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## STUDENT NOTE

# NOTE, THE CONVENTION FOR THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN: RADICAL, REASONABLE, OR REACTIONARY?

*Sarah C. Zearfoss\**

The Convention for the Elimination of All Forms of Discrimination Against Women<sup>1</sup> (Convention) entered into force ten years ago, less than two years after its adoption by the General Assembly of the United Nations. Although today States Parties to the Convention number over 100, the United States is not among them.<sup>2</sup> Given that the United States enjoys a reputation for being a leader in sex equality law both within and without its borders,<sup>3</sup> its failure to ratify is para-

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1. *Opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 14, *entered into force* Sept. 3, 1981 [hereinafter Convention]. The Convention entered into force on September 3, 1981, with the ratification of the twentieth state party. Convention, art. 27(1).

2. As of February 18, 1991, the 103 countries ratifying or acceding to the Convention are Angola; Antigua and Barbuda; Argentina; Australia; Austria; Bangladesh; Barbados; Belgium; Belize; Bhutan; Bolivia; Brazil; Bulgaria; Burkina Faso; Byelorussian SSR; Canada; Cape Verde; Chile; China; Colombia; Congo; Costa Rica; Cuba; Cyprus; Czechoslovakia; Democratic Yemen (now Yemen); Denmark; Dominica; Dominican Republic; Ecuador; Egypt; El Salvador; Equatorial Guinea; Ethiopia; Finland; France; Gabon; German Democratic Republic and Federal Republic of Germany (now Federal Republic of Germany); Ghana; Greece; Grenada; Guatemala; Guinea; Guinea-Bissau; Guyana; Haiti; Honduras; Hungary; Iceland; Indonesia; Iraq; Ireland; Italy; Jamaica; Japan; Kenya; Lao People's Democratic Republic; Liberia; Libyan Arab Jamahiriya; Luxembourg; Madagascar; Malawi; Mali; Mauritius; Mexico; Mongolia; New Zealand, Cook Islands, and Niue; Nicaragua; Nigeria; Norway; Panama; Paraguay; Peru; Philippines; Poland; Portugal; Republic of Korea; Romania; Rwanda; Saint Kitts and Nevis; Saint Lucia; Saint Vincent and the Grenadines; Senegal; Sierra Leone; Spain; Sri Lanka; Sweden; Thailand; Togo; Trinidad and Tobago; Tunisia; Turkey; Uganda; Ukrainian SSR; Union of Soviet Socialist Republics; United Kingdom of Great Britain and Northern Ireland; United Republic of Tanzania; Uruguay; Venezuela; Viet Nam; Yugoslavia; Zaire; and Zambia. (Source: Division for the Advancement of Women, CSDHA/UNOV, Vienna, Austria.)

3. See *International Human Rights Abuses Against Women: Hearings Before the Subcomm. on Human Rights and International Organizations of the House Comm. on Foreign Affairs*, 101st Cong., 2d Sess. 14 (Mar. 21 and July 26, 1990) [hereinafter *House Hearings*] (statement of Arvonne S. Fraser, co-director, International Women's Rights Action Watch) ("Almost every woman in the world knows that U.S. women have more rights and freedom than women in many other countries"); E. RHOODIE, *DISCRIMINATION AGAINST WOMEN: A GLOBAL SURVEY* 248 (1989) ("The constitutional rights of women, discrimination against women, occupational segregation, disparities in income of men and women, and legal remedies to provide women with equal opportunities to compete against men have received more attention in the U.S. . . . than in any other country in the world.").

doxical. Has the United States failed to ratify the document because it is too drastic by U.S. standards; because it simply replicates existing U.S. law; or because U.S. sex equality law has moved beyond its provisions?

When the United States became a signatory soon after the adoption of the text, then-President Carter transmitted the Convention to the Senate for its advice and consent.<sup>4</sup> It languished there for eight years before the Senate held a single day of hearings,<sup>5</sup> followed two years later with a second day of hearings.<sup>6</sup> Apart from these Senate hearings, two days of House hearings,<sup>7</sup> and a handful of remarks made from the floor of Congress, political interest in the Convention has been nonexistent.

Congressional activity prompted a spate of opinions from the public, however, about whether the Convention should be ratified by the United States. Those endorsing ratification consistently minimized the possible effects of the document by describing it as, for example, "basically compatible with U.S. law."<sup>8</sup> The statements of virtually all the witnesses who appeared before the House Committee on Foreign Affairs illustrate this. There, testimony focussed to a great degree on the failings of other countries, particularly India—the only country with a "significant population" other than the United States that has not ratified the Convention.<sup>9</sup> Little discussion was devoted to the Convention's potential to ameliorate domestic failings,<sup>10</sup> even by those who were there specifically to argue for ratification. The following argument is typical of Convention supporters:

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4. Message from the President of the United States Transmitting the Convention on the Elimination of All Forms of Discrimination Against Women, Adopted by the United Nations General Assembly on December 18, 1979, and Signed on Behalf of the United States of America on July 17, 1980, S. Exec. R., 96th Cong., 2d Sess. (Nov. 12, 1980) [hereinafter Memorandum of Law].

5. *Issues Relating to the United Nations Convention on the Elimination of All Forms of Discrimination Against Women: Hearing Before the Subcomm. on Terrorism, Narcotics and International Operations of the Senate Comm. on Foreign Relations*, 100th Cong., 2d Sess. (Dec. 5, 1988) [hereinafter *First Senate Hearings*].

6. *Convention on the Elimination of All Forms of Discrimination Against Women: Hearing Before the Senate Comm. on Foreign Relations*, 101st Cong., 2d Sess. (Aug. 2, 1990) [hereinafter *Second Senate Hearings*].

7. The Senate's lack of interest in the Convention was sufficient to attract the attention of the House, which held hearings on March 21, 1990, and on July 26, 1990, in order to "urge the Senate" if not to ratify the Convention, at least to hold hearings. *House Hearings*, *supra* note 3, at 9 (statement of Arvonne S. Fraser, co-director, International Women's Rights Action Watch).

8. Bocskor, *A Long Wait for Ratification*, MANHATTAN LAW., Dec. 1990, at 17.

9. Seligman, United Press International, Feb. 11, 1990 (NEXIS, Nexis library, Omni file).

10. Gus Yatron, the chairman of the subcommittee, described the order of priorities for the hearings as follows: "The Subcommittee . . . meets today to receive testimony concerning human rights violations specifically against women . . . by foreign governments. . . . [W]e will also look at the advancement of the Convention . . . ." *House Hearings*, *supra* note 3, at 1.

Reporting under the Convention would give us an opportunity to publicize our accomplishments as a nation. . . . We need not fear the quadrennial reporting and review process required under the provisions of the convention. Rather we should look at that process as an opportunity to show that the U.S. is a leader among nations in women's human rights.<sup>11</sup>

This statement reflects the perception that the United States has gone as far in its sex equality law as the Convention mandates, and that women in the United States enjoy rights and freedoms sufficient to eclipse the progress of any other nation. There even seems to be a hint of the normative position that for the United States, further development of sex equality law is unnecessary.<sup>12</sup>

Statements by opponents of the Convention also contain indications that sex equality laws have reached their optimum level. What opponents make explicit, and where they part company with the Convention's supporters, is their conviction that the Convention would have drastic consequences on the state of sex equality law in the United States. One opponent, Bruce Fein, has described the Convention's projected impact as "breathtaking," speaking of "the legal revolution that ratification would portend."<sup>13</sup> Fein argues that ratification would lead to far-reaching change:

The Convention would require amending the Constitution both to reach the private sector and to prohibit non-invidious, gender distinctions with an adverse impact on women. . . .

Women could neither be exempted from military draft registration, nor conscription, nor excluded from combat duty. All male-only private clubs and single-sex schools would be proscribed. Fetal-protection policies in the workplace would be illegitimate. Mothers could not be sanctioned for reckless drug use during pregnancy that impaired the physical and mental health of their newborns.<sup>14</sup>

Apparently, opponents of the Convention have a much more expansive conception of the type of equality it requires than do its supporters.<sup>15</sup>

11. *Id.* at 18-19 (statement of Arvonne S. Fraser, co-director, International Women's Rights Action Watch).

12. *See, e.g.*, 136 CONG. REC. E2973 (daily ed. Sept. 25, 1990) (statement of Rep. Claudine Schneider): "[T]he United States cannot effectively champion the cause of oppressed women without ratification. . . . [R]atification would put us in a far better position to foster meaningful improvements in the treatment of women worldwide." *But cf.* her statement that "[a]lthough the United States is a leader among nations in advancing the role of women, we feel that there is still much to be done in this country to eliminate discrimination against women." *Id.*

13. Fein, *Trying to Hobbleskirt the World; Risky U.N. Bias Tract*, Washington Times, Aug. 7, 1990, at G1.

14. *Id.*

15. *See also* Francis, *Son of New World Order*, Washington Times, Oct. 24, 1990, at G2: Article 5 of the convention would require co-signers to "modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferi-

Fein's catalogue of consequences may strike many women's rights advocates as a step in the right direction. A United Nations Convention that could require such consequences would indeed be a powerful tool. One must wonder, then, whether those who speak before Congressional committees in support of the Convention do not want change for women, or instead whether their testimony reflects a certain disingenuousness. Publicly minimizing the potential of a requested change while privately hoping for maximum effect is a standard political strategy, the intent being to get the law passed and then to work on expanding its meaning and scope.<sup>16</sup> But this can be a corrupting strategy, causing activists to scale back their understanding of their own goals.<sup>17</sup> If advocates manage to get a law passed by packaging it in a politically palatable form, and the result is simply a minor change to the legal *status quo* or even no change at all, the worth of such a law is *de minimis*.

This Note will explore the merits behind these positions and attempt a resolution. If the potential effect of the Convention can only be to freeze and enshrine sex equality law as it currently exists, one

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ority or superiority of either of the sexes or on stereotyped roles for men and women." That means not only censorship to root out what the enforcers think are anti-egalitarian ideas but also social therapy intended to "cure" us of such pathologies as chivalry and simple good manners.

16. Consider, for example, testimony before the House by those advocating that registration for the draft include women as well as men. Little attention was devoted to the prevalent perception in Congress that women could not or should not appropriately serve in combat; instead, the focus was on whether there would be sufficient need during a war for those positions typically filled by women such as to make it worthwhile to have women register. *Registration of Women: Hearings on H.R. 6569 Before the Military Personnel Subcomm. of the House Comm. on Armed Services, 96th Cong., 2d Sess. 61-62 (Mar. 5 and 6, 1990)* (testimony of Robbi Smith, National Coalition for Women in Defense) ("[the] basic thought or concern is . . . not how to register women and advance the cause of social justice, but how does registering women further the national defense . . . . If sufficient women volunteer to fulfill the needs of the services for women and there are the current combat exclusion restrictions then the services will not need to induct women. . . . We are not advocating a 50-50 military, and the number of men and the number of women would have to be left in the views of the services and the jobs they have for each to fill."); 97 (statement of Judy Goldsmith, Vice President-Executive, National Organization for Women) ("Whatever happens about registering or drafting women in the short run, in the event of a real national crisis or war, women will be drafted (if men are) and will serve. Why? Because they are needed. Women today are an essential part of our nation's work force and are a key part of the trained and trainable technical pool of young people required to operate a modern military. Moreover, because of sex segregation in our labor force certain work categories, which are essential to the military, are overwhelmingly female. Women are a vital part of the administrative, computer, communications, medical and other technical personnel of this nation.").

17. Consider again Catherine Bocskor, who responds to the Convention's opponents as follows: "Opponents read the terms of the Women's Convention literally, without a full understanding of the convention as an international human-rights treaty that allows for progressive implementation. The U.N. Committee on the Elimination of Discrimination Against Women, established to oversee compliance with the convention, recognizes that progressive nature in its quarterly review of reports from signatories on their implementation of the terms of the convention." Bocskor, *supra* note 8, at 17. A better response might be simply to concede that opponents are correct: what the document requires is change, and what its supporters want is change.

who is interested in achieving changes in the law for the purpose of benefiting women will not want to put her energy into lobbying for ratification. It is therefore important to get past political strategies and determine what promise the Convention might hold for women in the United States. If the United States were to ratify the Convention, what changes, if any, would result?

Section I of this Note discusses the language of the Convention and the changes it purports to require, and reviews those critiques that focus on the weaknesses, and even the partial ineffectiveness, of the document in achieving its professed aims. Section II will discuss the role the Convention could play in U.S. law in light of *ex ante* limitations proposed by the State Department under the Carter Administration.<sup>18</sup> It will conclude that the proposed reservations, taken together, would effectively eviscerate the Convention. Section III will show that the Convention can effect important and meaningful changes for women in the United States and therefore should be ratified—but only if its supporters insist that its full potential be realized.

## I. THE STRUCTURE OF THE CONVENTION: PRAISE AND PROBLEMS

### A. *Praise*

Scholarly commentary on the document is replete with superlatives: "the Convention . . . is the definitive international legal instrument requiring respect for and observance of the human rights of women; it is universal in reach, comprehensive in scope and legally binding in character."<sup>19</sup> It is not without cause that feminist legal scholars greet the Convention with optimism. The definition of "discrimination against women" employed in the Convention is, even standing alone, progressive. It prohibits "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women . . . of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."<sup>20</sup> The "effect or purpose" language achieves the proscription of intentional and unintentional discrimination alike, while "any other field" extends the Convention's reach to private spheres. Eliminating discriminatory effects as well as purposes is often considered crucial to the successful

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18. Memorandum of Law, *supra* note 4.

19. Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 30 VA. J. INT'L L. 643 (1990).

20. Convention, *supra* note 1, art. 1.

eradication of *any* form of discrimination since "policies undertaken without discriminatory motive may perpetuate inequalities established by prior acts of purposeful discrimination."<sup>21</sup>

Extending the Convention's reach to private spheres by use of the "any other field" language is uniquely important, though, to a convention meant to eradicate discrimination against women. It is in the area of private relations that women are furthest from attaining equality. Yet it is precisely this area that legal reforms have traditionally ignored: "[the] areas . . . which have been defined by states as being areas of private life . . . are often thought not to be areas where the discourse of human rights is relevant, yet they are areas in which the majority of the world's women live out their days."<sup>22</sup> Issues such as domestic violence, child care, family planning, the marital relationship, and deeply ingrained societal perceptions and prejudices are recognized as some of the most pressing concerns for women today,<sup>23</sup> but because States have defined them as "private," they are often outside the scope of governmental control. States have tended to "define[] as private relationships in the home and in domestic labour. They have defined as private the sexual relations between a man and his wife, and the economic consequences of matrimony."<sup>24</sup> That the Convention did not distinguish between public and private in structuring and

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21. T. MERON, *HUMAN RIGHTS LAW-MAKING IN THE UNITED NATIONS: A CRITIQUE OF INSTRUMENTS AND PROCESS* 60 (1986). Despite its importance, it is a standard that has not been adopted in the United States constitutional law of discrimination; its use in the Convention is therefore all the more significant. See, e.g., *Washington v. Davis*, 426 U.S. 229 (1976) (a law that is neutral on its face is not invalid under the Equal Protection Clause simply because it results in a racially disproportionate impact; instead, the disproportionate impact must be traced to a purpose to discriminate on the basis of race); *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979) (a statutory veterans' hiring preference that operated overwhelmingly to the advantage of males did not violate the Equal Protection Clause because the adverse effect did not reflect "invidious gender-based discrimination," which would require a showing that the particular course of action was selected at least in part "because of" its adverse effects on an identifiable group). Despite *Washington* and *Feeney*, however, the Court has held that "disparate impact," although not constitutionally prescribed, is a constitutionally *permissible* standard in the context of race discrimination. See, e.g., *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 2896 (1989) (applying a disparate impact standard in the employment context under Title VII). See also Voting Rights Act Amendments of 1982, 42 U.S.C. § 1973 (1988) (applying disparate impact standard in voting rights context); Note, *Business Necessity in Title VIII: Importing an Employment Discrimination Doctrine into the Fair Housing Act*, 54 *FORD. L. REV.* 563 (1986); Note, *Disparate Impact Analysis and the Age Discrimination in Employment Act*, 68 *MINN. L. REV.* 1038 (1984). Therefore, the "effect or purpose" standard set out in the Convention does not present a constitutional problem.

22. Burrows, *International Law and Human Rights: the Case of Women's Rights*, in *HUMAN RIGHTS: FROM RHETORIC TO REALITY* 80-98, 82 (1986).

23. See E. RHODIE, *supra* note 3, at 275 ("the real target of reform [is] private actions and social relationships, i.e. male perceptions of women and the continued existence of female stereotypes.").

24. Burrows, *supra* note 22, at 84.

shaping the substantive rights it addresses is a key element of its potential strength in the field of women's rights.

Following its broad definition of discrimination, the Convention's next fifteen articles set forth those fields in which States Parties are obligated to take "all appropriate measures" to eliminate discrimination.<sup>25</sup> The coverage pertains to a wide range of activities, including politics, economics, employment, commercial transactions, social relations, cultural activities, legal activities, familial and personal relations, health care, and education. The Convention also expressly provides that affirmative action shall not be considered discriminatory, although it specifies that the "temporary special measures aimed at accelerating *de facto* equality . . . shall be discontinued when the objectives of equality of opportunity and treatment have been achieved."<sup>26</sup> Other particularly noteworthy<sup>27</sup> elements of the Convention include the following obligations for States Parties:

(a) "[t]o embody the principle of the equality of men and women in their national constitutions or other appropriate legislation";<sup>28</sup>

(b) to "take all appropriate measures . . . [t]o modify . . . social and cultural patterns of conduct . . . with a view to achieving the elimination of prejudices . . . which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles," as well as to "ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing . . . of their children";<sup>29</sup>

(c) to "take all appropriate measures . . . to suppress all forms of traffic in women and exploitation of [and] prostitution of women";<sup>30</sup>

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25. The exhortation to States Parties to "take all appropriate measures" appears throughout the Convention; according to Theodor Meron, "[t]he word 'appropriate' should be interpreted to mean necessary to the achievement of the stated objectives of the Convention, and not appropriateness under the national law of a State Party. According to general principles of international law, existing legal limitations on the State's ability to act . . . would not excuse the violation of its international obligations under the Convention." T. MERON, *supra* note 21, at 65-66.

26. Convention, *supra* note 1, art. 4. Note, though, that this article also permits special measures "aimed at protecting maternity." See *infra* notes 54-61 and accompanying text. See also *infra* note 33. Cf. Fein, *supra* note 13, at G1 (claiming that the Convention forbids such protective measures).

27. It should be emphasized that the labelling of certain provisions as "noteworthy" is only meant in the context of existing U.S. law and cultural norms; some provisions of the Convention that are extremely important in certain cultures will be less so, or not at all so, in the United States. An example is article 14, relating to "the particular problems faced by rural women"; this article is quite important for countries in which the economy is largely dependent on agriculture, and in which access to agricultural developments lags behind that of many Western countries.

28. Convention, *supra* note 1, art. 2(a).

29. *Id.*, art. 5.

30. *Id.*, art. 6.



(d) to take appropriate measures to ensure that women "participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government" as well as in "non-governmental organizations and associations concerned with the public and political life of the country";<sup>31</sup>

(e) to "take all appropriate measures . . . to ensure . . . [t]he elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education . . . and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods" as well as "[a]ccess to specific educational information . . . on family planning";<sup>32</sup>

(f) to take all appropriate measures to eliminate employment discrimination against women, including ensuring

(1) "[t]he right to the same employment opportunities, including the application of the same criteria for selection in matters of employment";

(2) "[t]he right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value";

(3) "maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances"; and

(4) "the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities . . . , in particular through . . . child-care facilities";<sup>33</sup>

(g) to "take all appropriate measures to eliminate discrimination . . . in health care . . . including [services] related to family planning" and to ensure access to services "in connexion with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation";<sup>34</sup> and

(h) to "take all appropriate measures to eliminate discrimination . . . in . . . marriage," including to ensure "[t]he same rights and responsibilities as parents" and "[t]he same rights to decide . . . responsibly on the number and spacing of their children."<sup>35</sup>

31. *Id.*, art. 7(b) and 7(c).

32. *Id.*, art. 10(c) and 10(h).

33. *Id.*, art. 11(1)(b), 11(1)(d), 11(2)(b), and 11(2)(c). Note that in article 11, though, the Convention once again refers to "protective" measures, including "[t]he right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction," and "[t]o provide special protection to women during pregnancy in types of work proved to be harmful to them." *Id.*, art. 11(1)(f), 11(2)(d). That article does conclude, however, with the caveat that "[p]rotective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary." *Id.*, art. 11(3).

34. *Id.*, art. 12(1) and 12(2).

35. *Id.*, art. 16(1)(d) and 16(1)(e).

The provisions of the Convention go beyond, both *de jure* and *de facto*, the *status quo* for women in the United States. In the United States, social and cultural patterns of conduct often reflect prejudices about the inferiority of women and promote stereotyped gender roles. For example, the legal treatment of prostitution discriminates against women;<sup>36</sup> women do not perform at all levels of government;<sup>37</sup> textbooks and teaching methods contain stereotyped concepts of the roles of men and women;<sup>38</sup> comparable worth is not a precept of employment law;<sup>39</sup> child-care facilities are not regularly provided by employers;<sup>40</sup> access to adequate health care is not available to all women;<sup>41</sup> women often do not have the ability to decide on the number and spacing of their children;<sup>42</sup> and the responsibilities attendant to mar-

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36. Erbe, *Prostitutes: Victims of Men's Exploitation and Abuse*, 2 L. & INEQUALITY 609 (1984) (arguing that prostitution is not a victimless crime, because women in prostitution are victims of pervasive violence by customers, pimps, and police); Cooper, *Prostitution: A Feminist Analysis*, 11 WOMEN'S RTS. L. RPTR. 99, 112 (1989) ("By institutionalizing male sexual dominance, prostitution perpetuates the male definition of women as available [for] sex, which in turn ensures their continued subjugation for that purpose.")

37. See Mandel, *The Political Woman*, in THE AMERICAN WOMAN 1988-89, at 78-87, 89-94 (Women's Research and Education Institute, 1988) (women have yet to achieve ranking positions in political parties as well as elective and appointive positions). See generally S. CARROLL, WOMEN AS CANDIDATES IN AMERICAN POLITICS (1985) (documenting the systemic limitations on women's efforts to reach elected offices).

38. See generally D. LEE & A. CLIFTON, *Women and the Educational Institution*, in MINORITY STATUS: THE POSITION OF WOMEN 119 (1981) (detailing sex discrimination in classrooms and texts); Coleman, *The Problem That Has a Name*, 15 STUDENT LAW., Feb. 1987, at 3 (gender bias in legal casebooks); Sandler, *The Classroom Climate for Women*, in THE AMERICAN WOMAN 1987-88, at 243 (Women's Research and Education Institute of the Congressional Caucus for Women's Issues 1987) (describing discrimination against girls in the classroom).

39. See 42 U.S.C. §§ 2000e-2000e17 (1988) (comparable worth not included in employment discrimination statutes); *AFSCME v. State of Washington*, 770 F.2d 1401 (9th Cir. 1985) (holding no Title VII violation where an employer compensates employees in jobs in which females predominate at lower rates than employees in jobs in which males predominate even though the jobs are of comparable worth).

40. See Cherlin, *Women and the Family*, in THE AMERICAN WOMAN 1987-88, at 84 (Women's Research and Education Institute of the Congressional Caucus for Women's Issues 1987) (the number of corporations that accommodate working parents by providing child care assistance is modest).

41. *Geduldig v. Aiello*, 417 U.S. 484 (1974) (upholding state disability plan that excluded pregnancy and pregnancy-related disabilities from coverage); Davis, *Women and Health Care*, in THE AMERICAN WOMAN 1988-89, at 162 (Women's Research and Education Institute, 1988) (lack of access to health care disproportionately affects women). See also *New Jersey Prenatal Care*, SOJOURNER, Jan. 1990, at 11-12 (low birth weight is the primary cause of infant mortality, but it is a problem that would be remedied by adequate prenatal care for women); *Really, Doctor*, SOJOURNER, May 1990, at 16 ("Women who have bypass surgery for heart disease are much sicker and slightly older than men who have the surgery, researchers said . . . . The report . . . found a bias against referring women for bypass surgery. 'For women's symptoms to be acted on, [the women] have to be significantly sicker,' said the study coordinator . . .").

42. See Quindlen, *Public & Private; Common Ground*, N.Y. Times, Dec. 13, 1990, at A31, col. 5 ("Over the last three decades, as some major surgeries became outpatient procedures and doctors learned to take the heart from one human being and put it in the body of another, American women have lived with the birth control options of the 1960s"); Kellogg, *Lawmakers Call for Family Planning Program Expansion*, UPI, Mar. 15, 1990 (NEXIS library, Currnt file)

riage and the raising of children are often not equally shared.<sup>43</sup> Thus, if the United States were to ratify the Convention, it would appear that changes to existing law would be necessary in order for this country to be in compliance.

This brief overview of the substance of the Convention indicates that at least some of its normative provisions are extremely strong, and that several go beyond the current standards of U.S. law. The challenges that this presents will be dealt with in Section II. As a preliminary matter, however, there are many criticisms that can be levelled in more general terms against the Convention and its structure.

## B. Problems

### 1. Scope of Coverage

As broad as its substantive provisions often are, the Convention fails to address a number of areas of concern to women, and in addition includes provisions that are distinctly detrimental to its purpose of eliminating discrimination against women.

Perhaps most noticeable is the Convention's complete lack of attention to domestic violence and marital rape.<sup>44</sup> In fact, the Convention never explicitly addresses a woman's right to decide whether to have sexual intercourse. Nonetheless, there are provisions that arguably could have an implicit impact on the question of sexual abuse within marriage. Article 16, relating to rights within marriage, provides that women and men shall have "[t]he same rights . . . during marriage . . ."; "[t]he same rights to decide freely and responsibly on the number and spacing of their children . . ."; and "[t]he same personal rights as husband and wife . . ."<sup>45</sup> Concluding that the rights

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("A lack of family planning services for the poor makes abortion an ugly choice of birth control for them," said Sen. Connie Binsfeld, R-Maple City, [Michigan].") and "Raj Wiener, director of the Department of Public Health . . . said there are 467,000 Michigan women in need of family planning services, of whom about 68,000 are sexually-active teenagers. She added that more than 17,000 teens give birth to infants every year.")

43. See Hochschild & Waggoner, *For Working Women, Having it All May Mean Doing it All*, PEOPLE Sept. 4, 1989, at 51 ("[A]ccording to Arlie Hochschild, a sociology professor at the University of California at Berkeley, the household roles of men and women have not evolved along with their work lives: It is women who still bear the greater responsibility for child care, cooking and cleaning."); Blank, *Women's Paid Work, Household Income, and Household Well-being*, in THE AMERICAN WOMAN 1988-89, at 123 (Women's Research and Education Institute, 1988) (women spend more hours on household tasks than men).

44. The Convention likewise fails to address pornography and the relationship between pornography and sex discrimination, particularly domestic violence and marital rape. See, e.g., A. DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN (1981). See also C. MACKINNON, FEMINISM UNMODIFIED 153 (1987): "[A]lthough the content and dynamic of pornography are about women—about the sexuality of women, about women as sexuality . . . the law of obscenity has never even considered pornography a women's issue." (emphasis in original).

45. Convention, *supra* note 1, art. 16(1)(c), 16(1)(e), and 16(1)(g).

referred to include the right to choose whether to have sexual intercourse seems reasonable, since the right of deciding on the number and spacing of children reasonably should include rights regarding intercourse.

Even if one accepts that the two rights are reasonably linked, however, other language in the provisions indicates that guaranteeing rights regarding consensual sex was not the purpose underlying this article. Article 16(1)(c) appears to be directed at ensuring equal legal status because its full guarantee goes to the "same rights and responsibilities during marriage and at its dissolution";<sup>46</sup> article 16(1)(e) specifically directs itself to the problem of lack of information about and access to birth control;<sup>47</sup> and the rights expressly delineated in article 16(1)(g) mention only "the right to choose a family name, a profession and an occupation."<sup>48</sup>

Also not explicitly addressed by the Convention is the question of abortion rights. While article 12(1) requires States Parties to ensure "access to health care services, including those related to family planning," the article explicitly specifies only "services in connexion with pregnancy, confinement and the post-natal period, . . . as well as adequate nutrition during pregnancy and lactation."<sup>49</sup> In the opinion of one commentator, "[i]n requiring free health services only in connection with childbirth . . . , it is obvious that the Convention disfavors the alternative of abortion."<sup>50</sup> Furthermore, the same commentator argues that

[b]ecause men have equal rights with women in matters of family plan-

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46. Convention, *supra* note 1, art. 16(1)(c). Cf. T. MERON, *supra* note 21, at 71-72:

Art. 16 obligates States Parties to . . . ensure equality of men and women, with particular regard to the enumerated rights, which include ownership of property, choice of spouse, and choice of occupation. It would appear that [article 16] regulates not only legal status but interpersonal conduct as well. . . . Conflicts may thus arise with privacy interests of the individual, freedom of opinion and belief, and associational rights involved in marital and family relations.

Again, although article 16 may be taken to reach the issue of marital rape when its language is read in conjunction with the broad definition of discrimination, it is important to note that Convention does not include freedom from rape among the enumerated rights to which article 16 applies "with particular regard." Therefore, any protection from rape which the article *does* provide is, at a minimum, weaker than the other, enumerated rights.

47. The text in full provides: "The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights." Convention, *supra* note 1, art. 16(1)(e).

48. *Id.*, art. 16(1)(g).

49. *Id.*, art. 12(2).

50. T. MERON, *supra* note 21, at 71. See also Bocskor, *supra* note 8, at 17: Those opposed to the treaty worry that it could be interpreted to mandate public financing of abortion on demand. They cite Article 14 . . . .

The [ABA] study found, however, that the convention does not, and was not meant to, address the subject of abortion; Article 14 was meant to address birth control.

ning, abortion under the Convention, if recognized at all, would not be a woman's individual right which she might exercise independently of consent of the father. Men claiming paternity could challenge, as a denial of their rights, a woman's decision to have an abortion.<sup>51</sup>

At least one other commentator, though, does not view the issue as clearly settled by the Convention.

Like all fundamental instruments written in general terms, [the Convention] leaves unanswered many questions which will be resolved only when concrete applications are attempted. For example . . . [i]f men and women are to have "equality" in deciding spacing of children, may a man require his pregnant spouse to undergo, or may a father-to-be prohibit the woman who is pregnant by him from undergoing, an abortion?<sup>52</sup>

Unsettled or not, the fact that the possibility exists that the Convention could support this result is certainly disturbing from the perspective of ensuring women's rights. In the United States, a man may neither require nor prohibit a woman from undergoing an abortion.<sup>53</sup> If the Convention could be a source of legal support for legislation allowing such involvement by men, the result would be a reversal for women's rights, giving a woman less rather than more control over her body and her life.

Similarly disturbing is the Convention's acceptance,<sup>54</sup> and at times what appears to be requirement,<sup>55</sup> of the use of "protective legislation," that is, legislation prohibiting all fertile women from engaging in certain activities in the interest of protecting fetuses, whether the fetus is real or only potential. Article 11(3) does provide some small safeguard by requiring that "[p]rotective legislation . . . be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary."<sup>56</sup> In addition, in other articles of the Convention "the drafters correctly recognized that pregnancy and motherhood may not be utilized as a basis for discrimination against women if the goal of equality is ever to be achieved."<sup>57</sup>

51. T. MERON, *supra* note 21, at 72.

52. Greenberg, *Race, Sex, and Religious Discrimination in International Law*, in 2 HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 307, 330 (T. Meron ed. 1984).

53. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976) (holding unconstitutional a Missouri law requiring prior written consent by the husband of a women seeking an abortion).

54. Convention, *supra* note 1, art. 4(2).

55. *Id.*, art. 11(1)(f) and 11(2)(d), treating protection of maternity in the employment context as a right.

56. Convention, *supra* note 1, art. 11(3).

57. T. MERON, *supra* note 21, at 74. See Convention, *supra* note 1, art. 11(2)(a) and 11(2)(b). However, as Meron points out, the Convention does "not provide explicit protection to women in two principal areas: discrimination in hiring on grounds of maternity or pregnancy and discrimination in job assignment and promotion." T. MERON, *supra* note 21, at 74.

Nonetheless, it is clear that the potential for abuse is great because the provisions permit great discretion to States Parties in designing legislation. It is therefore possible that these provisions "might be used as a pretext justifying discrimination against women, when a 'protective' purpose can be articulated,"<sup>58</sup> an abuse that the weak caveat would not be adequate to control. In the United States, this issue has been most prominently raised in the context of private actors rather than public legislation, with corporations devising employment policies designed to keep women from working in areas that pose hazards to fetuses.<sup>59</sup> The Supreme Court has held that sex-specific fetal-protection policies are forbidden under Title VII as impermissible sex discrimination.<sup>60</sup> Whether enacted through private policies or public legislation, the possibility of discrimination resulting from such legislation is not merely hypothetical; there is much evidence that "the effect of protective legislation has been to lower the economic status of women as a group, to deny them employment or force them into unskilled, low-paying positions, often in sex-segregated industries, and to deter their professional advancement."<sup>61</sup>

The Convention, then, provides flawed coverage in two ways: (1) it fails to provide explicit substantive coverage of areas that are of great concern to women, areas that would be ideally addressed in a document that aims to eliminate discrimination against women; and (2) it permits States Parties to legislate in the name of protecting women, but with such wide discretion that the legislation could harm women and might even be only a cover for discriminatory action. There is no completely satisfactory answer to these criticisms. One response, though, is that even without explicitly addressing domestic violence or rape, the Convention certainly does *permit* a State Party to legislate in these areas, and any such legislation would easily be viewed as legislation promulgated for the purpose of conforming with obligations under the Convention. Since article 1 contains a broad definition of discrimination, and allows States Parties to regulate private behavior, then legislation in nonaddressed areas should be treated as implementing the Convention.

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58. T. MERON, *supra* note 21, at 73.

59. *See, e.g.*, International Union, UAW v. Johnson Controls, Inc., 111 S. Ct. 1196 (1991). There, the "protective purpose" was to guard fetuses from the apparently harmful effects of lead necessary to manufacture batteries. Despite medical evidence that exposure to lead also harms men's reproductive capabilities, only women were barred by Johnson Controls's employment policy from the higher-paying jobs requiring exposure to lead, unless they could prove their infertility.

60. *Id.*

61. T. MERON, *supra* note 21, at 73-74. *See also* Becker, *From Muller v. Oregon to Fetal Vulnerability Policies*, 53 U. CHI. L. REV. 1219 (1986).

For example, a State Party which recognizes that women are raped because of their sex, and that rape impairs the enjoyment of the fundamental freedom of bodily integrity, may treat rape as sex discrimination violative of the Convention, even if it considers rape a "private" act. Realistically, though, it is doubtful that any State Party actually would legislate in this way. As a result, the Convention's failure to explicitly name sexual abuse as prohibited discrimination weakens the document.

The questions of abortion and protective legislation are more difficult, since the concern is not simply the Convention's lack of provisions affirming women's rights, but rather, its inclusion of provisions that could place women in the United States in a worse position than the one they presently occupy. These failures are a major flaw in the document and indicate that it is far from providing perfect guarantees for women's rights. While this Note will discuss below the ways in which the United States could ratify the Convention without leading to a reversal of sex equality progress made thus far,<sup>62</sup> it cannot be denied that these defects cast doubt on the Convention's ability to fulfill its promise to eliminate "all forms" of discrimination.

The Convention embodies an understanding of sex equality that revolves largely around women's functions as wives and mothers. The Convention's failure to include abortion among the rights it guarantees and its allowance of protective legislation at the possible sacrifice of women's employment rights reflect this understanding, as does its repeated caveat following the articulation of a right, "the interest of the children is the primordial consideration in all cases."<sup>63</sup> This understanding is important and beneficial for women insofar as it prescribes action in private arenas historically ignored by legislation. It also contemplates the special difficulties of women in the employment arena. Yet, this understanding is negative for women insofar as it neglects issues such as domestic violence, abortion, pornography, and rape—acts and conditions that impair or nullify the fundamental freedoms and human rights of women, and that occur *because they are women*. Furthermore, the Convention fails to address special concerns of lesbians and unmarried heterosexual women. The net effect of the Convention's understanding may be to strengthen a traditional image of women as mothers, albeit mothers with rights.

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62. See *infra* II(C), *Reservation as to Constitutional Limits*.

63. Convention, *supra* note 1, art. 5(b) (exhorting States Parties to take appropriate measures to modify social and cultural patterns of conduct). See also art. 16(1)(d) (regarding the equal rights and responsibilities of parents, "in all cases the interests of the children shall be paramount"); art. 16(1)(f) (regarding equal rights to guardianship or wardship of children, "in all cases the interests of the children shall be paramount").

Whether certain issues were left untreated because the drafters did not view them as relevant to the issue of discrimination, perhaps because of a perception that phenomena such as rape or domestic violence are not omnipresent "discrimination" but anomalous and discrete societal dysfunctions, or whether the silence reflects a political compromise over issues that were not susceptible of general international agreement, the result is that the Convention's understanding of equality for women is incomplete.

## 2. Overbreadth

Although this Note presents as a virtue the Convention's permitting States Parties to reach into private behavior, there are commentators who view this as the document's vice. Those who make this criticism generally acknowledge that the ability to reach and legislate in the fields of private action is important for eliminating discrimination against women, yet they are concerned by the possibility of conflict with other human rights. For example, to Theodor Meron,

[i]t is not clear whether it was appropriate to extend the . . . Convention to encompass even private, interpersonal relations . . . . It is certainly true that discrimination against women in personal and family life is rampant and may obviate equal opportunities which may be available in public life. There is danger, however, that state regulation of interpersonal conduct may violate the privacy and associational rights of the individual and conflict with the principles of freedom of opinion, expression, and belief.<sup>64</sup>

Despite his belief that the Convention may entail an unwarranted intrusion into private acts, Meron acknowledges that because private behavior is an extraordinarily significant area of discrimination against women, some balancing of concerns may be appropriate. Therefore, because of what he views as the "danger of intrusive state action and possible violation of the rights of ethnic or religious groups," Meron counsels "limiting state action to educational measures."<sup>65</sup> He recognizes that even within the scope of his proposed limit, the Convention "permits States to restrict the expression of religious belief to the extent that the practices and values propagated by a particular religious group deter equality in education between men and women."<sup>66</sup> In this realm, he views State intrusion into religious belief "an appropriate balancing of the principles involved,"<sup>67</sup> simply because education bears a "critical importance . . . in altering social and cultural

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64. T. MERON, *supra* note 21, at 62.

65. *Id.* at 67.

66. *Id.* at 70.

67. *Id.*



problems of gender discrimination."<sup>68</sup> He does not specify what in particular would constitute unacceptably "invasive State action."<sup>69</sup>

Meron's distinction between acceptable and unacceptable limits on state intrusion into private behavior illustrates that "private behavior" is more a label applied *post hoc* to an area deemed inappropriate for State regulation than a useful guide to determine the boundaries of that area. Meron believes that even his proposed limiting of state action to education might threaten religious freedom, but still would allow it because of his idiosyncratic balancing of values. Although "excessive encroachment by the State into interpersonal relations"<sup>70</sup> is not desirable, one should recognize that the concept of "excessive" is essentially an empty one, relying on each individual's balancing of various values.<sup>71</sup>

Meron's primary concern appears to be with intrusions by the Convention into religion. The large number of sex-specific human rights violations grounded in religious practices illustrate well that distinctions between private and public behavior are unhelpful to forming conceptions of equality. Many people will agree that the most egregious of these violations—for example, the Hindu practice of suttee<sup>72</sup>—deserve no state protection; that is, there should be no proscription on legislating against such a practice merely because it occurs in a "private" area. There are doubtless those who will disagree, and as one moves toward the less dramatic along the range of such activities, the controversy will increase.<sup>73</sup> Yet, if one cannot leg-

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68. *Id.*

69. *Id.* Meron does specifically refer to articles 2 and 5 as troubling: "States Parties are required by the language of [the] provisions [of art. 2] to restrict privacy and associational rights if restrictions are necessary to prevent discrimination." *Id.* at 64. "Art. 5 . . . mandates regulation of social and cultural patterns of conduct regardless of whether the conduct is public or private." *Id.* at 66.

70. *Id.* at 63.

71. *See, e.g.,* Burrows, *supra* note 22, at 82 ("the distinction drawn by states between public and private areas of life, which roughly corresponds to the world of men and that of women, allowing for the existence of rights in the former but not in the latter, is a distinction drawn for political reasons. It is not one which is inherent in the nature of society, neither is it natural, nor necessary."). Consider also that perceptions as to what areas are inviolably private change over time. *See, e.g.,* New York State Club Assn. v. City of New York, 487 U.S. 1 (1988) (holding that while there is still a constitutional right of "free association" in small social clubs, larger business-oriented clubs may be subject to anti-discrimination regulation). *See also* M. HALBERSTAM & E. DEFEIS, WOMEN'S LEGAL RIGHTS: INTERNATIONAL COVENANTS — AN ALTERNATIVE TO ERA? 97 (1987) ("[G]ender-based discrimination by some private associations may be prohibited consistent with the First Amendment . . ." (citing Roberts v. United States Jaycees, 468 U.S. 609 (1984) and Hishon v. King & Spalding, 467 U.S. 69 (1984))).

72. Suttee is the practice, now forbidden by law, of a Hindu widow cremating herself on her husband's funeral pyre.

73. There are an abundance of examples of discriminatory practices grounded in religion. Some lead to actual violence, *e.g.,* the Hindu practice of dowry payments, which is connected with incidents of "bride burnings," *see* Crosette, "India Studying 'Accidental' Deaths of Hindu

islate against an abusive practice because there is a religious tradition behind it, the ability to deal with discriminatory abuses is radically weakened.<sup>74</sup> If the international convention meant to address human rights abuses against women is fettered by concern over religious rights, its potential effectiveness vis-à-vis women will be diminished. Protection of religious rights should be the domain of the international agreements drafted specifically for that purpose.<sup>75</sup> Although a balancing of concerns must be achieved by States Parties in the cases where different human rights potentially compete, it is inappropriate to require that the balancing of women's rights and religious rights be undertaken by the women's Convention, or to suggest that guarantees of women's rights must accommodate religious rights instead of the other way around.<sup>76</sup>

The ability to reach private behavior and action may very well be imperative to achieving meaningful diminishing of discrimination against women.

[T]he public sphere versus private sphere ideology as expressed in law is

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Wives," N.Y. Times, Jan. 15, 1989, § 1 at 10, col. 1; the Islamic rule that "beating [a wife] is . . . acceptable behavior if it is administered as chastisement," see Dwyer, *Law Actual and Perceived: The Sexual Politics of Law in Morocco*, 13 L. & Soc'y 139, 147 (1979); or Islamic laws regarding rape. See RHOODIE, *supra* note 3, at 14-15 ("in Pakistan a blind girl who had been raped and was pregnant was sentenced to be stoned to death. She could not identify the rapist, but according to Islamic law since she was pregnant she was held to be guilty of illegal sex . . ."). Others restrict women's freedom of physical movement, e.g., the Talmudic rule "that a traveling woman must be chaperoned by at least three men," see Wegner, *The Status of Women in Jewish and Islamic Marriage and Divorce Law*, 5 HARV. WOMEN'S L.J. 1, 3 (1982), or the Islamic and Hindu practice of purdah, i.e., the seclusion of women from public observation. Other practices restrict women's activity more generally, such as the Islamic rules that men, but not women, may marry multiple spouses, divorce verbally, and marry non-Moslems; or the Catholic rules against birth control and abortion; or the Mormon practice of polygamy but not polyandry. Still other practices relate only to religious infrastructure, such as the prohibition on women priests in Catholicism.

74. If one then extends that understanding to cultural practices in general, saying that any abusive practice that enjoys a cultural backdrop cannot be legislatively addressed, one has effectively eliminated the ability to address abuse.

75. See, e.g., International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171, *entered in force*, Mar. 23, 1976; International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3, *entered in force* Jan. 3, 1976. See also Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, GA Res. 55, 36 U.N. GAOR Supp. (No. 51) at 171, U.N. Doc. A/RES/36/55 (1982); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 702, comment (j) [hereinafter RESTATEMENT] ("The United Nations Charter . . . links religious discrimination with racial discrimination and treats them alike; to the extent that racial discrimination violates the Charter religious discrimination does also. Religious discrimination is also treated identically with racial discrimination in the principal covenants and in the constitutions and laws of many states. There is as yet no convention on the elimination of religious discrimination . . . but there is a strong case that systematic discrimination on grounds of religion as a matter of state policy is also a violation of customary law.")

76. As a practical matter, this world does not appear to be in great danger that any countries will develop political climates that will foster radical legislative innovations in furtherance of women's rights in such a way as to trample upon other human rights.

a key measure of society's perception of women's rights. The public sphere, work and politics, is accepted as the domain of men. The private sphere, domestic life, home and family are considered the domain of women. This dichotomy is deeply ingrained in the laws of some countries and thus the law plays a critical role in maintaining sexual stratification.<sup>77</sup>

Those who accept this view would not consider States' involvement in private acts of discrimination as such an alarming a possibility as would those who do not share this belief or those who have no interest in eliminating "sexual stratification." There will be disagreement over any particular balancing of concerns, even among those who are interested in the elimination of discrimination against women. While its reach into private behavior is perhaps the most controversial element of the Convention, it is also one of its great strengths and separates it from most legal action taken to achieve equality for women.

### 3. Failure of Laws Generally

A recurring question arises when considering the Convention: Can any law, regardless of the skill with which it is drafted or the breadth of its substantive provisions, ever result in meaningful change for women? There is a discouraging pattern supporting the claim that "[e]ven though by the 1990s nearly every nation will have ratified the various international conventions protecting and promoting the rights of women, equal treatment of the sexes will not be at hand."<sup>78</sup> For example, it is evident now that the "Decade for Women did not produce fundamental changes in societies' attitudes towards women . . . . The improvements were statistical, but in limited areas and in a limited number of countries, and the same statistics often revealed new or accentuated existing discrimination."<sup>79</sup> Similarly, some critics of the potential usefulness of the proposed Equal Rights Amendment in the United States argue that "there were sufficient state laws in existence to cover all contingencies, at federal, state and local level" and that "existing federal laws outlawing discrimination which have been on the law books for 20 years continue to be violated. Why would the E.R.A. be honored?"<sup>80</sup>

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77. E. RHOODIE, *supra* note 3, at 92.

78. Blaustein, *Foreword* in E. RHOODIE, *supra* note 3, at xi. Sex discrimination is not the only area where law and reality diverge, of course. See, e.g., Dasgupta, *Child Welfare Legislation in India: Will Indian Children Benefit from the UN Convention on the Rights of the Child*, 11 MICH. J. INT'L L. 1301, 1313 (1990) ("Despite passing the necessary laws, almost to the point of there being a 'surfeit of laws dealing with children,' children are only marginally better off than in the past." (citation omitted)).

79. E. RHOODIE, *supra* note 3, at 22.

80. *Id.* at 275, 277.

There are two responses to this argument. The first is to dispute the claim that *any* country, let alone the United States, provides all the laws necessary for women to achieve equal rights. Consider, for example, Australia: according to Esther Rhodie, who has surveyed sex discrimination laws around the globe, "[t]here is no doubt . . . that Australia is in the forefront in legislation to enhance the status of women, more so than Canada or Britain."<sup>81</sup> The measures Australia has taken

to advance the position of women [include] the passage of anti-discrimination legislation, the introduction of affirmative action programmes, the establishment of national and State machinery to initiate and co-ordinate strategies for the achievement of women's equality, . . . draft[ing] legislation in gender-neutral terms . . . and the development of guidelines for the non-sexist portrayal of women in the media.<sup>82</sup>

On the other hand, Australia does not have legislation instituting comparable worth standards of pay equity, and, in fact, "[a]mong the continuing manifestations of inequality . . . [are] the lesser level of average weekly earnings of women . . ."<sup>83</sup> Furthermore, Australia has been faulted for its failure to accept the provision of the Convention relating to maternity leave with pay due to lack of financial ability, and its failure to "accept the application of the Convention in so far as it would require alteration of Defence Force policy which excludes women from combat and combat-related duties."<sup>84</sup> Even the country in the forefront of legislation on women's rights has room for improvement.

It is impossible, though, to refute the observation that there is a "considerable gap between law and reality . . ."<sup>85</sup> Inadequate or not, the laws Australia does have are not perfectly implemented. Rhodie, although she classifies Australia as leading the vanguard of sex discrimination law, goes on to point out that "Australia has one of the highest degrees of sex segregation in the work force of any of the industrially developed countries."<sup>86</sup> This observation raises the challenge that it is societal perceptions and attitudes toward women that must change before *de facto* equality for women can be achieved.<sup>87</sup>

81. *Id.* at 92.

82. Starke, *Australia and the Convention on Discrimination Against Women*, 62 *AUSTL. L.J.* 478 (1988).

83. *Id.* at 478.

84. Multilateral Treaties Deposited with the Secretary General: Status as of 31 December 1986, at 160, U.N. Doc. ST/LEG/SER.E/3 (1985) [hereinafter *Multilateral Treaties*].

85. Blaustein, *supra* note 78, at xi.

86. *Id.* at 92.

87. See, e.g., T. MERON, *supra* note 21, at 55 ("In no . . . area [other than sex discrimination] is the disparity between the formal or 'proclaimed' equality and the reality of discrimination at

Given this necessity, the Convention's reach into private actions, and its requirement that States Parties focus on and attempt to ameliorate the "social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and . . . practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women"<sup>88</sup> distinguishes it from standard legislative proposals. However, one cannot in good faith maintain that ratification of one particular treaty would be the answer to all problems of sex inequality. In view of the weaknesses of this Convention discussed above, and the broad areas not covered, the Convention alone cannot possibly be enough to guarantee an end to discrimination against women.

#### 4. Weakness of Enforcement Provisions

The Convention's weak provisions for implementation and enforcement sharply contrast with its generally strong normative provisions.<sup>89</sup> That the Convention's enforcement mechanisms are unusually impotent is true even within the context of human rights treaties, which are commonly noted in international law for the weakness of their enforcement provisions.<sup>90</sup>

The provisions for enforcement and supervision of States Parties are set out in Parts V and VI of the Convention. A Committee, consisting of twenty-three expert representatives of States Parties, reviews the reports of States Parties detailing their progress under the Convention. The reports are to be submitted within one year after the Convention enters into force for a particular State, and every four years thereafter.<sup>91</sup> The Committee meets "for a period of not more than two weeks annually,"<sup>92</sup> and at that time reviews the reports and in turn

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home, in society, and in the workplace so great. . . . Deeply rooted societal and religious traditions have impeded progress.").

88. Convention, *supra* note 1, art. 5(a).

89. See Howell, Book Review, 81 AM. J. INT'L L. 474, 477 (reviewing HUMAN RIGHTS: FROM RHETORIC TO REALITY (1986)), responding to Burrows's criticism of this aspect of the treaty: "Burrows is quite correct in asserting the need for stronger enforcement mechanisms, but in a world of nation-states jealous of their sovereignty, the obstacles to achieving this are great, albeit not insurmountable with regard to every state." Cf. International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter Race Convention]. See Meron, *Enhancing the Effectiveness of the Prohibition of Discrimination Against Women*, 84 AM. J. INT'L L. 213 (1990) ("[T]he implementation clauses of the convention are far weaker than those in the other UN treaty addressed to discrimination, the International Convention on the Elimination of All Forms of Racial Discrimination." (citation omitted)).

90. See Howell, *supra* note 89, at 477 ("As with international law in general, enforceability is a serious problem for international human rights provisions regarding women.").

91. Convention, *supra* note 1, arts. 17 and 18.

92. *Id.*, arts. 20 and 21.

reports annually to the United Nations General Assembly, making suggestions and recommendations based on the reports of the States Parties. Any dispute between two or more States Parties concerning interpretation or application of the Convention that is not settled by negotiation may be submitted to arbitration and then referred to the International Court of Justice if after six months the parties cannot agree on the organization of the arbitration.<sup>93</sup>

One major inadequacy in the structuring of the Committee is its lack of authority to consider anything other than the submitted reports. There is no provision that would allow the Committee to examine "individual complaints or communications from victims of discrimination, or of complaints submitted by one State Party against another for failure to fulfil its obligations under the Convention."<sup>94</sup> Furthermore, the Committee has no authority to pronounce that a State Party is in violation of its duties under the Convention. Apparently, the Committee is to rely on the public nature of the reporting mechanism and on the possibility of negotiation of disputes between States Parties for the enforcement of the substantive provisions.

Not only is the Committee limited in its ability to consider and comment on the activities of States Parties, but it does not have enough time in which to perform its limited duties. The provision setting the Committee's meeting time at "not more than two weeks annually"<sup>95</sup> is "unusual [and] reflects an overzealous effort to reduce expenditures; no other human rights treaty organs have been subjected to such constraints."<sup>96</sup> The restriction has not been without effect; the Committee's consideration of reports is currently so backlogged that one member of the Committee has estimated that the discussion of the reports already submitted will not be completed until the year 2000.<sup>97</sup> Finally, the Committee is further curtailed in the performance of its functions by being

isolated geographically and programmatically from the mainstream of the human rights program. The Commission on Human Rights meets in Geneva . . . [while the Committee] meets in Vienna . . . . As a result of this fragmentation, the struggle against sex discrimination has received inadequate attention and has not benefited from salutary innovations in UN human rights procedures . . . .<sup>98</sup>

Although some of the Committee's problems are common to the

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93. *Id.*, art. 29.

94. T. MERON, *supra* note 21, at 56.

95. Convention, *supra* note 1, art. 20.

96. Meron, *supra* note 89, at 84-85.

97. See T. MERON, *supra* note 21, at 80-82.

98. Meron, *supra* note 89, at 215.

UN human rights treaty supervisory bodies as a whole, namely, "inadequate resources and the failure of States Parties to submit adequate reports on time, or at all,"<sup>99</sup> other difficulties certainly seem unique to it. While it is unclear precisely why the Committee's supervisory powers were designed to be so weak, it is reasonable to presume that at least part of the answer lies in what has been described as the "conceptual and institutional marginalization"<sup>100</sup> that has been the fate of women's rights within the field of international human rights.

### 5. Reservations

A final criticism of the Convention is the prevalence of reservations to the text. The Vienna Convention on the Law of Treaties,<sup>101</sup> the authoritative document governing treaty law generally, defines "reservation" to be "a unilateral statement . . . made by a State, when signing, ratifying, . . . or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State."<sup>102</sup> The Vienna Convention provides that States may in general formulate reservations to a treaty that has not expressly prohibited them, except that no reservation may be "incompatible with the object and purpose of the treaty."<sup>103</sup> The Convention itself also explicitly addresses the issue of reservations, by reiterating the general terms of the Vienna Convention (reservations are permitted if not "incompatible with the object and purpose of the . . . Convention"<sup>104</sup>), as well as by expressly permitting reservations to the provision requiring arbitration between States Parties in the event of disagreement over the Convention's meaning or application.<sup>105</sup> The Convention does not, though, "establish any specific criteria of incompatibility"<sup>106</sup> that would enable States Parties or the Committee to easily determine when its spirit had been contravened.

One commentator has pointed out that although the Convention entered into force more quickly than any previous human rights convention,<sup>107</sup> the document is "among the most heavily reserved of inter-

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99. Byrnes, *The "Other" Human Rights Treaty Body: The Work of the Committee on the Elimination of Discrimination Against Women*, 14 YALE J. INT'L L. 1, 5 n.19 (1989).

100. *Id.* at 5.

101. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, *entered into force* Jan. 27, 1980 [hereinafter the Vienna Convention].

102. *Id.*, art. 2(1)(d).

103. *Id.*, art. 19(c).

104. Convention, *supra* note 1, art. 28(2).

105. *Id.*, art. 29(2).

106. T. MERON, *supra* note 21, at 80.

107. Cook, *supra* note 19, at 643 (citation omitted). In September 1981, within two years

national human rights conventions, with at least 23 of 100 states parties making a total of 88 substantive reservations. An additional 25 reservations have been made to article 29 on dispute settlement."<sup>108</sup> In addition to attracting scholarly critiques, the profusion of reservations has attracted the objections of certain States Parties; a core group of Mexico, Sweden, and the Federal Republic of Germany have filed a total of ninety-five objections to the reservations of other States Parties.

One explanation for the large number of reservations is the Convention's failure to "establish specific criteria of incompatibility."<sup>109</sup> In contrast, the Race Convention provides that a reservation is impermissible if two-thirds of the States Parties object to it.<sup>110</sup> A second explanation is the inability, due to lack of authority, of the Committee to determine that reservations are incompatible. This, in combination with the ability of a state to reserve the dispute resolution provision, means that a State Party could effectively guarantee that there is no way to adjudicate the appropriateness of a particular reservation.<sup>111</sup>

The fullest explanation may lie, however, in the peculiar status of discrimination against women as that form of discrimination that is most firmly entrenched cross-culturally, in such a way as to be commonly perceived as a legitimate cultural practice.<sup>112</sup> As an example, Egypt ratified the Convention yet formulated a comprehensive reservation "concerning the equality of men and women in all matters relating to marriage and family" that purports to make the ratification "without prejudice to the Islamic Sharia's provisions . . . . This is out of respect for the sacrosanct nature of the firm religious beliefs that

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after its adoption, the twentieth state party ratified the Convention. See also Mehren, *New Group Keeps Spirit of Nairobi Alive*, L.A. Times, Mar. 20, 1986, at 1, col. 3. ("By the standards of the United Nations as well as by the gauge of international treaties [the number of signatories to the Convention] is gigantic for a document just 6-years old. 'Probably of all U.N. conventions and instruments, it's the one that has moved the fastest.'" (quoting Arvonne Fraser)).

108. Cook, *supra* note 19, at 644. This record should be compared with the Race Convention, which, with 127 States Parties, has had only two parties make substantive reservations (Afghanistan and the German Democratic Republic). *Id.* at 644, n.5.

109. T. MERON, *supra* note 21, at 80.

110. Race Convention, *supra* note 89, art. 20(2).

111. It appears that a State Party determined to challenge the appropriateness of a reservation could pursue traditional remedies against the State that lie outside the Convention. See RESTATEMENT, *supra* note 75, § 703(1) and § 703, comment g. However, for obvious political reasons, the likelihood that any State Party would do so is slim.

112. See A REPORT ON THE NINTH SESSION OF THE COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN 10 (International Women's Rights Action Watch CEDAW #9, May 1990) [hereinafter CEDAW REPORT] ("*The existing conflicts between the status of women under religious law and traditional customs and practices, and the status of women under the Convention seem to be the major reason for the most comprehensive reservations.*" (emphasis in original)).



govern marital relations in Egypt and which may not be called into question . . . .”<sup>113</sup> It is not only Islamic law that presents conflicts with equality for women, of course; Rabbinic courts, for example, give less evidentiary weight to the testimony of women.<sup>114</sup> Furthermore, it is not only religious beliefs that present conflicts; that “[o]ther traditional social or ethnic practices are also implicated”<sup>115</sup> is not seriously debatable. Representatives to the Committee often blame, with complete candor, the traditional prejudices of their countries for the lack of progress in the field of women’s rights.<sup>116</sup> Even more striking was the Turkish report to the Committee at its most recent hearing: the report blamed women themselves, claiming that “discrimination was foreign to the Turkish temperament” and that “the low number of women in high-level posts was to be explained by the ‘poverty of desire’ . . . .”<sup>117</sup> The fact that a reporting State Party would express such a sentiment to the Committee is potent evidence of the sanguinity with which women’s lack of equality is often viewed, even by those who have made an apparently strong commitment to address the problem.

The necessary accommodation of varying cultural standards that is endemic to the successful formulation of a human rights treaty reaches dizzying proportions in the context of women’s rights. Without the escape mechanisms that have been included in the Convention, there certainly would be fewer States Parties. Whether ratification of the Convention, when modified by major substantive reservations, provides any meaningful assistance to the cause of women’s rights is debatable. For the purposes of this Note, however, it is the consequence of these mechanisms for the United States that will be examined.

## II. THE U.S. APPROACH TO THE CONVENTION

The position taken by the Department of State under President Carter,<sup>118</sup> as expressed in its Memorandum of Law to the Senate rec-

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113. *Multilateral Treaties*, *supra* note 84, at 162.

114. T. MERON, *supra* note 21, at 79. *See also infra* note 73.

115. *Id.*

116. *See, e.g.*, the statements made by the representatives of Panama, U.N. Doc. CEDAW/C/SR.50, at para. 9-20 (1985), and of the Philippines, U.N. Doc. CEDAW/C/SR.32, at para. 20-31 (1984).

117. CEDAW Report, *supra* note 112, at 9. Lest one think such perceptions exist only in Turkey, consider *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302 (7th Cir. 1987), where the employer’s defense in a sex discrimination suit was that women were not as interested in commission sales positions as were men.

118. The State Department under both President Reagan and President Bush has not addressed the Convention. At the August 2, 1990, Senate hearing, the State Department representative indicated that it was not yet ready to proceed with a recommendation for or against ratification. *Second Senate Hearings*, *supra* note 6, at 44.

ommending ratification of the Convention, was that while "there are no constitutional or other legal obstacles to United States ratification,"<sup>119</sup> there are "provisions that might require either implementing legislation or reservations"<sup>120</sup> because they cover areas not adequately addressed by current U.S. law. Consequently, either legislation bringing the United States into compliance with the Convention's obligations or reservations declaring that problematic provisions shall not apply to the United States would be necessary in order not to violate the international obligations undertaken by ratification. Although the State Department characterizes both reservations and implementing legislation as "options,"<sup>121</sup> it demonstrates that its preference is for the former.<sup>122</sup> The executive branch preference for reservations over implementing legislation is shared by the legislative branch, and even those Senators who favor ratification also prefer reservations to implementing legislation.

Superficially, this preference is not always apparent. In discussing potential areas of concern raised by particular articles, the Memorandum of Law almost always contains a recommendation for *either* a reservation *or* implementing legislation. For example, article 2 presents a possible conflict with current U.S. law providing for "male only registration for military service,"<sup>123</sup> and the conclusion is that "[a]ppropriate corrective legislation or reservations may be necessary . . . ."<sup>124</sup> The same treatment is found in the discussion of article 11, which presents conflicts with the interpretation of Title VII that does not allow for comparable worth, with the Social Security Act, and with the unemployment insurance system.<sup>125</sup> Thus at first glance it appears that the State Department is neutral on the subject of how U.S. law should accommodate the Convention.

This is not the case with the Senate. Senator John Kerry was responsible for the first field hearing on the Convention, and described

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119. Memorandum of Law, *supra* note 4, at IV.

120. *Id.* at VI.

121. *Id.* at VIII.

122. Merely making the suggestion of an "appropriate reservation" in areas of conflict with current legislation (in contradistinction to areas of constitutional conflict or federalism questions, both of which present separate concerns) indicates the limited effect the State Department envisions for the Convention. If the Senate were to recommend ratification, and the President were to ratify a convention purporting to eliminate discrimination against women, one would think that would be acknowledging the existence of such discrimination. In that case, allowing existing legislation that conflicts with the Convention to take precedence over the terms of the Convention would be completely contrary to the object and purpose of the Convention. See *infra* notes 190-192 and accompanying text.

123. Memorandum of Law, *supra* note 4, at 3.

124. *Id.*

125. Memorandum of Law, *supra* note 4, at 7.

himself at the hearing as a strong supporter of ratification: "To many of us it is astonishing that such equities [as contained in the Convention] should not be easily and quickly and immediately ratified overwhelmingly."<sup>126</sup> Despite his apparent support, however, the Senator presented an inaccurate explanation for why reservations to the Convention are desirable:

No treaty can be inconsistent with American law because when you pass a treaty it becomes law. [T]he State Department . . . suggested to us that all of the questions raised by this treaty could be dealt with through reservations and declarations, which are a normal part of the treaty ratification process. The Senate can state its understanding and its acceptance of certain provisions, so that it does not conflict with U.S. law . . . .<sup>127</sup>

The implications of his statement are incorrect. The Convention, with its mechanisms for progressive implementation, does not require that States Parties be in complete compliance with its terms immediately on ratification.<sup>128</sup> The Senator, however, seems to view the appropriate function of the Convention as "not chang[ing] the law of the United States specifically. What it does is establish a set of rights which are a guideline for further action which is going to be taken individually."<sup>129</sup> The Senator's position, although quite unclear—if the Convention does not change the law, how does it establish rights? Who will be taking what action under those rights?—certainly does not seem to anticipate a radical reforming role for the Convention.

On closer examination, moreover, it becomes clear that the State Department shares the view of Senator Kerry that the function of the Convention should not be to change current law. The Memorandum includes a recommendation for three reservations that effectively eliminate any concern about conformance with current U.S. law by eliminating, in large part, the Convention's utility. The three reservations are:

- (1) a "federal-state" reservation;<sup>130</sup>

126. *First Senate Hearings*, *supra* note 5, at 2.

127. *Id.* at 3.

128. As pointed out in the RESTATEMENT, *supra* note 75, § 111 comment h, "[t]here can, of course, be instances in which the United States Constitution, or previously enacted legislation, will be fully adequate to give effect to an apparently non-self-executing international agreement, thus obviating the need of adopting new legislation to implement it." Nonetheless, the *Restatement* makes clear that such is not the norm for treaties. See also Burrows, *supra* note 22, at 92 ("The obligation so to act is not an immediate one. . . . [The Convention] provides for its progressive implementation. Thus a margin of discretion is left to each state as to when it will fulfil the obligations assumed.").

129. *First Senate Hearings*, *supra* note 5, at 23.

130. See Memorandum of Law, *supra* note 4, at VIII.

- (2) a "non-self-executing" reservation;<sup>131</sup> and
- (3) a reservation stating constitutional limits.<sup>132</sup>

### A. *Federal-State Reservation*

The State Department points out that the "Convention includes no provision that would take into account the division of authority between the state and Federal governments in the United States."<sup>133</sup> It proceeds to "therefore recommend a reservation that would deal with the provisions imposing obligations whose fulfillment is dependent on the state and local governments . . . ." <sup>134</sup> In other words, for every area that is currently regulated by state law, the State Department recommends a reservation asserting the federal government's lack of responsibility for assuring an end to discrimination against women. A cursory review shows that a huge proportion of the Convention's provisions are currently addressed by state law, and accordingly, all of those provisions would be eviscerated by the proposed reservation. Affected would be article 6, on prostitution; article 10, on education; article 11, on employment (primarily affected would be unemployment insurance programs); article 15, on contracts; and article 16, on marriage, divorce, and child custody. Essentially, the reservation would serve to remove these areas from coverage by the Convention.

While it is descriptively true that the states have traditionally legislated in these areas, and while it is equally true that the Constitution does not specifically empower the federal government to legislate in these areas, it is not true that there is any constitutional prohibition, expressed or implied, on federal initiatives in these areas. To the contrary, recent years have seen an expansion of federal legislation in the areas of civil rights, employment, health care, education, and housing, through the use of federal spending powers, taxing powers, and the Commerce Clause.<sup>135</sup> An initial response to the proposed reservation, then, is that "it is doubtful whether United States participation in [the Convention] would be precluded, since the subject matter is already

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131. *See id.* at IX.

132. *See id.* at 1.

133. *Id.* at VIII.

134. *Id.*

135. *See, e.g.*, Equal Employment Opportunities Act, 42 U.S.C. § 2000(e) (1988) (prohibiting discrimination in employment); Equal Pay Act, 29 U.S.C. § 206(d) (1988) (prohibiting discrimination in remuneration); and Equal Educational Opportunities and Transportation of Students Act, 20 U.S.C. § 1701 (1988) (prohibiting discrimination in education). This footnote should not be taken to imply that it is my position that the current legislation fulfills the federal government's obligations under the Convention; it is merely meant to point out that the government is perfectly capable of legislating in these areas.

governed by federal law to a large extent."<sup>136</sup>

It can be stated still more firmly that the U.S. Constitution in no way requires that a federal-state reservation be made to the Convention, despite the State Department's strong implication to the contrary. As explained in the Restatement,

[t]he Power to make treaties . . . is a power delegated to the United States and is of status equal to that of other delegated powers of the United States under the Constitution. . . . Consequently, the Tenth Amendment, reserving to the several States the powers not delegated to the United States, does not limit the power to make treaties . . . .<sup>137</sup>

Settled law makes clear that "[t]o the extent that the State Department recommendation for a federal-state clause is premised on the belief that such a reservation is mandated by the Constitution it is wrong."<sup>138</sup>

The concerns that lead to the proposed federal-state reservation are not constitutionally-based, then, but rather policy-based.<sup>139</sup> Federalist arguments notwithstanding, there is no constitutional requirement that states should be left free to discriminate against women after the federal government has deemed it inappropriate by ratifying an international treaty. Nonetheless, federalism is certainly a plausible policy concern, and there is no reason why the Senate could not legally impose a federal-state reservation as a condition of its consent.<sup>140</sup> Such a reservation, though, weakens the federal government's obligations under the Convention, thereby weakening the Convention's ability to eliminate discrimination for women in the United States—the federalist argument does not have a neutral result. By leaving implementation, *vel non*, to the individual states,<sup>141</sup> the reservation would ensure that the United States would incur no international violation for failure to implement the affected provisions of the Convention.

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136. M. HALBERSTAM & E. DEFEIS, *supra* note 71, at 54 (citations omitted).

137. RESTATEMENT, *supra* note 75, § 302, comment d. *See also* Missouri v. Holland, 252 U.S. 416, 434 (1920) (Holmes, J.) ("No doubt the great body of private relations usually falls within the control of the State, *but a treaty may override its power.*" (emphasis in original)). *See also* United States v. Postal, 589 F.2d 862 (5th Cir. 1979), *cert. denied sub nom.* Postal v. United States, 444 U.S. 832 (1979).

138. M. HALBERSTAM & E. DEFEIS, *supra* note 71, at 63.

139. The State Department refers to the influence of policy considerations in a footnote to its Memorandum. "The Convention is the product of a consensus among more than 130 States and, as must be expected, contains certain language that can give rise to policy, as distinct from legal, questions." Memorandum of Law, *supra* note 4, at VI n.2.

140. *See* RESTATEMENT, *supra* note 75, § 303, comment d ("There is no accepted doctrine indicating limits on the conditions the Senate may impose.").

141. The effect of the reservation would not be such that the 50 states would be prohibited from legislating to implement its provisions; instead, it would simply relieve the federal government from the burden of doing so.

States themselves are under no obligation to implement treaties.<sup>142</sup> Without the reservation, if the United States chose to allow the states to be responsible for implementing the terms of the Convention, the federal government would still then be responsible for any failure to do so on the part of the states.<sup>143</sup> Since the effect of a federal-state reservation is to lessen the obligation of a federal State Party in comparison to countries that do not employ federal systems, federal-state reservations tend to be disfavored by the international law community:

A "federal-state clause" is likely to render a federal state's commitment under an international agreement less onerous than that of unitary states. Such clauses are therefore more likely to be acceptable in multilateral agreements reflecting common purposes than in those containing reciprocal exchanges. Even in "common purpose" agreements there has been increasing resistance to such clauses.<sup>144</sup>

Therefore, commitment to women's rights as well as to international law would counsel an abandonment of the proposed reservation.

### B. *Non-self-executing Reservation*

The State Department is correct in its assertion that one "issue raised by the Convention is whether it is itself effective as domestic law."<sup>145</sup> In the United States, a treaty whose terms establishes specific rights and obligations in individuals is effective without implementation by additional legislation, and is directly enforceable by individuals in domestic courts; such a treaty is referred to as "self-executing."<sup>146</sup> It is the State Department's judgment regarding the Convention that "[v]irtually all of the articles . . . are . . . *not* self-executing . . . since they appear to contemplate that legislative or other implementing ac-

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142. While self-executing treaties and customary international law have supremacy over state law, non-self-executing treaties do not. RESTATEMENT, *supra* note 128, at 115, comment e (any U.S. treaty or international agreement "supersedes inconsistent state law or policy" but a "non-self-executing agreement is not effective as law"). See also Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760 (1988). The Convention is at least in part not self-executing, and the State Department has proposed a reservation declaring that the whole of it be non-self-executing. See *infra* II(B), *Non-self-executing Reservation*.

143. See RESTATEMENT, *supra* note 75, § 302, reporter's note 4.

144. *Id.*

145. Memorandum of Law, *supra* note 4, at VIII.

146. Donaldson, *Annotation: United Nations Resolutions as Judicially Enforceable in United States Domestic Courts*, 42 A.L.R. Fed. 577, 578 (1990). Cf. Paust, *supra* note 142, at 760 (the "self-executing" distinction is one of "the most glaring of attempts to deviate from the text of the Constitution.").

Other countries take different approaches as to whether a treaty can be directly applied in court without implementing legislation. In Japan, for example, all treaties are considered self-executing unless explicitly stated to be otherwise, and Japanese courts tend to interpret and apply treaties directly without even asking whether they are self-executing. Iwasaw, *Legal Treatment of Koreans in Japan: The Impact of International Human Rights Law on Japanese Law*, 8 HUM. RIGHTS Q. 131, 135 (1986).

tion be taken by the parties . . . to carry out the . . . provisions."<sup>147</sup> If a reservation were made reflecting that judgment, then the federal government's only obligation under the Convention would be to adopt implementing legislation,<sup>148</sup> and U.S. courts would not be able to directly enforce the Convention upon suit by individuals.<sup>149</sup> Such a reservation would also disable the Convention, as a non-self-executing treaty, from invalidating inconsistent state and federal laws, absent implementing legislation.<sup>150</sup>

In the absence of a reservation, courts would apply settled standards for determining whether a provision of the Convention is self-executing.<sup>151</sup> In 1829, Chief Justice Marshall created the doctrine of the self-executing treaty in U.S. law.<sup>152</sup> Under Marshall's conception, the question is do "[the] words [of a treaty] act directly . . . , so as to give validity to [acts] not otherwise valid; or do they pledge the faith of the United States to pass acts which shall ratify and confirm them?"<sup>153</sup> In determining whether the language is direct in the necessary way, Marshall conceived of treaties as being either like acts of the legislature, or like contracts between nations. The former are self-executing, while the latter are not:

Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court. . . . [I]f it is [the language of contract], the ratification and confirmation which are promised must be the act of the legislature. Until such act shall be passed, the Court is not at liberty to disregard the existing laws on the subject.<sup>154</sup>

More recently, the District of Columbia circuit court held in *Diggs v. Richardson*<sup>155</sup> that the question of whether a treaty was self-executing and creating of individually enforceable rights was a matter for

147. Memorandum of Law, *supra* note 4, at VIII-IX (emphasis provided).

148. At least, in regard to those areas not covered by the federal-state reservation or by any other reservation directed to specific articles, as contemplated in the Memorandum of Law.

149. Courts could, though, "use the treaties as standards for interpreting domestic constitutional and statutory provisions." Greenberg, *supra* note 52, at 326.

150. See M. HALBERSTAM & E. DEFEIS, *supra* note 71, at 93.

151. "Some provisions of an international agreement may be self-executing and others non-self-executing." RESTATEMENT, *supra* note 75, § 111, comment h.

152. *Foster & Elam v. Neilson*, 27 U.S. (2 Pet.) 253 (1829).

153. *Id.* at 314.

154. *Id.* at 314-15.

155. 555 F.2d 848 (D.C. Cir. 1976).

determination by the parties' intent, which in turn is to be ascertained by examining the language of the instrument. The lack of language in the treaty specifically directed to the judiciary and the lack of provisions conferring specific rights on individuals led the court to hold the treaty to be not self-executing. In *People of Saipan ex rel. Guerrero v. United States Department of Interior*,<sup>156</sup> the court found that the treaty in question was self-executing after considering (1) the purpose of the treaty; (2) whether adequate domestic procedures existed for direct implementation of the treaty's terms; and (3) whether alternative enforcement procedures existed.

Examining the guidance of these cases in light of the terms of the Convention, it is quite probable that many of its provisions would be found by a court to be not self-executing. Those provisions, for example, exhorting States Parties to "take all appropriate measures" are undoubtedly much more like Chief Justice Marshall's "contract" language than they are like acts of legislature. They lack the explicit and detailed wording necessary, under U.S. law, for direct implementation by a court. The language seems to create a duty for a State to implement the standards contained in a provision through legislation. Nonetheless, there are other terms that arguably are self-executing, given the factors considered by the courts. The Convention specifically requires that States Parties include in their report to the Committee the "legislative, *judicial*, administrative or other measures which they have adopted to give effect to the provisions of the present Convention";<sup>157</sup> under *Diggs*, this specific addressing of the judiciary would be a favorable factor. Also under *Diggs*, the combination of the very broad definition of "discrimination against women" contained in article 1<sup>158</sup> with the provision in article 2 that "States Parties condemn discrimination against women in all its forms"<sup>159</sup> appears to confer specific rights on women. In considering the factors named by the court in *People of Saipan*, it would seem that the Convention's purpose of eliminating discrimination would dictate in favor of finding it to be self-executing; certainly U.S. courts are competent to consider questions of discrimination, and the important nature of the issue should require that all reasonable methods be made available so that women may enforce its terms. Finally, the weakness of the Convention's en-

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156. 502 F.2d 90 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975).

157. Convention, *supra* note 1, art. 18(1) (emphasis supplied).

158. Prohibited is "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women . . . of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field." *Id.*, art. 1.

159. *Id.*, art. 2.



forcement mechanisms,<sup>160</sup> and the otherwise complete lack of a judicial forum for women desiring to claim rights under the Convention, would strongly militate in favor of finding at least some of the provisions to be self-executing.

According to Louis Henkin, "[i]t has been suggested that there should be a strong presumption that a treaty is self-executing unless the contrary is clearly indicated."<sup>161</sup> One would think that this presumption, in combination with the factors considered by the courts, would bode well for a finding that some provisions of the Convention are self-executing. Nonetheless, U.S. courts have consistently held that individual plaintiffs do not have standing to make claims under international human rights treaties,<sup>162</sup> including the Charter of the United Nations,<sup>163</sup> the Universal Declaration of Human Rights,<sup>164</sup> and the International Covenant on Civil and Political Rights.<sup>165</sup> The case of *Sei Fujii v. California*<sup>166</sup> is typical in its rejection of legal claims based on human rights treaties. The plaintiff there had been denied the right to own land in California under the Alien Land Law because he was born in Japan. The plaintiff made the claim that a law that restricts ownership of land by aliens is unenforceable under the Charter of United Nations, being "inconsistent with [its] declared principles and spirit . . ."<sup>167</sup> The lower court agreed with this argument and held that "[t]he Alien Land Law must therefore yield to the treaty as the superior authority."<sup>168</sup> In the words of one commentator, "[i]f this had remained the law, international human rights jurisprudence would have been off to a good start in the United States."<sup>169</sup> The California Supreme Court, however, reversed, holding that the treaty was

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160. See *infra* I(B)(4), Weakness of Enforcement Provisions.

161. L. HENKIN, R. PUGH, O. SCHACHTER, & H. SMIT, *INTERNATIONAL LAW: CASES AND MATERIALS* 202 (1987). Consider also the position taken by the *RESTATEMENT*:

Since generally the United States is obligated to comply with a treaty as soon as it comes into force for the United States, compliance is facilitated and expedited if the treaty is self-executing. Moreover, when Congressional action is required but is delayed, the United States may be in default on its international obligation. Therefore, if the Executive Branch has not requested implementing legislation and Congress has not enacted such legislation, there is a strong presumption that the treaty has been considered self-executing by the political branches and should be considered self-executing by the courts.

*RESTATEMENT*, *supra* note 75, § 111, Reporter's note 5.

162. *Dickens v. Lewis*, 750 F.2d 1251 (5th Cir. 1984).

163. U.N. CHARTER.

164. G.A. Res. 217 (III), U.N. Doc. A/810, at 71 (1948).

165. *Opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.

166. 38 Cal. 2d 718, 242 P.2d 617 (1952).

167. *Sei Fujii v. California*, 217 P.2d 481, 483 (Cal. App. 1950), *rev'd* 38 Cal. 2d 718, 242 P.2d 617 (1952).

168. *Id.* at 488.

169. Greenberg, *supra* note 52, at 316.

not self-executing and so did "not . . . create rights and duties to individuals."<sup>170</sup>

Despite this poor record, if the Convention were to be ratified without a non-self-executing reservation there is at least some hope that courts would treat some of its terms as self-executing. Apparently, even the State Department suspects that certain of the Convention's provisions could have direct effect, since they state only that "[v]irtually all of the articles . . . are . . . not self-executing"<sup>171</sup>—an apparent concession that others *are* self-executing. Without this reservation, those provisions susceptible to interpretation as self-executing could be used in domestic courts as a source of rights, and this would be an important furtherance of the objectives of the Convention. As discussed above, laws meant to eliminate discrimination against women do not always function to do so. At least part of that unfortunate phenomenon can be ascribed to "arbitrary or selective . . . and inconsistent application of the law."<sup>172</sup> Putting the application of the law in the hands of its intended beneficiaries would at least help, albeit to a limited degree,<sup>173</sup> to ameliorate this problem. In light of the enforcement weaknesses already inhering in the Convention, it would not be in keeping with the overall purpose of the document for the United States to further weaken the capacity of women to enforce its provisions.

### C. *Reservation as to Constitutional Limits*

The State Department suggests a final overarching reservation that would apply to the Convention as a whole. Although presented in vague terms, the point would be to only permit implementation of the Convention within the limits permitted by the Constitution.<sup>174</sup> With certain qualifications, this reservation would be a positive addition to the Convention for women, but it is essential that any such provision be carefully drafted so as to protect the interests of women and the

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170. 38 Cal. 2d 718, 722-23, 242 P.2d 617, 621. The Alien Land Law was, however, held to be prohibited under the terms of the U.S. Constitution.

171. Memorandum of Law, *supra* note 4, at VIII (emphasis provided).

172. E. RHOODIE, *supra* note 3, at 92.

173. The usefulness would be limited for two reasons. First, not all of the Convention's provisions would be self-executing, as discussed *infra*. Second, enabling women to bring cases in U.S. courts using the Convention as a new source of rights would not be a radical reform, given systemic problems that keep women out of the courts (such as finances). See "Women, Second-Class Inmates," Chicago Tribune, Oct. 8, 1985, Perspective section, at 19.

174. When it prepared the Memorandum, the State Department emphasized that "[s]pecific language for implementing legislation or reservations [was] not being recommended . . ." Memorandum of Law, *supra* note 4, at IX. At least part of the vagueness is attributable to the Memorandum's position in the early stages of the process.

purpose of the Convention. The imprecision with which the State Department has proposed the reservation leaves room to ensure that the reservation achieves these objectives.

The State Department's position is that

[t]he definition of "discrimination against women" . . . reach[es] into areas that are not regulated by the federal government either due to Constitutional restraint or as a matter of public policy. An appropriate reservation that would state the limits of federal jurisdiction would address the concern raised by this Article and [be] applicable throughout the Convention.<sup>175</sup>

The remainder of the Memorandum of Law refers back to this statement only obliquely, by identifying a potential constitutional conflict and recommending "appropriate reservations" or "statements of understanding."<sup>176</sup> Sometimes the State Department refers to the reservation as one stating the "limits of federal jurisdiction,"<sup>177</sup> which suggests the federalism issues addressed above—but because the State Department is quite explicit when referring to its federalism concerns, one can deduce that it is considering a distinct reservation in these instances.<sup>178</sup>

International obligations incurred through treaties are subject to constitutional limitations; this is an accepted tenet of U.S. domestic law:

The view, once held, that treaties are not subject to constitutional restraints is now definitely rejected. Treaties . . . are subject to the prohibitions of the Bill of Rights and other restraints on federal power, such as those relating to suspension of the writ of habeas corpus or prohibiting the grant of titles of nobility.<sup>179</sup>

Courts interpret treaties accordingly; in the absence of the State Department's proposed reservation stating constitutional limits, courts would imply such limitations.<sup>180</sup> In that case, "[w]hen international

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175. *Id.* at 1.

176. For example, "[m]embership in private clubs . . . that are not supported in any way by federal financial assistance is . . . not subject to government regulation. Appropriate . . . reservations may be necessary . . ." *Id.* at 3. Or, "[t]he United States federal government does not regulate family education or interpersonal relationships. . . . Therefore, a statement of understanding may be appropriate." *Id.* at 4. Or, "[a] statement of understanding may be appropriate to clarify the limited role of the federal government in non-governmental organizations and associations, including political parties . . ." *Id.* at 5.

177. *Id.* at 1, 7 ("Article 13 raises no areas of concern, with the exception that social relationships and the purely private activities of persons are beyond the limits of federal jurisdiction.")

178. *Id.* at V, VI, VII, and VIII.

179. RESTATEMENT, *supra* note 75, § 302, comment b.

180. See M. HALBERSTAM & E. DEFEIS, *supra* note 71, at 96 ("That is not to say that there are no constitutional limitations on treaties. Treaties, like state and federal legislation, are subject to the specific prohibitions of the Constitution."); *Reid v. Covert*, 354 U.S. 1, 6 (1957) (holding a treaty inconsistent with the Constitution may be binding internationally but will not be enforced as law in the United States).

law is not given effect in the United States because of constitutional limitations . . . , the international obligations of the United States remain and the United States may be in default."<sup>181</sup> Such a reservation merely mandates the same result that would have been reached regardless—but ensures that the United States will not violate its international obligations in reaching that result.<sup>182</sup> In other words, such a reservation allows a State Party to not be in compliance with the terms of the Convention where such terms conflict with domestic law, and yet not incur international penalties.

One strong argument against such a reservation is that it would reduce the value of the Convention in exchange for enhancing its efficacy. As the State Department itself points out, at the time of its Memorandum the proposed 27th Amendment to the Constitution guaranteeing equal rights for women was not passed; we now know that it never was. Although "the 14th and 5th Amendments to the Constitution provide a basis to invalidate any federal or state classification or distinction based on sex if it is not substantially related to an important government objective,"<sup>183</sup> the fact remains that the U.S. Constitution does not provide explicit guarantees of equality on the basis of sex. Making the Convention subject to the Constitution therefore seems to mandate a limitation on the former's objectives. Perhaps it would be better to have the courts reach this result themselves rather than to place an *ex ante* requirement; possibly courts would view constitutional limits with more flexibility if they are not faced such a reservation. In addition, without the reservation, parties can at least raise arguments in court that ask for change in contravention of the Constitution, while having the reservation would disable such arguments. This argument weighs the objectives of eliminating sex discrimination with the importance of fealty to international obligations, and concludes that any possibility of expansion for the former takes precedence over the latter.<sup>184</sup>

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181. RESTATEMENT, *supra* note 75, ch. 2 at 40.

182. Catherine Bocskor has argued that the reservation is not necessary because in the context of United States law, "all appropriate measures" could not be taken to mean violation of the U.S. Constitution. Bocskor, *supra* note 8, at 17. However, this argument is disputed by Meron's understanding of the meaning of "appropriate," as set out *infra* at note 25, as well as by article 13 of the Declaration of Rights and Duties of States (International Law Commission 1949): "Every State has the duty to carry out in good faith its obligations arising from treaties . . . , and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty."

183. Memorandum of Law, *supra* note 4, at 1. *But cf.* Meron, who takes the position that the "failure to ratify the proposed Equal Rights Amendment to the US Constitution makes it unlikely that 'the principle of equality between men and women' will be embodied in the US Constitution . . . in the foreseeable future." T. MERON, *supra* note 21, at 63.

184. After all, the Committee's weak enforcement power means that the United States risks little punishment, as a practical matter, by violating the terms of the Convention. Catherine

The argument fails to take account, though, of the areas where the Constitution has been interpreted to provide rights to women that go beyond those of the Convention. The most important example is the recent Supreme Court decision in *Johnson Controls*, holding unconstitutional an employment policy meant to protect a fetus at the expense of women's employment rights.<sup>185</sup> The Convention, in contrast, allows such protective legislation. Likewise, in the abortion arena, the rights of U.S. women extend beyond the Convention's provisions. However scaled back constitutional rights pertaining to abortion have been in recent years,<sup>186</sup> they are more fully and more favorably spelled out under U.S. constitutional doctrine than in the Convention. These examples illustrate areas where U.S. constitutional norms are more expansive than the Convention.

What a reservation of this type should do is to allow augmentation of current constitutional understandings in favor of the elimination of discrimination against women, while preserving those aspects of constitutional doctrine that go beyond the Convention.<sup>187</sup> Hence, the middle-tier scrutiny given to distinctions made on the basis of sex should be replaced with strict scrutiny, but a woman's right to abortion should continue to be permitted to the extent allowed by the Constitution. Protective legislation should likewise continue to be prohibited. Careful drafting can ensure that the reservation serves these functions rather than merely furnishing an excuse for noncompliance with the Convention.

This reservation would, nonetheless, serve to prohibit infringements

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Bocskor emphasizes this point when she writes that the Committee, "established to oversee compliance with the convention, recognizes [the Convention's] progressive nature in its quarterly review of reports . . ." Bocskor, *supra* note 8, at 17. In other words, the Committee treats conflicts with existing laws and constitutions leniently.

185. *International Union, UAW v. Johnson Controls*, 111 S.Ct. 1196 (1991). One should note that in highlighting potential areas of conflict with current U.S. law, the State Department expressed no concern regarding the apparent requirement in the Convention as to legislation protecting maternity, which at the time of its Memorandum was a question unsettled by the Supreme Court.

186. *Compare Roe v. Wade*, 410 U.S. 113 (1973) (holding the constitutional right of privacy is broad enough to encompass a woman's decision whether to terminate her pregnancy) *with Harris v. McRae*, 448 U.S. 297 (1980) (holding Due Process does not require a state to pay for medically necessary abortions for which federal reimbursement is unavailable) *and Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (holding a state may require that physicians ascertain the "viability" of a fetus if the physician believes a woman is twenty or more weeks pregnant).

187. *See Lillich & Hannum, Linkages Between International Human Rights and U.S. Constitutional Law*, 79 AM. J. INT'L L. 158, 159 (1985) (stating that *Reid v. Covert*, 354 U.S. 1 (1957), "established the principle that constitutional rights could not be diminished by treaty, so that international law would be used to expand protections or fill gaps left in U.S. law rather than to restrict existing rights.").

of other rights in the manner that Meron discusses.<sup>188</sup> This obviously means that there will be areas where women's rights will lose to other recognized constitutional rights, such as in the area of the First Amendment.<sup>189</sup> Nonetheless, the reservation would enable gender discrimination to be treated as a lexically equal constitutional value. Furthermore, the reservation would be an indication that the United States takes its international obligations seriously, even when they are difficult-to-enforce human rights obligations.

It may simply be invalid for the United States to ratify the Convention subject to the first two proposed reservations and a version of the third that fails to promote the elimination of discrimination. Such a weakening of the document arguably contravenes its object and purpose, contrary to the terms of both the Convention and the Vienna Convention on the Law of Treaties. As has been suggested by Jack Greenberg,

[r]atification subject to such limitations . . . raises the question of why the United States, or any state making similar reservations, should ratify at all. In addition, there may be a question of whether such wholesale reservation is valid, or whether ratification subject to such reservation is valid. After all, the most oppressive and racist government could ratify any international human rights instrument if it contained reservations which would not require it to make any changes in its policies.<sup>190</sup>

Furthermore, any value that the United States might otherwise obtain from ratifying the Convention as a demonstration of its "leadership in international human rights"<sup>191</sup> would be severely diminished by attaching these reservations. Exhorting the United States to ratify international human rights covenants as a demonstration of such leadership is an oft-repeated argument:

[Ratification] would . . . enhance the United States image internationally . . . . The United States, which has proclaimed its belief in human rights from its birth as a nation and which has done more than most states to implement such rights in practice, is one of the few states and the only Western democracy that has not ratified any major human rights

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188. See *infra* I(B)(2), Overbreadth.

189. "[While the cases of *Roberts v. United States Jaycees* and *Hishon v. King & Spalding* make clear] that gender-based discrimination by some private associations may be prohibited consistent with the First Amendment, discrimination necessary to protect intimate relationships or legitimate expressive association is protected by the First Amendment." M. HALBERSTAM & E. DEFEIS, *supra* note 71, at 97. See also *id.* at 96 ("Of particular relevance to the Convention . . . is the First Amendment protection of freedom of association. The broad definition of discrimination in the Convention and the specific provisions requiring states parties to enact legislation prohibiting discrimination and to eliminate discrimination in various areas apply to private as well as government discrimination.")

190. Greenberg, *supra* note 52, at 325-26.

191. Bocskor, *supra* note 8, at 17.

covenant.<sup>192</sup>

To the extent that image-enhancement is a goal of ratifying the Convention, the executive and legislative branches would be wise to consider the negative impact of broad-based reservations. More importantly, if the Convention is meant to accomplish any progress in sex equality for women, these reservations will curtail achievement of that goal.

### III. REASONS TO RATIFY THE CONVENTION

As the State Department proposal stands, the Convention if ratified would do virtually nothing for substantive sex discrimination law in the United States. It would not be a source of rights for individual women in domestic courts because of the non-self-executing reservation. To implement the terms of the Convention, assuming a non-self-executing reservation, the Congress would have to pass implementing legislation—but the State Department and Senate have expressed the position that U.S. law currently conforms to the Convention, and so no new legislation is necessary. The federal-state reservation would allow states to contravene the Convention's terms absent controlling federal law in an area, because states would have no obligations under the Convention—and in such cases the intended beneficiaries of the Convention would have no recourse even to international enforcement. And without careful drafting of a reservation meant to restrain the Convention within constitutional limits, the terms of the Convention might be frozen at the level of current constitutional sex equality doctrine. Careless drafting might lead women to actually experience a reversal of abortion and employment rights that have heretofore been guaranteed.

Thus, unless the ratified Convention does not contain the first two State Department proposals as reservations, and the third proposed reservation is crafted to advance the aim of sex equality, the Convention will not be able to change substantive sex discrimination law. Given that this appears to be the most politically likely outcome, it is worthwhile to canvass rationales for ratifying the Convention subject to the proposed reservations to determine whether such a document would benefit women and the state of sex discrimination law at all.

If the Convention were ratified in such a way that it could only embody the present state of sex equality law, two points are implicit: (1) the United States would always be free to progress *beyond* the Convention in its sex equality law, for such laws would not contravene

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192. M. HALBERSTAM & E. DEFEIS, *supra* note 71, at 98.

the Convention; and (2) sex discrimination laws could not degenerate beyond the terms of the Convention, or else the United States would be in contravention of its international obligations thereunder. Jack Greenberg, who has advanced the latter argument, states that although "ratification would forbid regression . . . , in the United States [regression] is unlikely anyway."<sup>193</sup> Why Greenberg thinks regression is unlikely in the United States is unclear, but readers of *Webster*<sup>194</sup> and *Wards Cove*<sup>195</sup> know that Supreme Court decisions securing rights are never written in stone. Greenberg offers a second argument why ratifying subject to reservations is better than no ratification at all:

[W]hile reservations could perhaps be repealed one by one, a step by step method of ratification does not seem to exist. Given the history of the United States' reluctance to join in international human rights compacts, ratification with wholesale reservations was apparently fastened upon as the most feasible political means of securing any U.S. acquiescence at all.<sup>196</sup>

One may doubt the likelihood that the reservations will ever be removed, but it is possible that the quadrennial reporting to CEDAW could create sufficient pressure for the United States to feel compelled to more affirmatively act under the Convention.<sup>197</sup>

A number of commentators make a similar point: ratification of the Convention may create increased interest in, and hence advocacy and pressure for, legislation meant to eradicate sex discrimination. The intention of the Senate in attaching reservations may be to limit the scope of application of the document; ratification could then be seen as a cost-free yet powerful public relations measure. Yet ratification may create a momentum.

[T]he progressive implementation . . . does allow a certain flexibility to states which could ratify the Convention, thus demonstrating their com-

193. Greenberg, *supra* note 52, at 325-26.

194. *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).

195. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (holding that even after disparate impact is established, the ultimate burden of persuasion remains on the plaintiff, and that business "necessity" is not the standard in the sense that the challenged practice must be "essential" to the employer's operations, but only that the practice must promote the "legitimate employment goals" of the employer in a "significant way."). *Cf.* *Griggs v. Duke Power*, 401 U.S. 424 (1971) (holding that an employment practice that operates to exclude minorities that cannot be shown to be related to job performance is prohibited under Title VII, notwithstanding a lack of discriminatory intent).

196. Greenberg, *supra* note 52, at 325-26.

197. *See, e.g., Burrows, supra* note 22, at 96:

The international enforcement machinery . . . is . . . very weak, and it does not inspire a great deal of optimism as to its ability to encourage compliance by recalcitrant states. . . . This view, of course, ignores the moral value of international law and the persuasive influence which that law can have on states which have not assumed legal obligations under international treaties.



mitment to the advancement of women, without the necessity for immediate action. For women in such a state the Convention would then provide valuable ammunition in their task of persuading their own government to extend legislation to permit women the full enjoyment of their rights . . . .<sup>198</sup>

In other words, even if the Convention is not useful in itself as a source for sex equality law, its indirect impact may prove useful.<sup>199</sup>

#### IV. CONCLUSION

The Convention contains provisions that could potentially render considerable change in U.S. sex discrimination law. Other features of the Convention, though, are steps backward for the United States. After its review, the State Department proposed reservations that would effectively remove any potential for change from the Convention, leaving the document "reasonable," that is, a replica of current U.S. sex equality law. Even if the Convention mirrored the State Department's view, ratification might very well accomplish sufficient benefits to merit ratification. But if supporters of the Convention are truly hoping for meaningful change for women, they should be cognizant of the enervating effects of the State Department's approach, and demand that the first major human rights convention directed solely at achieving change for women be held to its full promise.

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198. *Id.* at 92.

199. See Bocskor, *supra* note 8, at 17: "The fact that the treaty will have no significant effect on domestic law does not detract from the importance of ratification of course. Its precatory value, in areas of law where U.S. provisions fall short, should not be understated . . . ."

There is a related argument that U.S. ratification would strengthen the normativity of sex discrimination as an international prohibition—that is, U.S. ratification would have value as "soft" law. As more countries ratify an exhortatory treaty such as the Convention, its terms become increasingly accepted as norms of international law. See Dupuy, *Soft Law and the International Law of the Environment*, 12 MICH. J. INT'L L. 421, 424-28 (1991). According to the *Restatement*, the prohibition against sex discrimination, unlike that against racial discrimination, is not yet fully a customary international law norm. RESTATEMENT, *supra* note 75, § 702, comments (j) ("Racial discrimination is a violation of customary law when it is practiced systematically as a matter of state policy . . .") and (l) ("Gender-based discrimination is still practised in many states in varying degrees, but freedom from gender discrimination . . . , in many matters, may already be a principle of customary international law.") (emphasis supplied). U.S. ratification could carry the world closer to making it clearly such a principle.

See also Burrows, *supra* note 22 at 96:

The very existence of such treaties relating to the elimination of discrimination against women may preclude the possibility that in the future sex may again become a permissible ground for discrimination. The Convention has set out the ethic of the cosmopolitan community and, whilst some states may refuse to accept it on grounds such as religion, it remains nonetheless the prevalent international ethic.