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Exporting Subjects: Globalizing Family Law Progress through International Human Rights

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EXPORTING SUBJECTS: GLOBALIZING FAMILY LAW PROGRESS THROUGH INTERNATIONAL HUMAN RIGHTS

Cyra Akila Choudhury*

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INTRODUCTION

In our popular culture and social consciousness, women are no longer the second-class citizens they used to be. Magazines, television

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advertisements, and billboards featuring women show us how we have achieved independence, wealth, desirability, and our intelligence. We are no longer the supporting role in movies and entertainment but stars in our own right. For this, we can thank both changing society and the unrelenting work of many women who refused to bring the coffee for the boss. The women's movement in the United States has made large gains for women through the use of social activism and legal action. Their successes have led to increased acceptance of women in the corridors of business and government; greater access to education; recognition of the harms of domestic violence, sexual harassment and rape; and the securing of reproductive rights. Like the Virginia Slims advertisement used to say: *You've come a long way, baby*. Despite these victories, Liberal legal feminism¹ has also been critiqued by black feminists and Third World feminists for its narrow construction of women's rights and its failure to include women at the margins of Liberal society.² Its relationship to cul-

1. Throughout this Article, I use a number of terms that require some definition. First, when I refer to "Liberals," I mean the political and philosophical school of thought that has among its features a commitment to individual rights, equality (defined often as formal equality with some acceptance of substantive equality), and the recognition of a public sphere distinct from a private sphere. Liberal feminism is a branch of this thought that includes gender equality. In some instances, Liberal feminism is a critique of Liberalism's failure to include women that is based on the argument that women are equal to men, have rights of citizenship, and ought to be recognized in the public sphere and given equal access to it. Liberal feminism has diverged in that it critiques the private sphere for oppressing women and hiding a myriad of sins such as domestic violence and inequality in families. Liberal legal feminism is a subset of broader Liberal feminism and is comprised of legal scholars and activists who seek to advance Liberal feminist ideas through law reform. Third World feminists, postcolonial feminists, and Critical Race Feminists often share many ideas with Liberal feminists, however, they distinguish themselves by including specific experiences of race, class, and colonization into their critiques and diverge from Liberal feminists where the latter fail to acknowledge these specific histories. Moreover, they are more sympathetic to group rights than most Liberal feminists.

2. See Adrien Katherine Wing, *Introduction to CRITICAL RACE FEMINISM: A READER* 1, 7–16 (Adrien Katherine Wing ed., 2d ed. 2003). In her introduction to the volume, Wing notes that mainstream feminism failed to account for the subordination felt at the intersection of race and gender as well as for the complicity of dominant women in that subordination:

CRF [Critical Race Feminism] constitutes a race intervention in feminist discourse, in that it necessarily embraces feminism's emphasis on gender oppression within a system of patriarchy. But most CRF proponents have not joined the mainstream feminist movement. While reasons vary, in some cases the refusal to become associated is due to that movement's essentialization of all women, which subsumes variable experiences of women of color under the experience of white middle-class women. Mainstream feminism has paid insufficient attention to the central role of white supremacy's subordination of women of color, effectuated by both white men and women.

Id. at 7; see also Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, in *CRITICAL RACE FEMINISM: A READER*, *supra*, 34 (discussing the shortcomings of Catherine MacKinnon's Dominance Theory for its failure to address race). See generally Kimberle

tures and religions that are illiberal and non-Western has been fraught with tension and its track record on fighting for the rights of subordinated women of color both at home and abroad has been inconsistent at best.

Despite a growing number of critiques of Liberal feminism by Third World, postcolonial, and Critical Race feminists, the calls for more contextual approaches have largely been ignored, particularly in scholarship on and activism for women in Asia and Africa. Rather, women's experiences in these continents are universalized in ways that erase difference and context. In the view of most Liberal feminists, women in those parts of the world are struggling for basic equality and rights. They suffer daily at the hands of abusive spouses. Their cultural practices continue to subordinate them and they are at risk of genital "mutilation," dowry deaths, rape, child marriage, trafficking, forced veiling, and a litany of other ills.³ The Liberal feminist view, in short, sees their lives as universally abject. Unsurprisingly, women in the United States who have achieved so much and come such a long way have felt the imperative to help their sisters around the globe. After all, what woman would elect to preserve such oppressive religious and cultural structures? What woman would not want to become educated, independent, and equal like her Western counterpart? Moreover, what feminist would refuse to help overcome such oppression and violence?

Beginning in the 1990s and continuing on to the present, transnational activism⁴ experienced a growth spurt when many local groups began to notice the unfortunate circumstances of their sisters in other countries and then to develop links with groups in those countries to try to solve the problems related to the oppression of women.⁵ Despite these

Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (discussing the intersection of race and gender in the context of violence against women of color).

3. See NICHOLAS D. KRISTOF & SHERYL WUDUNN, *HALF THE SKY: TURNING OPPRESSION INTO OPPORTUNITY FOR WOMEN WORLDWIDE* 3–21 (2009) (highlighting stories of trafficking, subordination, and humiliation of women in various developing countries and cultures).

4. By "transnational activism," I mean the work undertaken by individuals and organizations in one country seeking to change or reform policies, practices, and laws in another country or region. This is different from "international activism" which seeks to change the laws and policies between states on the international level rather than within specific countries.

5. See Amy Farrell & Patrice McDermott, *Claiming Afghan Women: The Challenge of Human Rights Discourse for Transnational Feminism*, in JUST ADVOCACY?: WOMEN'S HUMAN RIGHTS, TRANSNATIONAL FEMINISMS, AND THE POLITICS OF REPRESENTATION 33, 46–47 (Wendy S. Hesford & Wendy Kozol eds., 2005) (arguing that international activism around "barbaric" practices like clitoridectomy and veiling gave U.S. feminists causes to mobilize their constituents and to gather new members as well as to "legitimate their existence in the United States within a 'post-feminist' era."); see also Temma Kaplan, *Women's Rights as*

good intentions, the idea that women would naturally agree about the causes of and solutions to their problems collided with concrete differences. These differences manifested in myriad questions, complicating the collaborations of transnational activists:⁶ What to do with women who disagree about what causes their subordination? What to do with women who disagree that genital cutting is “mutilation?” What to do with women who refuse to uncover their hair or their faces? What to do with women who would rather marry as a second wife than not marry at all? It is easiest perhaps to dismiss these women as victims of false consciousness, brainwashed into believing their subordination is freedom. It is much harder, however, to view them as articulators of an alternative view of human flourishing. Although Liberalism has not historically viewed co-present, alternative visions of human flourishing as equal with Liberal notions of the good life and good society,⁷ the choice of how to characterize these women’s views is hardly insignificant—rather, it impacts further choices about the way in which we undertake activism on their behalf or in collaboration with them. Ultimately, this choice may result in either further compounding their subordination or in fact enabling their flourishing.

This Article examines the ways in which the prioritization of individual rights and freedom promoted by Liberal legal feminism, specifically with regard to family law reform, dictates the reform priorities articulated by transnational activists for women’s rights.⁸ As the

Human Rights: Women as Agents of Social Change, in *WOMEN, GENDER, AND HUMAN RIGHTS: A GLOBAL PERSPECTIVE* 191 (Marjorie Agosín ed., 2001) (describing the efforts of feminist activists since 1990 to raise awareness on a global level of women’s rights as a subset of human rights).

6. See Farrell & McDermott, *supra* note 5, at 50–52.

7. See UDAY SINGH MEHTA, *LIBERALISM AND EMPIRE: A STUDY IN NINETEENTH-CENTURY BRITISH LIBERAL THOUGHT* 46 (1999). In discussing Liberal theorists’ exclusion of certain groups like Indians from the universalism of Liberalism, Mehta points out that British Liberal theory deployed a number of strategies to achieve this exclusion. One of these, the interpretation of cultural particularities and difference as “backwardness,” is described as:

[D]elving into the arcane details of ancient theological, cultural, and historical particulars, and through them, exposing the deficiencies of India’s political—although most often psychological—endowments. It presumes on [sic] the necessity of a complex set of individual and social indexes as the prerequisite of political inclusion. In this, again, it does not explicitly qualify the universalistic claims; rather, it implicitly raises the ante and thereby the conditions of inclusion. [This is referred to] as the strategy of civilizational infantilism.

Id. at 69–70.

Mehta analyzes the work of several Liberal philosophers who have been influential in the English-speaking world, for example, John Stuart Mill and Jeremy Bentham among the utilitarians. An interesting counterpoint to these theorists is Edmund Burke, a conservative who often spoke against the British imperial project in India.

8. See *infra* notes 10–62 and accompanying text.

Article explains, this American-born reform package is exported through international human rights channels, and at transnational meetings among transnational elites with an aim to reform “local,” “traditional” societies. When these reform priorities arrive at the intended local/tradition society, they are met with resistance and alternative priorities that do not necessarily comport with Liberal feminist agendas. With this process in mind, the Article traces the journey of key family-law reforms, namely with regard to reproductive rights and domestic violence, as these projects move from the United States through the transnational sphere and into local destinations in South Asia to show how these core projects are received and reprioritized. Further, the Article attempts to uncover the feminist subject that is concurrently exported. The feminist subject is comprised of a very particular set of ideas of what it means to be a woman, defining how women should be and what they should value and prioritize in both law and society. While the Liberal feminist subject may not necessarily be dangerous or destructive, this Article questions the ways in which such reforms impact “local women” themselves and explores the costs of that impact. The Article proceeds in four Parts. Part I explores the legal reform and activism undertaken by feminists in two key family law areas—the right to abortion and domestic violence—in order to show how these reforms became feminist priorities in the United States. Part II explores how these legal projects are exported into the international and transnational realm through international human rights law and in the venue of international meetings. Part III examines the local laws of India, Pakistan, and Bangladesh on reproductive rights and domestic violence and looks at the reception of transnational reform priorities within a local context, arguing that these priorities are not necessarily congruent with the needs of local women. Finally, Part IV sets out an alternative set of priorities that take into consideration the demands of local women in South Asia, concluding that activists should focus on these local priorities rather than solely on the Liberal feminist agenda.

I. FAMILY LAW AND PROGRESS TOWARD GENDER JUSTICE IN THE UNITED STATES

In the United States, women have challenged the social and legal constraints they face in successive generations to win the right to be treated as equals with men, to have equal access to all public spheres, and to be recognized as autonomous individuals.⁹ One of the key

9. See Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, in *FEMINIST SOCIAL THOUGHT: A READER* 696, 696–98 (Diana Tietjens

battlegrounds for change has been the family.¹⁰ Family as an institution, perhaps more than any other, continues to be the most gendered area of the law, often dictating both public and private gender hierarchies. While there were a number of projects undertaken to reform family law in the United States, including marriage and divorce reform, reproductive rights and domestic violence are two of the most prominent in the last thirty years.¹¹

In this Part of the Article, I explore the domestic roots of the transnational export of family law. The first subsection traces legal reforms in the area of abortion and domestic violence with two purposes. The first purpose is to illustrate the roots of a transnational movement toward exporting similar reforms to the Global South. In essence, it lays out what has transpired in the U.S. domestic arena. The second purpose is to explore the Liberal feminist subject that is constructed through these struggles and consequently exported.¹² The two strands of legal reform and subject construction are intimately woven together and I discuss them together, showing how the reforms create the feminist subject and vice versa. Also, in this subsection, I discuss the internal feminist critiques of these projects that have come from feminist scholars who are increasingly uncomfortable with feminist orthodoxies and universalisms. The aim here is to point to the existence of these important disagreements and to raise the question of why these critiques do not also get exported alongside the reforms, which I take up in subsequent parts of the Article.¹³ The second subsection of this Part discusses the subject of

Meyers ed., 1997) (providing a brief history of gender equality in the American Supreme Court); see also ELEANOR FLEXNER, *CENTURY OF STRUGGLE: THE WOMAN'S RIGHTS MOVEMENT IN THE UNITED STATES* 306 (rev. ed. 1975) (describing the efforts of anti-suffragist organizations in the late 19th century and early 20th century); Christine A. Littleton, *Reconstructing Sexual Equality*, in *FEMINIST SOCIAL THOUGHT: A READER*, *supra*, at 714 (discussing the development of different models of feminist legal theory and arguing for a model of equality as acceptance in which feminine qualities are not a hindrance in the working world).

10. Family law in nearly every area has changed radically with the advent of the women's movement and activism by feminist organizations. See STEPHANIE J. COONTZ, *MARRIAGE, A HISTORY: HOW LOVE CONQUERED MARRIAGE* 243, 263–76 (2005) (discussing the changes in family law and families, particularly with the liberalization of divorce).

11. Family law no longer encompasses simply the law relating to entry into and exit from marriage and the rearing of children. Casebooks now often start with the very concept of family. Moreover, most casebooks on the subject include a separate chapter on constitutional law and the right of privacy, in which reproductive rights play the central role, and a chapter on domestic violence. See, e.g., DOUGLAS E. ABRAMS ET AL., *CONTEMPORARY FAMILY LAW* (2d ed. 2009); JUDITH AREEN & MILTON C. REGAN, *FAMILY LAW: CASES AND MATERIALS* (5th ed. 2006). Curiously, the economic impact of marriage and divorce is not given a separate chapter despite its significance in how marital partners fare both in and out of the relationship.

12. See Inderpal Grewal, *TRANSNATIONAL AMERICA: FEMINISMS, DIASPORAS, NEO-LIBERALISMS* 123 (2005).

13. Grewal notes that:

the “American Woman” separately. Liberal feminist universalism takes for granted that all women will eventually be the kind of model rights-bearing, individual agent that American women represent. This is the idealized subject that is constructed for export and through it, social norms, as well as legal ones, are sought to be restructured. It is worthwhile, therefore, to explore the subject specifically.

A. U.S. Liberal Legal Feminist Projects in Family Law

1. Right to Abortion on Demand and Pregnancy

An essential aspect of personal autonomy as understood by Liberal philosophy is the right to control one’s physical being. Women, slaves, Native Americans, and other colonized groups were historically denied autonomy and consequently control over their bodies as a matter of law. The legality of buying and selling a person, of legally sanctioning the availability of women’s bodies because of ownership, of forcing sex on wives, and of forcing women to bear unwanted children, are all examples of bodily dependence and subordination tolerated by Liberal philosophy.¹⁴ Indeed, the U.S. Constitution, drafted by men deeply rooted in Liberal thought, reflects the ideals of liberty and equality. Yet, like many Liberal philosophers, the drafters of the Constitution were able to carve out certain groups of people from the promises of the Constitution, despite its universal language, because some regarded these groups as being “naturally” incapable of exercising all of the rights meaningfully.¹⁵ It is against this backdrop of exclusion that women mobilized their efforts and achieved success. By the mid-twentieth century, women were recognized by society and the state as individuals rather than as appendages of their husbands or paternal families. From there, a basis was formed to press for other rights.

The right to control reproduction came well after the triumph over ideas such as coverture, women’s inability to exercise political judgment, and their unsuitability to practice law or medicine. It emerged at a time

Articulating a cosmopolitan “global” ethic, human rights crossed many borders. Although, as Gayatri Spivak has pointed out, human rights left out the rural subaltern and recuperated a colonial relationship with the colonizing West, thus reviving the notion of “white man’s burden,” it was difficult to dismiss human rights as simply an élite or neocolonial formation, since they made for a powerful discourse that circulated effectively across many transnational connectivities.

Id.

14. See, e.g., SUAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* 25–40 (1989) (discussing Liberal arguments that justice within families is a misguided goal).

15. See *id.* at 251–58, 421–28 (discussing blacks and women, respectively).

of political and social-cultural upheaval and it did not begin as a right to abortion as it is often characterized in contemporary debates. Rather, the first right to be sued for in the fight for sexual liberation was the right to contraception in the line of cases beginning with *Griswold v. Connecticut*, decided in 1965. The right of women to procure and use contraception was based on the right to privacy rather than a fundamental right to equality.¹⁶ The privacy in question existed in the marriage, between two spouses, rather than the individual privacy of the woman. In *Eisenstadt v. Baird*, decided in 1972, the Court extended privacy rights to all women regardless of their marital status, based on the Equal Protection Clause.¹⁷ Thus, women were recognized as individuals by their right to use contraception when they were single. This placed them on more equal footing with their married counterparts as well as with men who enjoyed the use of contraceptives regardless of their marital status. Marriage itself began to change from a communal enterprise with the state being strongly interested in its promotion and protection to a private agreement between spouses with the state's involvement in the ordering of the relationship decreasing.¹⁸

In the 1950s and 1960s, along with the debates about contraception, there was a renewed interest in abortion. By the 1970s, a number of states had liberalized their abortion statutes to allow for therapeutic abortion to save either the life of the mother or of the child, or in cases of

16. *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965).

17. *Eisenstadt v. Baird*, 405 U.S. 438, 442–43 (1972).

18. See HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 72–77 (2nd ed. 1987). Clark notes that

[A]ttitudes toward marriage on the part of some segments of the population are changing so drastically and publicized so widely and so rapidly that the law can hardly remain oblivious to them. Attacks upon the institution of marriage are being made with more or less vehemence by leaders of the women's rights movement on the ground that it is an instrument by which women are prevented from achieving a personal identity, or by which they are made the property of men and are enslaved.

Id. at 73 (citing BETTY FRIEDAN, *THE FEMININE MYSTIQUE* 150–81, 233–57 (1963)); KATE MILLETT, *SEXUAL POLITICS* 61–156 (1970).

As evidenced by the increasing acceptance of premarital agreements, now viewed merely as contracts between spouses, women are arguably stepping fully into their individuality. See *id.* at 1–17. See also Richard W. Bartke, *Marital Sharing—Why Not Do It By Contract?* 67 GEO. L.J. 1131, 1147–64 (1979) (discussing the history and use of private contracts between spouses providing for the sharing of property). But see CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 61 (1989) (“Feminist theory sees the family as a unit of male dominance, a locale of male violence and reproductive exploitation, hence a primary locus of the oppression of women.”).

For a historical view of marriage, see, e.g., *McGuire v. McGuire*, 59 N.W.2d 336 (1953), in which a wife sued her husband for support under the traditional theory that a wife's obedience was exchanged for financial support. She failed to obtain relief from the court because she continued to reside with her husband while pursuing the case.

felonious intercourse resulting in pregnancy.¹⁹ Though there are other cases in which the Supreme Court had to consider the restrictions on abortion, the first case in which the right was front and center was *Roe v. Wade*.²⁰ Standing on the narrow foothold provided by *Griswold*, the Court struck down the Texas statute at issue that prevented women from procuring an abortion except in situations where medical opinion found the life of the mother to be in jeopardy.²¹ The Court held that women had a constitutional right to privacy that protects the decision to end a pregnancy. This fundamental right is “protected by the Bill of Rights or its penumbras.”²² Further, the Court held that the state’s interest in protecting the life of the child does not become compelling until after viability.²³

Having decided that women, as the bearers of children and therefore the individuals most affected by a pregnancy, have the right to procure an abortion without undue state interference, the Court was left to deal with the effects on family relationships that decisions about abortion might have. These later cases take on the reality that women are not living in isolation and that others are also intimately bound up in the decisions made by individuals. For example, in *Planned Parenthood of Central Missouri v. Danforth*, the Court considered whether anyone other than the woman in question should be involved in deciding whether to continue a pregnancy and struck down laws requiring

19. Robin West’s analysis of the difference between a married woman’s right to abortion and that of a single woman is instructive:

The “marital rape exemption” persisted as formal doctrine well into the 1980s, and there is still today a substantial lack of parity between the legal treatment of rape in marriage and rape outside of marriage. Likewise, in 1950 (as well as in the 1960s and 1970s, up until *Roe v. Wade*), a married woman impregnated as a result of forced marital sex—sex forced by violence or threats of violence, but not rape, by virtue of marital rape exemptions—would not be able to obtain a legal abortion if she so desired, even when an unmarried woman, pregnant as a result of rape, might do so. Since a married woman could not be “raped” by her husband, even a pre-*Roe v. Wade* “liberal” abortion statute that allowed for abortion in the event of “rape,” by definition, did not extend to married women. Thus—a married woman could be lawfully forced to conceive and bear children against her will, even where an unmarried woman could not.

ROBIN WEST, MARRIAGE, SEXUALITY AND GENDER 38–39 (2007); see also Robin West, West, J., *Concurring in the Judgment*, in WHAT *Roe v. Wade* SHOULD HAVE SAID: THE NATION’S TOP LEGAL EXPERTS REWRITE AMERICA’S MOST CONTROVERSIAL DECISION 121, 124–25 (Jack M. Balkin ed., 2005) (describing historical reasons and rights that might explain why a married woman could not opt for an abortion by herself while an unmarried woman could).

20. *Roe v. Wade*, 410 U.S. 113 (1973).

21. *Id.* at 129 (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972)).

22. *Id.* at 151–55.

23. *Id.* at 163.

spousal notification and consent.²⁴ Similarly, in *Bellotti v. Baird*, the Court held that statutes preventing minors from obtaining an abortion without parental notification and consent must include a judicial bypass.²⁵

Aside from the legal battles, however, the social debate on abortion seems to be waning in importance for the majority of Americans. As Robin West notes, both abortion rights opponents and proponents are converging on the understanding that the incidence of abortion decreases when women are offered more support for child-bearing and rearing.²⁶ But given that so much of feminist theory has been focused on rejecting arguments based on biological differences between men and women and on the press for formal equality between men and women, it has been hard to fashion a theory of pregnancy that supports women and child-bearing without reopening the door to paternalistic protection of women by the state. Sylvia Law has theorized this tension between “reality” and the social interpretations of that reality that both helps and hurts women. On the one hand, pregnancy cannot form the basis by which to regulate women to their detriment because such regulations are often based on impermissible gender role and typing, but, on the other hand, recognition of the unique position of pregnant women based on the reality that such women are indeed not akin to men or even non-pregnant women make legal enactments that benefit only them vulnerable to similar challenges.²⁷

Indeed, while feminists have been focused on preventing the erosion of the right to abortion, they have been less successful with regard to the treatment of pregnancy and child-care.²⁸ It is beyond the scope of this Article to review the literature on the effects of pregnancy and pregnancy discrimination. However, a few key points are salient to the construction of the Liberal feminist subject. First, the law constructs pregnancy in a way that equalizes it with other forms of “illness” or “disability.” Women who become pregnant and want to be paid for maternal leave may cobble

24. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 69 (1976).

25. *Bellotti v. Baird*, 443 U.S. 622, 643 (1979).

26. Interview with Robin West, Frederick J. Haas Professor of Law and Philosophy, Georgetown University Law Center (June 2008). However, there are still periodic attempts by states to curb the right to an abortion. For example, Utah enacted a law that would punish women who “intentionally” miscarry. See Robert Gehrke, *Utah Lawmakers Quickly Amend Much-Criticized Abortion Bill*, SALT LAKE TRIB., Mar. 5, 2010, available at http://www.sltrib.com/news/ci_14519597 (available via subscription).

27. See Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1014–39 (1984).

28. See Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77, 90–98 (2003).

together sick leave, short-term disability, and vacation time.²⁹ If they are covered under the Family and Medical Leave Act of 1993 (FMLA), they may take up to twelve weeks of unpaid leave for the birth of a child.³⁰ No employer is required to offer paid maternal leave.³¹ Moreover, FMLA is available for both men and women.

In short, while the law recognizes and attempts to equalize the burden of parenting, it does not do so for pregnancy. Rather, women must look to benefits that are gender neutral—though ultimately having a gendered effect—for support during their pregnancy. This is an example of formal equality at work. While feminists have been pleased with the protections that the law has afforded in terms of preventing pregnancy discrimination against women who were previously obliged to leave work when they began to “show,” they have been disappointed and justifiably critical of the lack of public support for child-bearing and rearing.³² These critiques have come in a number of forms, including the critique of equality itself. Nevertheless, it seems very difficult if not impossible to construct activism around differing notions of equality, such as substantive equality versus formal equality, when prior activism has privileged the latter and U.S. equality jurisprudence is largely based on it.

2. Domestic Violence

Throughout the history of women’s rights, Liberal feminists have struggled with the state, both against its protectionist-patronizing policies, like protecting women from harm during pregnancy by forcing them to leave the workforce, unequal labor laws, and statutory rape laws, and for protection-recognition policies like maternal leave, child care, rape law, and sexual harassment law, in order to articulate a feminist subject that is a fully equal citizen. However, the state’s continued reluctance to interfere with the family as a privately ordered institution has meant that women’s equal status in the public sphere sometimes

29. See U.S. Office of Personnel Management, Family and Medical Leave available at <http://www.opm.gov/oca/leave/HTML/fmlafac2.asp> (last visited, Oct. 25, 2010). See *Pregnancy + Short-Term Disability + FMLA .. Very Confused*, HUMAN RESOURCES BLOG (Sept. 3, 2008, 9:02 AM), <http://www.humanresourceblog.com/2008/09/03/pregnancy-short-term-disability-fmla-very-confused/>.

30. Family and Medical Leave Act of 1993, 29 U.S.C. § 2602 (2006).

31. *Id.* § 2612.

32. See Annie Pelletier, Comment, *The Family Medical Leave Act of 1993—Why Does Parental Leave in the United States Fall so Far Behind Europe?*, 42 GONZ. L. REV. 547, 551–52 (2006); see also Martha T. McCluskey, *Caring for Workers*, 55 ME. L. REV. 313, 314–16 (2002) (summarizing the debate about public benefits for gendered family caretaking labor).

stops short at the family home's front door.³³ Behind those doors, traditional hierarchies and inequalities go unchallenged by state policy and regulation. Accordingly, the home was and remains another front in the battle for equality.

Domestic violence has been a perennial concern for women, who are its chief victims.³⁴ For feminists, it has been identified as a major block on the road to equality.³⁵ The threshold effort engaged in by feminists in the United States is the very recognition of the existence of a problem. In a legal milieu where the family itself was deemed to be private and beyond the regulation of the state, private actors could commit violence on family members with relative impunity. Until the nineteenth century, wife beating, while not socially acceptable when extreme, was nonetheless tolerated as a prerogative of the husband.³⁶ For much of history, the law allowed husbands to coerce sex from their wives.³⁷ Even though the marital rape exemption has been repealed in approximately half the jurisdictions in the United States, it remains in effect in the other half.³⁸ Even in those jurisdictions in which the exemption is no longer valid, spousal rape remains a lesser crime than rape committed outside marriage.³⁹ Moreover, in some jurisdictions, the consent requirement is so

33. See, e.g., *McGuire v. McGuire*, 59 N.W.2d 336, 342 (1953) (showing that there is no way to enforce a right to support in an existing marriage; rather, only when the marriage breaks down does a partner's right to support become justiciable); see also Twila L. Perry, *The "Essentials of Marriage": Reconsidering the Duty of Support and Services*, 15 YALE J.L. & FEMINISM 1, 14 (2003) (describing the strong belief that judicial intervention into issues of support before a marriage has dissolved violates principles of marital autonomy).

34. According to a National Institute of Justice Report, women were more likely to experience intimate partner violence than men. See PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, NCJ 181867, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE 17 (2000), available at <http://www.ncjrs.gov/pdffiles1/nij/181867.pdf>.

35. See, e.g., *State v. Black*, 60 N.C. 266, 267 (1864) (holding that the law permits a husband "to use towards his wife such a degree of force as is necessary to control an unruly temper and make her behave herself"); see also *Das v. Das*, 754 A.2d 441, 458–63 (2000) (outlining the historical toleration for wife-beating and the subsequent change in social consciousness in recognizing that it is a problem).

36. See *supra* note 35 and accompanying text.

37. See, e.g., SIR MATTHEW HALE, *Historia Placitorum Coronae: THE HISTORY OF THE PLEAS OF THE CROWN* 628 (Thomas Dogherty ed., new ed. 1800) (1739) ("But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.")

38. See Lalena Weintraub Seigel, Note, *The Marital Rape Exemption: Evolution to Extinction*, 43 CLEV. ST. L. REV. 351, 367–69 (1995); Michelle J. Anderson, *Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates*, 54 HASTINGS L.J. 1465, 1468–1473 (2003).

39. For an overview of current marital rape laws, see generally NAT'L CTR. FOR THE PROSECUTION OF VIOLENCE AGAINST WOMEN, SUMMARY OF SPOUSAL RAPE LAWS (2009), www.wcsap.org/pdf/Spousal%20Rape%20Statutes%202009.pdf.

pitiful that the removal of the exemption seems simply window dressing.⁴⁰

Early efforts at reform by feminists were characterized by “the classic liberal ideology of privacy, autonomy, and individual choice.”⁴¹ According to Aya Gruber, these efforts were aimed at equalizing domestic rape victims with their non-married counterparts. The problem was identified as unequal treatment of married women and the under-enforcement of gender crimes, particularly when they occurred in the family.⁴² From the 1960s–1980s, the main feminist project with regard to domestic violence was, first, to force the state to recognize the crimes and, second, to punish them. Gruber notes that at a particular moment in feminist activism related to domestic violence, there was a choice to be made.⁴³ One choice was to continue the hard work of changing the environment in which women lived that gave rise to or exacerbated these crimes, including activism for economic and distributive justice and other social reforms—traditional staples of feminist legal theory and activism. The other choice was to adopt a new approach and engage the state to pursue and punish the perpetrators.⁴⁴ Liberal feminist activism took the latter road.⁴⁵

The laws resulting from the marriage of liberal feminist activism and state power were indeed far more punitive than their predecessors. Where the state had been a lackadaisical prosecutor of gender crimes, it then became a ferocious avenger. Two legal reforms that purported to solve the problem of under-enforcement were mandatory arrest statutes and “no-drop” policies. The mandatory arrest statutes passed in many jurisdictions resulted in the ballooning of the number of domestic violence arrests being made. By forcing the police officers called to a domestic dispute to take the situation seriously by mandating arrest, police officers’

40. *Id.*

41. Morrison Torrey, *Feminist Legal Scholarship on Rape: A Maturing Look at One Form of Violence Against Women*, 2 WM. & MARY J. WOMEN & L. 35, 38 (1995).

42. Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 752–63 (2007); see also, Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 16 (1999) (illustrating the more widespread prosecution of domestic violence crimes in recent years).

43. See Gruber, *supra* note 42, at 762 (describing this moment of choice between “aggressive prosecution” and “feminist adherence to a woman’s autonomy,” which meant respecting women’s choices not to seek prosecution). See also Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law*, 4 BUFF. CRIM. L. REV. 801, 806–07 (2001) (discussing the dilemma of mandatory prosecution policies encroaching on individual female autonomy). Naomi Cahn has similarly observed that the state’s approach has not been particularly sensitive to women. Naomi Cahn, *Policing Women: Moral Arguments and the Dilemmas of Criminalization*, 49 DEPAUL L. REV. 817, 820–22 (2000).

44. See Gruber, *supra* note 42.

45. *Id.* at 762–63.

discretion was essentially taken away from them.⁴⁶ Writing for *The Washington Post*, Liza Mundy highlights the absurd results sometimes achieved by these policies. She describes a domestic dispute in which the wife “pushed” her husband, resulting in a call to the police and a mandatory arrest of the wife.⁴⁷ Regarding these new laws mandating arrest, Mundy observes that “the new approach represents a *huge change, both practically and philosophically—and a huge victory for advocates on behalf of domestic violence victims.*”⁴⁸

Another victory for Liberal feminist activism is the implementation of no-drop policies, which are a corollary to the mandatory arrest regime. These policies attempt to ensure that domestic violence cases will be treated as serious crimes from arrest through prosecution by requiring prosecutors “to pursue any case where there is sufficient evidence.”⁴⁹ That is to say, the prosecutor may not drop the case and the victim does not have a choice about whether he or she will go through with the prosecution.⁵⁰ With the state at the helm rather than the victim, prosecution

46. See G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservativization of the Battered Women’s Movement*, 42 Hous. L. Rev. 237, 240–41 (2005).

47. Liza Mundy, *Fault Line*, WASH. POST MAG., Oct. 26, 1997 at 8, 8–10. The article is worth quoting at length:

“Is this the Gestapo or what?” Tom says. “I just wanted documentation in a custody dispute. I certainly didn’t want this!”

Tucker puts Judy in the back of his squad car and drives her to the Fairfax County Adult Detention Center, where she is charged with domestic assault and battery under Virginia’s criminal code, section 18.2–57.2. The new law directs Tucker to request an emergency protective order to protect Tom from further acts of abuse, and so Tucker does, and the order is granted, directing Judy to stay away from her husband—specifically, his office—for three days, except for “incidental contact to assure welfare of children.”

A \$750 bond is set to guarantee she shows up for trial.

Her name is entered into the Virginia crime information network, so that if she violates the stay-away order, her existing criminal charge will be readily available.

She is fingerprinted and her mug shot is taken. . . .

Meanwhile, back at the office complex, the two remaining officers, T.J. Rogers and Ben Ferdinand try to calm her husband—counseling the victim, as the new law also directs. We don’t have discretion, Ferdinand explains, gently, for the third time. “You’re not pressing charges. It’s Officer Tucker who’s pressing charges”

Id. at 10.

48. *Id.* at 11 (emphasis added).

49. Leigh Goodmark, *Law is the Answer? Do We Know That for Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 St. Louis U. Pub. L. Rev. 7, 16 (2004) (citation omitted).

50. *Id.* at 17. Goodmark describes the difference between “hard” and “soft” no-drop policies:

statistics for domestic violence showed a marked increase, incarceration rates for perpetrators similarly increased, domestic homicide rates dropped, and violence in general dropped.⁵¹

Yet as Goodmark, Gruber, and Miccio note, there is a dark side to these “improvements.”⁵² While feminists protested vociferously about under-enforcement of gender crimes in the bad old days, when those crimes were finally taken seriously, the manner in which the state undertook reform gave some feminists further reason to complain. The policies and reforms that were enacted turned out to be blunt instruments with none of the nuanced approach that a crime committed by one intimate partner against another who is closely connected and possibly dependent deserves. Goodmark underscores a number of problems, including the disparate impact of mandatory arrest and no-drop policies on minority families.⁵³ Gruber treats the deprivation of agency suffered by women at length and notes that this was a consequence—perhaps unintentional and certainly unfortunate—of doing business with the state.⁵⁴ Miccio’s critique rests more on the inefficacy of these strategies in actually dealing with the domestic violence problem.⁵⁵ As she notes, zero-tolerance did not lead to a slow eradication of domestic violence as was hoped for, but rather pushed the problem into the shadows where victims, now afraid of the consequences of state intervention, continue to be abused by their partners.⁵⁶ The problem for them is not primarily legal but cultural:

Prosecutors’ offices employ either “hard” or “soft” no-drop policies. Hard no-drop jurisdictions push cases forward regardless of the victim’s wishes. In these jurisdictions, if the victim’s testimony is deemed essential, prosecutors will even subpoena reluctant victims to testify and arrest or request imprisonment of victims who refuse to appear pursuant to the subpoena. Victims in hard no-drop jurisdictions are also expected to participate extensively in pre-trial preparation, signing statements, being photographed and interviewed, and providing the state with information. In soft no-drop jurisdictions, which are thought to be more prevalent, victims are not forced to testify in criminal matters but are provided with services designed to increase comfort with the criminal system and are encouraged to cooperate. In cases where the victim will not testify despite receiving these services, and the case cannot be made without her, prosecutors are likely to dismiss charges despite the no-drop policy.

Id. at 17.

51. See Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1671–74 (2004).

52. See Goodmark, *supra* note 49; Gruber, *supra* note 42; Miccio, *supra* note 46.

53. Goodmark, *supra* note 49, at 35–39.

54. See generally Gruber, *supra* note 42, at 811–13.

55. See Miccio, *supra* note 46, at 323.

56. See *id.* at 280–82.

Criminalization, as envisioned by advocates in the 1970s and 1980s, was strategic. The institution of mandatory practices, specifically arrest, was perceived as the first step in a process that would lead to a seismic cultural change by inscribing women's empowerment, individual and collective accountability, and conceptions of equality upon the cultural landscape.⁵⁷

This is an interesting departure from other critics of these policies in that Miccio seeks to re-center the cultural and societal acceptance of female subordination in the United States much in the way that inter- and trans-nationalists seek to center it in the global fight against domestic violence. That is to say, culture is often the explanation for domestic violence and women's subordination in the Global South, but much less so in the U.S. context. Miccio's recognition of the cultural component of domestic violence and the explicitly cultural impact that the legal reforms hoped to make adds a dimension missing from other critiques. Yet, Miccio also notes that the reforms did not work a seismic change in culture.⁵⁸ As the decision in *Town of Castle Rock v. Gonzalez* emphasized, the state's willingness to protect women even after the enactment of these antidiscretionary policies was less than robust.⁵⁹

In sum, while liberal feminist activists did not abandon the broader goals of gender justice, many were willing to take a chance on the possibility that the state would take seriously violence done to women if their discretion not to was removed. In some sense, then, mandatory arrest and no-drop policies were met with a feeling of hope and gratification by proponents of mandatory policies.⁶⁰ Characterizing women as victims, suffering first at the hands of the abuser and then at the hands of a patriarchal state, it is easy to see the attraction of using the state's power—now cast in the light of women's rights champions—to hit back at abusers.⁶¹ The changes in women's legal rights in the United States reflect the

57. *Id.* at 265.

58. *Id.* (discussing how mandatory practices were expected to work a "seismic cultural change by inscribing women's empowerment, individual and collective accountability, and conceptions of equality upon the cultural landscape," and showing how this did not happen).

59. *Town of Castle Rock v. Gonzalez*, 545 U.S. 748, 748 (2005) (holding that Gonzalez had no protected due process property interest in the enforcement of a restraining order against her husband, and, as such, the police did not violate her constitutional rights. Gonsales repeatedly called the police after her estranged husband kidnapped her three children. The police failed to intervene and the husband subsequently murdered the children). *See also* G. Kristian Miccio, *Exiled from the Province of Care: Domestic Violence, Duty and Conceptions of State Accountability*, 37 RUTGERS L.J. 111 (2005) (examining the Public Duty Doctrine that shields the state from tort claims arising from their failure to protect against domestic violence).

60. *See, e.g.*, ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING* 186 (2000).

61. *See* Gruber, *supra* note 42, at 759, 825.

evolving nature of women's personhood and the way in which law conceives of women as subjects and citizens. As the next Section discusses, those changes form the foundations of the Universal Woman or feminist subject constructed by Liberal feminism.

B. American Woman: The Subject of Export

As feminist reforms in family law were undertaken, a number of theoretical issues emerged. One of these, the tension between community and individuality, was a result of the change in family structure and hierarchy that came about as the family itself transformed from a communitarian, status oriented institution into a partnership of equals or a contractual arrangement. As women strove to achieve equality, they also became more fully individuated both outside and within the family.⁶² The view was that men had always enjoyed the unencumbered legal and political identity imagined by liberal theory. Women, however, were placed at the mercy of their biology and the attachments of family that it entailed.⁶³ As a matter of fairness then, a threshold struggle was to achieve the kind of individuality that would make women equal to that of men in the eyes of the law and society and that would afford the kinds of opportunities outside the home that men enjoyed.⁶⁴ As Mary Becker notes:

Liberal feminism assumes that people are autonomous individuals making decisions in their own self-interest in light of their individual preferences. Human well-being therefore should increase as individuals have more choices. Sexism operates by pressuring of requiring, sometimes by law, individuals to fulfill male and female roles regardless of their individual preferences. The solution to inequality between women and men is to offer individuals the same choices regardless of sex. The legal standard of formal equality is an expression of this solution.⁶⁵

While such *individuation* has certainly brought many benefits to women, including the ability to make choices that were heretofore

62. See Reva B. Seigel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression* 56 EMORY L.J. 815, 818–22 (2007). Seigel argues that vesting women with the right to choose motherhood “recognizes women as self-governing agents who are competent to make decisions for themselves and their families” and that “reproductive rights repudiate customary assumptions about women’s agency and women’s roles.” *Id.* at 819.

63. *Id.*

64. See Mary Becker, *Patriarchy and Inequality: Towards a Substantive Feminism*, 1999 U. CHI. LEGAL F. 21, 32–33 (1999).

65. *Id.* The problem with this approach is that if the realm of choices is constrained to those that reflect a particular social ordering, then the “real” choice that women or men may wish to make may not be a viable option.

foreclosed to them, there has been much critique of *equality* in recent feminist scholarship.⁶⁶ However, many of the critiques, rooted from within the overarching Liberal perspective, continue to take for granted, in some sense, the underlying Liberal theories of personhood, the role of the person in society, the rights of a person in the state, the changing nature of family, a belief in Aristotelian notions of equality, and a privileging of positive law imbedded in the state itself.⁶⁷ As Eva Feder Kittay notes, “[t]he view that within a just society *all* persons should be treated as free and equal is shared by different theories within the liberal tradition. The inclusiveness of the *all* has been extended to the formerly disenfranchised, for example, women and black men.”⁶⁸

Yet, despite the inclusion of women, a considerable tension continues to color women’s rights debates. Women, as caregivers to dependent children or elders, are often not able to make the autonomous choices that Liberal personhood envisions.⁶⁹ Kittay and others have attempted to reconcile or balance the reality of the communal nature of many women’s lives with this atomistic individual agent-subject.⁷⁰ Kittay attempts to provide a dependency critique of Liberalism in which she argues that traditional theory has not accounted for the times in life when a human is entirely dependent on another for survival.⁷¹ Because of this, Liberal theory is under-inclusive of women who are the primary caregivers constrained in their choices by the duties and obligations of care.⁷² In other words, the hierarchy of actors within the traditional Liberal theoretical order does not comport with the lived experience of women who often subordinate their individual “rights” and preferences so that others who are dependent on them might flourish. This is not to say that women would be better off giving up their individual legal identities. Such an idea frames the problems and the tension in a false dichotomy where

66. See, e.g., WENDY BROWN, *REGULATING AVERSION: TOLERANCE IN THE AGE OF IDENTITY AND EMPIRE* 59–77 (2006); Lisa Schwartzman, *Liberal Rights Theory and Social Inequality: A Feminist Critique*, *HYPATIA*, Spring 1999, at 26, 27–30. See also EVA FEDER KITTAY, *LOVE’S LABOR: ESSAYS ON WOMEN, EQUALITY, AND DEPENDENCY* 75–76 (1999) (highlighting the neglect of dependency and the consequences of that omission in theories of equality and social justice).

67. See, e.g., Robin West, Review Essay, *Liberalism and Abortion*, 87 *GEO. L.J.* 2117 (1999) (placing the work of Eileen McDonagh on the Liberal continuum from J.S. Mill to Catherine MacKinnon, extending freedom in marriage, in sexual choice, and finally in child-bearing).

68. See KITTAY, *supra* note 66, at 75.

69. See *id.* at 76.

70. See, e.g., MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* 174–186, 230–240 (discussing the tension between women’s individual rights and their belonging in religious communities).

71. *Id.*

72. *Id.* at 77.

women are forced to choose between all or nothing.⁷³ Yet, resolving the tension and balancing the individual rights framework with lived communitarian experience has been extremely difficult.

Another problem that has emerged within liberal feminist activism is the continued stereotyping of women in the law as a vulnerable group requiring protection.⁷⁴ Such rhetoric is commonplace in the realm of domestic violence but it has also been deployed in reproductive rights to limit the choices women may make.⁷⁵ It is understandable that feminist activists prefer not to focus on difference when that difference is used to diminish women's autonomy and freedom. Indeed, the autonomy that has been so hard won is of prime importance to American women (and all other women as well) as they struggle to gain equal access. Legal attempts to paternalistically protect women from having to make hard choices has been resisted even while women's autonomy is sometimes used punitively in a "you've made your bed, now lie in it" sort of manner.⁷⁶

Given the willingness of the law to use autonomy against women while attempting to diminish the same through "protectionism" explains why American women have clung to it. Indeed, despite prodigious gains in legal rights and access to the public sphere, American women continue to face many of the challenges faced by women globally. They continue to be underrepresented in terms of political power and as leaders of private industry, and they continue to face obstacles to their advancement in almost every field due to lagging support from the state.⁷⁷ Furthermore, violence against women continues to be a perennial problem. In addition to this, as autonomous agents and independent public subjects, American women have become a considerable economic market toward which commercial industries target particular kinds of products and services.⁷⁸ In the social sphere, women are considered

73. Another way of understanding this false dichotomy is as the agent/object dichotomy or the autonomy/dependency dichotomy. On one side is inscribed the idealized individual who in Greek philosophy would have been capable of citizenship and political life while on the other is someone who is incapable of citizenship or public existence because of their dependent and objectified nature. See HANNAH ARENDT, *THE HUMAN CONDITION* 28–37 (2d ed. 1998).

74. See Beth A. Burkstrand-Reid, *The Invisible Woman: Availability and Culpability in Reproductive Health Jurisprudence*, 81 U. COLO. L. REV. 97, 136–46 (2010) (discussing the use of culpability as a tool to punish women for certain reproductive choices).

75. *Id.*

76. *Id.*

77. See MACKINNON, *supra* note 18, at 155–70.

78. See BROWN, *supra* note 66, at 189; see also Rebecca Reisner & Derek Thompson, *The Diet Industry: A Big Fat Lie*, BUSINESSWEEK (2008), http://www.businessweek.com/debateroom/archives/2008/01/the_diet_indust.html ("Americans spend \$40 billion a year on weight-loss programs and products."); see also Pallavi Gogol, Special Report, *I am Woman*,

equal, capable, and free, but their choices are shaped by subtler and more insidious forces than those which women in the Global South face. This subtle sexist coercion is under-theorized, poorly understood, and often rejected by women themselves who prefer the illusion of their own power of choice.⁷⁹

Other critiques from alternative strands of feminism include difference, dominance, and diversity critiques, all of which argue that women are underserved by theories of equality for similar overlapping reasons.⁸⁰ More recently, an emerging critical neo-feminist legal theory is questioning some of the orthodoxies of the past two decades.⁸¹ It is interesting to note, then, that these rich disagreements within U.S. feminist legal theory are flattened when they are packaged for export. That is to say, feminist activists tend not to include such critical perspectives when they undertake activism for reform in the Global South. Rather, mainstream Liberal legal feminism, with its attachments to formal equality and the individual agent, seems to be the unquestioned export. Indeed, like Liberal notions of universal rights, feminism has its own orthodox views on women's universal rights.⁸²

To some extent this can be explained by Liberal feminism and Liberalism's shared conception of progress. If feminist legal theory conceives of formal equality as the first battle in the gender war for inclusion, then Liberal notions of progress that place all societies on a historical continuum would suggest that "backward" societies must fight this battle as well. This in turn suggests particular kinds of formal, positivist reform measured by state actions and interventions toward regulating a state's population and ensuring equal protection for women. Yet, how well these ideas travel, particularly to societies that continue to understand humans as primarily relational and communal beings, re-

Hear Me Shop, BLOOMBERG BUSINESSWEEK (Feb. 14, 2005), http://www.businessweek.com/bwdaily/dnflash/feb2005/nf20050214_9413_db_082.htm; William Saletan, *Tuck Off: The Healthy Recession in Cosmetic Surgery*, SLATE (Apr. 8, 2008, 7:52 AM), <http://www.slate.com/id/2188419/> (discussing the popularity of breast implants and other cosmetic procedures).

79. See BROWN, *supra* note 66, at 189.

80. See generally Wing, *supra* note 2; IDENTITY POLITICS AND WOMEN: CULTURAL REASSERTIONS AND FEMINISMS IN INTERNATIONAL PERSPECTIVE (Valentine M. Moghadam ed., 1994).

81. Professors Aya Gruber, Cyra Choudhury, Laura Kessler, and Leigh Goodmark led a workshop at the Third Annual Feminist Legal Theory and Practice Conference at the University of Baltimore's School of Law. For conference details, see Univ. of Baltimore Sch. of L., 2010 Feminist Legal Theory Conference, <http://law.ubalt.edu/template.cfm?page=1374> (last visited Oct. 25, 2010).

82. See Cyra Akila Choudhury, *Empowerment or Estrangement?: Liberal Feminism's Visions of the "Progress" of Muslim Women*, 39 U. BALT. L.F. 153, 156-59 (2009).

mains a question to be settled and is taken up in more detail later in the Article.

II. INTERNATIONAL LAW AS VEHICLE

A. Exporting Progress

While feminist organizations in the United States continued the battle for gender equality, a simultaneous movement emerged in the 1990s that took up the cause of women in the far reaches of the world.⁸³ This second flank of activism can be distinguished into two forms: transnational projects and international projects. For the purpose of this Article, transnational projects are those that require partner organizations in the home country and seek to reform laws in the domestic sphere through local activism as well as assistance from external organizations. International projects are those that seek to reform or enforce international laws such as U.N. conventions and treaties. As can be readily discerned, these two types of projects may be intimately connected, overlapping, and co-developing, thus yielding a third hybrid project type. The discussion in this Section considers hybrid transnational projects that seek to reform national law and specific local norms based on and justified by international law and that also seek to have an impact on the construction and interpretation of international law. This Section specifically considers the structural and normative means that Liberal legal feminism uses to effect change in the Global South.⁸⁴ In its conclusion, this Section argues that Liberal feminist organizations in the United States base their reform agendas on their own experience. This explanation accounts for the

83. See Farrell & McDermott, *supra* note 5, at 46–47.

84. SUSAN DELLER ROSS, *WOMEN'S HUMAN RIGHTS: THE INTERNATIONAL AND COMPARATIVE LAW CASEBOOK 1* (2008):

Throughout human history women have faced discrimination and violence and, despite significant progress, still do. But today, it is possible to help *change that reality* through the international human rights system that arose from the ashes of World War II. *Lawyers can use international treaties and lessons from comparative law to create new domestic legal structures to advance women's rights in every country around the globe.* To do so, they must understand the interlocked elements of women's subordination and the ways that law can be used either to deny or grant women equality and freedom from violence.

Id. (emphasis added).

It is of interest that although Ross claims that countries can learn from each other through comparative law, her use of the methodology highlights the problems in the Global South. The normative valence of human rights, given here as a neutral law, are well hidden. One might ask that, if it were discovered that polygamy or veiling had some social benefits for women, would the author advocate it in a Western context? Clearly the conclusion is so well foregone that the question itself seems ridiculous.

continuities between the U.S. domestic priorities and those found in the international-transnational space. Evidence of this approach can be seen in the materials of a number of leading transnational organizations based in the United States. For instance, the Feminist Majority Foundation (FMF), a leading Liberal women's rights group, takes on particular issues that impact women globally.⁸⁵ Yet, the way in which these issues are framed and the "problems" identified may not be in accord with women who are purportedly beset by them.⁸⁶ The International Women's Rights Action Watch is specifically dedicated to promoting recognition of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).⁸⁷ Stop Violence Against Women provides training materials including methods on improving law enforcement and judicial responses.⁸⁸ The Center for Reproductive Rights provides reporting on reproductive rights and lobbies the U.S. government to pressure states to comply with international law.⁸⁹ These organizations base their strategies on domestic views of the issues and use international law to promote their agenda. For example, FMF states:

85. *Global Women's Rights*, FEMINIST MAJORITY FOUNDATION, <http://feminist.org/global/index.asp> (last visited Oct. 25, 2010).

86. For instance, the Feminist Majority Foundation is committed to eradicating violence against women. One form of violence that it has identified is female genital cutting, which it terms "mutilation." Examining the sources of their information, they list the World Health Organization, the United Nations, the U.S. Department of State, Amnesty International, and BBC News. Not one of these sources is located in the country where they are seeking to eradicate the practice. *Violence Against Women: Female Genital Mutilation*, FEMINIST MAJORITY FOUNDATION, <http://feminist.org/global/fgm.html> (last visited Oct. 25, 2010).

87. *Women Change the World*, INTERNATIONAL WOMEN'S RIGHTS ACTION WATCH, <http://www1.umn.edu/humanrts/iwraw/about.html> (last visited Oct. 25, 2010):

The IWRAW program pioneered shadow reporting (NGO participation in the review of a country that has ratified a treaty) for the CEDAW Convention and shadow reporting on women's human rights to the Committee on Economic, Social and Cultural Rights. In addition to producing shadow reports for sixty country reviews and holding international consultations on topics related specifically to the CEDAW Convention, IWRAW has engaged in training, conferences and expert groups, and global events such as the Fourth World Conference on Women and its follow-up reviews, all with a view to expanding the knowledge and application of the CEDAW Convention and other human rights treaties to advance women's human rights.

Id.

It is interesting to note here that the organization is based in the U.S.—a country that has not yet ratified Convention on the Elimination of All Forms of Violence Against Women (CEDAW) itself.

88. *Domestic Violence Training Modules*, STOP VIOLENCE AGAINST WOMEN, http://stopvaw.org/Domestic_Violence_Training_Modules.html (last visited Oct. 25, 2010).

89. *Engaging Policymakers: Around the World*, CENTER FOR REPRODUCTIVE RIGHTS, <http://reproductiverights.org/en/our-work/engaging-policymakers/around-the-world> (last visited Oct. 25, 2010).

The Feminist Majority Foundation's Global Campaign has always been based on the belief that the fight we face on the domestic front and the fight we face on the global front for women's rights are not two separate battles: They are one and the same. Women's rights are human rights.⁹⁰

It should be noted, however, that the United States is not the sole exporter of Liberal feminist reforms or subjects. Moreover, the epistemological traffic is not one-way. As I show below, there is a great deal of interaction and cross-pollination in the framing of the problems and their solutions, primarily in the context of the Global South. However, knowledge and subjectivities constructed in South Asia that might benefit women in the United States are not readily imported into and given effect in the West, which inhabits a position of already having achieved "human rights" and having nothing to learn from women in the Global South.⁹¹ Indeed, domestic problems in the United States and Europe are rarely spoken of in terms of international human rights problems.

The first subsection maps the international laws that are available for securing women's rights to abortion and protecting women against violence in order to highlight the continuities in the discourse about international law and U.S. domestic law.⁹² It then examines two international meetings as examples of the transnational space in which the exchange of ideas and the crafting of strategies for rights activism takes place. This helps to trace the transnational feminist subject that emerges from the interactions of elite women at these transnational meetings.

The second subsection examines the subject that emerges. It traces the continuities between the American Woman and the Universal Woman, arguing that the very meaning and content of what it is to be a woman is derived from Liberalism. This hegemonic construction then works to exclude other ways of being a woman in the same moment that it seeks to improve women's lives through reform.

90. FEMINIST MAJORITY FOUNDATION, *supra* note 85.

91. For instance, India recently passed a bill reserving a third of the seats in parliament for women. India has often used quotas to redistribute power to underrepresented groups. Although it is a controversial move, it has succeeded. See Harmeet Shah Singh, *India's Upper House Passes Pro-Women Bill*, CNN (March 10, 2010, 1:24 AM), <http://www.cnn.com/2010/WORLD/asiapcf/03/10/india.women.bill/index.html>. But it is unimaginable that such a reform would take place in the United States with its traditional abhorrence of anything remotely resembling a "quota." See *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) (invalidating quotas as a violation of equal protection).

92. I note here that I am not examining the ways in which activist organizations in the Global South access international law to justify their positions. Rather, I am following the routes mostly in one direction. A study of the dialogic way in which women's rights in the South are constructed is a next step in the broader field.

1. International Laws: Abortion Rights and Domestic Violence Prevention as Universals

Although women's rights scholarship has increased exponentially in the last three decades, the number of formal, binding international legal instruments available as the framework for recognition of women's rights remains limited.⁹³ On the other hand, a large number of statements, declarations, resolutions, and reports from a plethora of sources continue to add to the literature and form a secondary layer of material to which activists and scholars look for emerging consensus or trends.⁹⁴

The main international instruments⁹⁵ that women can use, aside from the United Nations Charter itself, are: 1) the Universal Declaration of Human Rights (UDHR);⁹⁶ 2) the International Covenant on Civil and Political Rights (ICCPR);⁹⁷ 3) the International Covenant on Economic, Social and Cultural Rights (ICESCR);⁹⁸ and 4) the Convention on the Elimination of All Forms of Discrimination Against Women.⁹⁹ Though the UDHR is a declaration, and thus non-binding, the ICCPR, ICESCR, and CEDAW are treaties and, as such, have the force of justiciable law.¹⁰⁰

93. See, e.g., Barbara Stark, *When Globalization Hits Home: International Family Law Comes of Age*, 39 VAND. J. TRANSNAT'L L. 1551, 1572–1580 (2006).

94. See *infra* notes 104 and 205; see, e.g., *infra* note 120.

95. See *infra* Table 1.

96. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR], available at <http://www.ohchr.org/EN/UDHR/Pages/Introduction.aspx>.

97. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 10, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR], available at <http://www2.ohchr.org/english/law/ccpr.htm>.

98. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 10, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICESCR], available at <http://www2.ohchr.org/english/law/cescr.htm>.

99. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR, 34th Sess., U.N. Doc. A/RES/34/180 (Dec. 18, 1979) [hereinafter CEDAW], available at <http://www2.ohchr.org/english/bodies/cedaw/convention.htm>.

100. The UDHR is undoubtedly the most significant statement of the rights due to a person by nature of his or her humanity and nothing else. It has been the work of feminist activists to constantly and consistently remind the world's leaders and its populace that the document applies with equal force to women as it does to men. The entire declaration is of relevance to women, of course, but there are Articles that are specifically useful for activism on behalf of women's rights. Table 1 provides a comprehensive list of these Articles. The UDHR is a neutral law that enshrines the liberal aspiration in Article 2 that every human will be treated equally irrespective of his or her "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status." It exhorts states to treat their subjects as equal before the law. For women in particular, the UDHR recognizes the right to marry and establish a family. Moreover, each party to a marriage is entitled to equal rights at every stage of the relationship including dissolution. Article 25(2) accords motherhood and childhood "special care and assistance." In terms of security of the person and provisions against violence to the person, the UDHR has far more substance. Articles 2 through 8 provide that the life and liberty of all shall be protected, that all persons will be free from torture, cruel, and inhuman or degrading punishment, and that they shall be equal before

In addition to these sources, statements that have been made by other international bodies, like the U.N. General Assembly and the Human Rights Committee, might have some force, at least in indicating an increasingly accepted norm of international law even though they are not binding on any state.¹⁰¹

Of these instruments, only CEDAW specifically deals with women and is truly global in its scope. Yet, it is also hampered by reservations made by signatory states that are free to limit obligations to the extent that they are incompatible with religion or culture.¹⁰² The UDHR, moreover, enshrines the right to life in a manner that has left it vulnerable to interpretation by abortion opponents who argue that a fetus is included in “everyone” and, therefore, abortion would be a violation of the Declaration.¹⁰³ As such, it is safe to say that there really is no single

the law with a right to an effective remedy for breaches of their rights. Article 12 is of particular interest because it provides that persons shall be free from attacks on their honor (an “honor-killing” arguably is an attack on both a woman’s person and her honor). Article 28 provides an international system where such rights will be actualized (arguably preventing violence between states which deprives human beings of their human rights).

The UDHR was the product of a growing consciousness that states ought not to be left unrestrained to treat their own subjects with impunity. As such, it is directed at states to prevent the kind of genocidal violence that occurred during the Second World War. Interestingly, it was not particularly a response to another kind of violence that had been done over centuries to millions of people on almost every continent: that is to say, it was not a response to colonization. Nevertheless, despite its parochial birth, the UDHR was widely adopted and the claim continues to be that the rights that it enshrines are “universal”—applicable across culture, religion, economic status, gender, and any other axis of difference. Increasingly in the last few decades, the UDHR has also been used against states for allowing private acts breaching the human rights of people. For feminist activists, gender-neutral laws such as the UDHR offer an avenue by which they can communicate that women are important and that violations of women’s rights are abrogations of international commitments entered into by signatory states whether the acts are done by the states themselves or are countenanced and given protection by the states because they do not enforce the rights or prosecute the violation when such violations are done by private actors. *See* UDHR, *supra* note 96. *See, e.g.,* Renu Mandhane, *The Use of Human Rights Discourse to Secure Women’s Interests: Critical Analysis of the Implications*, 10 MICH. J. GENDER & L. 275 (2004) (arguing that, while human rights imply women’s rights, international organizations may need to explicitly reference women’s rights in some contexts in order to promote women’s interests); *see also* Johanna E. Bond, *International Intersectionality: A Theoretical and Pragmatic Exploration of Women’s International Human Rights Violations*, 52 EMORY L.J. 71 (2003) (discussing the need to understand the identities of women as being shaped by additional factors such as race, nationality, and religion in order to promote women’s rights).

101. *See, e.g.,* UDHR, *supra* note 96.

102. *See*, Ross, *supra* note 84, at 13; *see also* Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT’L L. 613, 633 (1991).

103. This is an odd interpretation given that the declaration clearly speaks of the rights attaching to born humans. Arguably, the UDHR is inapplicable to those yet to be born. *See* UDHR, *supra* note 96, art. 3; *see also* Peta-Gaye Miller, *Member State Sovereignty and Women’s Reproductive Rights: The European Union’s Response*, 22 B.C. INT’L & COMP. L. REV. 195, 200–04 (1999); Donald A. MacLean, Note, *Can the EC Kill the Irish Unborn?: An Investigation*

international treaty or convention that is accepted universally and protects women's right to reproductive choice, let alone abortion specifically. However, proponents of the recognition of such a right cobble together the provisions of the UDHR, CEDAW, ICCPR, and ICESCR to arrive at a rough approximation of legal support for the right.

Zampas and Gher, counsel for the Center for Reproductive Rights, outline these provisions.¹⁰⁴ According to them, the ICCPR's Article 6(1) provides that the right to life ought not be read restrictively.¹⁰⁵ Given the number of women who die or are seriously injured from unsafe abortions, a state's failure to provide safe abortion can be a violation of Article 6(1). The Human Rights Committee General Comment No. 28 has interpreted Article 6(1) in this expansive manner and requires states to take measures to prevent unwanted pregnancies and clandestine abortion.¹⁰⁶ Further, criminalization of abortion, even in cases of rape, was of "particular concern" for the Committee.¹⁰⁷ In its 2004 Concluding Observations to Poland, the Human Rights Committee stated that the threat of criminal sanctions "incite[s] women to seek unsafe, illegal abortions, with attendant risks to their life and health."¹⁰⁸

CEDAW links women's right to health with access to abortion and a requirement that states work toward decreasing the number of maternal deaths due to back alley abortions.¹⁰⁹ As Zampas and Gher note, "with respect to abortion, CEDAW has given considerable attention to the issue of maternal mortality as a result of unsafe abortions, and explicitly framed the issue as a violation of women's right to life."¹¹⁰ Interestingly, the connection between the lack of access to family planning services, the methods, and the illegality of abortions are all cited as causal factors of unsafe abortions and resulting maternal deaths.¹¹¹

of the European Community's Ability to Impinge on the Moral Sovereignty of Member States, 28 HOFSTRA L. REV. 527 (1999).

104. Christina Zampas & Jaime M. Gher, *Abortion as a Human Right—International and Regional Standards*, 8 HUM. RTS. L. REV. 249, 256–58 (2008).

105. *Id.* at 256.

106. *Id.*

107. *Id.* at 257.

108. Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Human Rights Comm., 82d Sess., Oct. 27–Oct. 28, 2004, ¶ 8, CCPR/CO/82/POL (Dec. 2, 2004).

109. Comm. on the Elimination of Discrimination Against Women, *General Recommendations Adopted by the Committee on the Elimination of Discrimination Against Women, General Recommendation No. 24: Article 12 of the Convention*, in COMPILATION OF GENERAL COMMENTS AND GENERAL RECOMMENDATIONS ADOPTED BY HUMAN RIGHTS TREATY BODIES 233, 280 (2004), transmitted by Note of the Secretariat, U.N. Doc. HRI/GEN/1/Rev.7 (May 12, 2004).

110. See Zampas & Gher, *supra* note 104, at 258–59.

111. *Id.* at 259.

Finally, the ICESCR gives issues surrounding the family significant importance. Articles 10 and 12 in particular require the state to protect the family and to provide adequate healthcare.¹¹² These can be read to place an affirmative duty on the states to protect maternal health including the right to abortion, at the very least in order to protect the life of the mother.¹¹³ Given that a significant number of countries in the world have a blanket ban on abortion, such a reading would certainly mean that those countries are in violation of their human rights obligations.¹¹⁴

112. See ICESCR, *supra* note 98.

113. See, e.g., Zampas & Gher, *supra* note 104, at 259.

114. Although it is not legally binding, the Beijing Platform of Action outlines the aspiration of various women's movements with regard to reproductive rights. In that agenda, the conference outlined the importance of reproductive choice and health. Reproductive health is broadly defined to include a safe and satisfying sex life, the freedom to choose when and how often to bear children, and the right of access to health care. It goes on to note:

Reproductive health eludes many of the world's people because of such factors as: inadequate levels of knowledge about human sexuality and inappropriate or poor-quality reproductive health information and services; the prevalence of high-risk sexual behaviour; discriminatory social practices; negative attitudes towards women and girls; and the limited power many women and girls have over their sexual and reproductive lives. Adolescents are particularly vulnerable because of their lack of information and access to relevant services in most countries. Older women and men have distinct reproductive and sexual health issues which are often inadequately addressed.

The human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence. Equal relationships between women and men in matters of sexual relations and reproduction, including full respect for the integrity of the person, require mutual respect, consent and shared responsibility for sexual behaviour and its consequences.

Further, women are subject to particular health risks due to inadequate responsiveness and lack of services to meet health needs related to sexuality and reproduction. Complications related to pregnancy and childbirth are among the leading causes of mortality and morbidity of women of reproductive age in many parts of the developing world. Similar problems exist to a certain degree in some countries with economies in transition. Unsafe abortions threaten the lives of a large number of women, representing a grave public health problem as it is primarily the poorest and youngest who take the highest risk. Most of these deaths, health problems and injuries are preventable through improved access to adequate health-care services, including safe and effective family planning methods and emergency obstetric care, recognizing the right of women and men to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods of their choice for regulation of fertility which are not against the law, and the right of access to appropriate health-care services that will enable women to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant. These problems and means should be addressed on the basis of the report of the *International Conference on Population and Development*, with particular reference to relevant paragraphs of the Programme of Action of the Conference. In most countries, the neglect of women's reproductive rights severely limits their opportunities in public and private life,

In contrast, the right to be free from violence, unlike reproductive choice, is far less controversial. Most states are willing to accede that all individuals ought to be free from the threat of extrajudicial violence.¹¹⁵ Such a right is supported by the UDHR, which encourages states to provide equal protection of the laws to all its citizens.¹¹⁶ While the declaration is addressed to states and concerns the prevention of governmental breaches of human rights, it is now understood that failures to curb private abuses amount to a breach of human rights precisely because of the equal protection provisions.¹¹⁷ Barbara Stark has argued that human rights frameworks, like domestic U.S. law, no longer recognize the traditional public-private dichotomy.¹¹⁸ This means that family violence is no longer a matter of private concern, but rather a public problem that requires state intervention.¹¹⁹

While CEDAW, the ICCPR, and the ICESCR provide the positive legal framework for preventing violence as a human rights abuse, perhaps the most important normative statement about violence as a gendered problem in particular is the Declaration on the Elimination of Violence Against Women (DEVAW), a resolution passed by the U.N. General Assembly on December 20, 1993.¹²⁰ The resolution reiterates the key points of Liberal feminist legal doctrine against violence by: recognizing violence as a violation of women's liberty and right to life; eliminating the public-private sphere dichotomy; holding states responsible for upholding women's right to equal protection of the law and enforcing sanctions against private actors; and, recognizing that violence comes in many forms.¹²¹ Of particular interest is the fact that the declaration recognizes the work of the women's movement in "drawing increasing attention to the nature, severity and magnitude of the problem

including opportunities for education and economic and political empowerment. The ability of women to control their own fertility forms an important basis for the enjoyment of other rights. Shared responsibility between women and men in matters related to sexual and reproductive behaviour is also essential to improving women's health.

United Nations Fourth World Conference on Women, Sept. 4–15, 1995, Beijing Platform for Action, ¶¶ 95–97, U.N. Doc. A/CONF.177/20 (Oct. 17, 1995), available at <http://www.un.org/esa/gopher-data/conf/fwcw/off/a-20.en>.

115. See *id.* Mission Statement, ¶ 12.

116. See UDHR, *supra* note 96.

117. See *id.*

118. See Stark, *supra* note 93, at 1575–76.

119. *Id.*

120. Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, U.N. Doc. A/RES/48/104 (Dec. 20, 1993) [hereinafter DEVAW], available at <http://www.un.org/documents/ga/res/48/a48r104.htm>.

121. *Id.*

of violence against women.”¹²² In 2008, the General Assembly adopted another resolution, “Intensification of the efforts to eliminate all forms of violence against women,” to reaffirm the need to tackle gender violence and again calling for states to criminalize violence against women and take adequate measures for its prevention.¹²³

Although some of the particular problems with the international approach will be taken up in the next Section, it is worth noting here the focus on the state and its use of police power and regulation. While human rights proponents have historically understood that violations of those rights often come at the hands of the state, they are nevertheless proponents of state power when it comes to regulation in these areas.¹²⁴

2. The Loci of Exchange: Export-Import of Legal Ideas and Strategies at International Meetings

The preceding Section does not begin to scratch the surface of the number of documents that have been generated by international and transnational actors on the issue of reproductive rights and violence against women. It does, however, sketch an outline of the international laws that activists and scholars rely on when advocating for women’s rights. In this Section, I examine the marketplace or the loci where the exchange of information takes place. Specifically, what kinds of epistemological transactions take place at such meetings, how do the negotiations occur, and what is “understood” by the key actors when they say that “women’s rights are human rights?”

International meetings like those held in Beijing and Nairobi are the locations at which women from across the globe congregate to build transnational networks and coalitions around specific women’s issues. At these meetings, delegates from both states and non-governmental organizations (NGOs) work to create a shared set of goals and understandings about the pressing issues facing women.¹²⁵ Typically, while many documents are produced at these meetings, an important consensus document is produced that sets out the problems and goals of

122. *Id.* para. 10.

123. The resolution was drafted by the Belgian and Netherlands representatives of the Third Committee of the General Assembly which deals with human rights issues. U.N. Secretary-General, *Intensification of Efforts to Eliminate All Forms of Violence Against Women*, U.N. Doc. A/65/208 (Aug. 2, 2010).

124. See generally INST. OF SOC. STUDIES TRUST, *PROGRESS OF WOMEN IN SOUTH ASIA 2007 (2007)* [hereinafter ISST] (discussing strategies for prevention of trafficking and violence against women). For a comprehensive picture of specific provisions of international instruments relating to women, see *infra* Table 1.

125. SALLY ENGLE MERRY, *HUMAN RIGHTS & GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE* 44–46 (2006).

the participant stakeholders.¹²⁶ Sally Engle Merry describes the arduous process of building consensus that takes place around such official documents:

The debates about wording proceeded with virtually no discussion of the reasoning behind various positions or the evidence for or against them. Most of the time, delegates simply suggested wording changes. It is likely that the substantive debates had already taken place during the deliberations before the final meeting. But there were still major differences of opinion in the room. For example, is globalization responsible for women's poverty around the world? Should women have the right to abort their unborn children? Are wealthy countries willing to pay for reforms in poorer countries? Is the basis for social order secular or religious? It seems unlikely that evidentiary arguments would produce agreement on these questions. Instead, the strategy of finding phrases that are vague and convoluted was a way to reach consensus. Word-smithing produced a single document despite gaping disparities in views about women's place in society.¹²⁷

The intense negotiations that attend the creation of the documents do not reflect a shared set of understandings about the problems women face or how to solve them. Instead, they reflect a more superficial and broad agreement that there are problems and that they need attention. Beyond the pithy slogan of "women's rights are human rights" lurks the reality that women cannot be reduced to a universal category and that there are disagreements over which women need to be helped, what reforms need to be done, who should undertake those reforms, and how it should be funded. The vague language in the documents glosses over these serious divergences in understanding and level of commitment.

A more frequent set of smaller meetings that occur is that of the CEDAW Committee. The Committee oversees and monitors compliance with CEDAW by signatories. The membership of the Committee consists of representatives who are gender experts from signatory countries, who meet twice a year to hear reports from select countries.¹²⁸ During these

126. See, e.g., CEDAW, *Ways and Means of Expediting the Work of the Committee on the Elimination of Discrimination against Women: Overview of the Working Methods of the Committee on the Elimination of Discrimination Against Women*, 37th Sess., Jan. 15–Feb. 2, 2007, U.N. Doc. CEDAW/C/2007/U4/Add.1 (Oct. 25, 2006).

127. MERRY, *supra* note 125, at 46.

128. See CEDAW, *supra* note 126; see also MERRY, *supra* note 125, at 78–79. The adoption of the optional protocol gives individuals standing to bring complaints directly to the attention of the Committee. Early proponents of individual standing likely expected that the optional protocol would give women, and particularly Third World women, a way to bring their subor-

meetings, the states provide reports on their progress toward meeting CEDAW goals and the Committee then holds a pre-session in which it works through the report and raises questions and issues of concern.¹²⁹ The state representatives are given advance warning of these and are prepared to face the formal Committee in the regular session, which consists of an oral exchange between the Committee members and the representatives.¹³⁰ NGO participants are allowed limited interventions that take the form of written statements, but rarely are NGO representatives allowed to speak.¹³¹

Nevertheless, vigorous NGO activity accompanies that of the official meetings, creating a critical venue for activists to gather, exchange information and strategy, and build networks.¹³² One of the primary functions of the NGOs at such meetings is to raise new issues for their counterparts—and sometimes the Committee—to consider. Despite this vital role played by NGOs, many are excluded from the discussion given the high cost of travel to either New York City or Geneva. Consequently, the discussions are dominated by delegates from NGOs that are part of a group of “transnational elites.”¹³³ The space in which these NGOs operate is a transnational space heavily influenced by the West, though not dominated by it, considering that it also includes elites from the Global South.¹³⁴ As Merry notes, it is a space “within which people from all over the world participate to produce a social reformist, fundamentally neo-liberal vision of modernity governed by concepts of human rights.”¹³⁵ In other words, although there are differences in approach, there is a fundamental baseline consensus about “the value of the autonomous self, the capacity to make choices among alternative cultural paths, the

dination to light and shame their otherwise under-enforcing and lax governments into acting. Yet, the cases brought under CEDAW are mostly minority women bringing actions against First World, highly-industrialized countries. In one example, a woman brought a case against Spain claiming a violation of equal protection because the hereditary family title of nobility had passed to her younger brother rather than herself. CEDAW, Decision of the Committee on the Elimination of Discrimination Against Women Under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, Communication No. 7/2005, submitted by Cristina Muñoz-Vargas y Sainz de Vicuña, 39th Sess., July 23–Aug. 10, 2007, U.N. Doc. CEDAW/C/39/D/7/2005 (Aug. 9, 2007).

129. See CEDAW, *supra* note 126.

130. *Id.* ¶¶ 7, 13, at 3–4.

131. *Id.* ¶ 39, at 10; see also MERRY, *supra* note 125, at 70.

132. Sally Engle Merry’s work describing the interaction of non-governmental organizations (NGOs) and governments in the CEDAW monitoring process is an invaluable anthropological contribution to understanding how human rights travel in the transnational arena. See MERRY, *supra* note 125, at 86–87.

133. *Id.* at 54–55, 82.

134. *Id.* at 99–100.

135. *Id.* at 100.

protection of physical autonomy and the possession of rights.”¹³⁶ The space and the actors in it reflect each other’s modernity and cultural and educational hybridity, resulting in the near absence of the alternative views lived out in the real lives of many women. In sum, the women who are purported to be the “beneficiaries” of these meetings become subaltern, rendered invisible and silent. Instead of actually being all-encompassing, the women engaged in rights activism on behalf of *all women* only represent those who are deeply committed to Liberal ideas of personhood, Liberal social arrangements, and a politico-legal order that reflects the unilinear progress of Liberal history. Unsurprisingly, the predominant view of women’s identity is coextensive with that of Liberal feminism.

B. The “Universal” Woman: A Traveling Subject

The transnational meeting is a space in which the global elite come to produce not only the vision of modernity Merry describes, but also a universal feminist subject—an idealized subordinated woman who is created through the discourse of Liberal feminism.¹³⁷ As a product of Liberal thought, it is no surprise that this subject is a close kin to the U.S. feminist subject. Although the discourse that produces the feminist subject has encountered criticism and been fractured within the United States, the international human rights discourse remains dominated by Second Wave Liberal notions of equality, autonomy, and choice and has marginalized its critics. Indeed, the idealized person of Liberalism is so closely mirrored in the Universal Woman that she does not require much description. To describe the Universal Woman would be to repeat many of the characteristics of the American Woman.¹³⁸ Because the Global North funds much of the participation in international meetings and produces much of the technical and theoretical knowledge, it is not surprising that women’s rights advocates from the Global South tend to agree with the structure of human rights and the international pressure to reform in ways that promote Liberalism.¹³⁹

But what about the critiques? Why do they not travel and work to destabilize the hegemony of Liberal discourse? Transnational feminist organizing around women’s issues, as orchestrated by elites, has inter-

136. *Id.* at 101.

137. By “universal feminist subject,” I mean to denote the theoretical and idealized personhood that emerges from the discourse of Liberal feminism. The formation of subjects has been written about by philosophers ranging from Kant, Hegel, and Heidegger to Foucault and recently Judith Butler. Most relevant to the discussion here is the work by Butler on gender and the creation of “woman” as a subject.

138. *See supra* notes 62–92 and accompanying text.

139. *See MERRY, supra* note 125, at 54–55.

nalized difference through multiculturalism (much like Second Wave feminism does in the United States). A commitment to multiculturalism or diversity does not displace the centrality of human rights, and its hidden cultural content shifts the focus to other cultures that differ and are therefore in need of reform.¹⁴⁰ Yet the tolerance of cultural difference espoused in transnational multiculturalism is superficial. Elites from the Global South experience culture as part and parcel of a neoliberal choice-driven modern society.¹⁴¹ That is to say, they conceive of culture and religion as choices that can be made when such culture or religion diverges from the mainstream Liberal culture and religion. However, they fail to interrogate the utterly normalized and, thereby inscrutable, cultural space they inhabit. Instead it is made to appear as though Liberalism has no culture or religious valence.¹⁴² The only women who are truly “different” are those who are immersed in the local or those who adhere to different political ideologies like socialism, communism, Hindutva, or Islamism—those whose culture and religion is worn on their skin and enacted in peculiar rituals and practices that suggest pre-modernity.¹⁴³

140. See, e.g., Choudhury, *supra* note 82, at 153.

141. See BROWN, *supra* note 66, at 188–89 (2006). As Brown notes:

Liberal tolerance discourse not only hides its own imbrication with Christianity and bourgeois culture, it sheaths the cultural chauvinism that liberalism carries to its encounters with nonliberal cultures. For example, when Western liberals express dismay at (what is perceived as mandatory) veiling in fundamentalist Islamic contexts, this dismay is justified through the idiom of women’s choice. But the contrast between the nearly compulsory baring of skin by American teenage girls and compulsory veiling in a few Islamic societies is drawn routinely as absolute lack of choice, indeed tyranny, “over there” and absolute freedom of choice (representatively redoubled by near-nakedness) “over here.” This is not to deny differences between the two dress codes and the costs of defying them, but rather to note the means and effects of converting these differences into hierarchicalized opposites. If successful American women are not free to veil, are not free to dress like men or boys, are not free to wear whatever they choose on any occasion without severe economic and social consequences, then what sleight of hand recasts their condition as freedom and individuality contrasted with hypostasized tyranny and lack of agency? What makes choices “freer” when they are constrained by secular and market organizations of femininity and fashion rather than by state or religious law? Do we imagine the former to be less coercive than the latter because we cling to the belief that power is only and always a matter of law and sovereignty . . . ?

Id.

142. *Id.*

143. See *infra* notes 285–304 and accompanying text (describing Liberal feminism’s view of difference in the work of Susan Moller Okin).

III. ARRIVING IN SOUTH ASIA:¹⁴⁴ LOCAL CONTEXTS, TRANSLATIONS, AND RESISTANCES

Transnational feminist projects are typically aimed at the social problems that transnational organizations and feminists recognize as priority issues. In Parts I and II, this Article traced the development of two family law projects in the United States and then mapped the laws that reflected these projects in the international arena.¹⁴⁵ Having thus explained how legal reform priorities are set and uploaded into the international realm, Part III explores how these reforms are transplanted into the local sphere and investigates the subjects on which they operate. Given the global activist and media focus on reproductive rights and violence against women in the South, it would be easy to assume: first, that the local laws are wholly inadequate to the task of protecting and promoting women's rights; second, that reproductive rights and violence are the leading agenda items for women in the Global South. This part of the Article challenges these simplistic assumptions and provides a more nuanced account of local challenges. In the first Section, it examines the laws already in place and how reforms have either been undertaken or proposed to bring them in compliance with international human rights obligations and norms. These reforms raise a number of questions: (1) for whom are these reforms undertaken; (2) are these legal reforms appropriate or adequate to achieve their purported goals; and (3) what consequences flow from these reforms? This Section begins by underscoring the many societal, economic, and political problems that complicate issues of reproductive rights and violence in the South Asian context. It then explores the local subject and the encounters between universal and particular subjects.

A. Law (Not Culture): Placing Reproductive Choice and Domestic Violence in Context

South Asia is one of the most densely populated regions in the world. With a combined population of over 1.3 billion people, resources to support the large population are limited and the region suffers from

144. South Asia as a geographic region consists of Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, and Sri Lanka. See World Bank, *South Asia: Countries*, <http://www.worldbank.org/> (follow "Countries" hyperlink; then follow "South Asia" under "Browse By Region"; then follow the "Countries" hyperlink in the lefthand column) (last visited Sept. 19, 2010). In this Article, I focus more closely on the Indian Subcontinental countries of Bangladesh, India, and Pakistan. The term "South Asia" is often used as a neutral signifier of this sub-region. See SUGATA BOSE & AYESHA JALAL, *MODERN SOUTH ASIA: HISTORY, CULTURE, POLITICAL ECONOMY* 3 (2004).

145. See *supra* notes 9–82 and accompanying text.

great distributive inequities.¹⁴⁶ The bottom twenty-five percent of the population lives in abject poverty.¹⁴⁷ Moreover, poverty impacts women disparately.¹⁴⁸ Most women in South Asia work in the informal economy and in households.¹⁴⁹ Their labor is uncompensated or undercompensated.¹⁵⁰ A truism among some development experts holds that a high birth rate contributes to poverty and impedes national advancement into industrialization.¹⁵¹ As such, for rural and poor women, all discussions about reproductive choice are imbedded in the larger discourse of economic development, population control, and access to health care.¹⁵² Because economic development, poverty, and population are so closely linked, activists working to secure reproductive rights for women in South Asia make quite different arguments for those rights.¹⁵³

1. Abortion and Reproductive Rights

Feminist advocacy based on privacy or autonomy—while perfectly comprehensible to the educated liberal elite—is not as easily comprehended by the majority of the undereducated, rural, and poor of South Asia.¹⁵⁴ As such, laws tend to be roughly normative, reflecting the societal values and political preferences that prevail. In Bangladesh, for instance, abortion is criminalized unless there is a threat to the life of the woman. This law was promulgated by the British in 1860 and has not been reformed since.¹⁵⁵ Medical abortion as a right based in personal

146. SHANTAYANAN DEVARAJAN & IJAZ NABI, WORLD BANK, ECONOMIC GROWTH IN SOUTH ASIA: PROMISING, UN-EQUALIZING,...SUSTAINABLE? 4–6 (2006), available at http://siteresources.worldbank.org/SOUTHASIAEXT/Resources/South_Asia_growth_June_2006.pdf.

147. *Id.* at 4.

148. *See* ISST, *supra* note 124, at 1–4.

149. *Id.*

150. MAHBUB UL HAQ HUMAN DEV. CTR., HUMAN DEVELOPMENT IN SOUTH ASIA 2000: THE GENDER QUESTION 6 (2000), available at <http://www.mhdc.org/reports/hdrsa%202000.pdf>.

151. *See, e.g., id.* at 14.

152. *See id.* at 25–33 (discussing access to health care and the impact of economic policies on women in South Asia).

153. *See* DEVELOPMENT ALTERNATIVES WITH WOMEN FOR A NEW ERA, <http://www.dawnnet.org/index.php> (focusing on maternal health); *see also*, Bishakha Datta and Geetanjali Misra Advocacy for Sexual and Reproductive Health: The Challenge in India, in *Reproductive Health Matters* Vol. 8, No. 16, *Reproductive Rights, Advocacy and Changing the Law* 24–34 (Nov., 2000) (discussing access to health care and lack of institutional capacity).

154. MAHBUB UL HAQ HUMAN DEV. CTR., *supra* note 150, at 131 (discussing the difference in decision-making power of educated and undereducated women).

155. UNITED NATIONS POPULATION DIV., DEP'T OF ECON. & SOC. AFFAIRS, 1 ABORTION POLICIES: A GLOBAL REVIEW 47–48 (2002), available at <http://www.un.org/esa/population/publications/abortion/> (follow “Country Profiles” hyperlink and then “Bangladesh” hyperlink).

autonomy is not legally protected.¹⁵⁶ However, abortion issues are closely bound up in the need for methods of birth control due to the socio-economic pressure from a growing population. Because population control is considered a priority, Bangladesh provides for menstrual regulation¹⁵⁷ until eight weeks after the last menstrual period and this is not construed as an abortion at all, but rather as a public health intervention.¹⁵⁸ In effect, it is a chemical abortion if the woman is indeed pregnant but verification of pregnancy is not required to undergo menstrual regulation treatment. As a result, the moral implications of abortion can be side-stepped.¹⁵⁹

In India, which was governed by the same British code as Bangladesh at its independence, abortion has been decriminalized since the 1970s through the passage of the Medical Termination of Pregnancy Act.¹⁶⁰ Abortion is available on demand, at least theoretically, if not practically. However, along with abortion on demand came the problem of sex selection.¹⁶¹ Coupled with abortion, malnutrition, neglect, and, sometimes, infanticide, it has led to a skewed gender ratio.¹⁶² Typically, there should be more females than males, however, in India there are more males. Sex-selective abortion and infanticide account for the large number of these “missing women.”¹⁶³ Despite legal efforts to prevent the

156. See MAHBUB UL HAQ HUMAN DEV. CTR., *supra* note 150, at 118–133 (discussing women’s health, maternal mortality, and population).

157. *Id.*

158. *Id.* at 48. (“Despite the restrictive nature of the law, ‘menstrual regulation’ services have been available in the Government’s family planning programme. The Government does not feel that this service conflicts with current abortion laws as it provides menstrual regulation as a family planning method, not as an abortifacient.”).

159. *Id.* Menstrual regulation (MR) is, in essence, an early term chemical abortion if the woman is, in fact, pregnant. However, because women seeking MR do not actually have to establish pregnancy to obtain the procedure, they do not fall foul of the abortion law. The procedure, therefore, operates in the space between prevention of pregnancy and abortion. Furthermore, it is a procedure that can be performed on an outpatient basis and by trained providers not necessarily physicians, making it ideal for developing and rural populations. See UNITED NATIONS POPULATION DIV., *supra* note 155.

160. See Medical Termination of Pregnancy Act, No. 34 of 1971, INDIA CODE (1993), available at <http://www.indiacode.nic.in/> (follow “Short Title” hyperlink, then search for “Medical Termination of Pregnancy Act”). The Act was amended in 2002 and provides for the criminal punishment of abortion providers if they are not medical practitioners. Moreover, abortions may only be done at hospitals. Medical Termination of Pregnancy (Amendment) Act, No. 64 of 2002, INDIA CODE §§ 4, 5 (1993), available at <http://www.indiacode.nic.in/> (follow “Short Title” hyperlink, then search for “Medical Termination of Pregnancy (Amendment) Act”).

161. See Kristi Lemoine & John Tanagho, *Gender Discrimination Fuels Sex Selective Abortion: The Impact of the Indian Supreme Court on the Implementation and Enforcement of the PNDT Act*, 15 U. MIAMI INT’L & COMP. L. REV. 203 (2007).

162. *Id.* at 205, 207–09.

163. Amartya Sen, *Missing Women—Revisited* 327 BRIT. MED. J. 1297, 1297(2003); see also AMARTYA SEN, *DEVELOPMENT AS FREEDOM*, 104–07 (1999).

practice of sex-selection, it continues to occur. In 2002, the Pre-Natal Diagnostic Techniques Amendment Act was passed, limiting the use of diagnostic testing to those cases where the health of the fetus is in question and specifically preventing providers from disclosing sex.¹⁶⁴

While Indian women have a measure of choice in controlling their reproduction through liberalized abortion laws, they have also been subject to state pressure. Rural women in particular have borne the brunt of the state's need to reduce birth rates and population and have been victims of coercive policies, including compulsory sterilization.¹⁶⁵

In some respects, the broader state regulatory concern cuts against reproductive rights if constructed narrowly as the right to abortion, aimed at bettering women's lives. For some women, it is the opposite that is threatened: the right to have as many children as they desire,¹⁶⁶ or even the right to have girl children. When sex-selection is put into the picture of extended families, with reproductive decision-making power placed in the hands of husbands and in-laws, it is unclear that a right to abortion on demand is either empowering to the child-bearer or women in general. What are the effects, then, of advocating freedom to choose without consideration for these ground realities? What would the legal freedom to abort provide for women who have limited access to basic health care in a society that is actively engaged in population control? And what does it mean when the overall sociopolitical landscape is shifting to more liberalization and privatization and away from the socialism that, at least discursively, made space for government provision of services? The Liberal answer has often been a greater push in promoting individual rights.¹⁶⁷

Pakistan, which also shares the same legal history, revised its abortion laws in the 1990s to reflect *shari'ah* law.¹⁶⁸ In the West, the very spectre of "*shari'ah*" calls to mind a set of medieval and brutal legal

164. Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002, No. 14, Acts of Parliament, §§ 4–6, 2003 (India), available at http://www.medindia.net/indian_health_act/pre-natal-diagnostic-techniques-amendment-act-2002-amendment-of-section-4-5-6.htm.

165. See Kaval Gulhati, *Compulsory Sterilization: The Change in India's Population Policy*, 195 SCIENCE 1300, 1304–05 (1977); see also M. Minkler, "Thinking the Unthinkable": *The Prospect of Compulsory Sterilization in India*, 7 INT'L. J. HEALTH SERV. 237 (1977) (discussing the National Population Policy Statement adopted by the Indian Government in 1976 and the subsequent critiques of coercive and compulsory sterilization measures).

166. See Gulhati, *supra* note 165, at 1303 (noting that the right to have children is sacrosanct to women in rural India).

167. See, e.g., NUSSBAUM, *supra* note 70, 59–86, 246 (2000) (the capabilities approach is by definition an individualistic approach examining the ways in which each individuals personal capabilities are realized or thwarted).

168. UNITED NATIONS POPULATION DIV., DEP'T OF ECON. & SOC. AFFAIRS, 3 ABORTION POLICIES: A GLOBAL REVIEW 20 (2002), available at <http://www.un.org/esa/population/publications/abortion/> (follow "Country Profiles" hyperlink and then "Pakistan" hyperlink).

punishments and oppressions.¹⁶⁹ Yet, interestingly, the law is not as restrictive as one might imagine. Under the new laws, abortion is not prohibited when used to save the life of the mother or to provide necessary treatment.¹⁷⁰ This ambiguity in the law allows for an early term abortion for therapeutic purposes other than explicitly saving the life of the mother.¹⁷¹ If it does not fall within the legal exceptions, the punishment for an illegal abortion depends on when during the pregnancy the abortion is performed.¹⁷² Before the organs of the fetus are formed, the illegal termination of a pregnancy is considered a *ta'zir* crime, punishable by imprisonment for three to ten years.¹⁷³ After the limbs are formed, abortion is punishable as a *diyah* crime, which requires compensation to be paid to the heirs similar to a murder.¹⁷⁴ Islamic criminal law treats murder very much like a wrongful death tort.¹⁷⁵ As such, unless there has been a hybridization of the law with that of common law European systems, the punishment for murder is either the death penalty (under a theory of *lex talionis*) or compensation paid to the victim's family, depending on the family's choice.¹⁷⁶ Under Islamic law, the limbs and organs are considered to be formed by the fourth month.¹⁷⁷ Thus, before the fourth month, an abortion would be a *ta'zir* crime but after that time, it would be treated as a *diyah* crime. If the *shari'ah* were applied strictly, a *ta'zir*, early term abortion would be punished more severely with a lengthy prison sentence than a later term abortion which only requires monetary compensation to the heirs of the victim.

Despite the reform of the law to conform to *shari'ah*, the enforcement of laws against abortion is lax. The reality of most women's situations is that they do not have access to health care,¹⁷⁸ therefore the

169. See, e.g., Dipesh Gadhur et al., *Rowan Williams Faces Backlash Over Sharia*, SUNDAY TIMES, Feb. 10, 2008, para. 20, <http://www.timesonline.co.uk/tol/comment/faith/article3342059.ece>; see generally SHERENE H. RAZACK, *CASTING OUT: THE EVICTION OF MUSLIMS FROM WESTERN LAW & POLITICS* (2008) (exploring the use of stereotypical characterizations of Muslim society and the contemporary legal and social responses to Muslims in the West).

170. UNITED NATIONS POPULATION DIV., *supra* note 168, at 19–20.

171. *Id.* at 20.

172. *Id.*

173. *Id.*

174. *Id.* See also Dr. Azizah Y. al-Hibri, Panel on Religious and Ethical Perspectives on Population Issues: Family Planning and Islamic Jurisprudence 4–5 (May 19, 1993), available at <http://www.karamah.org/docs/family-planning-islam.doc>. But see *Gonzales v. Carhart*, 550 U.S. 124 (2007) (upholding a ban on “partial birth” abortions).

175. See KNUT VIKØR, *BETWEEN GOD AND THE SULTAN: A HISTORY OF ISLAMIC LAW* 287–90 (2005).

176. *Id.* at 288.

177. UNITED NATIONS POPULATION DIV., *supra* note 168, at 20.

178. See ISST, *supra* note 124, at 15–22 (providing statistics of hospital beds and gross domestic product (GDP) expenditures on health, and concluding that there is a lack of adequate access to health care).

laws either allowing them to obtain a legal abortion or obstructing them from doing so are essentially a theoretical debate about women's roles and rights. Even if the laws were changed, lack of health care providers would still prevent medically supervised abortions.¹⁷⁹ Thus, international pressure to conform *laws* to allow for abortion on demand may not make much sense without the funding and structural reforms in health care to provide the service. Moreover, increased attention to abortion as constructed in the West might have perverse effects. As al-Hibri notes, where a fluid understanding of abortion as a social practice was present, after the right became a major transnational human rights concern, rigid, overly legalistic, and conservative interpretations of abortion in Islam emerged, making it more restricted than it was previously.¹⁸⁰

2. Domestic Violence

Advocacy for domestic violence prevention, one might imagine, would be less problematic than for abortion rights because of a general, global consensus that spousal violence is both morally and criminally wrong. But here also there are some key concerns. First, it is a fact that domestic violence is a major problem in many households in South Asia.¹⁸¹ Dowry deaths, honor killings, and forced marriage have all been well publicized in the West. As signatories to CEDAW and because of organized activism, several governments in South Asia have passed legislation aimed at reducing or eliminating violence against women. In Bangladesh, for example, the Oppression of Women and Children Act¹⁸² passed in 1995, provides for the death penalty for dowry murder,¹⁸³ rape of a woman or child,¹⁸⁴ minimum sentences for acid violence,¹⁸⁵ and a prohibition on the trafficking of women and

179. *Id.*

180. Azizah al-Hibri, *Who Defines Women's Rights? A Third World Woman's Response*, 2 HUM. RTS. BRIEF, Fall 1994, at 9. al-Hibri asserts that:

In the case of abortion rights specifically, in certain Muslim countries the result was to produce a highly conservative official juristic analysis of the issue. This presents a retrenchment, since, for hundreds of years, Muslim jurists have had quite a liberal analysis of abortion, and, unlike the situation that used to exist in the United States, safe abortions were widely available in many Muslim countries.

Id. ¶¶ 9–10.

181. See ISST, *supra* note 124, at 27–40.

182. Oppression of Women and Children (Special Enactment) Act, No. 18 of 1995, THE BANGLADESH GAZETTE EXTRAORDINARY, July 17, 1995, available at http://www.commonlii.org/bd/legis/num_act/oowacea1995466/.

183. *Id.* § 10.

184. *Id.* §§ 6, 7.

185. *Id.* §§ 4, 5. Acid violence is the use of acid to disfigure women physically as punishment. The punishment could be for romantic rejection or other perceived slights. See ACID SURVIVORS FOUNDATION, <http://www.acidsurvivors.org/> (last visited Oct. 25, 2010).

children.¹⁸⁶ This Act was amended in 2000 with the Women and Children Repression Prevention Act to strengthen existing laws pertaining to violence against women and children.¹⁸⁷ In addition, the legislature has created a draft bill on domestic violence that has yet to be enacted. The bill, if passed, would provide for expanded punishment for domestic violence in all forms and stronger criminal enforcement.¹⁸⁸ At the time it was proposed, NGO organizations criticized the bill for relying on “enforcement” more than protection and for not providing measures to punish police officials for abuse.¹⁸⁹

As the most politically stable democratic state in South Asia, India’s legal enactments against similar problems are manifold. Laws against child marriage, dowry, dowry-related violence, and sexual harassment have been on the books for decades.¹⁹⁰ More recently, India passed the Protection of Women from Domestic Violence Act, 2005¹⁹¹ which:

[P]rotects all members of a household, and it embraces the definition of violence adopted by the United Nations as being any form of abuse, whether emotional, physical, sexual, or verbal. It also offers a wide range of new protection measures: injunctions, protective orders, and maintenance and custody orders.

186. See Oppression of Women and Children (Special Enactment) Act, *supra* note 182, §§ 8, 9. In a recent ruling, the Bangladesh High Court overturned a portion of this Act as unconstitutional because it contemplates the death penalty as the only form of punishment for the murder of a victim pursuant to rape. See *Death Penalty Declared Illegal*, DAILY STAR (Bangladesh), Mar. 3, 2010, at 1, <http://www.thedailystar.net/newDesign/news-details.php?nid=128499>.

187. Women and Children Repression Prevention Act, No. 8 of 2000, Feb. 14, 2000 (Bangl.), available at www.hsph.harvard.edu/population/trafficking/BANGLADESH.traf.00.pdf (unofficial translation). For an overview of the impact of this amendment, see Taslima Mansoor, *Justice Delayed is Justice Denied*, DAILY STAR, Mar. 11, 2006 (Law & Our Rights), <http://www.thedailystar.net/law/2006/03/02/index.htm>.

188. For the text of the proposed bill, see Government of People’s Republic of Bangladesh, The Law Commission, *A Final Report On The Proposed Law Of Domestic Violence [sic] Along With A Draft Bill Namely, The Domestic Violence [sic] Act, 200...* [sic] (Dec. 29, 2005), www.lawcommissionbangladesh.org/reports/71.pdf.

189. See Hana Shams Ahmed, *When It Also Happens at Home*, FORUM, May 2009, available at <http://www.thedailystar.net/forum/2009/may/happens.htm>; *Bangladesh: The Draft Bill on Domestic Violence—Some Recommendations*, WOMEN LIVING UNDER MUSLIM LAWS (July 15, 2006), <http://www.wluml.org/node/3069> (“ASK [Ain o Shalish Kendra] is concerned about the role of “enforcement officer” in the draft Bill, which makes the police directly responsible for receiving and investigating complaints under the Bill. In addition, the Bill lacks any punishment or complaints mechanism for enforcement officers.”).

190. See generally FLAVIA AGNES, *LAW AND GENDER INEQUALITY: THE POLITICS OF WOMEN’S RIGHTS IN INDIA* (1999) (discussing the issue of gender and law reform and the strategies to protect women’s rights in India).

191. The Protection of Women from Domestic Violence Act, No. 43 of 2005, INDIA CODE (1993), available at <http://www.indiacode.nic.in/> (follow “Short Title” hyperlink, then search for “Protection of Women from Domestic Violence Act”).

The common practice of throwing a married woman out of her home is now illegal, and while there is still no law making marital rape a crime, the 2005 act opens the door to make it so.¹⁹²

The 2005 Act has been criticized by traditionalists and right-wing parties who claim that it is aimed at destroying the institution of family and traditional gender roles.¹⁹³ More disturbing are the problems with the Act's treatment of women as only victims and not perpetrators, thereby ignoring the male victims of domestic abuse.¹⁹⁴ Further, it is overbroad in its definition of verbal and emotional abuse by including in its definition "insults, ridicule, humiliation, name calling and insults or ridicule specially with regard to not having a child or a male child."¹⁹⁵ This would allow a single instance of domestic disharmony to be considered abuse. Moreover, under the shared housing provision women are allowed to remain in the marital home if they are the victims of domestic abuse.¹⁹⁶ A magistrate may require the abuser to remove himself and, in addition, may restrain his relatives from entering any part of the house in which the victim resides thereby providing the woman with shelter rather than requiring her to provide it for herself.¹⁹⁷ Clearly, this provision envisions a multi-room home that is primarily the luxury of wealthy Indians. In poorer houses, enforcing such a provision may remove the husband's family from the house entirely.¹⁹⁸ Further, a wife's actions that contribute to the abuse are not taken into consideration by the courts.¹⁹⁹ Thus an adulterous wife could report an argument over her adultery as domestic abuse and have the husband removed from the house, as long as the argument included a threat. Finally, the Act allows magistrates to jail a husband for violating a protective order on the sole testimony of the wife.²⁰⁰ This punishment, which could be as much as a year or include a fine for up to 20,000 rupees (\$415 USD), is an unreasonable amount for most

192. *India: Better Legal Options Equal More Justice for Women*, UNIFEM (Nov. 22, 2006), http://www.unifem.org/gender_issues/voices_from_the_field/story.php?StoryID=543.

193. See Mehak Khanna, *Protection of Women from Domestic Violence Act 2006—Was It Worth the Effort?*, LEGAL SERVICES INDIA (Jan. 21, 2008), <http://www.legalserviceindia.com/article/1150-Protection-of-Women-from-Domestic-Violence-Act.html> (discussing the criticisms of the Act); see also Rajesh Vakharia & Siff Nagpur, *Protection of Women from Domestic Violence Act, 2005—A Complete Eyewash by Feminists*, INDIA POST (Aug. 5, 2010), available at <http://www.theindiapost.com/articles/protection-of-women-from-domestic-violence-act2005-%E2%80%93-a-complete-eyewash-by-feminists>.

194. This is evident in the very title of the act. See *supra* note 191.

195. See *id.* Ch. II, § 3, Explanation I (iii)(a).

196. *Id.* Ch. IV, § 17.

197. *Id.* Ch. IV, § 19.

198. See *id.*

199. See *supra* note 196 (noting that a "traitorous wife" can retain the marital home).

200. *Id.* Ch. V, § 31(2).

Indians, whose per capita income is \$2,800 USD a year.²⁰¹ Unless a woman has independent means, the punitive measures in these reforms will undoubtedly adversely affect her as well.

In Pakistan, the issues of domestic violence have increasingly become mired in the fight against extremist Islamist movements like the Taliban.²⁰² For example, honor killings have been the focus of anti-violence activism. To this end, Pakistan has amended some of its laws to punish domestic murder more seriously. For example, the parliament passed The Criminal Law (Amendment) Act, 2004 which makes changes such as minimum sentences and the removal of discretion in the existing criminal code to deal more effectively with honor crimes.²⁰³ Further, the Protection of Women (Criminal's Laws Amendment) Act, 2006 was enacted in December 2006.²⁰⁴ The purpose of this law is to bring the laws related to *zina* (adultery or fornication) and *qazf* (a false allegation of adultery or fornication), both part of the Hudood Ordinance of 1979,²⁰⁵ in conformity with the stated objectives of the Islamic Republic of Pakistan and its constitutional mandate.²⁰⁶ In 2009, Pakistan's National Assembly passed the Domestic Violence (Prevention and Protection) Bill.²⁰⁷ The bill defines domestic violence broadly as "all intentional acts of gender based or other physical or psychological abuse committed by an accused against women, children or other vulnerable persons, with whom the accused is or has been in a domestic

201. *Development Data: India at a Glance*, WORLD BANK, 2 (Dec. 9, 2009), http://devdata.worldbank.org/AAG/ind_aag.pdf.

202. See Huma Yusuf, *Pakistan's Taliban Rising? Ask the Women*, CHRISTIAN SCI. MONITOR, May 26, 2009, <http://www.csmonitor.com/World/Asia-South-Central/2009/0526/p06s07-wosc.html>; see also Karen Engle, *Liberal Internationalism, Feminism, and the Suppression of Critique: Contemporary Approaches to Global Order in the United States*, 46 HARV. INT'L L.J. 427, 429-34 (2005). Although Engle is concerned primarily with Afghanistan, the War on Terror has rendered the border between Afghanistan and Pakistan so porous that the latter now likely faces similar threats from similar foes.

203. An Act Further to Amend the Pakistan Penal Code, PAK. PENAL CODE (Act XLV of 1860), amended by Criminal Law (Amendment) Act, No. I of 2005. It has been argued that this amendment does not go far enough in curbing the practices of honor killing. For a discussion of various provisions of the amendment, see *Confronting Honor Killings: Asian Center for Human Rights Report*, COUNTERCURRENTS.ORG (Oct. 29, 2004), <http://www.countercurrents.org/hr-achr291004.htm>.

204. The Pakistani Penal Code Act, No. 45 of 1860, amended by Protection of Women (Amendment) Act, available at <http://www.pakistani.org/pakistan/legislation/2006/wpb.html>.

205. *Hadd* offences are those that are specifically named in the *Qur'an* and bear specific punishments. There are very few *hadd* offences, among most schools of thought these are: theft, banditry or fomenting unrest, unlawful sexual intercourse, false accusation of unlawful sexual intercourse, drinking of alcohol, and apostasy. See RUDOLPH PETERS, *CRIME AND PUNISHMENT IN ISLAMIC LAW: THEORY AND PRACTICE FROM THE SIXTEENTH TO THE TWENTY-FIRST CENTURY* 53 (2005).

206. PAKISTAN CONST. pmb1.

207. The Domestic Violence (Prevention and Protection) Bill of 2009, available at www.na.gov.pk/passed_bill/domestic_violence2009.pdf.

relationship,²⁰⁸ and provides a number of preventative as well as punitive measures.²⁰⁹ However, the Senate has failed to act on the bill and it has not come into force as of this writing.²¹⁰ Of the three countries in the Indian subcontinent, Pakistan has arguably made the least amount of progress in amending its law and providing adequate measures for the prevention of domestic violence. Even general laws that apply to punish violence against women have been weakly enforced.²¹¹ As of 2010, with the increased internal displacement of people from Pakistan's Northwest Frontier Province resulting from the conflict in Afghanistan and the tribal regions of Pakistan, as well as the floods that same year, it is likely that there will be an increase in domestic violence against vulnerable migrant women.²¹² Moreover, the threat of violence in general, including that against men who are often the heads of households and protectors of their families, will only put women more at risk. Law reform that is aimed at reducing domestic violence will have less of an impact unless adequate attention is given to these exacerbating factors.

Some of the legal reforms in the area of reproductive rights and domestic violence undertaken in South Asia have their source in international pressure to comply with international human rights obligations, such as those contained in CEDAW.²¹³ However, there is also considerable domestic activism and pressure on governments to improve the legal standing of women in all the various reaches of the

208. *Id.* art. 4.

209. The Act makes provision for counseling, the aggrieved party's right to reside in a household, protection orders and residence orders, monetary relief, custody orders, and police protection. Interestingly, there is no provision in the bill for criminal punishment except in the event of a violation of a protective order. *See id.* arts. 6–13.

210. *Pakistan: Expedite Domestic Violence Legislation*, HUMAN RIGHTS WATCH (Jan. 11, 2010), <http://www.hrw.org/en/news/2010/01/11/pakistan-expedite-domestic-violence-legislation>.

211. SAMYA BURNEY, HUMAN RIGHTS WATCH, *CRIME OR CUSTOM?: VIOLENCE AGAINST WOMEN IN PAKISTAN* § I (1999), available at <http://www.hrw.org/legacy/reports/1999/pakistan/>; *see also* *Pakistan: Insufficient Protection of Women*, Amnesty International USA, 2007 available at <http://www.law.georgetown.edu/rossrights/docs/reports/pakistan-amnestyprotection.html> (last visited Oct. 25, 2010).

212. *See, e.g.*, Adnan Hyder et al., *Intimate Partner Violence Among Afghan Women Living in Refugee Camps in Pakistan*, 64 *SOC. SCI. & MEDICINE* 1536 (2007); *see also* Patrick Duplat, *Pakistan: Women Face the Brunt of Displacement*, *REFUGEES INT'L* (Dec. 8, 2009), <http://www.refugeesinternational.org/blog/pakistan-women-face-brunt-displacement> (discussing the unique characteristics that gender based violence can take on in a refugee camp situation).

213. SOUTH ASIAN TASK FORCE ON ADVANCEMENT OF CEDAW (SATAC), <http://www.aalilegal.org/satac.html> (last visited Oct. 25, 2010); *VIOLENCE, LAW & WOMEN'S RIGHTS IN SOUTH ASIA* 14 (Savitri Goonesekere ed., 2004) (discussing the use of international treaties as a basis for local reform).

subcontinent without regard to external obligations.²¹⁴ Further, *all women* are contemplated as beneficiaries of these reforms regardless of their particular situations. However, Liberal feminism imagines women to be more homogenous than they are in reality. Their particularities are subsumed or privatized, creating an assumption that solutions which work for one population work for another. Certainly these assumptions are valid when the discussion is undertaken at the level of generalities and universals like violence, reproductive rights, and other rights. Yet, the actual effects of these reforms become complex when the universals of Liberalism come up against the particularities of different women in South Asia.

B. The “Local” Woman: Particularities Meet Universality

Who is the particular woman in South Asia? Although this question cannot be answered without some level of generalization, in this Section the Article will attempt to give as nuanced a picture of women who are not part of the educated, urbanized, elite as possible. First, the local woman is the vast majority of the women in South Asia. She is undereducated, having received substantially less than twelve years of schooling. She is likely part of an extended family in which she performed household labor since childhood.²¹⁵ She lives in a rural location embedded in a “traditional” socio-cultural milieu. She likely married young. She will likely expect to have several children as part of her role as wife and mother.²¹⁶ In other words, she is not the autonomous actor that Liberalism imagines as the ideal.²¹⁷ Instead, she is deeply imbricated in family and society.

The local woman is the subject of scrutiny and regulation from a number of quarters that constrain the realm of choices that she has and what are normatively considered appropriate choices.

The following are some of the regulations and constraints that the local woman faces. First, she is constrained by the expectations of her family and immediate society. Her choices and capabilities are re-

214. There are a number of women’s groups that have been active in India since pre-independence to the present. Some of the larger groups are the All India Democratic Women Association, Self Employed Women’s Association (SEWA), the All India Muslim Women’s Personal Law Board, and Manushi—a journal that has focused on feminist organizing—among others.

215. See ISST, *supra* note 124, at 22–25; see generally AMNESTY INTERNATIONAL, THE GENDER TRAP: WOMEN, VIOLENCE AND POVERTY (2009).

216. See WORLD BANK GROUP, 2006 WORLD DEVELOPMENT INDICATORS: CARING FOR MOTHERS (2006), available at http://devdata.worldbank.org/wdi2006/contents/Section1_1_5.htm.

217. See *supra* Part I.B.

stricted through the allocation of resources.²¹⁸ Second, she is influenced by NGOs and welfare groups seeking to expand her opportunities and capabilities through both social reform and legal reform.²¹⁹ Third, she is regulated and constrained by the state through its own social reform policies, allocation of resources, and population-control policies.²²⁰ Finally, she is subject to the influence of transnational and international forces that may be directly involved in social programs, rule of law initiatives, foreign policy directed programs, and, perhaps most importantly, armed conflict.²²¹

Given the number of actors that influence her, it is easy to lose sight of the woman herself. She becomes a passive recipient of all these attentions as opposed to an actor. Her subaltern voice is co-opted by the elite, educated, transnational feminists who represent her at international meetings and within the state.²²² Nevertheless, these women are not mute. They have particular ideas about what is a good life for themselves and their children, and they are articulators of alternative visions of how to be a woman. Subaltern voices, when they speak for themselves, often tell of a different vision of flourishing—a vision that overlaps with other women's visions but is not coextensive.²²³ For instance, in South Asia, women who belong to particular ethnic and religious groups and castes express such affiliations as primary, rather than secondary, to gender.²²⁴ For some, a communal affiliation is a matter of safety and protection from majoritarian violence.²²⁵ Moreover, as the Article has argued above, as the focus of population-control policies, poor and minority women have been deprived of their right to bear children freely rather than being deprived of the right to terminate their pregnancies. Similarly, with regard to domestic violence, poor women can face worse immiseration and social ostracism if their husbands, i.e., their primary economic support, are incarcerated. These realities conflict with the dominant reform policies of elite Liberal women and color the priorities and choices that poor and minority women make.

In some cases, the alternative view of womanhood that rural women articulate is deeply unsettling to urban elites. This is

218. See SEN, DEVELOPMENT AS FREEDOM, *supra* note 163, at 115–16.

219. See, e.g., *id.* at 116 (discussing the role of SEWA in changing the normative views of women's extra-domestic work).

220. See, e.g., *id.* at 192–95.

221. See *infra* notes 237–239 and accompanying text.

222. See MERRY, *supra* note 125, at 82.

223. See *infra* notes 245–253 and accompanying text.

224. See Cyra Akila Choudhury, *(Mis)Appropriated Liberty: Identity, Gender Justice, and Muslim Personal Law Reform in India*, 17 COLUM. J. GENDER & L. 45, 77 (2008).

225. *Id.* at 81–82.

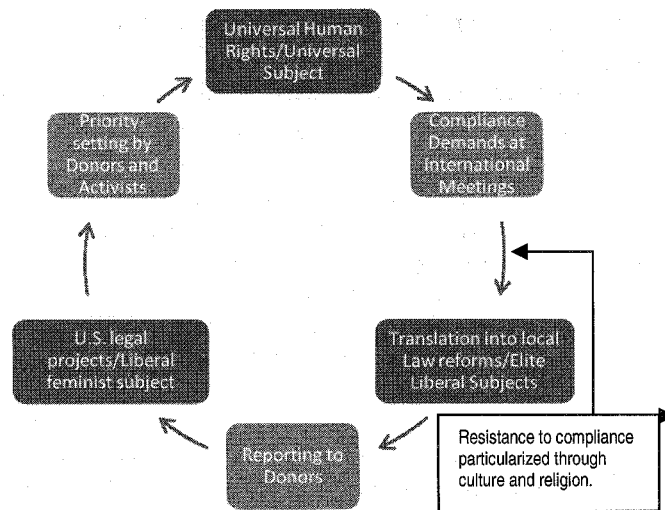
particularly true when those visions reflect “traditional” notions of religion, gender roles, and family.²²⁶ One explanation for elite Liberal women’s reluctance to accept these alternative articulations is the belief that rural women suffer from a false consciousness which elite women—having shed the shackles of tradition, culture and religion—have overcome. The alternative priorities that are put forth, then, can easily be dismissed by the fully conscious, better-educated feminist. In the next Part, I examine some of these priorities.

IV. REORIENTING LIBERAL FEMINIST PRIORITIES: ALTERNATIVE APPROPRIATIONS OF HUMAN RIGHTS

The diagram on the following page represents the direction in which information about women’s rights reform flows. As the Article has argued in Part I, the Western organizations such as the FMF identify particular legal reform projects based on domestic experience and priorities. These are uploaded to the international arena through priorities set by donor agencies and already established human rights norms that reflect Liberal universal values. Signatories to those conventions and recipients of donor money are then required to adopt the reform projects or comply with reform priorities. When the agenda is brought into the local context, NGOs and the state attempt to translate these reforms into local laws.²²⁷

226. See ESTELLE B. FREEDMAN, *NO TURNING BACK: THE HISTORY OF FEMINISM AND THE FUTURE OF WOMEN* 96–98, 115–17 (2002). For instance, Freedman notes that for working class women in the Global South, “economic justice, along with cultural and national sovereignty, must become a priority of feminism.” *Id.* at 115. These priorities, as I argue below, are sometimes in conflict with liberal priorities of individual rights. Moreover, she also recounts the experience of some women whose entry into politics and consciousness of oppression was a result of the oppression of their men. *Id.* at 115–116.

227. See *infra* notes 244–253 and accompanying text.



Legal reform in line with international human rights norms is undoubtedly progress in the struggle to make women's lives better. It is, nevertheless, likely that the women who primarily benefit from such reforms already have a modicum of security in their lives.²²⁸ Indeed, those who are able to take advantage of the law are typically the economically well-off in South Asia.²²⁹ To help the majority of South Asian women, a different set of reforms is required and Liberal feminist priorities need to be reoriented. There are at least three alternative priorities that ought to be considered. First, a human rights reform agenda that does not take the skewed economic distribution that persists in South Asia as a fundamental and interwoven problem cannot be effective in improving the lives of vulnerable women. The precarious position that women are in is made worse by global financial policies that disproportionately impact developing countries.²³⁰ Second, women in the South are adversely impacted by threats to security resulting from the War on Terror and other military or police interventions as well as from the degradation of their

228. See, e.g., Cynthia Stephen, *Feminism and Dalit Women in India: Some Searching Questions*, COUNTERCURRENTS.ORG (Nov. 16, 2009), <http://www.countercurrents.org/stephen161109.htm>. As Stephen explains:

The mainstream Indian women's movement continues to be led by privileged dominant caste, upper-class, urban feminists. The participation of women factory workers, dalit women and urban poor are co-opted to make up the numbers. Overall, it has not been very successful in capturing the imagination of wider society, despite notable success in legal reform for women's rights, the provision of some supportive services and to a certain extent in the media—all areas of concern to the middle classes. *Id.*

229. *Id.*

230. See *infra* notes 244–253 and accompanying text.

environment.²³¹ It is often the state itself that victimizes women and, as such, legal reforms that require harsh enforcement measures to be undertaken by the state may be counterproductive. Third, and finally, women's rights cannot be pitted against "culture" and "tradition" without running the risk of becoming illegitimate in the eyes of the very women they seek to liberate.²³² The judgments of elite women that play into the civilizing discourses of Liberal imperialism silence the voices of poor women when they attempt to speak. As a result, poor women are regarded not as agents in their own right but objects of reform they may not always want.²³³ To be truly effective, Liberal legal feminism must expand its agenda and its definition of human rights to accommodate the priorities of local women.

A. Economic Distribution and Globalization

Women in South Asia suffer from endemic poverty that severely impacts their capabilities and those of their children.²³⁴ The issue of poverty has been on the global agenda for many decades with repeated attempts by the governments to craft programs that will reduce the number of poor.²³⁵ Despite limited progress, local efforts have also had their drawbacks. In Bangladesh, a major effort by NGOs like Grameen Bank and BRAC resulted in innovative approaches like microcredit, cottage industry promotion, and microenterprise.²³⁶ However, over the last thirty years, none of these innovations have achieved the kinds of poverty reduction needed.²³⁷ Women, who have been a major target group for these programs, remain the most economically deprived and vulnerable actors in society.²³⁸ Moreover, liberalization of markets in developing countries has led to the erosion of social policies that were aimed at redistribu-

231. See *infra* notes 271–283 and accompanying text.

232. See *infra* Part IV.C.

233. See Stephen, *supra* note 228; see also Moses Seenarine, Dalit Women: Victims or Beneficiaries of Affirmative Action in India—A Case Study, Presentation at the Southern Asian Institute, Columbia University (Apr. 10, 1996), available at http://www.womenutic.com/00_09_008.htm (positing that affirmative action programs directed at dalits and other disadvantaged groups have not helped dalit women).

234. See SEN, DEVELOPMENT AS FREEDOM, *supra* note 163, at 190–203.

235. See generally *Millennium Development Goals Indicators*, UNITED NATIONS [hereinafter *MDGI*], available at <http://unstats.un.org/unsd/mdg/Default.aspx> (last visited Oct. 25, 2010).

236. See GRAMEEN BANK, <http://www.grameen-info.org/> (last visited Oct. 25, 2010); BRAC, <http://www.brac.net/> (last visited Oct. 25, 2010).

237. In the last fifteen years, the percentage of the total population that has been raised above the poverty line ranges from 11% to -4%. See *MDGI*, *supra* note 235 (choose "Data," then choose "Country Level Data" from the drop down menu, then select "Goal 1," then "Target 1.A," and highlight Bangladesh, Pakistan, and India in the box labeled "Countries"). Note that not all countries have reported for the same time periods.

238. *Id.*; see also ISST, *supra* note 124, at vii–xii.

tion.²³⁹ In the 1980s, India transitioned from an autarkic development model to a liberalized, semi-open market.²⁴⁰ The consequence of this has been rapid development in some sectors and steady wealth accumulation among certain groups in the population.²⁴¹ However, the gap between rich and poor has widened.²⁴² Consequently, the most impoverished women in India are the last to benefit from any growth in the economy.²⁴³

At the Beijing meeting, a recurring issue brought up by women from the Global South was the effect of fiscal policies imposed on poor nations by international financial institutions.²⁴⁴ Specifically, structural adjustment programs were identified as causing women to slide into deeper poverty.²⁴⁵ For women from the North, the most significant issues facing women focused on individual rights and freedoms like reproductive freedom, personal autonomy, and freedom from violence. For instance, Azizah Al-Hibri notes the trend in international meetings where women from the Global North determined the agenda and expected acquiescence by women from the Global South. Starting in 1981, "Third World women were told that their highest priorities related to the veil and clitoridectomy (female genital mutilation). In Cairo, they were told

239. See Smitu Kothari, *Whose Independence?: The Social Impact of Economic Reform in India*, J. INT'L AFF., Summer 1997, at 85, 95–96; see also ANDERS RIEL MÜLLER & RAJ PATEL, SHINING INDIA? ECONOMIC LIBERALIZATION AND RURAL POVERTY IN THE 1990S, POLICY BRIEF No. 10, FOOD FIRST: INSTITUTE FOR FOOD AND DEVELOPMENT POLICY 1–2 (2004).

240. *Id.* at 1.

241. *Id.* at 5–19.

242. See Graham Dwyer, *Facing Asia's New Challenges*, 38 ADB REVIEW, Aug.–Oct. 2006, http://www.adb.org/Documents/Periodicals/ADB_Review/2006/vol38-3/facing-challenges.asp.

243. See John E. Dunlop and Victoria A. Velkoff, *Women and the Economy in India*, U.S. CENSUS BUREAU, INTERNATIONAL PROGRAMS CENTER (Dec. 3, 1998), available at <http://www.census.gov/ipc/prod/wid-9802.pdf>.

244. As Corpuz states:

One of the strengths of the women's movements, especially those in the Third World, lies in its ability to demonstrate the link between economic structures and policies and the appalling poverty of women. Extensive research has been done by women's organisations in Asia, Africa and Latin America on how external debt and structural adjustment policies have intensified women's poverty. During the NGO Forum on Huairou and in the official conference, many meetings were held on these very issues. UNIFEM was one of the few UN agencies that organised roundtable discussions on the effects of economic restructuring on women. But Northern governments did not pay much attention. The World Bank on its part aggressively tried to counter such positions through its own workshops and spokespersons.

Victoria Tauli Corpuz, *Depoliticising Gender in Beijing*, THIRD WORLD NETWORK, <http://www.twinside.org.sg/title/gen-ch.htm> (last visited Oct. 25, 2010)

245. Michel Chossudovsky, *The World Bank Derogates Women's Rights: Outcomes from Beijing*, 6 DEV. IN PRAC. 65, 66 (1996).

that their highest priorities related to contraception and abortion."²⁴⁶ The 1993 World Conference on Human Rights in Vienna was no different and equally disappointing. Indeed, at the concurrent NGO Forum, the "gulf became so wide that a series of Third World women's meetings were held impromptu on site."²⁴⁷ Clearly, these meetings did not give voice to the local woman or her alternative view of the feminist subject.

The Beijing Conference would have presented another opportunity for women human rights advocates and activists to bridge the seeming gulf between the Global North and South. However, according to Vandana Shiva, this opportunity was missed.²⁴⁸ Similar to prior conferences, the NGO conference at the meeting focused on a limited set of human rights. Shiva, who is a well-known environmental activist, is scathing in her criticism:

Human rights emerged as a major theme at the Women's Conference, with speaker after speaker insisting that women's rights are inseparable from human rights. . . .

The right to meet basic needs does not figure in the US discourse on human rights even though in the Third World, the denial of basic needs is the real issue of violation of human rights. This will also increasingly become the central human right that will be violated in the North as globalisation leaves larger numbers unemployed, homeless and without economic security.

The Beijing conference provided an opportunity to widen our thinking about human rights to include issues of economic justice. . . .

The narrow notion of human rights that distorted the Beijing agenda was also exemplified in the manner in which women's health rights have been reduced to reproductive rights, and reproductive rights have then been distorted to imply population control.²⁴⁹

The NGO statements from Third World organizations include issues of women's reproductive rights and violence.²⁵⁰ Yet, these are not the

246. al-Hibri, *supra* note 180.

247. *Id.*

248. Vandana Shiva, *Beijing Conference: Gender Justice and Global Apartheid*, THIRD WORLD NETWORK (Sept.–Oct. 1995), <http://www.twinside.org.sg/title/just-cn.htm>.

249. *Id.*

250. *See generally* Statements by NGOs, *Fourth World Conference on Women*, DIV. FOR THE ADVANCEMENT OF WOMEN (Sept. 4–15, 1995), <http://www.un.org/womenwatch/daw/>

central concerns expressed. Instead, economic issues affecting women as workers, labor rights, international financial policies such as structural adjustment, and corporate exploitation are repeatedly brought to focus as they all impact women disparately.²⁵¹

Liberal legal feminism, because of its close kinship with Liberal thought in general, is less troubled by the neoliberal economic policies promoted in the Global South.²⁵² One of the keystones of neoliberal thought is the protection of private property.²⁵³ Perhaps because of this and because of the vestigial feudalism of South Asia, one of the main programs that India embarked upon after independence—land reform—was never carried through to any great effect.²⁵⁴ The poor remain largely landless.²⁵⁵ Studies show that women who own property are less vulnerable to domestic violence.²⁵⁶ Yet, feminist legal activism to secure more property for women has been mostly restricted to microenterprise, ensuring that women either receive their marital property such as jewelry, money or other moveable goods, or to changes in inheritance laws that limit the amount a woman can inherit from her father or her spouse.²⁵⁷ NGOs working with microcredit and microenterprise have helped to alleviate some of the worst effects of poverty for some women. However, there have been some criticisms of this approach, in particular, the economic victimization by men of poor women who can more easily receive microloans.²⁵⁸ Moreover, without property, such enterprise is

beijing/ngostatements.html (focusing on statements made by Ms. Shum Yun Shan, Ms. Supatra Masdit, Dr. A. Sabah, Mrs. Shobhana Ranada, & Dr. Margaret Ogola).

251. *Id.*

252. See Vasuki Nesiiah, *Toward a Feminist Internationality: A Critique of U.S. Feminist Legal Scholarship*, in GLOBAL CRITICAL RACE FEMINISM: AN INTERNATIONAL READER 42, 42–43, 49–50 (Adrien Katherine Wing ed., 2000) (problematizing the lack of critique of global economic forces that act upon Third World women).

253. *Id.*; see also PROPERTY RIGHTS AND NEOLIBERALISM: CULTURAL DEMANDS AND LEGAL ACTIONS (Wayne V. McIntosh & Laura J. Hatcher eds., 2010). For an interesting discussion of liberal theory's shortcomings as a means of redressing social inequality, see Maria Grahn-Farley, *Race and Class: More than a Liberal Paradox*, 56 BUFF. L. REV. 935, 936–38 (2008). Although I am not convinced that the welfare framework that is presented as a way to escape liberalism's tendency to fall into dichotomies markedly differs from Liberal notions of equality, Grahn-Farley does diagnose Liberalism's incapacity to account for permanent inequality.

254. See Prem Chowdhry, *Introduction: Understanding Land Rights of Women*, in GENDER DISCRIMINATION IN LAND OWNERSHIP, xvii–xviii (Prem Chowdhry ed., 2009); see also A. BALAKRISHNAN, RURAL LANDLESS WOMEN LABOURERS: PROBLEMS AND PROSPECTS (2005).

255. See BALAKRISHNAN, *supra* note 254.

256. See ISST, *supra* note 124, at 33 (discussing land ownership as being protective against domestic violence towards women).

257. ERIN P. MOORE, GENDER, LAW, AND RESISTANCE IN INDIA 41 (1998) (finding that upper-class women were more able to control some of their wealth).

258. Anne Marie Goetz & Rina Sen Gupta, *Who Takes the Credit?: Gender, Power, and Control Over Loan Use in Rural Credit Programs in Bangladesh*, 24 WORLD DEV. 45, 45, 49

still vulnerable to economic shifts that can dry up consumer demand.²⁵⁹ Little has been done to hold the state accountable for the redistribution of land to women, and without active intervention from the state, it is unlikely that women who are landless will ever be able to own such property.²⁶⁰ For transnational activists and feminist legal scholars, the challenge is to incorporate economic redistribution—including land reform that cuts against liberal property rights—in the reform agenda. Moreover, it is critical that the global economic power structure that perpetuates Third World indebtedness be included in reform agendas.

Further, an ancillary but increasingly important concern is the proposition that it is necessary to have a shift in feminist thinking about women as economic actors. In the South Asian contexts, women have been a focus of development because it is recognized that helping women helps families and dependent children.²⁶¹ What would a shift away from such a communal framework do economically? Liberalism tends to elevate the individual as the economic actor and unit of analysis above communal actors—with the exception of the “state.”²⁶² One possible result of seeing women as autonomous actors is that they also become better consumers for goods that may not otherwise appeal to them or seem like a priority. Both men and women who are primarily responsible for families and supporting the elderly in the absence of any social security are less likely to become the consumer who purchases luxury goods.²⁶³ Indeed, for them, the very category of luxury goods likely includes many items Western consumers consider necessities. Liberal

(1996); see John de Wit, *Targeting the Poorest and Covering Costs*, NEWSL. OF THE MICRO-CREDIT SUMMIT CAMPAIGN, Feb.–Mar. 1998, <http://www.microcreditsummit.org/newsletter/best3.htm>; Celia R. Taylor, *Microcredit as Model: A Critique of State/NGO Relations*, 29 SYRACUSE J. INT’L L. & COM. 303, 327 (2002).

259. See RENANA JHABVALA & SHALINI SINHA, SELF EMPLOYED WOMEN’S ASSOCIATION, LIBERALIZATION AND THE WOMAN WORKER 2–3 (2002) (discussing loss of employment due to globalization without any efforts to retrain women in the informal economy).

260. See EKTA PARISHAD & PRAXIS—INSTITUTE FOR PARTICIPATORY PRACTICES, LANDLESSNESS AND SOCIAL JUSTICE: AN ASSESSMENT OF DISPARITIES IN LAND DISTRIBUTION AND PROSPECTS OF LAND REFORMS 31 (2009), <http://www.angoc.org/portal/publications/EP%20Praxis%20-%20Landless%20and%20Social%20Justice.pdf>; see also BALAKRISHNAN, *supra* note 254.

261. See MOORE, *supra* note 257, at 157.

262. See SEN, DEVELOPMENT AS FREEDOM, *supra* note 163, at 74.

If the object is to concentrate on the individual’s real opportunity to pursue her objectives . . . , then account would have to be taken not only of the primary goods the persons respectively hold, but also of the relevant personal characteristics that govern the *conversion* of primary goods into the person’s ability to promote her ends.

263. See CHRISTA WICHTERICH, THE GLOBALIZED WOMAN: REPORTS FROM A FUTURE OF INEQUALITY 130 (2000); SASKIA SASSEN, GLOBALIZATION AND ITS DISCONTENTS: ESSAYS ON THE NEW MOBILITY OF PEOPLE AND MONEY 79–80 (1999).

feminist legal theory should reconsider the ways in which legal reform, in effect, delinks women from their group identities and affiliations and works to produce not only the autonomous, free person but also individual consumers who then comprise a new and important economic market.

B. Security: War and Environment

Feminists who have raised the seeming “irony” of humanitarian intervention on behalf of ethnic populations while failing to provide such intervention on behalf of women assume that women are a distinct group on whose behalf such intervention would work.²⁶⁴ But this position exhibits a sort of deep racism about non-Liberal cultures that is integral to much of Liberalism. As Gayatri Spivak noted in her seminal work, this racism reflects the desire to save brown women from brown men and their oppressive cultures and religions.²⁶⁵ These stereotypes allow the justification of violence against “brown men.” Further they permit Liberal feminists to ignore the victimization of those same “brown men” in “traditional” societies, constructing them only as perpetrators of oppression against women.²⁶⁶ For example, in India, the “plight” of Muslim women has often been used to chastise Muslim males and to denigrate Islam as a sexist religion.²⁶⁷ Muslim women have been caught between the desire to improve their situation in society and loyalty to their own communities. Indeed, it is difficult, if not impossible, for many Muslim women to side with “outsiders” who pass judgment on an important part of their identity and who might also call for the persecution of Muslim men. Unfortunately, the reaction to such pressure from the outside can be a closer hewing to rigid, conservative, and formalistic interpretations of religion and culture.²⁶⁸

In the United States, critiques of the harmful effects of domestic violence law reform have begun to emerge.²⁶⁹ Yet many Liberal feminists who pushed for these reforms have largely ignored the relevance of this critique in the global arena or in local contexts in the South. If impoverished

264. See CATHERINE A. MACKINNON, ARE WOMEN HUMAN?: AND OTHER INTERNATIONAL DIALOGUES 192–195, 276 (2006) (discussing ways in which humanitarian laws could account for violence done to women).

265. Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, in MARXISM AND THE INTERPRETATION OF CULTURE 296 (Carly Nelson & Lawrence Grossberg eds., 1988); see also 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 241 (2009).

266. See Spivak, *supra* note 265, at 296.

267. *Id.*; see generally RAZACK, *supra* note 169.

268. See Chowdhry, *supra* note 224, at 98 (discussing Muslim women's activism in India).

269. See *supra* notes 39–61 and accompanying text.

women in an industrialized nation like the United States are driven into greater poverty through the criminal prosecution of their partners, is that not likely to be even more of a concern in a country with inadequate social safety programs? In India, women's rights activists' unalloyed faith in state intervention and legal reform as the means to improving women's lives is questionable given that the state itself has been the perpetrator of forced sterilization programs and other coercive regulatory policies against women.²⁷⁰

In addition to the domestic sphere, the issue of international conflict and the insecurity it causes has increasingly impacted women. Feminist human rights proponents have not given adequate attention to the effects of military intervention on women in the Global South. While there have been protests against the oppression of women by men in the Global South, the insecurity created by Western interventions has received less criticism. For instance, the region has already suffered large internal displacements in the War on Terror. In India, terror attacks from neighbors increase the regulation and insecurity of Indian Muslim women. In Pakistan, drone attacks consistently kill large numbers of civilians and have displaced millions.²⁷¹ Yet these tactics that are a part of a U.S.-led War on Terror have received less criticism for causing women's poverty and vulnerability than have the actions of groups like the Taliban or other Islamic extremists.²⁷²

The gendered effects of the war are still being examined by both Liberal feminists and other groups of feminists. For some Liberal feminists, support for the War on Terror seems to pose little conflict with their support for women's rights. This is because the men that are purportedly being captured in the War on Terror are "dangerous" and oppressive toward women.²⁷³ However, this convenient fiction that only the guilty are being captured is becoming harder to maintain as the United States fails to bring charges against many captives and with the

270. See MOORE, *supra* note 257, at 60–62.

271. Peter Bergen & Katherine Tiedemann, *Pakistan Drone War Takes a Toll on Militants—and Civilians*, CNN (Oct. 29, 2009), <http://edition.cnn.com/2009/OPINION/10/29/bergen.drone.war/> (claiming one in four people killed in a drone attack is a civilian); see also INTERNALLY DISPLACED PERSONS IN PAKISTAN AND AFGHANISTAN: A REPORT FROM THE FIELD, THE BROOKINGS Institution (2010), available at http://www.brookings.edu/events/2010/0505_idps.aspx (noting that in a two-week period two million Pakistanis were displaced and 1.4 million remain displaced as of May 2010).

272. See *Work Towards Freedom and Equality: For the Women of Afghanistan*, WOMEN FOR WOMEN INTERNATIONAL, <http://www.womenforwomen.org/global-initiatives-helping-women/help-women-afghanistan.php> (last visited Oct. 25, 2010); WOMEN FOR AFGHAN WOMEN, http://www.womenforafghanwomen.org/advocacy.php?ID=/advocacy/oct_2009.html (last updated Oct. 2009); FEMINIST MAJORITY FOUNDATION, http://feminist.org/afghan/taliban_women.asp (last visited Oct. 25, 2010).

273. See Choudhury, *supra* note 265, at 4.

revelation of stories like that of Maher Arar and other innocent men captured in the sweeps.²⁷⁴ Women are made less secure when the men in their society are subject to scrutiny and pursuit as terrorist suspects based only on their identity rather than their actions. In places like Afghanistan, the loss of male family members can result in severe hardship for women who have no recourse to state security.²⁷⁵ Several questions arise. First, to what extent are feminism's aims compatible with governmental police and military power? Second, how can a genuine liberation theory like feminism support efforts against terrorism without buying into the stereotypes of the "bad" brown man and the helpless brown woman?

The value of feminist criticism is that it highlights the many ways in which dominant power structures and distributions disadvantage women.²⁷⁶ But when such criticism comes from the North and colludes with global power-holders, like the U.S. government, it loses some of its legitimacy.²⁷⁷ While the particular partnership of Liberal legal feminism and state power on behalf of women might seem innocuous, it is important to remember that after September 11, the issue of women's oppression was employed as a rallying cry by the administration in its effort to justify military intervention in Afghanistan.²⁷⁸ Sadly, the cooptation of women's rights found little resistance among Liberal feminists.²⁷⁹

Finally, in order to make feminist legal activism and theory truly valuable for women in the Global South, the idea of "human rights" envisioned narrowly as a number of individual rights ought to be reconsidered. The orthodox categories of human rights as those limited to the Liberal political and legal articulations can obscure the denial of other human requirements. One of these requirements is environmental security. Women in the Global South have long understood the interdependent nature of their society and the environment.²⁸⁰ The material

274. See Cyra Akila Choudhury, *Terrorists & Muslims: The Construction, Performance, and Regulation of Muslim Identities in the Post 9/11 United States*, 7 *RUTGERS J.L. & RELIGION* 8, 40 (2006).

275. See *Afghan Widows in the Fetters of the Fundamentalism*, REVOLUTIONARY ASSOCIATION OF THE WOMEN OF AFGHANISTAN (RAWA) (Dec. 13, 1996), <http://www.rawa.org/widows.html>.

276. See Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory* 7 *SIGNS: J. OF WOMEN IN CULTURE & SOC'Y* 515, 516 (1982).

277. See generally Choudhury, *supra* note 82.

278. Vasuki Nesiiah, *From Berlin to Bonn to Baghdad: A Space for Infinite Justice*, 17 *HARV. HUM. RTS. J.* 75, 90–91 (2004).

279. *Id.* at 157.

280. For example, South Asian women were involved in environmental activism as early as the 1970s. See *CHIPKO MOVEMENT, INDIA*, <http://www.iisd.org/50comm/commdb/desc/d07.htm> (last visited Oct. 25, 2010) (describing the movement that began when village women worked to save trees from illegal logging in North India); NARMADA BACHAO

consumption of resources by the North has a direct effect on people in the South. The North, which produces most of the greenhouse gases responsible for climate change suffers fewer of its impacts.²⁸¹ Rather it is mostly the poverty-stricken people of the Global South and occasionally the poor in the North who consume far fewer resources and who struggle against environmental degradation such as floods, droughts, and food and shelter insecurity while clinging to the bare threads of life.²⁸² Liberal notions of human rights fail to take these military and environmental factors into consideration, thereby absolving Liberal feminists of their complicity in the global distribution and consumption of resources as well as the distribution of consequences.²⁸³ Without accountability for such complicity, the orotund pieties mouthed about “women’s rights” being “human rights” ring hollow.

C. Culture and Religion: Provincializing Liberal Legal Feminism

The final reorientation that would make Liberal legal feminism an equal partner in reform is a change in the relationship between feminist theory and what it externalizes as culture or religion. During the colonial era, culture and tradition were considered the leg-irons that held the sub-continent back.²⁸⁴ Progress demanded that the regressive elements of Indian culture be reformed to comport with the Liberal notions of a just

ANDOLAN, <http://www.ecoindia.com/education/narmada-bachao-andolan.html> (last visited Sept. 20, 2010) (describing the efforts of Indian woman working to prevent the damming of the Narmada river).

281. See *Global Inequities*, WORLDWATCH INSTITUTE, <http://www.worldwatch.org/node/810#3> (last visited Oct. 25, 2010) (“While the consumer class thrives, great disparities remain. The 12 percent of the world’s population that lives in North America and Western Europe accounts for 60 percent of private consumption spending, while the one-third living in South Asia and sub-Saharan Africa accounts for only 3.2 percent.”); see also JEREMY I. LEVITT & MATTHEW C. WHITTAKER, HURRICANE KATRINA: AMERICA’S UNNATURAL DISASTER (2009) (examining the impact of Hurricane Katrina on poor populations in New Orleans, arguably, the worst natural disaster to strike the U.S.); *Katrina and Global Warming*, PEW CENTER ON CLIMATE CHANGE, <http://www.pewclimate.org/specialreports/katrina.cfm> (last visited Oct. 25, 2010) (while it is uncertain that Katrina was caused by global warming, there is some support for this theory); Deborah Zabarenko, *U.S. Blacks Face Harsher Climate Change Impact*, REUTERS, Jul. 29, 2008, available at <http://www.reuters.com/article/idUSN2933881420080729?feedType=RSS&feedName=environmentNews> (discussing the effects of climate change on poor blacks).

282. See U.N. High Comm’r for Human Rts., *The Relationship Between Climate Change and Human Rights*, ¶ 10, U.N. Doc. A/HRC/10/61 (Jan. 15, 2009); See also *Women, Gender Equality and Climate Change*, U.N. WOMEN WATCH, http://www.un.org/womenwatch/feature/climate_change/#threat (last visited Oct. 25, 2010).

283. See Chandra Talpade Mohanty, *US Empire and the Project of Women’s Studies: Stories of Citizenship, Complicity and Dissent*, 13 GENDER, PLACE & CULTURE: J. FEMINIST GEOGRAPHY 7, 15–18 (2006).

284. See MEHTA, *supra* note 7 and accompanying text.

and good society.²⁸⁵ Liberal legal feminism retains this dynamic in its relationship with culture and tradition which have become its “other.” That is to say, Liberal legal feminism imagines itself as an equal opportunity critic of culture wherever that culture subordinates women.²⁸⁶ However, this position hides the cultural valence of Liberal legal feminism itself, making it the norm against which all other cultures must inevitably fail. Some women in South Asia resist the idea that culture and religion are primarily to blame for their subordination.²⁸⁷ Muslim women, for instance, are reluctant to read Islam as irredeemably unjust toward women.²⁸⁸ They hold out hope that there can be changes within the religion while also maintaining that adherence to Islam is integral to notions of good society and the good life. Liberal critiques that recall the colonial paternalism toward subject populations cannot be liberating if those who it seeks to free are belittled by it.

This sort of denigrating Liberal feminist thought is evident in the late Susan Moller Okin’s work. In her contribution to the anthology, *Decentering the Center: Philosophy for a Multicultural, Postcolonial World*, Okin decidedly stakes herself at the center of a Liberal worldview that is in opposition to the marginal positions that the book purports to theorize.²⁸⁹ In the litany of abuses against women, her gaze is unidirectionally aimed at the concerns of the Global South. From Pakistan to Mali and from arranged marriages to female genital “mutilation,” her subjects are rarely women in the center.²⁹⁰

The normative claims that Okin makes, cloaked in objectivity, are that these women are so abjectly oppressed that the international women’s rights movement must be more responsive and answer their cries.²⁹¹ She supports her position by relying on the narratives of women in the third world who have documented these abuses for themselves. These narratives can, therefore, be cited by Western, elite feminists as evidence of oppression without the necessary contextualization. Indeed the contextualization, if and when offered by Third World women, is often (mis)characterized as apology and dismissed.²⁹²

Dismissing the contexts and glossing over the anxiety that Third World women face when they report subordination allows dominant

285. *Id.*

286. See Choudhury, *supra* note 82, at 156–59.

287. *Id.*

288. *Id.* at 160.

289. See generally 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).

290. *Id.* at 28–32.

291. *Id.* at 42.

292. See *id.* at 37 (detailing Okin’s discussion of Mohanty).

Western feminists of all backgrounds to call for simple solutions like the “universal” application of “human rights.”²⁹³ It prevents them from having to grapple with prior histories and experiences of colonization and domination and to come to terms with their own power that is often exerted over other women.²⁹⁴ In short, it makes facile claims to sisterhood while rendering that possibility rather more difficult for Third World women.

One result of this resistance to contextualize different women’s experiences is that Liberal judgments labeling certain cultures as “oppressive” can be rendered without explaining or justifying the authority of the judge to make such pronouncements in the first instance.²⁹⁵ Again, Okin provides an example of precisely this kind of ahistorically decontextualized judgment:

This situation of private rights violations is exacerbated by the fact that “respecting cultural differences” has increasingly become a euphemism for restricting or denying women’s human rights. . . . In India, for example, partly because of the history of violent religious intolerance, this distinction is built into the formal framework of the state; the different religious communities enforce their own “personal laws,” and there is no uniform civil code of family law. This can have grave consequences for women, who are differently (albeit usually unfairly) treated in divorce, and in custody and inheritance issues, depending on which religious group they belong to.²⁹⁶

Reading this paragraph, one gets the notion that Indian lawmakers chose to enshrine religious differences and inequalities into the constitution without regard to the impact on women. Yet, nowhere is it made evident that it was the British imperial establishment, seeking to administer a colony with greater efficiency, that codified the various religious

293. Cf. Azizah Y. al-Hibri, *Is Western Patriarchal Feminism Good for Third World/Minority Women?*, in SUSAN MOLLER OKIN, *IS MULTICULTURALISM BAD FOR WOMEN?* 41 (Joshua Cohen et al. eds., 1999) (critiquing Okin’s use of a dominant Western perspective of cultural universality); Lama Abu-Odeh, *Post-Colonial Feminism and the Veil: Considering the Differences* 26 *NEW ENG. L. REV.* 1527 (1992) (arguing that the veil can be empowering for Arab women).

294. Janet Halley makes this argument about feminism’s own will to power. See JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* 20–22 (2006) (discussing Governance feminism and its desire to govern, to “rule”).

295. See Okin, *supra* note 289, at 36–37, for a discussion of the anti-essentialist critique that, in her judgment, was taken to an extreme: “After reading or experiencing these critiques, many feminists (whether First or Third World, but especially the former) might have felt more than somewhat inhibited about writing anything, especially about Third World women, that was not *entirely contextualized and localized* in its focus.” *Id.* (emphasis added).

296. *Id.* at 30–31.

laws governing people's lives, thereby fixing them in the firmament of Indian law.²⁹⁷ I make this point not to absolve Indian lawmakers of their duty to resolve the tension between equal rights for women enshrined in the Indian Constitution and the continuation of religious law in the family law arena, but to point out how Okin's account can obscure the role of British imperialism in modern Indian law.²⁹⁸

Chandra Talpade Mohanty's critique of such decontextualization and the overly simplistic idea of "global sisterhood"²⁹⁹ are rejected. Instead, Okin brushes it off and vigorously defends the right of "white Western, middle-class, feminists" to offer up their judgments based on simply the observation that "we recognize each other."³⁰⁰ Indeed, given the colonial history of much of the world, it is ironic that at any hint of deconstruction, such misrecognition and the right to judgment are defended with alacrity:

It seems that some of the best feminist social critics are "inside-outside critics"; that is, persons from within a culture who at some point in life have experiences outside of that culture that makes them critical of some of its practices. . . . But though these women are all undoubtedly, *in a sense*, particularly informed and effective as "inside-outside critics" being a critic so located is surely neither necessary nor sufficient for being an informed and effective feminist critic.³⁰¹

Okin is correct to point out that personal experience of a culture alone, without a feminist theory, is insufficient to make a good "feminist critic," yet, complete inexperience of a people's history and only a Liberal feminist theory rooted in the values and judgments of "Western" epistemological cultures ought not to be "sufficient" qualifications

297. See Choudhury, *supra* note 224, at 52–59.

298. It is also important to interrogate more closely whether advancing a universal, uniform civil code would indeed alleviate the oppression of women at the hands of unequal (and, and therefore, unfair) religious law. Here Okin makes a simplistic judgment that such a code is "better" based her own values that may not easily translate to a heterogenous and conflict-ridden society like India. See Okin, *supra* note 289, at 31. I have argued that the Uniform Civil Code, in the hands of a Hindu fundamentalist political party, driven by a fundamentalist ideology, is an instrument of assimilation and punishment of minority communities. It is, in a word, Hindu fundamentalist men saving Muslim, Christian, Parsi, and Jewish women from their men. See Choudhury, *supra* note 224, at 78–79. Yet, Okin, who is content to skim the surface in her desire to cover the far geographies of women's oppression, does not even offer a citation to clarify this point.

299. Chandra Talpade Mohanty, *Feminist Encounters: Locating the Politics of Experience*, in *DESTABILIZING THEORY: CONTEMPORARY FEMINIST DEBATES 77–79* (Michele Barrett & Anne Phillips eds., 1992).

300. See Okin, *supra* note 289, at 37.

301. *Id.* at 40.

either.³⁰² Progress is not an explicit element of Okin's critique of "culture," but it is clear that cultural practices that do not measure up to her ideal of "equality," that do not guarantee women's human rights, and that continue to countenance if not promote inequality are "backward."³⁰³ One certainly gets the idea that we are moving away from culture and toward civilization, or ought to be.

Like Okin, Catherine MacKinnon has expressed skepticism about the anti-essentialism critique that is aimed at making "sisterhood" more problematic.³⁰⁴ Until recently, MacKinnon had confined her work to North America; however, her recent book, *Are Women Human and Other International Dialogues*, seeks to extend her work further afield.³⁰⁵ MacKinnon does not take up the cultural critique but rather simply considers all women as equally placed when it comes to violence and subordination at the hands of men.³⁰⁶ While she acknowledges that there are men who are also subordinated, her lack of attention to the difference between men and women in some countries or societies compared to their counterparts of different ethnicities, religions, or races renders obscure the roles that these latter play in subordination in general.³⁰⁷ MacKinnon disaggregates gendered violence from all other kinds of violence in a way that makes it hard to see how other violence can exacerbate gender violence. Moreover, it hides some women's support of violence. For instance, Hindu fundamentalist women have been shown to encourage their male counterparts to commit violence against Muslim men and women in India.³⁰⁸ Many women in the United States have been supporters of the wars on Terror and in Iraq, which have visited devastating violence on Iraqi women, insofar as they were willing to support the pro-war political Bush establishment by returning it to power in 2004.³⁰⁹ Historically, middle-class white women have supported slavery, colonialism, and other forms of violence that have subordinated both women and

302. *Id.*

303. *Id.* at 35.

304. See MACKINNON, *supra* note 264, at 50–52.

305. See *id.* at ix–xvii.

306. *Id.* at 53–54, 130.

307. For instance, she discusses the rapes of women in Bosnia in great detail but does not tie them sufficiently to the ethnic cleansing of their men. While the rape of Bosnian women was a grotesque campaign, surely the death of their men was as horrific if not worse. See, e.g., MACKINNON, *supra* note 264, at 141–233.

308. See Choudhury, *supra* note 224, at 84.

309. See News Release, Institute for Women's Policy Research, Smaller Gender Gap in Crucial States May Have Cost Kerry the Election (Nov. 11, 2004), available at <http://www.iwpr.org/pdf/IWPR-Release-11-11-04.pdf> (while women voted in larger numbers for John Kerry overall, the small increase in support for Bush among women may have been enough to return him to power); see generally *supra* notes 83–92 and accompanying text (discussing the Feminist Majority Foundation). Cf. Choudhury, *supra* note 82.

men of color.³¹⁰ Women in Arab countries have countenanced the abuse of domestic servants from South Asia who are mostly women.³¹¹ While MacKinnon's work is of great value in highlighting the gendered violence that takes place in all societies, the recognition that for some women, gendered, class-based, and racial violence intersect and can be perpetrated by women as well as men. Like Okin, MacKinnon enables herself to speak about all women's experience as though there were a seamless experience accessible to all who share a biological trait. Interestingly, MacKinnon disavows this characterization of her theory and of feminist theory as well. She contends that feminism as theorized by the Second Wave is a theory born of the particularities of women's lives and is ground-up theory. That is, feminist theory is based on women's experience; it is not a metanarrative or a totalizing theory that seeks to explain all of women's experiences through the monocausal use of gender.³¹² Yet, it is far from clear that MacKinnon's theory accounts for differences at the intersection of a number of oppressions, including those visited upon some women by other women. Certainly, in her recent essays *Are Women Human*, the general is more obvious than the particular.

In this work, MacKinnon has urged us to rethink women's relationship to international law.³¹³ In particular, she underscores the irony of leaving unexamined the daily, "ordinary" violence that is committed by men on women in every culture and country during peacetime while scrutinizing the acute moments of violence that are experienced during war. Moreover, she emphasizes the fact that international law is patriarchal and male dominated.³¹⁴ The states on which it relies are equally so and the concept of sovereignty shields states and the men in them from the gaze of international law when it comes to women's rights violations. The result is that women have not been able to fully vindicate their rights as humans under international legal norms and instruments.³¹⁵

To progress toward greater women's rights, in MacKinnon's view, the legal doctrine of state sovereignty that shields violators from being

310. See, e.g., BELL HOOKS, *AIN'T I A WOMAN?: BLACK WOMEN AND FEMINISM* (1999) (critiquing the subordination of black women at the hands of black men and white women).

311. See INT'L LABOR ORG., *GENDER & MIGRATION IN ARAB STATES: THE CASE OF DOMESTIC WORKERS* (Simel Esim & Monica Smith eds., 2004), available at <http://www.gender.gcim.org/attachements/Book%20in%20ArabStates.pdf>; *Trapped in the Home: Global Trafficking and Exploitation of Migrant Domestic Workers*, AMERICAN CIVIL LIBERTIES UNION, <http://www.aclu.org/womens-rights/trapped-home-global-trafficking-and-exploitation-migrant-domestic-workers> (last visited Oct. 25, 2010).

312. See MACKINNON, *supra* note 264, at 45–50.

313. *Id.* at 259–78.

314. *Id.* at 277.

315. *Id.* at 266–67.

held accountable by the international community ought to be curtailed or abandoned altogether.³¹⁶ Further, strengthening international legal norms that protect women would also give women the means to vindicate their rights. While MacKinnon argues on one hand that feminists were among the first to give the lie of the “universality” of norms that were patriarchal in origin and effect, this critique collapses or is ignored when it comes to cultural or political universalism.³¹⁷ International law’s universalism is left untouched and is, indeed, promoted as a means by which women’s rights can be better protected. I am not arguing here about whether this is a *true* claim, but rather that she is willing to argue for particularity when it comes to women’s experiences but not when it comes to cultural-societal experiences. Instead, we are left with a sense that there is a utopia where all women are treated equally with men and that equality and the contents of the society in which they live will be determined by the norms of international law—a Western, Liberal arrangement by description.³¹⁸

To restate many other theorists, Okin and MacKinnon may have been concerned with women as a group, but the rights in international law which they rightly argue are due women are individual rights. They accrue to a woman as a singular political individual and must be exercised as such. Moreover, in their view, such rights ought not to be subordinated to other categories of rights or obligations—particularly those that might stem from their cultural or religious identities.³¹⁹ Why is

316. *Id.* at 190–91.

317. *Id.* at 53–54.

318. This is not to say that international law can only be a Western, Liberal arrangement. It merely notes that the current dominant strains of international law are clearly of this Western, Liberal persuasion. Moreover, a number of critiques have been made with regard to the way in which the dominant receives the subordinate in International law and how this interaction shapes and changes international legal norms. *See, e.g.,* David Kennedy, *When Renewal Repeats: Thinking Against the Box*, 32 N.Y.U. J. INT’L. L. & POL. 335 (2000) (discussing new approaches to international law and the emergence of critical strains of thought in international legal theory).

319. Let me take this opportunity to make a distinction between my argument for culture and “identitarian” arguments for culture. My argument for culture rests not on any desire to protect or enshrine one particular reading of culture or religion in the world in a fixed, essentialist way. I am not privileging my understanding, or a “traditional” understanding of Islam, or South Asian cultures, which are at once intertwined yet distinct. Rather, I argue that alternative cultures in all their multiplicity are threatened by the Liberal notion of progress in so far as that progress is tied to a particular view of rights and relationships whose content is determined by historically and geographically contingent norms. I argue that such cultures, along with the religions that they may contain, have value despite the Liberal judgment that they are “regressive,” a judgment that is often based on narrow understandings and experiences of “others” and a set of veiled preferences about social ordering. Furthermore, I imagine different cultures to hold out the possibilities of different visions of human flourishing including different forms of practicing a religion. As such, I value the pluralism that it may offer even while understanding that “choice” in connection to culture may be illusory at best. As a comparatist,

this so? It is because those identities are also the source of subordination and have shielded the unequal ways in which women have been treated.³²⁰ It is here that the Liberal judgments about alien cultures and the teleology of progress toward a Liberal state, culture, political, and legal arrangement become apparent.³²¹ Whereas, imperial Liberals desired such an end in order to arrive at a stage in history where the colonies would be fully able to govern themselves, Liberal feminists wished for this progress in order for women to be fully individualized agency-wielding “humans.”³²²

The critique of “Imperial” Liberal legal feminism does not deny that culture constrains and some cultural practices subordinate.³²³ The question is to what extent should feminists call for the reform of those practices as part of a human rights agenda? If women’s rights advocates in the Global North continue to locate oppression in cultural and religious practices, they will continue to alienate many women in the Global South.

CONCLUSION: JUSTICE AND PROGRESS FOR WOMEN

In an era of increasing globalization, borders have become porous, lives interconnected and now more than ever the local is global. Theorizing these connections has been a challenge for feminist theorists seeking to improve the lives of women. This Article has attempted to draw some linkages in this effort. The first linkage is between U.S. domestic discourses and advocacy for women’s rights and its constitutive effect on international and transnational theory and activism. Focusing on the legal battles for abortion and domestic violence, it has tried to show how these local U.S. concerns are elevated as universal concerns for all women and thus overshadow the priorities of poor women in the South. Part of the export of these ideas is the export of the feminist subject that is constructed in the elite “women’s rights are human rights” discourse. Also, linking the Liberal feminist subject to the transnational feminist subject underscores the continuity between these two constructs. Indeed, this continuity is hardly surprising given that the elites engaged in human rights activism at this level share theoretical roots in Liberal ideas of progress.

constrained by my own hybrid culture, I, nevertheless, look to other cultures for such alternative realities to an increasingly enveloping Liberal, secular universal reality.

320. See MACKINNON, *supra* note 264, at 53–54.

321. See OKIN, *supra* note 289.

322. See MEHTA, *supra* note 7.

323. See Janet Halley, *Culture Constrains*, in SUSAN MOLLER OKIN, IS MULTICULTURALISM BAD FOR WOMEN? 100, 100–04 (Joshua Cohen et al. eds., 1999).

The second linkage that the Article attempts to highlight is the role of transnational Liberal legal feminism and reform agendas in the local South Asian context. The argument here is that transnational elites bring home understandings of women's rights that are heavily influenced by Liberal feminist thought. As such, their reforms reflect these understandings of women's autonomy and liberation. However, the transnational-liberal feminist subject is challenged by the reality of the local woman who remains embedded in society and family living, a far more communal existence than Liberalism acknowledges. Consequently, the representatives of impoverished women in the South articulate a different set of priorities than those of their transnational and Northern counterparts. While there is significant overlap in priorities—domestic violence and reproductive health are important issues in the Global South—economic justice and redistribution, global financial disparities, and insecurity caused by police and military intervention are more important priorities. Perhaps most disconcerting to transnational and Northern women is the unwillingness of many “traditional” women to jettison their attachments to culture and religion.

Finally, the Article has argued that in order to live up to its liberating potential, Liberal legal feminism ought to re-orient itself. Part of that process is to dismantle ideas of progress that include racist and neo-imperial judgments about the backwardness of “traditional” women and take their perspective and priorities seriously. Legal and political reforms undertaken, then, ought to be in partnership and with sensitivity to what local women need and desire. Their articulations of human flourishing—rather than the assumptions of elite women—need to be given their full weight. For instance, reducing the right to health care to maternal care and reproductive rights reinforces the gender stereotypical treatment of women as nothing but walking wombs. The governments of all three subcontinental countries' population-control programs have done this at the expense of other health needs. Moreover, abortion access has led to sex-selective abortions, reducing the number of women being born. Abortion as a legal right is less of an issue than the neglect and infanticide of girl children that has skewed sex ratios and led to the trafficking of women to meet the demand in the marriage market. Without taking these issues into consideration, activism for global abortion rights could be considered willfully one-sided.

Ultimately, the position I take is not one that questions the legitimacy of outsider critique or transnational legal activism for women. Re-orienting feminism does not prevent critique, disagreement, or action. Rather, it requires that disagreement and critique come from a position of equality and humility rather than superiority and condescension.

Transnational collaborations must make space for subaltern agents to speak and act. If they do not, they risk disempowering poor women further and failing to reach the potential of feminist transnational advocacy.

APPENDIX

TABLE 1
SPECIFIC PROVISIONS OF INTERNATIONAL INSTRUMENTS
RELATING TO WOMEN

	General Provisions/Human Rights/Equal Protection	For Reproductive Rights/Family Rights	Against Domestic Violence/Violence
UN Charter ³²⁴	Preamble Article 1		
UDHR ³²⁵	The declaration in its entirety is written in gender neutral language and applies to "everyone."	Article 16 Article 25	Article 3 Article 4 Article 5 Article 6 Article 7 Article 8 Article 12 Article 28
ICCPR ³²⁶	Article 2 Article 3 Article 6 Article 14 Article 16 Article 17	Article 23 Article 24	Article 6 Article 7 Article 8 Article 9 Article 26
ICESCR ³²⁷	Preamble Article 3 Article 7	Article 10 Article 12	
CEDAW ³²⁸	The Convention is generally applicable to all minorities. Equal protection and equal treatment is a recurring obligation throughout the document.	Article 5 Article 10 Article 11 Article 12 Article 13 Article 14	Article 6 (trafficking and prostitution)

324. U.N. Charter, pmb1., art. 1.

325. See UDHR, *supra* note 96.

326. See ICCPR, *supra* note 97.

327. See ICESCR, *supra* note 98.

328. See CEDAW, *supra* note 99.

	General Provisions/Human Rights/Equal Protection	For Reproductive Rights/Family Rights	Against Domestic Violence/Violence
		Article 16	
CAT ³²⁹	Preamble		Applicable to State parties
CERD ³³⁰ (impacting minority women)	The Convention is generally applicable to all minorities.	Article 5	Article 5

329. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, Supp. No. 51, U.N. Doc. A/39/51 (Dec. 10, 1948) [hereinafter CAT], available at <http://www2.ohchr.org/english/law/cat.htm>.

330. International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), U.N. GAOR, Supp. No. 14, U.N. Doc. A/6014 (Jan. 4, 1969) [hereinafter CERD], available at <http://www2.ohchr.org/english/law/cerd.htm>.