, VICE (May 30, 2013), <http://www.vice.com/read/femen-first-topless-protest-arab-world-tunisia-amina-taylor>.

202. See *Donate*, FEMEN, <http://femen.org/help?attempt=1> (last visited Mar. 17, 2015).

in bettering women's lives, they will have to partner more effectively with local groups on terms of equality. Women in the Global South will also have to eschew an identity politics that undercuts gains in gender justice.²⁰³ To do this, all of us will have to stop wielding simplistic cultural explanations that mirror those of traditionalists; we will have to disavow the easy judgmental attitude that pervades many feminist observations of the plight of the Global South or the Global North; and we will have to work toward real solidarity by actively valuing the experiences and desires of others. A feminist politics of democratic solidarity requires women on all sides to acknowledge that people will express their freedom differently in different political contexts and to use that pluralism as a strength rather than continuing to suffer it as a weakness.

203. See NANCY FRASER, *SCALES OF JUSTICE: REIMAGINING POLITICAL SPACE IN A GLOBALIZING WORLD* 100–15 (2010).