

## UNSEX CEDAW: WHAT'S WRONG WITH "WOMEN'S RIGHTS"

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## ABSTRACT

Although the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW" or the "Convention") has succeeded in some respects, even its supporters acknowledge broad failures. CEDAW's weakness draws on the titular mistaken diagnosis: "women" are not the issue—gender disparities are. The 1970's drafting of CEDAW focused on bringing women to their place at the international law table.<sup>1</sup> What's wrong with women's rights? In the international context, CEDAW attempts to empower women but fails to respect other gender inequality. As the preeminent treaty on gender inequality, CEDAW cannot succeed in creating gender equality if its scope remains limited to women. Men are external to core debates over gender inequality. CEDAW's focus on "women" enshrines the male/female binary in international law, when it should seek the elimination of the categories themselves. Under this model, women are the victims, while men are presumed to be the perpetrators. Catharine MacKinnon recently asked "Are women human?,"<sup>2</sup> and CEDAW's answer, by its existence outside of human rights, is that they are not. The Convention removes women's issues from human rights discussions, isolating their concerns. The identitarian category of "women" serves to reify rather than undermine gender disparities. For international law to foster gender equality, it is imperative that CEDAW undergo a radical refashioning.

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<sup>1</sup> See Fourth World Conference on Women, Beijing, China, September 4-15, 1995, *Progress Achieved in the Implementation of the Convention on the Elimination of all Forms of Discrimination Against Women*, ¶¶ 11-12, U.N. Doc. A/CONF.177/7 (June 21, 1995), available at <http://www.un.org/womenwatch/daw/cedaw/history.htm> [hereinafter *Beijing Conference*].

<sup>2</sup> CATHARINE A. MACKINNON, ARE WOMEN HUMAN?: AND OTHER INTERNATIONAL DIALOGUES (2006) [hereinafter MACKINNON, ARE WOMEN HUMAN?].

## INTRODUCTION

As Lady Macbeth gathers the strength to achieve her evil ends, she implores the spirits to “unsex me here.”<sup>3</sup> She believes that losing her identity as a woman will empower her. So, too, the Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW” or the “Convention”) must lose its focus on “women” to realize its potency.

The Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW” or the “Convention”), signed on July 17, 1980 by sixty-four countries,<sup>4</sup> has as its principal goals the protection and promotion of the rights of women and the elimination of discrimination against women.<sup>5</sup> As of May 26, 2009, 186 countries—more than ninety percent of United Nations’ members—are parties to the Convention.<sup>6</sup> The most notable non-party to the Convention is the United States.<sup>7</sup> In addition, as of May 26, 2009, there are seventy-nine Signatories and ninety-seven Parties to the Optional Protocol.<sup>8</sup> However, CEDAW has faced substantial criticism as an insignificant international treaty.<sup>9</sup>

CEDAW’s weakness arises from its mistaken diagnosis: “women” may be some of the victims of inequality, but gender disparities should be the focus of the Convention. As I have argued elsewhere, CEDAW, the preeminent international treaty on gender relations, has achieved a great deal at the level of international law and in signatory countries’ enforcement, but it has not done enough.<sup>10</sup> CEDAW’s focus on women hobbles its efficacy in battling gender inequality.

Neither feminist theory nor international law theory has approached the question of women’s role in CEDAW with an analytical perspective. Instead, CEDAW has been analyzed as “Governance Feminism,” the engagement of feminist efforts in the governance of a wide variety of regulatory forms, from

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<sup>3</sup> As Lady Macbeth prepares to murder Duncan, she says: “The raven himself is hoarse/That croaks the fatal entrance of Duncan/Under my battlements. Come, you spirits/That tend on mortal thoughts, unsex me here/And fill me from the crown to the toe top-full/Of direst cruelty. Make thick my blood.” William Shakespeare, *MACBETH*, act 1, sc. 5. Thanks to Bridget Crawford for the reference.

<sup>4</sup> United Nations, Short History of CEDAW Convention, <http://www.un.org/womenwatch/daw/cedaw/history.htm> (last visited Aug. 22, 2009).

<sup>5</sup> Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) art. 1, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

<sup>6</sup> See UN Treaty Collection: CEDAW Participants, <http://treaties.un.org/Pages/ParticipationStatus.aspx> (follow Chapter IV hyperlink; then follow Section 8 hyperlink) (last visited May 26, 2009) [hereinafter CEDAW Participants].

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> See *infra* Part I.

<sup>10</sup> See generally Darren Rosenblum, *Internalizing Gender: Why International Law Theory Should Adopt Comparative Methods*, 45 COLUM. J. TRANSNAT’L L. 759 (2007) [hereinafter Rosenblum, *Internalizing Gender*].

states to quasi-state institutions.<sup>11</sup> Janet Halley, in her work on international criminal law, criticized “Governance Feminism” for its push to eliminate consent as a defense to genocidal rape.<sup>12</sup> According to Halley, Governance Feminists rely on an excessive criminalization of sexuality in which some contact may be consensual.<sup>13</sup> This example demonstrates how Governance Feminism’s havoc falls on men, which has led Halley to “take a break from feminism.”<sup>14</sup>

This anti-identitarian impulse is correct insofar as strict adherence to identity may lead to unintended consequences, but it does not require the abandonment of all feminist goals. CEDAW’s focus on “women” exalts the men/women binary to the core of international law, when the goal of gender equality would be better served by seeking the elimination of the categories themselves. To move gender equality into the mainstream of international law, feminist scholars must critique CEDAW with the most substantial anti-essentialist and anti-identitarian perspectives.

This study centers on a textual analysis of CEDAW rather than an examination of the CEDAW Committee’s work or interpretations among signatories. Although that extensive material holds much fruit for further analysis of the Convention’s questionable reliance on identity, such a study demands further research and analysis.

This Article continues my project of challenging the intersections between liberal constitutional theory and international and comparative notions of equality and identity.<sup>15</sup> Variations in identity constructions across cultural lines define liberal remedies for group inequality. Fuller understandings of remedies for inequality such as quotas has compelled me to think more deeply about the relationship between universalist constitutionalism and equality between and among identity categories.<sup>16</sup> In particular, I have closely examined France’s Parity Law, which requires political parties name women as half of their candidates for public office;<sup>17</sup> Brazil’s Quota Law, which requires thirty percent of political parties be comprised of women;<sup>18</sup> and Norway’s Corporate Board Quota, which sets a floor of forty percent for either gender on publicly-listed

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<sup>11</sup> See Janet Halley, *Rape in Berlin: Reconsidering the Criminalisation of Rape in the International Law of Armed Conflict*, 9 MELBOURNE J. OF INTERNATIONAL LAW 78, 79 (2008).

<sup>12</sup> *Id.* at 78.

<sup>13</sup> *Id.*

<sup>14</sup> See generally JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* (2006) [hereinafter HALLEY, *SPLIT DECISIONS*].

<sup>15</sup> Fourteen years ago, I began a line of inquiry related to identity with a queer interrogation of “lesbian and gay” identity. Darren Rosenblum, *Queer Intersectionality and the Failure of Lesbian and Gay “Victories,”* 4 L. & SEXUALITY 83 (1995).

<sup>16</sup> See generally Darren Rosenblum, *Loving Gender Balance: Reframing Identity-Based Equality Remedies*, 76 FORDHAM L. REV. 101 (2008) [hereinafter Rosenblum, *Loving Gender Balance*].

<sup>17</sup> See Darren Rosenblum, *Parity/Disparity: Electoral Gender Inequality on the Tightrope of Liberal Constitutional Traditions*, 39 U.C. DAVIS L. REV. 1119 (2006).

<sup>18</sup> See Rosenblum, *Internalizing Gender*, *supra* note 10.

corporate boards of directors.<sup>19</sup> This Article continues the exploration of identity in focusing on an interrogation of the term “women” as deployed by international law. It brings this anti-essentialist interpretation of gender equality to bear on international law, moving it beyond the identitarian category of “women.”

First, I will present the broad range of critiques that amply demonstrate CEDAW’s failure to meet its own goals. Second, I posit that a core reason for the Convention’s failures lays in the centrality of “women” in the text. Third, CEDAW mistakenly targets the problem as discrimination, when a broader array of disparities is at hand. Fourth, this discrimination model presumes a *perpetrator* of discrimination—presumably “men”—when a far broader power construct is at issue. I conclude by arguing that this series of counterproductive engagements suggests the need for a radical refashioning of this crucial treaty.

## I. CEDAW’s Failures and Successes

The drafters of CEDAW sought to situate women’s rights as a preeminent international concern.<sup>20</sup> Women throughout the world confronted sexist institutions, and the drafters’ goals centered on bringing international law to ameliorate these harms.<sup>21</sup> Human rights endeavors begin with universalist ideas of law’s potential to protect the weak from the strong, and CEDAW is no exception.<sup>22</sup> This Section discusses the Convention’s failures and successes briefly, setting the stage for the discussion of its potential.

Although CEDAW faces many failures as one of the most aspirational of international treaties, its subtle-at-best enforcement methods and the many reservations of its signatories limit its efficacy.<sup>23</sup> Despite these shortcomings, CEDAW has achieved some internalization within national legal systems.<sup>24</sup>

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<sup>19</sup> See Darren Rosenblum, *Feminizing Capital: The Economic Imperative for Women’s Corporate Leadership*, BERKELEY BUS. L.J. (anticipated 2009) [hereinafter Rosenblum, *Feminizing Capital*].

<sup>20</sup> See Beijing Conference, *supra* note 1.

<sup>21</sup> *Id.*

<sup>22</sup> The United Nations, for example, adopted the Universal Declaration of Human Rights in 1948. The Preamble proclaims that its member states have pledged to promote “universal respect for and observance of human rights and fundamental freedoms.” U.N. Charter preamble, para. 6.

<sup>23</sup> See Jennifer Riddle, Note, *Making CEDAW Universal: A Critique of CEDAW’s Reservation Regime Under Article 28 and the Effectiveness of the Reporting Process*, 34 GEO. WASH. INT’L L. REV. 605 (2002) [hereinafter Riddle, *Making CEDAW Universal*]. “Of the United Nations’ human rights treaties, CEDAW has attracted the greatest number of reservations with the potential to modify or exclude most, if not all, of the terms of the treaty.” *Id.* at 606. As of 2002, fifty-five States had reservations to CEDAW, and another fourteen States had ultimately withdrawn reservations they had initially filed. See *id.* at 606; see also Adia Gonzales Martinez, *Human Rights of Women*, 5 WASH. U. J. L. & POL’Y 157, 175 (2001); Julia Ernst, *U.S. Ratification of the Convention on the Elimination of all Forms of Discrimination Against Women*, 3 MICH. J. GENDER & L. 299, 337-40 (1995); Kerry L. Ritz, *Soft Enforcement: Inadequacies of Optional Protocol as a Remedy for the Convention on the Elimination of all Forms of Discrimination Against Women*, 25 SUFFOLK TRANSNAT’L L. REV. 191, 207-208 (2001).

<sup>24</sup> See generally Rosenblum, *Internalizing Gender*, *supra* note 10 (analyzing the process by which Brazil and France internalized CEDAW article 7).

Thinking about gender or sex beyond just “women” would foster a broader basis for support and interest in CEDAW’s implementation.

Like many other human rights conventions, CEDAW authorizes broad reservations that allow many of the signatories to exempt themselves from nearly all of the provisions in the Convention.<sup>25</sup> For example, Saudi Arabia has only just begun to debate whether to allow women to drive, yet it is a signatory to CEDAW.<sup>26</sup> Such major reservations reduce CEDAW to a Convention centered on reporting alone. While reporting compels countries to measure compliance, it cannot force change. CEDAW’s “soft” law status parallels other human rights treaties, but its weak enforcement mechanisms and lack of resources cripple it. Cultural differences accentuate these shortcomings, as I have argued.<sup>27</sup> Despite these limitations, the Convention has succeeded in certain limited contexts in legitimizing and even institutionalizing women’s rights.<sup>28</sup>

At its inception, CEDAW only provided two procedures, the interstate procedure and the reporting procedure, to monitor State Parties’ compliance with CEDAW’s mandates.<sup>29</sup> Article 29 of CEDAW, the interstate procedure, provides for a resolution to conflicting interpretations and applications of the Convention between State Parties.<sup>30</sup> It states that disputes arising out of differing interpretations and applications are first put to arbitration to negotiate a solution to the dispute.<sup>31</sup> Barring a resolution within six months, the dispute can ultimately be sent to the International Court of Justice (ICJ) for a final decision.<sup>32</sup> However, State Parties often rely on the principle of non-intervention in other States’ internal affairs and avoid initiating procedures to evade the possible retaliatory effects.<sup>33</sup> More importantly, any State can refuse to be held to the procedure, making this provision a central source of CEDAW’s weakness.<sup>34</sup> These many

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<sup>25</sup> Reservations are allowed if they are “not incompatible with the object and purpose of the...Convention.” Rosenblum, *Internalizing Gender*, *supra* note 10, at 767 (quoting Laboni Amena Hoq, Note, *The Women’s Convention and its Optional Protocol: Empowering Women to Claim Their Internationally Protected Rights*, 32 COLUM. HUM. RTS. L. REV. 677, 688 (2001) [hereinafter *The Women’s Convention*]). However, the Convention provides no means to ensure compliance. *See id.* Moreover, states can independently determine what “appropriate means” are necessary for their compliance. Under such conditions, a state party can have little to no risk of being sanctioned. *See* Riddle, *Making CEDAW Universal*, *supra* note 23, at 630.

<sup>26</sup> Hassan M. Fattah, *Saudi Arabia Debates Women’s Right to Drive*, N.Y. TIMES, Sept. 28, 2007, at A3, available at <http://www.nytimes.com/2007/09/28/world/middleeast/27cnd-drive.html>.

<sup>27</sup> *See* Rosenblum, *Internalizing Gender*, *supra* note 10.

<sup>28</sup> *Id.*

<sup>29</sup> *The Women’s Convention*, *supra* note 25, at 684. Critics have argued that (prior to the Optional Protocol) CEDAW lacked a complaint and communication process designed to allow non-governmental organizations or individuals to bring complaints against State Parties for violations of the Convention. *See* Ernst, *supra* note 23, at 337-40.

<sup>30</sup> *The Women’s Convention*, *supra* note 25, at 684.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 685. The interstate reporting procedure, set forth in Article 18, obliges State Parties to submit an initial report within one year of ratification of the Convention, followed by periodic reports at least once every four years. *Id.* The reports must include the steps the State has taken to

roadblocks to efficacy have led to the reality that no state has ever engaged the interstate procedure<sup>35</sup>—clear evidence of its meaninglessness.

Reliance on state reporting hampers the Convention's enforcement, as state parties often fail to report at all, submit reports that are inaccurate or tardy, or both.<sup>36</sup> State parties have little incentive to portray the status of women accurately.<sup>37</sup> Moreover, Article 20 limits CEDAW's consideration of country reports to two weeks, a time period too short to permit thorough analysis.<sup>38</sup> The CEDAW Committee's reviewing reports and making general recommendations reflects its lack of substantial authority.<sup>39</sup>

Facing CEDAW's enforcement failures, international women's rights advocates pushed the forty-third session of the Commission on the Status of Women (CSW) to adopt the Optional Protocol to the Women's Convention in March 1999.<sup>40</sup> The Protocol offers two new mechanisms to hold governments accountable to their Convention obligations: 1) the communications procedure, which provides individuals and groups the right to lodge complaints with CEDAW regarding States' violations of the Convention's terms; and 2) the inquiry procedure, which enables CEDAW to conduct inquiries into States' serious and systematic abuses of women's human rights.<sup>41</sup> Although the Protocol allows CEDAW to initiate investigations against State parties, the Convention

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integrate the Convention into domestic laws and policies and the difficulties the State has faced in upholding the Convention. *Id.* These reports are submitted to CEDAW, which examines the reports. *Id.* Article 17 gives specific authority to CEDAW to review State Parties' reports and scrutinize their implementation and adherence to the Convention before the international community, and, if needed, CEDAW may issue general recommendations regarding the nature and extent of State Parties' compliance. *See id.*; *see also* Katherine M. Culliton, *Finding a Mechanism to Enforce Women's Right to State Protection from Domestic Violence in the Americas*, 34 HARV. INT'L L. J. 507, 529 (1993). However, CEDAW may not impose sanctions for noncompliance with the Convention or engage in any form of arbitration between State Parties, or an individual and a State Party, regarding the interpretation or application of the Convention. *See Ritz, supra* note 23, at 204; *see also The Women's Convention, supra* note 25, at 685.

<sup>35</sup> MACKINNON, ARE WOMEN HUMAN?, *supra* note 2, at 305.

<sup>36</sup> *See The Women's Convention, supra* note 25, at 687; *see also* Kathryn Christine Arnold, Note, *Are the Perpetrators of Honor Killings Getting Away with Murder? Article 340 of the Jordanian Penal Code Analyzed Under the Convention of the Elimination of all Forms of Discrimination Against Women*, 16 AM. U. INT'L L. REV. 1343, 1390 (2001). The author discusses CEDAW's failure to enforce the provision set forth in the Convention requiring State parties to submit reports to the Committee. *See id.* The author gives an example of Jordan, the subject of the author's discussion, as a country that rarely submits the requisite reports and when the Jordanian government submits the reports, the information in the reports is inaccurate. *See id.*

<sup>37</sup> *See The Women's Convention, supra* note 25, at 687.

<sup>38</sup> *See id.*; *see also* Ernst, *supra* note 23, at 340, 346-48.

<sup>39</sup> *See The Women's Convention, supra* note 25, at 687; *see also* Ernst, *supra* note 23, at 340; Ritz, *supra* note 23, at 205.

<sup>40</sup> *See The Women's Convention, supra* note 25, at 683.

<sup>41</sup> *See id.* at 678; *see also* Riddle, *supra* note 23; *see also* Linda M. Keller, Symposium Article, *The Convention on the Elimination of Discrimination Against Women: Evolution and (non)Implementation Worldwide*, 27 T. JEFFERSON L. REV. 35 (2004).

must first invite the cooperation of a subject State and that State must consent to any visit.<sup>42</sup> These and other procedures hamper CEDAW's efficacy.<sup>43</sup>

While the Protocol attempts to improve the CEDAW's ineffectiveness, it still fails to enforce the Convention.<sup>44</sup> To begin with, fewer than half of the member States have ratified it. In addition, although refusing reservations,<sup>45</sup> State parties can opt out of the inquiry procedure,<sup>46</sup> a provision enhanced by CEDAW's Article 10, which allows States to disregard CEDAW's competence to investigate complaints and to make recommendations.<sup>47</sup> Further evidence of the Protocol's limited utility lies in the fact that since its inception, the CEDAW Committee has decided just ten cases. Of the ten, in those where the Committee made a decision on the merits and found in favor of the claimant, the relief was limited to broad-based recommendations.<sup>48</sup> Despite the presence of the Protocol, CEDAW has no sanctioning power. Even if it were permitted to investigate alleged violations, it could not force state compliance.<sup>49</sup>

Like many human rights endeavors, CEDAW is clearly soft law in that it fails to delegate power to the international institution.<sup>50</sup> Soft law eases enactment,

<sup>42</sup> See Keller, *supra* note 41, at 38.

<sup>43</sup> Another argument for CEDAW's ineffectiveness is its vague phrasing of the goals State Parties must accomplish to meet their affirmative Convention obligations. See Arnold, *supra* note 36, at 1392-93. Critics assert that the language (such as Article 2's requirement that State Parties act "by all appropriate means and without delay" and "agree to pursue") used in the Convention concerning State Parties' obligations is vague and unclear. *Id.* The use of this terminology allows State Parties to avoid compliance with the obligations imposed by the Convention. State Parties could claim that the determination of "appropriate means" should be left to the States themselves and each State should independently determine what is appropriate. See *id.* at 1343, 1392-93. Thus, States that do not comply with the Convention's affirmative duties could escape sanctions by claiming that they have taken the measures that they deemed necessary to fulfill their obligations under the Convention.

<sup>44</sup> See *The Women's Convention*, *supra* note 25, at 678; see also Ritz, *supra* note 23, at 208-09.

<sup>45</sup> See *The Women's Convention*, *supra* note 25, at 678.

<sup>46</sup> See *id.*; see also Ritz, *supra* note 23, at 209-10.

<sup>47</sup> See Riddle, *supra* note 23, at 634.

<sup>48</sup> In the case of Ms. A.S. v. Hungary, Convention on the Elimination of All Forms of Discrimination Against Women, Communication No. 4/2004, U.N. Doc. CEDAW/C/36/D/4/2004, 3.3 (2006), the complainant alleged that before performing an emergency cesarean section to remove the complainant's dead fetus, state doctors effectively coerced her into signing a consent form that gave her doctors permission to tie her fallopian tubes, resulting in sterilization. The committee found that the complainant's rights had been violated and recommended that Hungary take further measures to ensure that the relevant provisions of the Convention be enforced, including reviewing domestic legislation and monitoring health centers. See *id.* at 18.

<sup>49</sup> See Ritz, *supra* note 23, at 191, 210-14.

<sup>50</sup> Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, in LEGALIZATION AND WORLD POLITICS 37, 58 (Judith L. Goldstein et al. eds., 2001). According to Abbot and Snidal, soft law:

[P]rovides a rational adaptation to uncertainty. It allows states to capture the "easy" gains they can recognize with incomplete knowledge, without allowing differences or uncertainties about the situation to impede completion of the bargain... Soft law avoids the sovereignty costs associated with centralized adjudication or other strong delegation and is less costly than repeated

as states do not actually cede enforcement power.<sup>51</sup> It mitigates the concerns states have by allowing reservations, escape clauses, imprecise commitments, and forms of delegation, which, in turn, accord member States future control if adverse circumstances arise.<sup>52</sup> States can apprehend the consequences of their agreement prior to making it a hard law—binding, precise and delegated enforcement.<sup>53</sup> Although CEDAW and the Optional Protocol require State members to implement general guidelines to end gender discrimination, they both set forth principles rather than rules, making the Convention a soft law.<sup>54</sup> CEDAW and the Optional Protocol fail to provide precise legal obligations and do not require compliance or responsibility by parties.<sup>55</sup> Finally, the Convention’s soft interstate and reporting procedures do not penalize state non-compliance.<sup>56</sup>

Perhaps CEDAW’s principal limitation is the reservations it permits,<sup>57</sup> a factor that reflects human rights norms more than the shortcomings of CEDAW itself. CEDAW has been ratified with reservations by more states than almost any other human rights treaty to date.<sup>58</sup> Many reservations draw on assertions of

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renegotiation in light of new information . . . ; [it] allows states to adopt their commitments to their particular situation rather than trying to accommodate the divergent national circumstances within a single text . . . ; [it] accommodates states with different degrees of readiness for legalization [and] . . . ; facilitates compromise between weak and powerful states.

*Id.* at 60.

In contrast to “soft law”, the term “hard law” has been defined as legally binding obligations that are precise and that delegate authority for interpreting and implementing the law. The advantages of choosing hard law include reduction of transactional costs, strengthening the credibility of the commitments of State Parties, expanding State Parties’ available political strategies, and resolving problems of incomplete contracting. Hard law is generally reserved for issues that require assurance devices when the benefits of cooperation are great but the potential for opportunism and its costs are high, require high credibility of commitments when noncompliance is difficult to detect, and need to be resolved on national as well as an international level. *Id.* at 38, 45-46.

<sup>51</sup> It also offers more effective ways to deal with uncertainties and “facilitates compromise—mutually beneficial cooperation, between actors with different interests and values, different time horizons and discount rates, and different degrees of power.” *Id.* at 38-39. Soft law is utilized when member States recognize a given issue but are concerned about their sovereignty and the costs and risks of entering an agreement. *Id.* at 50-51.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 51.

<sup>54</sup> See Ritz, *supra* note 23, at 191, 214-15.

<sup>55</sup> See *id.* at 215.

<sup>56</sup> See *id.* The Optional Protocol, which was aimed at strengthening the enforcement procedures of CEDAW, facilitates but does not enforce compliance. See *id.*

<sup>57</sup> See Martinez, *supra* note 23, at 175.

<sup>58</sup> See Riddle, *supra* note 23, at 605. “Of the United Nations’ human rights treaties, CEDAW has attracted the greatest number of reservations with the potential to modify or exclude most, if not all, of the terms of the treaty.” *Id.* at 606 Article 28 of the Convention, permits ratification of the Convention provided that the reservations are not “incompatible with the object and purpose of the present Convention.” See *The Women’s Convention*, *supra* note 25, at 688. The Convention, however, provides no mechanism to determine whether a given reservation violates the terms of Article 28. In addition, the Convention fails to provide CEDAW with the authority to evaluate or

cultural or religious beliefs, some sweeping.<sup>59</sup> For example, Saudi Arabia attached a general reservation to the treaty, stating that: “In case of contradiction between any term of the Convention and the norms of Islamic law, the Kingdom is not under obligation to observe the contradictory terms of the Convention.”<sup>60</sup> Libya made a similar reservation, providing that CEDAW cannot conflict with Islamic laws having to do with “personal status derived from the Islamic Shari’a.”<sup>61</sup> Countries like Egypt, Bangladesh, India and Iraq have made comparable reservations.<sup>62</sup> These examples illustrate the tension between the principles of nondiscrimination and freedom of belief.<sup>63</sup> CEDAW’s critics argue that these extensive reservations undermine the object and purpose of the Convention, reducing it to a symbolic commitment.<sup>64</sup> Yet many argue that without this reservation process, CEDAW would have far fewer signatories.<sup>65</sup>

Although CEDAW reflects some acknowledgement by the world community that women’s rights matter, its shortcomings reflect a serious flaw in this recognition. Reservations point to resistance to changing sexist cultural and religious norms. The Convention provides a first step but not a workable solution, suggested by the fact that over forty-five countries around the world—most of which have ratified or acceded to CEDAW—maintain laws that explicitly discriminate against women.<sup>66</sup>

As an international law text, CEDAW’s efficacy is limited. But in informal ways, the Convention has aided activists in enforcing international norms and required states to attend, at least somewhat, to CEDAW’s norms. Considering how limited CEDAW’s “hard” legal influence is, some find debates over “soft” law, particularly with regard to CEDAW, to be simply irrelevant.<sup>67</sup> Within nations, laws related to the issues raised by the Convention are quite “hard” indeed: domestic laws that affect women vary from State to State and impact real lives.<sup>68</sup> Depending on one’s sex, nationality determines when and whom one can marry, whether one can divorce, control one’s reproduction, own

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limit reservations that violate Article 28, and there are no procedural limitations on making reservations. Thus, as of 2002, fifty-five States filed reservations, and another fourteen States initially entered reservations but subsequently withdrew them. *See id.*

<sup>59</sup> *See* Keller, *supra* note 41, at 39.

<sup>60</sup> *Id.*

<sup>61</sup> *See* Riddle, *supra* note 23, at 627.

<sup>62</sup> *See id.*

<sup>63</sup> *See id.* Saudi Arabia, like many other countries, is not prepared to sacrifice its citizens’ religion and beliefs to enforce CEDAW. Furthermore, Saudi Arabia acceded to CEDAW only because CEDAW was a soft law that contains general, dimly enforceable, principles rather than precise legally binding and enforceable obligations. *See id.*

<sup>64</sup> *See id.*; *also* Martinez, *supra* note 23, at 175; Ernst, *supra* note 23, at 299, 337-40; Ritz, *supra* note 23, at 191, 207-08; Riddle, *supra* note 23, at 627.

<sup>65</sup> *See, e.g.,* Oona A. Hathaway, *Do Human Rights Treaties Make A Difference?*, 111 YALE L.J. 1935, 2006-10 (2002) (analyzing the correlation between compliance requirements and ratification of international human rights treaties).

<sup>66</sup> *See* Ritz, *supra* note 23, at 200.

<sup>67</sup> *See* Abbott and Snidal, *supra* note 50, at 38.

<sup>68</sup> Rosenblum, *Internalizing Gender*, *supra* note 10, at 825.

or inherit property, and even whether one can vote or run for office.<sup>69</sup> Most CEDAW signatories enforce straightforward rules on such questions, often manifesting deep gender inequalities.<sup>70</sup>

CEDAW's failures do not mean the treaty is useless—far from it. The Convention's provisions inspire a range of reactions from fully compliant internalization to disdainful evasion.<sup>71</sup> The fact that CEDAW may not obligate compliance does not mean that it has failed—countries do internalize international norms that arise in CEDAW. However, they do so in different ways, as in Brazilian and French compliance with CEDAW provisions for political representation.<sup>72</sup> The iteration of international norms in domestic contexts draws on comparative legal understanding. For example, international law can encourage internalization through transnational networks of activists and individuals<sup>73</sup> and through acculturation and selective adaptation.<sup>74</sup>

Cultural differences surface within and across national boundaries, leading State and non-State actors to engage in political behavior based on multiple rationalities. Although some internationalists<sup>75</sup> may worry that cultural relativism challenges the viability of their universal norms, in *Internalizing Gender*, I argued that international norms were adopted, albeit colored with local cultural realities.<sup>76</sup> The importance of culture and local factors does not demonstrate the irrelevance of international norms. Although cultural differences may distract observers from the influence of international norms, internalization occurs in the adoption of domestic law that reflects CEDAW's broad goals. International norms fragment and, to some extent, lose their universality, as domestic constructs borrow from and interact with international norms, yielding a syncretic internalization.<sup>77</sup>

In short, despite the profound challenges that face the enforcement of CEDAW's norms and the general weakness of its structure, CEDAW can and does influence national behavior. Central to its cross-cultural appeal and its profound limitations is its core subject, women. Considering the many ways in which CEDAW's focus on women restricts the Convention's potential, attention to the meaning of "sex" or "gender" would bring states into an explicit consideration of the potentially broader constituencies for a treaty that moves beyond the suffering of one narrowly-defined group.

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 787-800.

<sup>73</sup> See MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* 1-10 (1998).

<sup>74</sup> See Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 *DUKE L.J.* 621, 638 (2004); see also Rosenblum, *Internalizing Gender*, *supra* note 10, at 824-25.

<sup>75</sup> See Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 *YALE L.J.* 2599 (1997).

<sup>76</sup> Rosenblum, *Internalizing Gender*, *supra* note 10, at 759, 821-25.

<sup>77</sup> *Id.* at 824.

## II. CEDAW Should Not Focus Solely on Women

CEDAW errs in placing “women” at the center of the Convention. The meaning of “women” holds a clear appeal—its universality and biologically-driven clarity make it the apparently optimal focus for an international treaty reaching toward legitimacy in a wide range of cultures. This Part will postulate a reason for the use of “women” at the heart of CEDAW. It will then show that “women” confronts many shortcomings that undermine CEDAW’s own equality norms, both theoretical and strategic. “Women” is at the core of a positivist, identity-driven construction that reflects what Janet Halley calls “Feminist Universalism.”<sup>78</sup> Finally, although some scholars, notably Catharine MacKinnon and Martha Fineman, have attempted to reformulate the use of the term “women” in a broader fashion, these efforts fail to achieve the desired goal of making “women” a term that reflects the full panoply of sex and gender related issues.

### A. The Purpose of “Women”

CEDAW’s women-centered approach initially served the goal of recognizing women as proper subjects of human rights and that human rights norms excluded many issues that affect women. When drafted, CEDAW needed to focus on women and their experiences to define the harms of sexism. However, while CEDAW contains many definitions, at no point does it attempt to define its central subject. What did “women” mean in the 1970’s as CEDAW took shape?<sup>79</sup> In its silence, drafters at least partly relied on popular, rather than legal, definitions. The American Heritage Dictionary defines “women” as the plural of “woman”:

1 An adult female human; 2: Women considered as a group; womenkind; 3: An adult female human belonging to a

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<sup>78</sup> See Janet Halley, *Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law*, 30 MICH. J. INT’L L. 1, 6 (2008) [hereinafter Halley, *Rape at Rome*].

<sup>79</sup> The first wave of feminism was characterized by nineteenth century advocacy for women’s rights, primarily concerning attaining suffrage. Bridget J. Crawford, *Toward a Third-Wave Feminist Legal Theory: Young Women, Pornography and the Praxis of Pleasure*, 14 MICH. J. GENDER & L. 99, 101 (2007). The second wave of the 1960’s and 70’s sought more political recognition of the rights and power of women as a group and was signified by a rejection of traditional gender roles and femininity. *Id.* The second wave was followed by the third wave in early 1990’s. *Id.* at 107. “If first- and second-wave feminism sought an accretion of rights and power to women as a group, third-wave feminism seeks recognition for the individual. *Id.* at 117-18. “To date, third-wave feminist writing has focused primarily on non-legal (and non-theoretical) aspects of female sexuality, economic mobility and the multi-faceted nature of racial, ethnic, class and gender identities. Third-wave feminist writers also acknowledge and emphasize the role of culture, media and technology in shaping those identities. These writers tend to take a broad view of ‘women’s issues’ by connecting traditional feminist concerns such as reproductive freedom and discrimination in employment with broader justice movements for workers, immigrants, gays and lesbians and other disadvantaged groups.” *Id.* at 102.

specified occupation, group, nationality, or other category; 4: Feminine quality or aspect, womanliness; 5: A female servant or subordinate; 6: *Informal* a. A wife. b. A female lover or sweetheart.<sup>80</sup>

This definition serves to answer the quandary of why “women” did not require definition: it references a biological category (“female”) that is also a universal one (“womankind”). As with most silences, CEDAW’s non-definition of “women” reveals more than any definition it contains. It conveys a simultaneous presumption of universality. “Women” was viewed as a universal term that conveyed an obvious meaning to most people in most cultures.

Step back for a moment. At the time of CEDAW’s drafting, the term “women” had not yet been interrogated as a contested term. The drafters simply used the term without contemplating that it might limit the efficacy of the Convention. In the 1970’s, women’s rights activists asserted that international law needed to focus on women and their experiences and to define the harms of sexism.<sup>81</sup> CEDAW reflected an “up with women” answer to crucial international law questions.<sup>82</sup> Political movements and academic scholarship from the 1970’s concentrated on promoting women’s empowerment—“Sisterhood is Powerful.”<sup>83</sup> Women’s studies were just beginning to take root, as Title VII jurisprudence first explored the meaning of sex discrimination.<sup>84</sup> Proto-movement “transsexualism” did not yet yield any women’s movement introspection, as tensions between lesbian feminists and drag queens tore apart the lesbian and gay movement.<sup>85</sup> At that time, universalist notions of sisterhood overpowered even the hint of gender’s cultural contingency, which only began to shake the core of transnational feminism with the 1990’s controversies over female genital cutting.<sup>86</sup>

<sup>80</sup> THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1595 (4th ed. 2000).

<sup>81</sup> Crawford, *supra* note 79, at 101.

<sup>82</sup> *Id.*

<sup>83</sup> ROBIN MORGAN, *SISTERHOOD IS POWERFUL* (Vintage 1970).

<sup>84</sup> See generally *Frontiero v. Richardson*, 411 U.S. 677 (1973) (holding that the Due Process Clause of the Fifth Amendment prohibits the U.S. military from treating service men and women differently when they claim their spouse as a dependant); *Reed v. Reed*, 404 U.S. 71 (1971) (declaring an Idaho statute which required that men must be preferred to women in selecting the administrator of an estate when both candidates are similarly qualified as violative of the the Equal Protection clause of the 14<sup>th</sup> Amendment).

<sup>85</sup> This tension dates to early in the gay rights movement. During the 1973 Pride March in Washington Square Park in New York City, radical lesbian activist Jean O’Leary and the drag queens in attendance engaged in a dispute, in part over whether the transvestites’ overly feminine dress mocked women. Only the performance by Bette Midler of “You’ve Got to Have Friends” soothed tensions. STEPHAN L. COHEN, *THE GAY LIBERATION YOUTH MOVEMENT IN NEW YORK* 169 (2008).

<sup>86</sup> That controversy divided “Western” feminists, who decried the practice, from other feminists, including African and Middle Eastern feminists, who objected to the colonial tone of such reproaches. Western feminist efforts to eradicate FGC may have led to nationalist responses in certain contexts. Whereas the practice of FGC had been waning, once international actors entered national contexts to oppose it, FGC became a newly valued part of tribal or national tradition, a practice worth maintaining. See, e.g., Hope Lewis, *Between Irua and “Female Genital*

Few attempts have been made at a socio-legal history of CEDAW's drafting, but based on the period of the drafting and the actors involved, we can interpret the role "women" played. When drafted, CEDAW needed to focus on women and their experiences to define and address the harms of sexism. In the 1970's, the Convention sought to ensure women a place at the international law table, thereby serving the key second wave feminist goal of recognizing women as proper subjects of human rights.<sup>87</sup> Yet, this focus also served broader legitimizing purposes for the nascent international feminist movement. The creation of what was until recently the most widely-subscribed international treaty involved the elaboration and exercise of political power at national and international levels. CEDAW's drafters legitimized the treaty through the adoption of a universally understood identity such as "women." The role of the identity "women" in this enterprise merits attention at this time when the lack of descriptive or critical analysis has become apparent.

Knowing the complexity of the term "women," we may also explain CEDAW's non-definition of women as purposeful vagueness.<sup>88</sup> Parties to a contract gloss over differences through the use of vague language to conclude a deal.<sup>89</sup> Likewise, drafters of international treaties avoid contested language that may undermine widespread ratification. That vagueness served a political purpose, unifying State parties that may disagree on a definition. The use of the term "women" avoids the minefields of possible alternatives. Defining women would raise debates such as those that arose concerning the use of "gender" in the Rome Statute.<sup>90</sup>

American Heritage's popular definition of "women" deepens the suspicion that the use of the term "women" in the Convention helps construct "women" as men's victims. A "woman" colloquially means a servant or attendant, or (presumably a man's) wife, girlfriend or mistress.<sup>91</sup> By virtue of the seemingly harmless universalist and biological meaning, the *sotto voce* definition involving submission and subservience takes root. Perhaps CEDAW's silence in defining women furthered the goal of widespread ratification, but it was at the cost of reifying popular, and implicitly sexist, understandings of "women."

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*Mutilation*": *Feminist Human Rights Discourse and the Cultural Divide*, 8 HARV. HUM. RTS. J. 1 (1995); see also Eugenie Anne Gifford, "The Courage of Blasphemy": *Confronting Barriers to Resisting Female Genital Mutilation*, 4 U.C.L.A. WOMEN'S L.J. 329 (1994); Leslye Amede Obiora, *Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign Against Female Circumcision*, 47 CASE W. RES. L. REV. 275 (1997); Isabelle R. Gunning, *Uneasy Alliances and Solid Sisterhood: A Response to Professor Obiora's Bridges and Barricades*, 47 CASE W. RES. L. REV. 445 (1997).

<sup>87</sup> See Beijing Conference, *supra* note 1.

<sup>88</sup> The relative paucity of historical documents relating to the drafting of CEDAW obscures whether the drafters considered the meaning of the term "women."

<sup>89</sup> See Omri Ben-Shahar, "Agreeing to Disagree": *Filling Gaps in Deliberately Incomplete Contracts*, 2004 WIS. L. REV. 389 (2004).

<sup>90</sup> See generally Valerie Oosterveld, *The Definition of "Gender" in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice*, 18 HARV. HUM. RTS. J. 55 (2005).

<sup>91</sup> AMERICAN HERITAGE DICTIONARY, *supra* note 80, at 1978.

“Women” served a clear purpose in the positivist legal project of international women’s rights. Using Abbott and Snidal’s definition, international law derives legitimacy from three elements of the relationship between states and international bodies: obligation, precision, and delegation.<sup>92</sup> By each of these measures, the term “women” plays a crucial role. CEDAW’s reliance on the term created the conditions for states to sign the CEDAW treaty. The neutrality, and indeed the universality, of the term created the conditions for State Parties to bind themselves to an international treaty that obligated them to report the status of women to the CEDAW Committee.<sup>93</sup> The biological specificity of “women” served as the central category around which states could enter into precise agreements. Finally, although CEDAW, as a largely soft law, involves little delegation,<sup>94</sup> the delegation by states to the international body also presupposes the use of an uncontested term that would serve as the subject of the Convention. Thanks to the use of the term “women,” signatories apprehended the meaning of their agreement with regard to the obligation, precision and delegation.<sup>95</sup> The use of the term both legitimized and narrowed international remedies. It served as an organizing concept around which this positivist project could arise.

CEDAW, to the extent it has succeeded, depends on “women,” both as a concept and as a group. Yet “women” as a group of people have played a central role as actors working toward the limited successes of the project. International women’s rights activists have dedicated their energies, and some their lives, toward achieving the Convention’s legitimacy.<sup>96</sup> It is for understandable political reasons then that such feminists hesitate to explore the costs of the identity-centered deployment of “women.” Nonetheless, an honest assessment of the costs and benefits of both the choice by CEDAW’s drafters to place “women” at the center of their arguments and subsequent compliance by feminist engagements may help us recognize the limitations that result from these political choices.

## B. The False Universals and Certainties of “Women”

The term “women” created a cross-cultural site to resist fragmentation by other identity traits, such as nationality, class, race and religion.<sup>97</sup> Women’s power both within nation states and in international law has only recently

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<sup>92</sup> See Abbott & Snidal, *supra* note 50, at 38; see also Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT’L ORG. 421, 424 (2000).

<sup>93</sup> New and complex agreements create uncertainty over the possible consequences of a legalized arrangement. To alleviate concerns over uncertainty, actors often prefer imprecise language rather than face unfavorable commitments. See Abbott & Snidal, *supra* note 50, at 57-58.

<sup>94</sup> *Id.* at 54.

<sup>95</sup> See generally *id.*

<sup>96</sup> See, e.g., Afra Afsharipour, *Empowering Ourselves: The Role of Women’s NGOs in the Enforcement of the Women’s Convention*, 99 COLUM. L. REV. 129 (1999) (analyzing the impact of NGOs in enforcing CEDAW in Bangladesh).

<sup>97</sup> Dianne Otto, *Disconcerting ‘Masculinities’: Reinventing the Gendered Subject(s) of International Human Rights Law*, in INTERNATIONAL LAW: MODERN FEMINIST APPROACHES 105, 106 (Doris Buss & Abreena Manji eds., 2005).

garnered some currency. At least part of the legitimacy of international feminist efforts relies on the “almost contradictory idea of international feminism that all violence against women all over the world is the same.”<sup>98</sup> Fear of the fragmentation of this identity motivates continued reinvestment in the term. CEDAW’s identity-based model presaged subsequent women’s rights efforts that rely on identity for international law protection.<sup>99</sup>

Two areas of inquiry prove useful in elaborating the shortcomings of this unitary rhetoric: critical race feminism and comparative law-based critiques. Critical race feminists and other anti-essentialists have questioned the utility of a unified, universal concept of a group called women.<sup>100</sup> Black feminists in particular target the term “women” as a reference to white women.<sup>102</sup>

My work has selected various remedies for inequality and explored their meaning in light of vastly different understandings of constitutional norms.<sup>101</sup> I export this critical framework to an area of international law that has been the subject of much debate, but little of it in the fundamental question of the formative uses of identity. Comparative research reveals equally trenchant flaws in a universalist conception of “women.” The meaning of “women” varies from country to country.<sup>102</sup> Biological commonalities may exist among women in different countries, but the experience of women varies not only along national and cultural lines, but also especially along class lines.<sup>103</sup> Work and family roles vary along each of these axes, leading to vast disparities that undermine the

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<sup>98</sup> Lama Abu Odeh, *Comparatively Speaking: The “Honor” of the “East” and the “Passion” of the “West,”* 1997 UTAH L. REV. 287, 290 (1997).

<sup>99</sup> Otto, *supra* note 97, at 105-06.

<sup>100</sup> See generally Angela Harris, *Race and Essentialism in Feminist Legal Theory*, in CRITICAL RACE FEMINISM: A READER (Adrien Katherine Wing ed., 2003). See BELL HOOKS, *AIN’T I A WOMAN: BLACK WOMEN AND FEMINISM* 1-13, 119-58 (1981); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and the Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (Focusing on the multiple dimensions of identity and how the experiences of black women, which are rarely represented within the discourses of either feminism or antiracism, are frequently the product of intersecting patterns of racism and sexism); Kimberle Crenshaw, *Gender, Race, And The Politics Of Supreme Court Appointments: The Import Of The Anita Hill/Clarence Thomas Hearings, Anita Hill, Remarks Before The National Forum For Women State Legislators*, 65 S. CAL L. REV. 1467, 1567-68 (1992) (“African-American women by virtue of our race and gender are situated within at least two systems of subordination: racism and sexism. . . . [T]he dynamics of racism and sexism intersect in our lives to create experiences that are sometimes unique to us.”); Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition*, in FEMINIST LEGAL THEORY: AN ANTI-ESSENTIALIST READER 73-77 (Nancy E. Dowd & Michelle S. Jacobs eds., 2003) (recognizing overlapping identities of race and gender and discussing how working in a coalition can be most advantageous instead of pretending overlaps don’t exist).

<sup>101</sup> See Rosenblum, *Loving Gender Balance*, *supra* note 16.

<sup>102</sup> Sex, referring to biological difference, may vary minimally from country to country. Gender, in contrast, depends on culture and varies substantially across borders. Rosenblum, *Internalizing Gender*, *supra* note 10, at 801 (citing Katherine Frank, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1 (1995)).

<sup>103</sup> *Id.* at 804.

concept of a universal “woman.”<sup>104</sup> Socioeconomic factors construct the relationship between women and society, both in its public and private iterations.<sup>105</sup> Family structures could consign women to the home or encourage them to work, perhaps even abroad.<sup>106</sup> Reproductive policy, daycare, public education and healthcare each shift the nature of the identity of “women.”<sup>107</sup>

Each of these socioeconomic factors define the power relationship between men and women in different societies. Even the biological unity of “women” varies depending on the practice and availability of sex-related surgery, whether for ritual modification, cosmetic purposes or gender identity-related surgery.<sup>108</sup> CEDAW’s universalist language does not account for the impact of this contingency on international human rights law. Those who work with CEDAW may wish to avoid such contingency, fearing that it “softens” the already “soft” legal concepts in international women’s human rights law.<sup>109</sup>

Such anti-essentialist arguments surface in comparative work on gender identity that reveals the extent to which universal norms ignore gender's cultural construction. Thai and Indian gender identities, as Sonia Katyal has demonstrated, incorporate both sharply divergent gender and sexual identities.<sup>110</sup> Larry Catá Backer has contrasted the constructions of gender and sexuality in Malaysia, Zimbabwe and the United States.<sup>111</sup> And with regard to the issue of the wearing of the veil, several scholars have weighed in on the impact of cultural difference: Karima Bennoune,<sup>112</sup> Mary Anne Case,<sup>113</sup> Joan Wallach Scott,<sup>114</sup> Madhavi Sunder<sup>115</sup> and Adrien Wing,<sup>116</sup> to name a few. These cultural explorations of gender differentials reflect the dynamic relationship among

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<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* 104-12 (2006).

<sup>107</sup> Rosenblum, *Internalizing Gender*, *supra* note 10, at 804.

<sup>108</sup> *Id.* at 801.

<sup>109</sup> HILARY CHARLESWORTH & CHRISTINE CHINKIN, *THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS* 66 (2000).

<sup>110</sup> Sonia Katyal, *Exporting Identity*, 14 *YALE J.L. & FEMININISM* 97, 136-41, 152-67 (2002).

<sup>111</sup> Larry Catá Backer, *Emasculated Men, Effeminate Law in the United States, Zimbabwe and Malaysia*, 17 *YALE J.L. & FEMINISM* 101 (2007) [hereinafter Backer, *Emasculated Men*].

<sup>112</sup> Karima Bennoune, *Secularism and Human Rights: A Contextual Analysis of Headscarves, Religious Expression, and Women's Equality Under International Law*, 45 *COLUM. J. TRANSNAT'L L.* 367 (2007).

<sup>113</sup> Mary Anne Case, *On Feminist Fundamentalism*, in *CHILDREN IN THE DISCOURSES OF RELIGION AND HUMAN RIGHTS* (forthcoming).

<sup>114</sup> JOAN WALLACH SCOTT, *THE POLITICS OF THE VEIL* (2007).

<sup>115</sup> Madhavi Sunder, *Piercing the Veil*, 112 *YALE L.J.* 1398 (2003).

<sup>116</sup> Adrien Katherine Wing & Monica Nigh Smith, *Critical Race Feminism Lifts the Veil?: Muslim Women, France, and the Headscarf Ban*, 39 *U.C. DAVIS L. REV.* 743 (2006).

identities of sex, gender, and sexuality.<sup>117</sup> Cosmopolitan arguments contribute to understanding the complexity of identity categories such as “women.”<sup>118</sup>

In a previous article, I argued that CEDAW faces a particularly challenging barrier in the translation of a universal conception into different nations' sharply conflicting legal cultures.<sup>119</sup> Differentiation among legal cultures may lead to divergent internalizations of the same international norm.<sup>120</sup> One of the Convention's weaknesses has been the underlying inability of states to agree to specific enforceable remedies for gender inequality.<sup>121</sup> In that article, I showed how the differences between Brazilian and French gender constructions played out in remedies adopted pursuant to CEDAW.<sup>122</sup> There, I argued that an awareness of difference created possibilities for new and different universals, based on a broader understanding of cultural realities rather than simple projections of a particular culture onto the world political stage.<sup>123</sup> Here, I go one step further: the centrality of the imprecise term “women” pretends to attain universality while inhibiting cultural variation.

Indeed, CEDAW may be viewed as proto-“Governance Feminism,” a term Janet Halley and others use to describe feminist efforts at occupying key positions in public regulatory efforts.<sup>124</sup> The term was coined to describe the efforts of feminists responding to sex trafficking.<sup>125</sup> Subsequently, Halley has used this

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<sup>117</sup> Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83 CAL. L. REV. 11 (1995).

<sup>118</sup> Cosmopolitanism, a mingling of normative values throughout the world, revived first by Jeremy Waldron, *Minority Cultures and the Cosmopolitan Alternative*, in THE RIGHTS OF MINORITY CULTURES 93-119 (Will Kymlicka ed., 1995), and then in a different vein by KWAME ANTHONY APPIAH, *COSMOPOLITANISM: ETHICS IN A WORLD OF STRANGERS* (2006), and by Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155 (2007).

<sup>119</sup> Rosenblum, *Internalizing Gender*, *supra* note 10, at 807.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *See generally id.*

<sup>123</sup> *Id.* at 801. Comparative techniques elucidate the potential for integrating comparative and international legal scholarship. The comparative scholar will examine the construction and culture of international law, necessarily revealing its biases. Here, the political goals of CEDAW presume sociopolitical structures of firmly rooted democracies. The terminology of “sex” and “gender” ignores the potential for variation of gender across cultures. In certain countries, gender means the divide between men and women, while in others it may mean the fluidity of such identities, or even the ability to choose sex or marital partners without regard to gender. Comparative work reveals such cultural variations and their legal import. *Id.* at 807.

<sup>124</sup> *See Halley, Rape at Rome*, *supra* note 78, at 6.

<sup>125</sup> Gfeminists achieved success internationally through their efforts which led to the drafting of the 2000 United Nations “Protocol on Trafficking” as well as domestically when, during that same year, the United States congress passed the “Victims of Trafficking and Violence Protection Act.” Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 25, Annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/45/49 (Vol. I) (2001); Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 106, 114 Stat. 1464 (2000). Both of these achievements had reveratory effects on other national stages. *See* Janet Halley, Prabha Kotiswaran, Hila Shamir & Chantal Thomas, *From the International to the*

concept to criticize the feminist interventions in international criminal law that sought absolute reform and abolition of the practices used in what these feminists saw as a “global war against women.”<sup>126</sup>

Halley calls this structuralist feminist agenda “Feminist Universalism,” in which women, known as GFeminists, exist not as a “particular group of humanity” but rather as their own universe.<sup>127</sup> Assuming that women’s position as victim is ubiquitous, the Feminist Universalism vision seeks reforms far broader than those engaged in by the early Gfeminists’ efforts to shape international criminal law.<sup>128</sup> Halley explains that these early battles were relatively minor and that the feminist consensus was actually after something “more elusive, more structural.”<sup>129</sup> The goal was to change “the very classificatory scheme of universal justice.”<sup>130</sup> The Geneva Conventions provided a structure whereby the well being of women was part of an effort to maintain a “universal human integrity.”<sup>131</sup> As Halley reveals, the Feminist Universalists believe that “the right of women to be secure from sexual assault was itself fundamental, central, and of universal scope,” and that female suffering exists separately from that of a male.<sup>132</sup> Feminist Universalists went further, arguing that they needed to address the gendered social constructs that bolster male domination.<sup>133</sup>

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*Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J. L. & GENDER 335, 348 (2006).

<sup>126</sup> See Halley, *Rape at Rome*, *supra* note 78, at 2.

<sup>127</sup> *Id.* at 7. Feminist Universalism reflects some inspiration from Luce Irigaray, the French feminist philosopher. LUCE IRIGARAY, *THIS SEX WHICH IS NOT ONE* (Catherine Porter trans., Cornell University Press 1985) (1977). Feminists have long debated theories of difference. Since the 1970’s, French feminist theory, led by Hélène Cixous, Julia Kristeva, and Luce Irigaray, has delved into issues of women’s difference from men. Of the three, Irigaray developed the most explicitly political examination of women’s position in society. In that sense, although no particular philosopher or political theorist has dominated the debate on Parity in France, Irigaray’s philosophy most closely approaches the theories espoused by the Parity movement. Early on, her philosophy emphasized the fundamental difference between women and men. One of her most well known works, *This Sex Which Is Not One*, explored the social meaning of women’s biological difference from men. As men are unitary, women are multiple, Irigaray argued, even down to their genitalia. *Id.* at 23. Women’s multiplicity puts them in the social position of focusing on relational behavior. Irigaray explored how women’s language expressed this relationship-centered existence, in which women constantly relate to others, consistently referring to their interlocutors. With regard to women’s political role in society, Irigaray has argued that women, as metaphysically distinct from men, have the right to citizenship which reflects their own existence. See Luce Irigaray, *L’Identité Feminine: Biologie ou Conditionnement Social?*, in *FEMMES: MOITIE DE LA TERRE MOITIE DU POUVOIR* 101 (Gisele Halimi ed., 1994). A certain number of French feminists disagreed with this “difference” theory, espousing instead the theory that women have the right to “equal” treatment. GILL ALLWOOD & KHURSHED WADIA, *WOMEN AND POLITICS IN FRANCE 1958-2000*, 218-19 (2000).

<sup>128</sup> See Halley, *Rape at Rome*, *supra* note 78, at 60.

<sup>129</sup> *Id.* at 59.

<sup>130</sup> *Id.* at 61-62.

<sup>131</sup> *Id.* at 62.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 83.

Halley dismisses Feminist Universalism, referring to it, shamelessly, as “FU.”<sup>134</sup> Halley in particular criticizes the effort to link the everyday war against women, and all sexual violence, to war crimes. She points out the lack of a plausible “connection to armed conflict.”<sup>135</sup>

Feminist Universalism is the heir to two elements of CEDAW: its soft law core, as delineated in Part I, and its construction around “women.” It is because the Convention does not succeed at establishing hard international law that the communities that advocated for CEDAW’s expansion have shifted their arguments to rely on criminalization.<sup>136</sup> Criminalization provides an opportunity for feminists to attain hard law results for some of the core concerns that first arose in response to CEDAW.<sup>137</sup> This historical connection lead advocates to search for a more fruitful link between international law and violence against women.<sup>138</sup> Feminist Universalism also draws on the same brand of thinking about gender as CEDAW: “women” play a central role, and the broader issues of gender, and indeed of men’s role in gender, are at worst invisible or at best secondary. Without the victim-centered subjectivity of women, Feminist Universalism would have no core meaning.

#### 1. “Women” is not a Discrete Category

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<sup>134</sup> Halley writes: “unless you are a radical feminist, seeing it that way will take an effort of sympathetic imagination. If you can do it, you have entered into the consciousness of the FU.” *Id.* at 83. FU goes further. Once the Balkan conflict is “untethered” from its ethnic dimensions it becomes part of the everyday war against women and if “every rape is an expression of male domination” then for Copelon all rape should be within the scope of international criminal law. *Id.* at 64. The feminists efforts in extending the subject matter jurisdiction of the ICC to peace time failed as the Rome Statute has express provisions limiting its reach to armed conflicts. *Id.* at 112. However, the ICC does classify persecution on the basis of gender alone as a crime against humanity and so the very framing of ethno-nationalist conflicts that Halley detests is now an available tool for a prosecutor in the ICC. *Id.* at 108. Halley expresses concern that this success is inattentive to “the possibility that women have been the instigators or perpetrators of conflict” and also that it permits a “chilling indifference to the suffering and death of men.” *Id.* at 123.

<sup>135</sup> *Id.* at 84.

<sup>136</sup> *Id.*

<sup>137</sup> It is worth noting, though, that CEDAW does not directly address violence against women.

<sup>138</sup> Andrea Vesa argues that Article I of the CEDAW defines discrimination to include violence that is directed against a woman because she is a woman or that affects women disproportionately. See Andrea Vesa, *International and Regional Standards for Protecting Victims of Domestic Violence*, 12 AM. U. J. GENDER SOC. POL’Y & L 309, 327 (2004) (citing Office of the High Commissioner for Human Rights, *Violence Against Women: CEDAW General Recommendations No. 19*, para. 1, U.N. Doc. A/47/38 (1992)). Article 5(a) compels states “to modify the social and cultural patterns of conduct of men and women, with a view of achieving the elimination of prejudices and customary and all other practices which are based on the idea inferiority or superiority of either of the sexes or on stereotyped roles for men and women.” *Id.* (quoting CEDAW, *supra* note 5, at art. 5(a)). Susan Feanne Toepfer notes that CEDAW’s preamble establishes that its framers considered trafficking in women to be sex discrimination, and that CEDAW’s purpose was to prohibit these activities. Susan Feanne Toepfer, *The Worldwide Market for Sex: A Review of International and Regional Legal Prohibitions Regarding Trafficking in Women*, 2 MICH. J. GENDER & L 83, 101-02 (1994).

Framing CEDAW around “women” reinforces the binary between men and women in human rights and fails to serve as a universal descriptor. Its meaning, as part of a binary with men, lacks certainty.<sup>139</sup> Although I have made this argument elsewhere,<sup>140</sup> it is a crucial point that requires brief attention. The term “women” itself presumes a binary that essentializes gender. One’s gender identity may defy simple categorization due to biology<sup>141</sup> or by intent to change identity.<sup>142</sup> A clear divide between “men” and “women” does not exist.<sup>143</sup> Although most people accept that there are only “male” and “female” sexes, each category involves a myriad of genders formed genetically, biologically and culturally.<sup>144</sup> “Each of the so-called criteria of sexedness is itself a continuum—including chromosomal variables, genital and gonadal variations, reproductive capacities, [and] endocrinological proportions.”<sup>145</sup> Scientists generally agree that there are seven gender traits that constitute one’s gender identity: 1) chromosomes; 2) gonads; 3) hormones; 4) internal reproductive organs; 5) external genitalia; 6) secondary sexual characteristics; and 7) self identity.<sup>146</sup> These seven variables classify the distinct elements of gender identity.

As I have argued elsewhere, beyond transgender individuals’ lives, the gender binary wreaks multiple nefarious effects on public policy.<sup>147</sup> The ubiquity of the categories “male” and “female” cannot prove its veracity as the irreducible essence of gender. Such categories truncate the diversity of gender identity.<sup>148</sup>

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<sup>139</sup> See Darren Rosenblum, “Trapped” in *Sing Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 MICH. J. GENDER & L. 499 (2000) [hereinafter Rosenblum, “Trapped” in *Sing Sing*].

<sup>140</sup> *Id.*

<sup>141</sup> See, e.g., Nancy Ehrenreich & Mark Barr, *Intersex Surgery, Female Genital Cutting, and the Selective Condemnation of ‘Cultural Practices’*, 40 HARV. C.R.-C.L. L. REV. 71 (2005) (discussing the plight of intersex individuals and comparing legal arguments regarding corrective surgery for intersex people to those made related to female genital cutting).

<sup>142</sup> Many transgender people transition from one gender to another, with or without medical assistance, without the purpose of “passing” as the other gender. See generally KATE BORNSTEIN, *GENDER OUTLAW: ON MEN, WOMEN, AND THE REST OF US* 65–69 (1994).

<sup>143</sup> AMERICAN HERITAGE DICTIONARY, *supra* note 80, at 1595 (defining sex as “either of the two divisions, designated female and male, of this classification”).

<sup>144</sup> See Ann Fausto-Sterling, *The Five Sexes: Why Male and Female are Not Enough*, THE SCIENCES, Mar./Apr. 1993 at 20-21; see also Rosenblum, “Trapped” in *Sing Sing*, *supra* note 139, at 503.

<sup>145</sup> JOHN STOLTENBERG, *REFUSING TO BE A MAN* 28 (Plume 1989).

<sup>146</sup> See Douglas K. Smith, *Transsexualism, Sex Reassignment Surgery and the Law*, 56 CORNELL L. REV. 963, 972 (1971); See also Rosenblum, “Trapped” in *Sing Sing*, *supra* note 139, at 504. Fifteen years later, the New York Supreme Court of New York County used the exact formulation cited above in *Maffei v. Kolaeton Indus., Inc.*, 626 N.Y.S.2d 391 (N.Y. Sup. Ct. 1995) (holding that a pre-operative transgendered female was protected by New York City’s sex discrimination statute as a member of the class of males).

<sup>147</sup> See generally Rosenblum, “Trapped” in *Sing Sing*, *supra* note 139; see also David B. Cruz, *Disestablishing Sex and Gender*, 90 CAL. L. REV. 997 (1992).

<sup>148</sup> This Article will not directly address the relevance of my theory of gender binarism to feminist theory. Rather, the multiplicity of gender conforms quite closely to what I interpret as the spirit of contemporary anti-essentialist feminist theory. See Terry S. Kogan, *Transsexuals and Critical Gender Theory: The possibility of a Restroom Labeled “Other”*, 48 HASTINGS L.J. 1223 (1997).

The psychological component of "self identity" renders the simple male/female dichotomy useless, leaving the categories "male" and "female," and indeed "men" and "women," wanting.<sup>149</sup>

The contemporary evolution of medical technology, combined with the increasingly commonplace transgender identity, has blurred the lines between "men" and "women." Widespread medical testing of gender for the Beijing Olympics exposes the open-ended nature of sex definition.<sup>150</sup> As has been widely reported, the diversity of physical gender has led to the testing of each Olympic athlete to ascertain his or her gender.<sup>151</sup> More recently, one official defended gender testing of a runner in international competition because of "ambiguity, not because we believe she is cheating."<sup>152</sup> Given the indefinite nature of the term "women," it is not a useful descriptor of a group subject to the protection of international law. "Women," a term adopted for its clear biological reference, turns out not to be as clear as was widely thought. Its lack of precision, highlighted by the multiplicity of biological components in sex identity, is blurred still further by contemporary medical technology. But "women" not only fails to convey the specific group intended by CEDAW's drafters, it undermines the Convention's efficacy.

## 2. This Male/Female Binary Debilitates CEDAW

Beyond this literal deconstruction of the biological meaning of the term "women," the actual deployment of the term "women" in women's rights discourse exposes multiple socio-political meanings for the term "women." As Dianne Otto argues, the emphasis on certain "female subjectivities" establishes the "otherness" of women in women's rights discourse.<sup>153</sup> Otto identifies three "female subjectivities" reproduced by human rights discourse,<sup>154</sup> each of which is marginalized by a corresponding masculine subject.<sup>155</sup> First, the wife and mother requires protection and "is more an object than a subject of international law."<sup>156</sup> Men, as heads of households, form the masculine component of this binary.<sup>157</sup> The second subjectivity is the "formally equal" woman, whose role in public life is measured by the extent to which it matches the implicit "masculine standard of 'equality' against which her claims to equality are assessed . . . ."<sup>158</sup> This equality strategy presumes as normative the masculine standard, thereby fostering a

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<sup>149</sup> Rosenblum, "Trapped" in *Sing Sing*, *supra* note 139, at 504.

<sup>150</sup> See Katie Thomas, *A Lab Is Set to Test the Gender of Some Female Athletes*, N.Y. TIMES, July 30, 2008, at D1, available at <http://www.nytimes.com/2008/07/30/sports/olympics/30gender.html>.

<sup>151</sup> *Id.*

<sup>152</sup> Christopher Clarey, *Gender Test After a Gold-Medal Finish*, N.Y. TIMES, Aug. 19, 2009, at B13, available at [http://www.nytimes.com/2009/08/20/sports/20runner.html?\\_r=1&th&emc=th](http://www.nytimes.com/2009/08/20/sports/20runner.html?_r=1&th&emc=th).

<sup>153</sup> Otto, *supra* note 97, at 106.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

harmful binary that places women in the inferior position.<sup>159</sup> Third is the female victim “produced by colonial narratives of gender” and the perceived “sexual vulnerability” of women.<sup>160</sup> The male homologue for this subjectivity is the masculine bearer of “‘civilization’ and savior of ‘good’ women from ‘bad’ often ‘native,’ men.”<sup>161</sup>

Each of these opposing visions of the masculine and feminine “organizes sex/gender as a hierarchy, with the masculine assuming the position of authority.”<sup>162</sup> These constructions of women’s subjectivities reflect a pre-third wave feminist perspective that ignores the centrality of agency to contemporary understandings of gender.<sup>163</sup> Otto ultimately concludes that to dismantle the hierarchical binary of gender, gender must be reconceived as fluid and formulated as a hybrid.<sup>164</sup>

In reproducing these hierarchical binaries, CEDAW’s potential for transforming women’s lives is compromised.<sup>165</sup> Most of the CEDAW provisions follow a formal equality yardstick, measuring success as the extent to which men have access to a particular social position.<sup>166</sup> The imprecision of the term “women” becomes clearer once we consider the different contexts in which “women” exist—they are wives and mothers, persons equal to men, and victims. Each of these subjectivities arouses a legal response within CEDAW. Most important is the extent to which the Convention renders invisible the individuals identified as women but do not fit into these three subjectivities. I will address this directly later in my argument—the point now is to demonstrate that beyond the biological uncertainty of the term “women” lies a crucial socio-political imprecision.

### C. Attempts to Re-define Women Achieve Only Partial Success

Feminist legal scholars and activists have not entirely missed the shortcomings of the term “women.” Many (although certainly not all) have attended to lesbian, gay, bisexual, transgender and queer thinking about the complex relationship among identity, gender and sexuality.<sup>167</sup> One response by feminists has been to redefine “women” in a broader sense that recognizes such

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<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> See generally Crawford, *supra* note 79; see also Karen Engle, *Feminism and Its (Dis)contents: Criminalizing Wartime Rape in Bosnia and Herzegovina*, 99 *Am J. Int’l L.* 778 (2005); Ratna Kapur, *The Tragedy of Victimization Rhetoric: Resurrecting the “Native” Subject in International/Post-Colonial Feminist Legal Politics*, 15 *HARV. HUM. RTS. J.* 1, 2 (2002) [hereinafter Kapur, *The Tragedy of Victimization Rhetoric*] (discussing the extent to which victim narratives encase women in restrictive understandings of their position in society).

<sup>164</sup> Otto, *supra* note 97, at 106.

<sup>165</sup> *Id.* at 117.

<sup>166</sup> CEDAW, *supra* note 5, at art. 7-9.

<sup>167</sup> Valdes, *supra* note 117.

theoretical developments. Here, I will focus on two responses, those of Catharine MacKinnon and, more recently, of Martha Fineman.<sup>168</sup> These responses do an admirable job of expanding and updating the category of “women.” However, although effective arguments in a sense, they do not remedy the central shortcoming of the term “women” as I argue it here.

MacKinnon has recognized the fact that men may deserve the protections from sexist power that she originally prescribed for women.<sup>169</sup> In MacKinnon’s work, the alternating explicit and implicit subordination of women has played a driving role.<sup>170</sup> Two instances of this intervention surface: her argument in the Canadian Supreme Court’s consideration of pornography restrictions<sup>171</sup> and her argument in the *Oncale* same-sex sexual harassment case before the U.S. Supreme Court.<sup>172</sup>

Generally, MacKinnon focuses on sexuality as the central source of women’s oppression.<sup>173</sup> MacKinnon’s view is that all women experience oppression at the hands of patriarchal power in the form of “male laws.”<sup>174</sup> Critics have pointed out her reluctance to recognize the multiplicity of women’s experiences, including social, economic or historical forces, such as colonialism or the church, that affect class, cultural, religious and racial differences.<sup>175</sup>

With regard to the *Oncale* case, MacKinnon argued that when men suffer from other men’s sexual violence, they play the role of “women” and therefore merit protection under sex discrimination law.<sup>176</sup> “Men’s rape of women is a hateful act designed to reinforce male supremacy. So is men’s rape of men.”<sup>177</sup> Male victims are abused as women are so often abused, except that women have a Title VII remedy when their sexuality, and by extension, their gender, is assailed

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<sup>168</sup> Thanks to Mary Anne Case for raising this connection.

<sup>169</sup> See Brief for Women’s Legal Education and Action Fund as Amici Curiae Supporting *R. v. Butler*. [1992] 1 S.C.R. 452 (authored by Catherine A. MacKinnon).

<sup>170</sup> See generally CATHARINE MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989); see also CATHARINE MACKINNON, *WOMEN’S LIVES, MEN’S LAWS* (2005); MACKINNON, *ARE WOMEN HUMAN?*, *supra* note 2.

<sup>171</sup> Brief for Women’s Legal Education and Action Fund, *supra* note 169 (arguing that pornography should be regulated because it inflicts harm on women in a number of ways including reinforcing stereotypes, encouraging degradation of women, and makes men less receptive to women’s equality); MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE*, *supra* note 170.

<sup>172</sup> Brief for Women’s Legal Education and Action Fund, *supra* note 169.

<sup>173</sup> See, e.g., MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE*, *supra* note 170; MACKINNON, *ARE WOMEN HUMAN?*, *supra* note 2.

<sup>174</sup> MACKINNON, *WOMEN’S LIVES, MEN’S LAWS*, *supra* note 170.

<sup>175</sup> See RATNA KAPUR, *EROTIC JUSTICE: POSTCOLONIALISM, SUBJECTS AND RIGHTS* 101-102 (2005).

<sup>176</sup> See Brief of Catharine MacKinnon at 13-14, *Oncale v. Sundowner Offshore Services*, No. 96-568 (5<sup>th</sup> Cir. Aug. 12, 1997); see also *Oncale v. Sundowner Offshore Services*, 523 U.S.75 (1998) (holding that same-sex sexual harassment, in this case harassment of a male worker on an oil rig in the ocean, may constitute sex discrimination).

<sup>177</sup> Rus Ervin Funk, *Men Who Are Raped*, in *MALE ON MALE RAPE: THE HIDDEN TOLL OF STIGMA AND SHAME* 221, 222 (Michael Scarce ed., 2001).

by men at work.<sup>178</sup> In *Oncale*, MacKinnon argues that men deserve this protection as well.<sup>179</sup> Men who are victims are a sort of honorary women, “sisters in suffering.”<sup>180</sup> In this analysis, the gender of men is only the subject of rights to the extent that it exists as an analogy to women. By this reasoning, men’s access to protection from gender-based discrimination is through their similarity to women. International women’s rights discourse mirrors this tangential rights argument.<sup>181</sup>

Janet Halley has highlighted a more recent example of this thinking deployed by feminists in the context of the debates over the classification of sexual assault in the context of war crimes. Feminists attempted to redefine sexual assault as a crime of “gender” as opposed to “sexual” violence.<sup>182</sup> In a case that involved a particularly gruesome sexual injury inflicted on a man in a prison camp during the Balkan war, feminists voiced concern over the incident because the castrated victim was rendered inferior and “like a woman.”<sup>183</sup> Feminists argued that the incident perpetuated the prevailing male/female power structure that they sought to overturn.<sup>184</sup> Halley disagrees with this aspect of the FU vision, arguing that it fosters a “chilling indifference to the suffering and death of men.”<sup>185</sup> Further, she asserts that “[t]his framing reproduces in reverse the blind-spotted moral vision that it contests.”<sup>186</sup>

This concept of women extends the identity to anyone in the position of the women, i.e. the subordinate position. Martha Fineman’s recent work reflects this move, as she emphasizes the expansion of the feminist inquiry toward examining the positionality of the vulnerable.<sup>187</sup> Fineman introduces the concept of the inherent human condition of vulnerability, which she views as a universal constant that comprises the harms to which humans are vulnerable as the core measure of inequality.<sup>188</sup> Inequalities arise from state institutions and thus require reform.<sup>189</sup>

Fineman suggests that a vulnerability analysis should replace an equal protection analysis to shift the focus from discrimination against defined groups toward inequitable structures.<sup>190</sup> At the same time, she criticizes liberal notions of equality as weak in the face of subordination and domination. A liberal model fails to reform institutional arrangements that privilege some and disadvantage

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<sup>178</sup> Brief of Catharine MacKinnon at 13-14, *Oncale*, No. 96-568.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> See Halley, *Rape at Rome*, *supra* note 78, at Part IVB.

<sup>182</sup> *Id.* at 82.

<sup>183</sup> *Id.* at 86.

<sup>184</sup> *Id.* (citing Nicole Eve Erb, *Gender-Based Crimes Under the Draft Statute for the Permanent International Criminal Court*, 29 COLUM. HUM. RTS. L. REV. 401, 425 (1998)).

<sup>185</sup> *Id.* at 123.

<sup>186</sup> *Id.*

<sup>187</sup> See Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 1 (2008).

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 5.

<sup>190</sup> *Id.* at 1.

others.<sup>191</sup> Fineman's core criticism is that the identity categorized in the equal protection analysis is both over and under inclusive, as it fails to reflect "lack of opportunity categories" that transcends group boundaries.<sup>192</sup> A vulnerability approach recognizes individuals who live with the ever-present possibility that our needs and circumstance will change and are not as rigid as the suspect class groupings of an equal protection analysis.<sup>193</sup>

Alternatively, as Fineman suggests, vulnerability analysis focuses on the structures our society has and will establish to manage our common vulnerabilities.<sup>194</sup> A more active and responsive state would serve to monitor social equality in a way that the market cannot achieve.<sup>195</sup> For this vulnerability analysis to succeed, the state must empower vulnerable subjects, through redistributive remedies if necessary.<sup>196</sup> Where the state can identify clearly advantaged and disadvantaged parties, the state must either justify the disparity or remedy it.<sup>197</sup> Fineman's vulnerability theory introduces a new approach to remedying inequality, beyond traditional identity categories, through the view that equality is a universal resource that a responsive state advances by responding to vulnerability.<sup>198</sup>

The MacKinnon and Fineman theories each do important work in recognizing that sexist oppression targets something broader than biological women. They each move beyond the essentialist understanding of women as a biological reality. Each nonetheless retains an identitarian focus that impedes their goal. Here, men (for MacKinnon) or the invulnerable (for Fineman) deserve protection insofar as they may be defined as having some bit of womanhood or vulnerability. The two theories parallel each other in the sense that both find a substitute for "woman" that broadens the category to respond to identity criticisms. Although Fineman's theory seeks a more theoretically coherent route out of identity category traps, vulnerability as a concept retains some referent to identity markers.<sup>199</sup> Both MacKinnon's expansive definition of "women" and Fineman's shift to the "vulnerable" achieve certain goals in moving away from the sex binary as a marker for rights protection.

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<sup>191</sup> *Id.* at 3.

<sup>192</sup> *Id.* at 4.

<sup>193</sup> *Id.* at 12.

<sup>194</sup> *Id.* at 2.

<sup>195</sup> *Id.* at 5.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 22.

<sup>198</sup> *Id.* at 23.

<sup>199</sup> For an eloquent anti-essentialist argument in favor of the use of quotas and other identity-related remedies, see Jane Mansbridge, *The Descriptive Political Representation of Gender: An Anti-Essentialist Argument*, in *HAS LIBERALISM FAILED WOMEN? ASSURING EQUAL REPRESENTATION IN EUROPE AND THE UNITED STATES* 19, 30 (Klausen & Maier eds., 2001); see generally Rosenblum, *Loving Gender Balance*, *supra* note 16. Janet Halley also has an extensive anti-identitarian argument in her "break" from feminism. See generally JANET HALLEY, *SPLIT DECISIONS*, *supra* note 14.

In sum, “women” reflects a crucial shortcoming in CEDAW’s text as viewed from 2009: it reifies the sex binary instead of tearing it down. “Women” misdiagnoses broader issues of sex and gender, leaving CEDAW short in imagining potential solutions to inequality.

### III. Identity-Based Discrimination as CEDAW’s *Raison d’Être*

CEDAW’s focus on a universalized notion of “women” attempts to move the world from hundreds of different gender systems to a universal one. It seems at once boldly idealistic and fraught with incessant pitfalls as difference rears its complicated head. The identity-based construction of CEDAW mistakenly places discrimination as the principal harm of inequality, when a broader set of inequities is at stake. The establishment of “women’s human rights” isolates rather than emphasizes the role of gender in human rights discourse. Gender, a term that reflects social and cultural traits typically associated with sex, is the more appropriate subject of an international treaty. The focus of my argument is the problem with “women” and the consequences of choosing “women” as the central point for a discussion of rights related to sex and gender.

In this Part, I first contrast CEDAW with the Convention for the Elimination of Racial Discrimination (“CERD”) to demonstrate the greater consistencies in human rights claims made in the context of a non-identity based treaty construction. Given the advantages of a non-identity based treaty, I then discuss how “gender” or even “sex” would better address the concerns raised by CEDAW because both address categories rather than specific identity groups. I consider, and then dismiss, the risks of a term such as “gender.” Finally, I point to the Yogyakarta Principles as an example of one possible direction for a non-identity centered sex or gender treaty.

#### A. International Law Beyond Identity

Legal theory, as useful as it may be, is not the only source for this anti-identitarian critique of CEDAW. Other international treaties that target inequality deal with identity in more nuanced ways than the Convention. CEDAW maladroitly relies on a minority-identity human rights model that is inappropriate when women actually represent half of humanity. The artificial separation of women’s rights into a distinct construction poses both theoretical and practical limitations. Theoretical limitations include the challenge of understanding the intersection of a group-based rights system, such as CEDAW, and a rights-based system, such as the International Covenant on Civil and Political Rights (“ICCPR”). Indeed, some cite the ICCPR as a strong basis for sexuality rights.<sup>200</sup>

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<sup>200</sup> In his argument that the International Covenant on Civil and Political Rights (“ICCPR”) better serves as a legal basis upon which to ground the rights of gays and lesbians to procreate than on the basis of the right to privacy, Professor Aleardo Zanghellini cites the Principles as an example of an increasing international awareness of the right of sexual minorities to create a family.

Practical limitations isolate women's issues from "human rights," encouraging human rights professionals to relegate gender inequality concerns to the province of "women's issues."

Cosmopolitan human rights studies help distinguish the utility of identity-based terms, such as "women," against category-based structures, such as "gender" or "sex." Unlike its contemporary human rights treaties, CEDAW focuses on discrimination suffered by a particular group. It thus situates women's issues outside of human rights discussions and renders men as external to core debates over gender inequality.<sup>201</sup>

A key example of a non-identitarian construction of human rights is the Convention on the Elimination of Racial Discrimination ("CERD"). CERD entered into force in 1969, predating CEDAW by twelve years. Both instruments implement two crucial U.N. covenants: the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. The Covenants state that the "rights set forth therein are applicable to all persons without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."<sup>202</sup> Both these Covenants address rights at the universal level.

CERD, for example, demonstrates the weakness of CEDAW's minoritarian and identitarian focus by addressing a category of discrimination rather than the identity of its victims. CERD's methodology enables it to retain a focus on the oppression in all its iterations without regard to a particular, racialized group. This assessment demonstrates how CEDAW's exclusive focus on women isolates gender disparities from core human rights concerns and leads to marginalization and nonenforcement, while forestalling real solutions to appalling human rights dilemmas. This contrast reveals the import of a critical examination of the choices made by the CEDAW drafters.

CERD and CEDAW attempt to translate these rights into the arena of specific forms of oppression—racialized and sexist oppression. Both conventions stem from one of the purposes of the United Nations—to achieve international cooperation in promoting and encouraging respect for human rights and fundamental freedoms for all people "without distinction as to race, sex, language or religion."

Yet CERD and CEDAW diverge at the definition in Article I of CERD:

In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or

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Aleardo Zanghellini, *To What Extent Does the ICCPR Support Procreation and Parenting by Lesbian and Gay Men?*, 9 MELBOURNE J. INT'L L. 125 (2008).

<sup>201</sup> Otto, *supra* note 97.

<sup>202</sup> Office of the High Commissioner of Human Rights, Fact Sheet No.22, Discrimination against Women: The Convention and the Committee, *available at* <http://www.ohchr.org/Documents/Publications/FactSheet22en.pdf>.

exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.<sup>203</sup>

CERD centers on racial discrimination, not singling out any group.

CEDAW mimics CERD's initial definition but errs in focusing on a group rather than oppressive categorizations. CERD's very title reveals its proper focus on systems of oppression rather than fixed identities, whereas CEDAW concerns women as a group. Article I of CEDAW beings:

For the purposes of the present Convention, the term 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.<sup>204</sup>

CEDAW's definition, unlike CERD's, references a specific group—women. It looks to the equality of men and women as a basis for the goal of eliminating discrimination against women. The Convention's definition presents women as the only group suffering from discrimination based on sex. CERD, in contrast, retains a focus on the oppression in its iterations without regard to a particular racialized group. CEDAW's identitarian approach to rights directs remedies toward women rather than the eliminating the categories themselves.

One can argue CERD could not reference a specific group because of the multi-racial nature of discrimination:<sup>205</sup> no one group, say "black," could be defined against "white" the way that CEDAW can seek to protect "women" from "men." Race is an undeniably complex phenomenon. Even the most basic understanding recognizes multiple races, as quoted in *Loving v. Virginia*, "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents."<sup>206</sup> More persuasive is the recent argument that individuals do not belong to a race but are "racialized," that is to say that sociopolitical structures categorize certain phenotypes into groups.<sup>207</sup>

Feminist universalists could point to CERD's choice of nonidentitarian language as a natural consequence of racial discrimination's multiplicity. It is true that throughout the globe, women consistently face measurable economic and social harms. But deploying the identity "women" in this central fashion will not lead to sexism's end. It is worth noting that CERD arose at a time of anti-

<sup>203</sup> *Id.*

<sup>204</sup> CEDAW, *supra* note 5.

<sup>205</sup> Thanks to Sheila Foster for this comment.

<sup>206</sup> *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>207</sup> See generally TANIA DAS GUPTA, RACE AND RACIALIZATION: ESSENTIAL READINGS (2007).

colonialist and “Third-World” discourse in which advocates of racial equality pointed directly at the subjugation of the “brown people” by the “white people.”<sup>208</sup> CERD refrained from references to specific racial groups, while CEDAW directly put identity at its core.

Race’s complexity does not dwarf gender’s complexity beyond the binary; as described earlier, gender comprises many factors, biological, cultural and social, each of which combine in multifarious ways to yield humanity. Certainly, at the time of the drafting of CERD, and even in the subsequent time of CEDAW’s drafting, the discrete categories of “men” and “women” seemed legitimate. We now know that the gender diversity of humanity goes well beyond the men/women binary, and thus criticizing CEDAW with CERD’s formulation gains further legitimacy.

## B. The Argument for “Gender” and “Sex”

Because the problem with “women” is its identity-centered focus, either “gender” or “sex” would be a more useful subject for international law. As Part II detailed, “women” does not achieve what CEDAW seeks to achieve.<sup>209</sup> In relying on a specific group, CEDAW’s focus stands apart from many other human rights instruments. Framing the issues as an oppositional binary sets women up to continue to lose in this counterproductive relationship. To eliminate discrimination against women, men must be included in the design and implementation of remedies. CEDAW’s exclusive focus on women debilitates the Convention’s ability to imagine potential solutions to gender inequality. Two other terms may serve as alternatives: “gender” and “sex.” Each term has its advantages, but both terms achieve something “women” does not—they reach beyond binarist constructs toward understanding relationships that concern not just one group of people.

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<sup>208</sup> For period use of these terms, *see e.g.*, JAMES RADO & GEROME RAGNI, *HAIR: THE AMERICAN TRIBAL LOVE-ROCK MUSICAL* (1967), *available at* [http://www.script-orama.com/movie\\_scripts/h/hair-script-transcript-play.html](http://www.script-orama.com/movie_scripts/h/hair-script-transcript-play.html) (last visited July 22, 2009). Hair’s references to subjugation include the following lyrics: “The draft is white people sending black people to make war on the yellow people to defend land they stole from the red people!” *Id.*

<sup>209</sup> That is not to say that the women’s movement did not have any gender consciousness. To take one example, “Free to Be You and Me,” a revolutionary mid-1970’s educational film about sex differences, touted men who cry, boys who want dolls, and girls who wanted to be doctors and lawyers, while mocking boyish boys and girly girls. *Free to Be You and Me* (Bell Records 1972). Featured songs include “It’s Alright to Cry” sung by football star Rosie Greer, and “William’s Doll,” performed by Alan Alda and Marlo Thomas. The film targeted secondary sex traits with the scene of two babies trying to figure out who was a boy and who was a girl. Even this progressive film stood on the presumption of a real biological difference between men and women, even as it tried to tear social meaning from the male/female binary.

## 1. Argument for Gender

Gender, a term that reflects social and cultural traits typically associated with sex, is the more appropriate subject of an international treaty. Gender is defined as: “1 a: a grammatical category . . . 2 a: sexual identity, especially in relation to society or culture 3 a: the condition of being male or female; sex . . . .”<sup>210</sup> Gender is commonly understood to reflect social and cultural traits typically associated with sex. As Joan Wallach Scott puts it, “gender is the social organization of sexual difference. But this does not mean that gender reflects or implements fixed and natural physical differences between men and women; rather gender is the knowledge that establishes meaning for bodily differences.”<sup>211</sup>

The key contribution of “gender,” Scott argues, is its “rejection of the biological determinism implicit in the use of such terms as ‘sex’ or ‘sexual difference.’”<sup>212</sup> “Gender” denotes cultural constructions of “the entirely social creation about appropriate roles for men and women,” incorporating an entire system of relationships that may include sex, but is not directly determined by sex nor directly determining of sexuality.<sup>213</sup> Gender conveys the broader context in which meaning is assigned to certain social traits, some of which may have some biological connection, but many of which do not.

“Gender,” is more than a synonym for “women”—men have gender as well.<sup>214</sup> All people – not just women - are gendered. However, feminists often mistakenly deploy the word “gender” as a synonym for “women,” an act that fails to capitalize on the full breadth of the word’s import.<sup>215</sup> Although women’s ordeals hold a central place in gender inequality, ignoring other people and the broader, gendered power disparities will push CEDAW further down the path of inefficacy. Remedies for inequality solely based on group identity will not rectify sexist policies. Gender inequality afflicts all people, including men and transgender people, the subject of Part IV. By addressing gender inequality *in all of its manifestations*, international law would be better positioned to accomplish feminist goals. Focusing on women blinds CEDAW to a broader view of gender equality.

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<sup>210</sup> AMERICAN HERITAGE DICTIONARY, *supra* note 80, at 731.

<sup>211</sup> JOAN WALLACH SCOTT, GENDER AND THE POLITICS OF HISTORY 2 (1988). Scott continues by stating “We cannot see sexual difference except as a function of our knowledge about the body and that knowledge is not ‘pure,’ cannot be isolated from its implication in a broad range of discourse contexts.” *Id.*

<sup>212</sup> *Id.* at 29.

<sup>213</sup> *Id.* at 32.

<sup>214</sup> Thanks to Kendall Thomas for this phrasing.

<sup>215</sup> See Halley, *Rape at Rome*, *supra* note at 78 (“[S]exuality and gender are structurally committed to male domination and female subordination. If a man--or boy--is injured in sexuality or gender, that cannot be because masculinity has become a site of harm”).

a. Clarifying Goals: Minimizing the Gender Binarism

As I identified in a prior Article on transgender prisoners, one can locate most of the inequality and mistreatment that transgender people, and indeed all people, face in the gender binarism.<sup>216</sup> The rigid separation of the world into two sexes carries many harms. Subordinations based on gender define myriad socio-legal problems, including economic inequality and employment discrimination, as well as “private” issues such as spousal and child abuse and rape.<sup>217</sup> One’s gender is a fundamental aspect of one’s identity, perhaps the most fundamental given the legal coercion of individuals into one of the two sexes, “male” or “female.” Each of these problems entails elements of the “compulsory gendering”—the forced adherence to the gender binarism discussed in Part One.<sup>218</sup>

Otto’s work supports this argument—that the ultimate goal is to dismantle the harmful gender binaries that have always underpinned women’s human rights law.<sup>219</sup> Gender must be conceptualized “as something other than a dichotomy,”<sup>220</sup> formulated to reflect “the hybrid result of choices and desires, rather than either male or female.”<sup>221</sup> Human rights advocates must see gender hierarchy as the issue, rather than binary sex difference.<sup>222</sup>

b. Cultural Variability

Cultural variation forms a central core of what defines gender. Sex, referring to biological difference, may vary slightly from country to country, depending on how available and commonplace transgender medical procedures are.<sup>223</sup> Gender, in contrast, varies substantially from country to country.<sup>224</sup>

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<sup>216</sup> See generally Rosenblum, “Trapped” in *Sing Sing*, *supra* note 139.

<sup>217</sup> *Id.* at 561.

<sup>218</sup> *Id.*

<sup>219</sup> Otto, *supra* note 97, at 121.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at 126.

<sup>222</sup> *Id.* at 127. She suggests one way to reinvent gender as a hybrid—through the recovery “of women’s lost histories of grassroots resistance,” which often reveal “female subjectivities who are not defined by their gendered injuries and colonial victimhood, but have the agency to struggle for their rights.” *Id.*

<sup>223</sup> In the United States, for example, it is general practice Medicare and private insurance does not cover sex reassignment surgery. See Rebecca Mann, *The Treatment of Transgender Prisoners, Not Just An American Problem—A Comparative Analysis of American, Australian, and Canadian Prison Policies Concerning the Treatment of Transgender Prisoners and a “Universal” Recommendation to Improve Treatment*, 15 *Law & Sexuality* 91, 101-03 (2006). On the other hand, Medicaid does not specifically exclude sex reassignment surgery. *Id.* , In Canada, sex reassignment surgery has recently been reinstated as a procedure covered by national insurance. Advocate.com, Public Funding Reinstated for Sex Reassignment in Ontario, May 23 2008, [http://www.advocate.com/news\\_detail\\_ektid54783.asp](http://www.advocate.com/news_detail_ektid54783.asp) (last visited Aug. 22, 2009).

<sup>224</sup> See generally Katherine Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1 (1995).

Gender depends on culture, and this cultural dependence makes gender the more fundamental category than sex,<sup>225</sup> necessarily involving the power differential in the relationship between genders. Gender differs across societies on many axes; though they may defy easy definition, such differences exist nonetheless.<sup>226</sup> Socioeconomic factors construct the relationship between gender and the public/private dichotomy. Differing family structures and social policies may consign women (generally) to managing the home or free them to work in the public workplace.<sup>227</sup> Women’s “private” roles affect their potential to assume “public” responsibilities.<sup>228</sup> These socioeconomic factors, including those of class and race, help to construct gender as a power differential between men and women along the sex binary.<sup>229</sup>

Although “gender” raises questions of cultural contingency and mutability, this contingent awareness of cultural differences is a source of power, as it would foster more effective internalization of international norms.<sup>230</sup>

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<sup>225</sup> *Id.* at 40.

<sup>226</sup> See Rosenblum, *Internalizing Gender*, *supra* note 10, at 804. A quick glance at other comparative work on gender identity reveals the extent to which universal norms ignore gender’s cultural construction. For example, Thai and Indian gender identities incorporate both sharply divergent gender and sexual identities. See Sonia Katyal, *Exporting Identity*, *supra* note 110. In recent years, gay social movements emerged across the globe which drew on a Western model based on the relationship between sexual identity and sexual conduct. *Id.* at 137. The globalization of the Western model collided with pre-existing transgendered meaning of homosexuality and has significantly contributed to the alienation and disenfranchisement of Thailand’s kathoey—commonly called a “third sex”—within both popular and academic discourses. *Id.* at 136–38. India opted for the term MSM, or men who have sex with men. *Id.* at 153. MSM refers “to men from all age groups, marital status, economic classes, educational backgrounds, caste and religious communities, sexual identities, and gender identities who engage in sexual activity with other men.” *Id.* Thus, India and Thailand clearly demonstrate that the substitutive model of the Western world may be inadequate for obtaining protection for the vast numbers of sexual minorities throughout the world. *Id.* at 101–02. Larry Catá Backer has contrasted the constructions of gender and sexuality in Malaysia, Zimbabwe, and the United States. See Backer, *Emasculated Men*, *supra* note 111.

<sup>227</sup> See Rosenblum, *Internalizing Gender*, *supra* note 10, at 804. National laws govern abortion, leading to larger or smaller families. Public policy provides or denies daycare, public education and healthcare. Countries with extensive social services generally have higher levels of women’s workforce penetration.

<sup>228</sup> Rosenblum, *Feminizing Capital*, *supra* note 19.

<sup>229</sup> Joan Scott explains this point nicely: “The core of [my] definition [of gender] rests on an integral connection between two propositions: gender is a constructive element of social relationships based on perceived differences between the sexes, and gender is a primary way of signifying relationships of power.” SCOTT, GENDER AND THE POLITICS OF HISTORY, *supra* note 211, at 42. “Gender . . . provides a way to decode meaning and to understand the complex connections among various forms of human interaction.” *Id.* at 45–46. “We can write the history of that [political] process only if we recognize that ‘man’ and ‘woman’ are at once empty and overflowing categories. Empty because they have no ultimate, transcendent meaning. Overflowing because even when they appear to be fixed, they still contain within them alternative, denied, or suppressed definitions.” *Id.* at 49. “[G]ender must be redefined and restructured in conjunction with a vision of political and social equality that includes not only sex but class and race.” *Id.* at 50.

<sup>230</sup> See Rosenblum, *Internalizing Gender*, *supra* note 10, at 807.

## c. “Gender” as an Established Category

More recent international interventions by feminists have placed “gender” at the core of such efforts. In the past decade, international institutions from the International Criminal Court to the World Bank have begun to address gender issues directly, sometimes reflecting a more nuanced understanding of sex and gender than that of CEDAW. The World Bank and the International Monetary Fund have adopted and currently enforce explicit gender equality norms.<sup>231</sup> Over the past decade or so, “gender” has been the language of gender mainstreaming efforts to facilitate the inclusion of women and gender issues in all United Nations efforts.<sup>232</sup> The international legal use of the term “gender” has acquired wide currency without a clearly used definition. In this sense, “gender” copies CEDAW’s use of “women.”

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<sup>231</sup> See Rosenblum, *Feminizing Capital*, *supra* note 19. In this article I discuss the implications of the adoption of gender equality norms in both directions – in advancing these norms, but also in defining them in ways that benefit international financial institutions. My argument, that this interaction reflects a symbiosis between public and private sectors, builds on Kerry Rittich’s work. Kerry Rittich, *Engendering Development/Marketing Equality*, 67 ALB. L. REV. 575 (2003) [hereinafter Rittich, *Engendering Development*] (analyzing a World Bank report that proposes a strategy that rests on the use of market incentives to discourage gender discrimination, rather than the international law approach of holding the state responsible for gender equality); Kerry Rittich, *The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social*, 26 MICH. J. INT’L L. 199, 200 (2004) [hereinafter Rittich, *The Future of Law and Development*] (emphasizing market-centered types of social equality and inclusion, social justice is framed in market terms, which focuses on changes that yield economic results).

<sup>232</sup> CHRISTINE CHINKIN & FLORENCE BUTEGWA, GENDER MAINSTREAMING IN LEGAL AND CONSTITUTIONAL AFFAIRS 25-32 (2001). Critics of gender mainstreaming argue that the use of “gender” in “gender mainstreaming” simply reifies the male/female divide. In a discussion on the United Nation’s approach to human rights violations, Johanna Bond devotes a whole subsection to gender mainstreaming. Bond argues that a theoretical and practical shift must occur which places intersectionality theory at the forefront of contemporary human rights discourse and activism, precisely because a monolithic understanding of women does not address the reality of oppression as encountered across multiple axes. In support of her thesis, she contends that gender mainstreaming cannot truly implement change because it does not rise to the level of inclusiveness that intersectionality does. According to Bond, intersectionality requires more than “adding women to the mix,” yet gender mainstreaming “merely requires that both men and women be included as analytical subjects” and “tends to be essentialist” in that it “treats women as a monolithic group.” Johanna E. Bond, *International Intersectionality: A Theoretical and Pragmatic Exploration of Women’s International Human Rights Violations*, 52 EMORY L.J. 71, 140 (2003). Furthermore, gender mainstreaming efforts come not from an “understanding of intersectionality...but from a desire to merely comply with a top-down directive to ‘gender mainstream.’” *Id.* at 141. This motivation is especially problematic because it allows the United Nations to ignore the extent and the ways in which other systems of oppression work in tandem with sex discrimination, yet affect different women in vastly different ways. Bond calls on the CEDAW committee to issue a general recommendation directing states to investigate the intersectionality of various identity categories and to specifically address “intersectionality as it relates to discrimination based on sexual orientation.” *Id.* at 162. She further argues that heterosexism should be included as an explicitly prohibited form of discrimination, which would not result in an expansion of rights, but a more “nuanced understanding of States’ parties existing obligations.” *Id.* at 163.

Valerie Oosterveld describes the United Nations approach on defining “gender,” in which it does not really define the term at all, as “minimalist.”<sup>233</sup> The term has appeared in U.N. documents without any overt or implicit explanation of its meaning for over a decade.<sup>234</sup> The term was included in the Beijing Platform without being defined, although the President of the Conference was pressured by opposing states into making a statement which declared that the “ordinarily, generally accepted usage” of the term was “intended to be interpreted.”<sup>235</sup> More recent uses have involved a clearer definition, one whose meaning emphasizes that it is a social construction, influenced by culture, and that “the content of ‘gender’ can vary within and among cultures, and over time.”<sup>236</sup>

Two sites for international debate on the term “gender” reveal the political sensitivity that greets this debate. First, at the Fourth World Conference on Women in Beijing, certain conservative states strongly opposed the inclusion of the word “gender” in the absence of a satisfactory statement or definition.<sup>237</sup> The main argument of this opposition was that the “term might sanction rights based on sexual orientation.”<sup>238</sup> Thus, “gender” stood as a marker for a broader conceptualization of sex, with objectionable political implications for conservative, religiously-oriented states. The term also aroused substantial overt debate in the negotiations over the Rome Statute of the International Criminal Court (“ICC”) (1998). Many feminists engaged in the debate around the passage of the Rome Statute and the creation of the International Criminal Court sought broader use of the term “gender,” an effort that became the subject of extensive maneuvering.<sup>239</sup> Oosterveld points to the core disagreement among states in the negotiations process. As in Beijing, States which sought to retain the term “gender” were “committed to ensuring that any definition adopted would reflect that ‘gender’ refers to socially constructed understandings of what it means to be male or female.”<sup>240</sup> The states that opposed the term “insisted on reference to ‘two sexes’ and agreed on the inclusion of a reference to the broadly-phrased ‘society.’”<sup>241</sup>

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<sup>233</sup> Oosterveld, *supra* note 90, at 66. Thanks to Janet Halley for this crucial source.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* at 67.

<sup>236</sup> *Id.* For example, the Yogyakarta Principles reflect a more contemporary understanding of “gender.” See The Yogyakarta Principles (March 2007), available at [http://www.yogyakartaprinciples.org/principles\\_en.htm](http://www.yogyakartaprinciples.org/principles_en.htm).

<sup>237</sup> *Id.* at 62.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.* at 64.

<sup>241</sup> *Id.* Oosterveld correctly recognizes that it is important to predict how the ICC will interpret the term because their interpretation will “have a direct impact on the kinds of cases of persecution that the court may be able to prosecute, as well as on the law applied...and on the protection and participation of victims and witnesses.” *Id.* at 57. She points out that U.N. interagency definitions may favor women’s rights more clearly, but they have been eclipsed by the minimalist approach at the multilateral level, precisely because states disagree on the definition with great conviction. Obviously, the Rome Statute departs from the minimalist trend at the multilateral level, as it

These “gender” efforts raise the core debates over gender equality. Continuing this debate, even with its challenges, can achieve more when brought into the defining aspect of CEDAW—its focus on women. Opponents of “gender” may rely on the potential of a return to the clearer time when feminists sought rights for “women.” Women, whose issues could be divorced from that of humans. Women, whose issues could be handled as an afterthought by largely male-run states. Unsexing CEDAW could place women’s issues back into the orbit of human rights by focusing on “gender,” a reality that affects everyone’s lives. Although “gender” arouses the opposition of conservative states, it does not necessarily contain a particular perspective. Joan Scott argues that “gender” does not incorporate some particular normative stance as to how it exists or what should be changed. “Although gender in this usage asserts that relationships between the sexes are social, it says nothing about why these relationships are constructed as they are, how they work, or how they change.”<sup>242</sup> In this sense, conservative states that oppose the use of “gender” may be mistaken. Although the content of the meaning of “gender” as I use it runs counter to certain conservative norms, “gender” does not necessarily involve fluidity in sexual norms.<sup>243</sup>

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contains an explicit definition of the term. Nevertheless, the definition ultimately adopted in the Statute is far removed from the detailed United Nations’ approach. *Id.*

<sup>242</sup> SCOTT, GENDER AND THE POLITICS OF HISTORY, *supra* note 211, at 32-33.

<sup>243</sup> That said, it is unsurprising that conservative states oppose attention to gender. Even though the current text of CEDAW does not reference gender, CEDAW opposition groups in the US are concerned that the document already seeks to legalize same-sex marriage. Harold Hongju Koh, *Why America Should Ratify the Women’s Rights Treaty (CEDAW)*, 34 CASE W. RES. J. INT’L L. 263, 273-74 (2002). Opposition groups point to actions by CEDAW’s Committee that suggested that state laws against lesbianism be abolished and that “lesbianism be reconceptualized as a sexual orientation.” Laurel MacLeod and Catherine Hurlburt, *Concerned Women for America Strongly Oppose CEDAW* (September 2000), available at <http://www.cwfa.org/prINTERfriendly.asp?id=1971&department=cwa&%20categoryid=nation> If the text was changed to “gender,” the outcry from conservative groups against CEDAW because of fear of homosexual and transgender rights would likely be louder. The Yogyakarta Principles, which directly deal with issues of gender and sexuality, enshrine much of what conservative states fear about a revised interpretation of CEDAW. *See* The Yogyakarta Principles (March 2007), available at [http://www.yogyakartaprinciples.org/principles\\_en.htm](http://www.yogyakartaprinciples.org/principles_en.htm). Opposition to using “gender” has already surfaced during the negotiation of other international treaties. While negotiating the Rome Treaty, conservative nongovernmental organizations distributed lobby papers calling for the deletion of both “gender balance” and the reference to judicial expertise in sexual and gender violence. Oosterveld, *supra* note 90, at 61. Such groups believed that using the term “gender sensitivity” would “undermine traditional moral, cultural and traditional values.” David M. Kennedy Center for International Studies, *Impartiality in the Election of Judges*, available at [http://www.worldfamilypolicycenter.org/wfpc/About\\_the\\_WFPC/papers/icc\\_report.html#AppH1](http://www.worldfamilypolicycenter.org/wfpc/About_the_WFPC/papers/icc_report.html#AppH1) (last visited Jan. 12, 2005). Groups opposed to the use of the term “gender” wanted a definition that only referred to “the two sexes, male and female.” Oosterveld, *supra* note 90, at 65. Certain conservative groups also made their views on the term “gender” known at the 1995 Beijing Declaration and Platform for Action and the 1996 Habitat World Conference. *Id.* at 65-66.

## 2. The Argument for “Sex”

Although “gender” has already taken hold in international law contexts, “sex” holds certain distinct advantages over “gender.” First, “sex” already appears in the text of CEDAW, notably in the definition of “discrimination” in Article 1, but the word only makes rare appearances in CEDAW’s text. A broader use of “sex” would depart from CEDAW’s women-centered approach.

“Sex” does not presume the primacy of sex difference, in the way that “gender” does. Joan Scott writes that “[t]he term gender suggests that relations between the sexes are a primary aspect of social organization . . . and that differences between the sexes constitute and are constituted by hierarchical and social structures.”<sup>244</sup> “Gender” presumes a centrality to these differences that normatively supports positions that may not be valid. Second, “sex,” in contrast to “gender,” refers generally to a biological difference. Although feminist theory has largely and rightly run from biological essentialism, references to biological categories may be useful, particularly given how mutable they are. “Sex” may reinforce the male/female binarism until one considers the increasingly common transition between “sexes” and the concomitant realization that for many “sex” (manifested in changeable bodies) is more fluid than “gender” (embodied in a less mutable self-identity).<sup>245</sup>

The aversion to “sex” may arise from one key challenge: the confusion in English and other languages between “sex,” meaning “purported bodily difference between men and women,”<sup>246</sup> and “sex,” meaning erotic activity. Janet Halley nicely labels the former “sex1” and the latter “sex2,”<sup>247</sup> and while for academic debate this stands unchallenged in its clarity, these monikers would not enter into the international law lexicon. This confusion between sex1 and sex2 heightens widespread discomfort around sexuality. Indeed, the widespread use of “gender” in the United States has as its origin a decision by Ruth Bader Ginsburg while serving as the leading litigator of women’s rights in the 1970’s.<sup>248</sup> Ginsburg decided to use “gender” because she feared that using the term “sex” might make

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<sup>244</sup> *Id.* at 25.

<sup>245</sup> Thanks to Elizabeth Emens for phrasing this distinction so clearly.

<sup>246</sup> JANET HALLEY, *SPLIT DECISIONS*, *supra* note 14. Halley defines sex1 and sex2 as follows: “Sex1 . . . the purported bodily difference between men and women. The supposedly irreducible fact of biological dimorphism. ‘Is it a boy or a girl?’ Penis or vagina, testicles or ovaries, testosterone or estrogen, and so forth. Sex2 . . . everything that turns us on. The erotic. The paradigm here is ‘fucking,’ but it could be (for you) the vibration of your car or your unconscious wish to sleep with your mother and kill your father.” *Id.* at 24.

<sup>247</sup> *Id.* Halley defines sex1 and sex2 as follows: “Sex1 . . . the purported bodily difference between men and women. The supposedly irreducible fact of biological dimorphism. ‘Is it a boy or a girl?’ Penis or vagina, testicles or ovaries, testosterone or estrogen, and so forth. Sex2 . . . everything that turns us on. The erotic. The paradigm here is “fucking,” but it could be (for you) the vibration of your car or your unconscious wish to sleep with your mother and kill your father.” *Id.* at 24.

<sup>248</sup> *The Supreme Court; Excerpts From Senate Hearing on the Ginsburg Nomination*, N.Y. TIMES, July 22, 1993, at A20, available at <http://www.nytimes.com/1993/07/22/us/the-supreme-court-excerpts-from-senate-hearing-on-the-ginsburg-nomination.html?scp=1&sq=ginsburg&st=nyt>. Thanks to Elizabeth Emens for reminding me of this historical moment.

the judges deciding discrimination cases uncomfortable.<sup>249</sup> “Gender” thus came to play a large role in sex discrimination law.<sup>250</sup> Although Ginsburg’s reticence to use “sex” may reflect another era in which sexuality was lived largely in private, for many the confusion between the two terms may render “gender” more functional.

Conservative states may prefer “sex” to “gender” for two reasons. The biological referent may make “sex” seem less open to broader interpretation than “gender.” “Sex” could refer to biological identity rather than “gender,” which may be more subject to focus on gender roles and stereotyping. In addition, many link sexual orientation to gender stereotyping—a linkage that further expands the potential radicalism of “gender.” Political feasibility possibly makes “sex” a more palatable subject for CEDAW than “gender.”

“Sex” and even “gender,” for that matter, do not necessarily imply identity-neutral policies. Feminists and others who have worked on identity-related equality issues over the past two decades emphasize the danger of identity-neutral policies.<sup>251</sup> Gender-blindness, like colorblindness, would be subject to substantial and worthwhile critiques by critical thinkers. As I have previously argued, equality efforts depend on a culturally aware but rigorous consideration of how to balance principles of legal neutrality with the importance of identity-specific remedies.<sup>252</sup> Unsexing CEDAW does not entail a liberal notion of “sex neutrality,”<sup>253</sup> a liberal position such as that present in early U.S. Supreme Court sex discrimination jurisprudence.<sup>254</sup> Using “gender” as the principal framework establishes room for the inclusion of women’s rights and women-specific issues. Switching the focus to “gender” would not eliminate the ability of international law to address issues unique to women such as female genital cutting and pregnancy, as well as issues that predominantly affect women, such as domestic violence. The identitarian specificity of referencing women within a gender-based treaty may seem at odds with a focus on gender. Yet identity-based categories serve useful purposes when considered in temporal and geographical context.<sup>255</sup>

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<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> Jane Mansbridge, *The Descriptive Political Representation of Gender: An Anti-Essentialist Argument*, in *HAS LIBERALISM FAILED WOMEN? ASSURING EQUAL REPRESENTATION IN EUROPE AND THE UNITED STATES* 19 (Sytt Klausen & Charles S. Maier eds., 2001).

<sup>252</sup> Rosenblum, *Internalizing Gender*, *supra* note 10.

<sup>253</sup> Formal equality between men and women – treating them the same – is part of the sex neutrality jurisprudence of the U.S. Supreme Court. The perfect example is *Geduldig v. Aiello*, 417 U.S. 484 (1974), which held that denying women disabled by pregnancy a benefit otherwise available for disabled employees does not violate the law against sex discrimination, since it treats non-pregnant women and non-pregnant men the same way. *See also* *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976).

<sup>254</sup> *Geduldig* is the perfect example of this “sex neutral” vision, insofar as it focuses so little on the contextual differences between men and women. *See Geduldig*, 417 U.S. at 484.

<sup>255</sup> *See* Mansbridge, *supra* note 251.

Both “gender,” with its broad interpretative potential and “sex,” with its political appeal, succeed in shifting away from group-identity advocacy, yet many maintain “women” should remain central to international law efforts.

### 3. Counterarguments for Keeping “Women”

One may argue that the dichotomy between women and gender is a false one. Under this argument, even if gender/women is a false dichotomy, and I admit at some level it is, the way out within CEDAW’s current structure is to interpret “women” as meaning “gender.” Yet even if that were to occur, it would not solve the problem of the core question of exclusion from the purpose of the treaty. For example, others may argue that the use of the term “gender” is a luxury, available and useful in the more gender-balanced nations of the developed world.<sup>256</sup>

Indeed, substantial resistance to the use of “gender” in the place of “women” surfaced at the Fourth World Conference on Women in Beijing, focused on the fear of a shift away from women’s oppression.<sup>257</sup> Some feminist activists from the global South asserted that “gender” watered down their efforts.<sup>258</sup> One activist argued that “the focus on gender, rather than women, had become counter-productive in that it had allowed the discussion to shift from a focus on women, to women and men, and finally, back to men.”<sup>259</sup> This point was supported by another activist who argued that, in Jamaica, “the shift in discourse from women to gender had resulted . . . in a focus away from women, to ‘men at risk,’ reflecting concern about men’s failure in education and in securing employment, while women perform much better educationally and many support families alone.”<sup>260</sup> “Gender,” some argued, denied women-specific oppression and allowed government and entities to ignore the need for female-targeted measures and policies.<sup>261</sup>

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<sup>256</sup> See RHONDA COPELON, *WRITING GENDER INTO INTERNATIONAL CRIMINAL LAW: THE INTERNATIONAL CRIMINAL COURT STATUTE* (2000).

<sup>257</sup> Sally Baden & Anne Marie Goetz, *Who Needs [Sex] When You Can Have [Gender]?: Conflicting discourses on gender at Beijing*, in *FEMINIST VISIONS OF DEVELOPMENT: GENDER ANALYSIS AND POLICY* 19, 21 (Cecile Jackson & Ruth Pearson eds., 1998) (quoting Nighat Khan of Pakistan).

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Id.* (quoting Eudine Barriteau of Jamaica).

<sup>261</sup> *Id.* Baden and Goetz also discuss how instrumental arguments have been used to hasten the process of gender mainstreaming within institutions. One such argument justifies “the need to invest in female education,” with the end of serving “population control and child welfare goals.” *Id.* at 24. It is noted that such arguments may be successful in bringing attention to women’s issues, but they are also problematic “in that they often result in women or gender being simply a means to other ends.” *Id.* The authors suggest that Southern women’s hostility towards the new discourse is a result of their perception of gender mainstreaming as “an external agenda” imposed mostly by Northern development agencies, who are generally not held accountable to the Southern women they claim to work for. *Id.* at 25.

One concern is precisely the opposite of Joan Scott's assertion—that “[gender] can be used in a very descriptive way and the question of power can be easily removed.”<sup>262</sup> As referenced above, controversy greeted the debate over whether the Beijing Conference was about “sex” or “gender.”<sup>263</sup> Those opposed to the use of “gender” feared that, taken to its logical extreme, the argument about social construction must eventually deconstruct the body, a dilemma that has divided feminists themselves.<sup>264</sup> These disputes reveal the advantage of a term like “women,” that avoids some of these debates.

Yet “women” retains a group reference that undermines the cause of CEDAW. My goal here is not to resolve the “sex”/“gender” dispute in favor of one term or the other. It is important to note that even activists and others working intensively with these issues flip terms sometimes indiscriminately. Feminists sometimes deploy social constructivist arguments “when convenient, and biologically essentialist ones at other times.”<sup>265</sup> Policy arguments follow “sex” and/or “gender” used in “contradictory ways.”<sup>266</sup> This imprecision aside, for the purposes of this critique of CEDAW, either term performs a sea-change in international law when contrasted with “women.” “Gender” or “sex” both avoid referencing a specific group identity; either succeeds in bringing us away from group-based constructions of rights that take us away from the goals of gender equality.

### C. Anti-Women Discrimination or Human Rights?

CEDAW relies on an anti-discrimination model that places “women” in a central position as current and potential victims. This anti-discrimination model frames women's issues as separate from human rights issues. Discrimination implies an identity-related focus. Article 1 clearly defines discrimination: “any

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<sup>262</sup> *Id.*

<sup>263</sup> *Id.* at 25-26. The conservative reaction to “gender” “highlighted inconsistencies and areas of neglect in contemporary feminist approaches to the constitution of gender identity and political subjectivity...” *Id.* “To develop this argument,” a conservative essay distributed at the NGO Forum is analyzed. *Id.* at 28. In the essay, author Dale O’Leary translates the feminist “code words” of “free choice in reproduction” as limitless abortions and “lifestyle” as homosexuality. *Id.*

<sup>264</sup> According to Linda Nicholson, some feminists perceive “gender” to “stress the social construct in contrast to the biological given.” Others use “gender” to refer to “any social construction having to do with the male/female, as opposed to the masculine/feminine distinction (citation omitted).” *Id.* at 29 (quoting Linda Nicholson). Despite these problems, the authors believe that there is sufficient commonality among women to “bear testimony” to their “genuine sense of connection.” *Id.* at 33-34. It is contended that if women pay “attention to the various paths by which we each come to be ‘sexed,’” it should “help ensure that we avoid sinking back to reductive essentialisms.” *Id.* at 34. The authors never take a definitive stance with regards to the efficiency of the discourse switch and conclude by restating the need for feminist researchers to dialogue, especially with those working outside of a feminist agenda.

<sup>265</sup> *Id.* at 31.

<sup>266</sup> *Id.* at 21. For instance, the rejection of gender in the conference document was believed to signify homophobia, but one lesbian women stated she was “born a lesbian.” *Id.* at 31.

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, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms.”<sup>267</sup> Discrimination is referenced in the broader sense, including what those in the United States would call “disparate impact” discrimination, in which inequality may reflect discrimination. In common usage, however, the term “discrimination” has a much narrower meaning of an arbitrary decision based on some characteristic, such as sex, race, sexual orientation or ability.<sup>268</sup>

CEDAW’s definition is broader than this, but it still misdiagnoses “women’s” suffering as discrimination, rather than a pervasive set of oppressive social relations; one that surpasses the confines of any specific group of victims.<sup>269</sup> CEDAW’s focus is mistaken—it approaches the suffering women face due to sexism as if women were a discrete minority. In addition, CEDAW’s focus on “women” allows mainstream “human rights” law to remove gender justice projects from its scope. This discrimination model constructs an oppositional world of discriminators or their victims. CEDAW’s urge to “eliminate all forms of discrimination against women” envisions a class of passive victims and discrimination by an unspecified person or group. Concentrating exclusively on women both isolates gender disparities from core human rights concerns and forestalls real solutions to appalling human rights dilemmas.

Reassessing the discrimination model reveals the importance of reinserting “women” into human rights considerations. Catharine MacKinnon recently asked “Are women human?,”<sup>270</sup> and CEDAW’s answer, by its existence outside of human rights, is that they are not. Feminist activists sought to delineate separate rights for women because they viewed already established human rights norms as excluding women’s concerns.<sup>271</sup> Although women’s rights were asserted in this separate construction initially, more recently the relationship has become one in which women’s rights are human rights. “The hope was that making ‘universal’ human rights more responsive to women’s specific human rights violations would not only impact on human rights law, but also provide a new focus for the women-in-development agenda,” Otto explains.<sup>272</sup> The women rights-are-human rights strategy had the goals of forcing the recognition at the international level of

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<sup>267</sup> CEDAW, *supra* note 5.

<sup>268</sup> BLACK’S LAW DICTIONARY 393 (8<sup>th</sup> ed. 2004).

<sup>269</sup> To the extent that CEDAW reflects this continued emphasis on a discrimination model over a human rights model, it may also reflect U.S. feminists’ predominance at the time of CEDAW’s drafting.

<sup>270</sup> MACKINNON, ARE WOMEN HUMAN?, *supra* note 2.

<sup>271</sup> Hilary Charlesworth, *What are ‘Women’s International Human Rights?’*, in HUMAN RIGHTS OF WOMEN 58, 63 (Rebecca J. Cook ed., 1994). Charlesworth notes that “as in all areas of international law, women have been almost entirely excluded from the important human rights fora where standards are defined, monitored, and implemented. *Id.*

<sup>272</sup> Otto, *supra* note 97, at 121.

female-specific human rights violations as universal human rights violations and to institute gender mainstreaming.<sup>273</sup>

The women-centered human rights strategy not only reified the sex binary, but it also moved women's rights further from the human rights agenda.<sup>274</sup> Feminists eventually pursued another strategy to correct this unintended effect of CEDAW—"the women's rights-are-human rights strategy."<sup>275</sup> This approach sought to demonstrate that women-specific rights violations are also human rights violations. One of its main achievements was the recognition of gendered violence as a human rights violation, however, a considerable amount of energy was expended on detailing the practices of non-Western cultures—giving "new credence to the "'native victim' subject."<sup>276</sup> The other goal of this approach is the "mainstreaming" of women's issues into the general human rights discourse. Although Otto believes that mainstreaming has been "met with considerable success,"<sup>277</sup> she points out that it also "continues to affirm the masculinity of the universal subject who needs no special enumeration of his gender-specific injuries."<sup>278</sup>

Dianne Otto argues that the most promising solution to the aforementioned dilemmas of women's identity and the relationship between women's rights and human rights would be the creation of human rights law that recognizes gender identity as a "...hybrid result of choices and desire, rather than either male or female."<sup>279</sup> Despite the above-discussed risk of re-emphasizing men's rights,<sup>280</sup> in this re-emphasis of the human rights model's relevance regarding gender issues,

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<sup>273</sup> *Id.* at 121-122. The success of the first goal is manifested in the Declaration on the Elimination of Violence Against Women (DEVAW). However, Otto notes that DEVAW does not state that violence against women is a violation of human rights generally. Furthermore, focusing on violence against women replicates the passive, vulnerable female subjectivity. The condemnation of cultural violent practices also replicates the "native victim" subject. *Id.* at 122. The gender mainstreaming goal has also been "met with considerable success," as demonstrated through "the adoption of General Comments or General Recommendations that provide authoritative interpretations of the coverage of women's rights by the treaty texts." *Id.* at 123. Although Otto recognizes that "the extensive cataloging of women's injuries and disadvantages" is "...clearly necessary for making women's human rights abuses legally cognisable," she also asserts that the mainstreaming approach "continues to affirm the masculinity of the universal subject who needs no special enumeration of his gender-specific injuries." *Id.* Because of this "dynamic", Otto believes that it may be "impossible" to disrupt "gender hierarchies through human rights law." *Id.* at 124.; See generally CHRISTINE CHINKIN & FLORENCE BUTEGWA, GENDER MAINSTREAMING IN LEGAL AND CONSTITUTIONAL AFFAIRS (2001).

<sup>274</sup> *Id.* at 120.

<sup>275</sup> *Id.*

<sup>276</sup> *Id.* at 122.

<sup>277</sup> *Id.*

<sup>278</sup> *Id.* at 123.

<sup>279</sup> *Id.* at 126.

<sup>280</sup> However, the destruction of the dichotomous notions of sex which would result by recognizing the fluidity of gender may... "threaten the erasure of the female subject and her gender-specific human rights violations, and it may still reassert the masculine as the universal in the image of the hybrid." *Id.*

sexuality-related rights must figure at the core of the construction of gender-based rights.

Gender, with its explicit focus on social and cultural relations, could bring sexuality into the center of the architecture of international human rights law. Conservative states feared precisely this implied meaning of “gender” as “sexual orientation.” The absence of this consideration under CEDAW is one crucial casualty of its emphasis on “women.”<sup>281</sup> Decisions regarding reproductive freedom, prevention and care for HIV-related illness, and other sexuality-related rights belong at the core of an international treaty. The existence of many culturally different constructions of gender reveals the limitation of CEDAW’s emphasis on the category “women.” Given the interaction of these categories, an international convention on “women” should also be a convention on gender, and for that matter, on sexuality. Gender differentials reflect the dynamic relationship among identities of sex, gender, and sexuality, as Frank Valdes has explored.<sup>282</sup> These relations necessarily vary across cultures.<sup>283</sup>

Activists have made recent attempts to broaden the meaning of CEDAW to include gender and sexuality related discrimination. In *Equal and Indivisible: Crafting Inclusive Shadow Reports for CEDAW*, the International Gay and Lesbian Human Rights Commission, a United States-based non-governmental organization, makes a valiant effort to show how shadow reports for the CEDAW Committee may further recognition of discrimination against “LBT” women on the basis of sexual orientation and gender identity.<sup>284</sup> *Equal and Indivisible* encourages a broader interpretation of CEDAW,<sup>285</sup> one that differentiates between

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<sup>281</sup> It is worth noting that conservative states might attempt to increase their reservations in a treaty based on gender rather than “women.”

<sup>282</sup> See generally Valdes, *supra* note 117.

<sup>283</sup> See generally Rosenblum, *Loving Gender Balance*, *supra* note 16.

<sup>284</sup> See INT’L GAY & LESBIAN HUMAN RIGHTS COMM’N, EQUAL AND INDIVISIBLE: CRAFTING INCLUSIVE SHADOW REPORTS FOR CEDAW 17 (2009), available at <http://www.iglhrc.org/cgi-bin/iowa/article/publications/reportsandpublications/945.html> (hereinafter “EQUAL AND INDIVISIBLE”).

<sup>285</sup> The handbook provides a list of relevant sections of CEDAW that “are relevant to activists working on sexual orientation and gender identity.” *Id.* These seven points focus on the interdependence and indivisibility of all human rights that the CEDAW Convention reinforces, including elimination of public and private discrimination, gender stereotypes, and gender based violence. *Id.* With each of these points, the handbook advocates that it is both necessary and appropriate to interpret CEDAW to apply to discrimination of LBT women. For example, the handbook points out that “Article 2 addresses the obligations for states to respect, protect and fulfill rights, while Article 5 addresses cultural stereotypes.” *Id.* The guide argues that this applies to stereotypes based on sexual orientation and gender identity, as normative gender roles are deeply rooted in those stereotypes.” *Id.*

“sex” and “gender” and rejects the sex binary.<sup>286</sup> These “shadow reports” permit the CEDAW Committee to consider a broader set of rights abuses.<sup>287</sup>

The Yogyakarta Principles (“The Principles”) go beyond *Equal and Indivisible* to support a reframed vision of gender and sexual rights. The Principles, a non-binding statement by international law experts from 25 countries, is one example. The experts met from November 6-9, 2006, at Gadjah Mada University in Yogyakarta, Indonesia to draft a document articulating principles of international human rights law in relation to gender identity and to sexual orientation.<sup>288</sup> Responding to the “need for a more comprehensive articulation of [sexual orientation and gender identity] rights in international law”<sup>289</sup> and to the desire for a “more consistent terminology to address issues of sexual orientation and gender identity,” each of the 29 Principles articulate how international human rights law should protect gender and sexuality rights. The Principles also suggest how States should implement such legal obligations.<sup>290</sup> The Principles have been the object of substantial international attention and debate by legislative bodies, NGOs, and groups opposed to the rights of sexual minorities as they have been translated into the six languages of the United

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<sup>286</sup> *Id.* The handbook emphasizes the importance and necessity of recognizing the difference between sex and gender. *Id.* at 16. The handbook states that, “[b]y explicitly acknowledging the difference between sex and gender, the CEDAW Committee could facilitate a more profound debate on socially constructed norms and their effects on all women.” *Id.*

<sup>287</sup> *Id.* *Equal and Indivisible* also provides examples of discrimination against women and suggests questions to help evaluate whether human rights violations are occurring on the basis of sexual orientation or gender identity. *Id.* at 21-35. The areas include: (1) violence against women, including sexual violence and violence in the law enforcement, (2) recognition of a person’s gender identity, (3) forced marriage and discrimination on the grounds of marital status, (4) discrimination against human rights LBT human rights defenders, (5) right to education, (6) right of health, including discrimination and the right to health, medical “treatment” of homosexuality, discrimination and HIV/AIDS and (7) discrimination in employment and housing. *Id.* Many of these examples come from shadow reports, lending further support to the importance this reporting mechanism.

<sup>288</sup> Michael O’Flaherty & John Fisher, *Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles*, 8 HUM. RTS. L. REV. 207, 232-34 (2008). O’Flaherty served as Rapporteur for the development of the Principles.

<sup>289</sup> *Id.* at 232; Louise Arbour, UN High Commissioner for Human Rights, Address to the International Conference on Lesbian, Gay, Bisexual and Transgender Human Rights (July 26, 2006), [available at http://www.unhchr.ch/hurricane/hurricane.nsf/view01/B91AE52651D33F0DC12571BE002F172C?opendocument](http://www.unhchr.ch/hurricane/hurricane.nsf/view01/B91AE52651D33F0DC12571BE002F172C?opendocument).

<sup>290</sup> O’Flaherty & Fisher, *supra* note 288, at 233, 232-34. According to the Rapporteur for the Principles, the conclave intended the principles to serve a tripartite function: (1) “constitute a ‘mapping’ of the experiences of human rights violations experienced by people of diverse sexual orientations and gender identities”; (2) clear and precise application of international human rights law to such experiences; and (3) a detailed list of the obligations on States for “effective implementation of each of the human rights obligations.” The Yogyakarta Principles, *available at* <http://www.yogyakartaprinciples.org>.

Nations.<sup>291</sup> The Principles convey a core value in the “freedom to express oneself, one’s identity and one’s sexuality, without State interference based on sexual orientation or gender identity.”<sup>292</sup> The drafters deployed broad definitions of sexual orientation, gender, and gender identity.<sup>293</sup> Although the drafters note that the Principles “must rely on the current state of international human rights law” and thus will require international law revision to reflect legal developments, it is worth noting that the recommended actions are not only addressed to States, but also to NGOs, the media, and other non-State actors.<sup>294</sup> Although the Principles remain an aspiration for many, they have garnered substantial attention.<sup>295</sup> One scholar has expressed the concern that the Principles are vague

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<sup>291</sup> O’Flaherty & Fisher, *supra* note 288, at 237-47; Piero A. Tozzi, *Six Problems with the “Yogyakarta Principles”*, CATHOLIC FAMILY & HUMAN RIGHTS INSTITUTE, Apr. 2, 2002, [http://www.c-fam.org/docLib/20080610\\_Yogyakarta\\_Principles.pdf](http://www.c-fam.org/docLib/20080610_Yogyakarta_Principles.pdf).

<sup>292</sup> Article 19, The Yogyakarta Principles (March 2007), *available at* [http://www.yogyakartaprinciples.org/principles\\_en.htm](http://www.yogyakartaprinciples.org/principles_en.htm). The drafters organized the Principles as follows: Principles 1 to 3 address “the universality of human rights and their application to all persons without discrimination, as well as the right of all people to recognition before the law;” Principles 4-11 address “fundamental rights to life, freedom from violence and torture, privacy, access to justice and freedom from arbitrary detention;” Principles 12-18 address “non-discrimination in the enjoyment of economic, social and cultural rights, including employment, accommodation, social security, education and health;” Principles 19-21 address “the freedom to express oneself, one’s identity and one’s sexuality, without State interference based on sexual orientation or gender identity, including the rights to participate peaceably in public assemblies and events and otherwise associate in community with others;” Principles 22-23 address “the rights of persons to seek asylum from persecution based on sexual orientation or gender identity;” Principles 24-26 address “the rights of persons to participate in family life, public affairs and the cultural life of their community, without discrimination based on sexual orientation or gender identity;” Principle 27 addresses “the right to defend and promote human rights without discrimination based on sexual orientation or gender identity, and the obligation of States to ensure the protection of human rights defenders working in these areas;” Principle 28-29 affirm “the importance of holding rights violators accountable, and ensuring appropriate redress for those who face rights violations.” O’Flaherty & Fisher, *supra* note 288, at 234-35.

<sup>293</sup> In the Preamble of the Principles, the drafters define both the terms “sexual orientation” and “gender identity.” “Sexual orientation...refer[s] to each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.” Preamble, The Yogyakarta Principles (March 2007), *available at* [http://www.yogyakartaprinciples.org/principles\\_en.htm](http://www.yogyakartaprinciples.org/principles_en.htm). They go on to refine the definition of “gender identity”: Additionally, “gender identity...refer[s] to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.” *Id.*

<sup>294</sup> O’Flaherty & Fisher, *supra* note 288, at 237. According to O’Flaherty, the drafters believed they should recommend action points to other relevant actors who may protect and promote the rights of sexual minorities. There are some 16 recommendations directed at international governmental and non-governmental organizations as well as international rights and treaty bodies, human rights institutions and commercial organizations.

<sup>295</sup> While the Principles appear to have attracted attention from some international human rights groups, there is a dearth of scholarship discussing the Principles, their relevance, and their impact. That said, discussion and debate of the Principles is increasing. For example, in June of this year, the Organization of American States (“OAS”) unanimously adopted a resolution condemning

and fail to address specific remedies,<sup>296</sup> including, notably, avoiding dealing with the issue of same-sex marriage, instead opting in Principle 24 for a “right to found a family.”<sup>297</sup>

Although one may fear that such rights efforts may fail to achieve more than the backlash they provoke,<sup>298</sup> or may fail to garner substantial international

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human rights violations based on sexual orientation or gender identity. *OAS Adopts Resolution to Protect Sexual Rights*, Human Rights Watch, June 6, 2008, [http://hrw.org/english/docs/2008/06/06/colomb19049\\_txt.htm](http://hrw.org/english/docs/2008/06/06/colomb19049_txt.htm). The Brazil-sponsored resolution takes note of the importance of the adoption of the Principles. *Id.* Also, at the United Nations Department of Public Information/Non-Governmental Organization (“DPI/NGO”) 61<sup>st</sup> Annual Conference—“Reaffirming Human Rights for All”—the Principles were discussed in a workshop. DPI/NGO Homepage, <http://www.un.org/dpi/ngosection/index.asp>. Some scholars from an array of disciplines have begun to incorporate references to the Principles in their work; however, the legal community’s scholarship has not yet treated the Principles, save in the two references discussed *infra*. The Rapporteur for the conference that produced the Principles has attempted to catalogue if and how the Principles have impacted international human rights law. *See* O’Flaherty & Fisher, *supra* note 288, at 237-47. According to O’Flaherty, several States have cited the Principles, and have described the Principles as “groundbreaking” and “as articulating ‘legally-binding international standards that all States must respect.’” *Id.* at 238-39. O’Flaherty also reports that the first legal citation to the Principles appears in a brief to the Nepal Supreme Court. *Id.* at 246. The brief, submitted by the International Commission of Jurists, employs the Principles’ definition of “gender identity” and argues that the Principles represent an international consensus that “surgical modification is not a prerequisite for legal protection from discrimination based on gender identity. *Id.*; International Commission of Jurists, *Submissions to the Supreme Court of The State of Nepal, Providing the Basis in International Human Rights Law for the Prohibition of Discrimination Based on Sexual Orientation and Gender Identity, and Other Connected Matters*, available at [http://www.icj.org/IMG/ICJ\\_Nepal\\_Supreme\\_Court\\_Brief.pdf](http://www.icj.org/IMG/ICJ_Nepal_Supreme_Court_Brief.pdf) at paras. 4-5.

<sup>296</sup> O’Flaherty also argues that while the experts achieved the goal of capturing the existing state of international law, in some areas, the Principles fall short. O’Flaherty & Fisher, *supra* note 288, at 235. Other critiques include that some of the Principles are “vague and non-prescriptive” and that the Principles do not comprehensively address particular fact circumstances, like access to medicine in underdeveloped countries and same-sex domestic violence. *Id.* at 236.

<sup>297</sup> *Id.* Principle 24, The Yogyakarta Principles (March 2007), available at [http://www.yogyakartaprinciples.org/principles\\_en.htm](http://www.yogyakartaprinciples.org/principles_en.htm). Principle 24 also admonishes States *that already recognize same marriage* to “take all necessary legislative, administrative and other measures to ensure...any entitlement, privilege, obligation or benefit available to different-sex married or registered partners is equally available to same-sex married or registered partners.” *Id.*

<sup>298</sup> Emma Mittelstaedt, Comment, *Safeguarding the Rights of Sexual Minorities: The Incremental and Legal Approaches to Enforcing International Human Rights Obligations*, 9 CHI. J. INT’L L. 353, 365-66, 384 (2008). According to Mittelstaedt, holding signatories accountable to uphold their obligations under treaties onto which they have signed actually results in anti-GLBT legislation in some signatory States. *Id.* at 384-85. The author cites Ghana, South Africa, Nigeria, South Korea and Guatemala as examples of countries that have signed on to some international agreement that theoretically protects the rights of sexual minorities. The author advocates “an incremental approach to human rights” by the international community, which “would better serve the aims of improving LGBT rights worldwide.” *Id.* at 385. Because the Principles have not yet been adopted by any State, Mittelstaedt offers no hypothesis as to how the Principles might be received by any of the countries she includes as scenarios where the international community pushed too hard for the rights of sexual minorities. *See id.* The author does correctly point out, though, that the Principles emphasize not only the responsibilities of States, but also the responsibilities of the media, human rights institutions, NGOs and financial supporters. *Id.* at 366.

support, the Principles do reflect a potential solution to the bind in which CEDAW sits, where the centrality of “women” may hamper progress on issues of gender and sexuality rights.

In sum, the establishment of “discrimination” and “women’s human rights” confronts substantial theoretical and practical challenges in the centrality of group identity. “Gender” and “sex” would both improve the debate by shifting away from thinking about these issues as ones that solely affect the group known as “women” who are positioned as “victims” of “discrimination.” The women’s human rights movement as it now stands has caused some isolation of its concerns, instead of placing women at the center of human rights debate. One answer may involve shifting from an identity-centered treaty toward a rights-based treaty, as embodied in CERD or the Yogyakarta Principles. CEDAW’s error is confirmed when contrasted with CERD, which more effectively shapes the discussion of race-related human rights issues.

#### IV. Include All Sexes

As much as advocates may hesitate to move away from the sole focus on women, gender balance cannot advance until that shift occurs. Women’s ordeals still matter, but ignoring men and the broader, gendered power disparities does a disservice to CEDAW’s goals of gender equality. Remedies for inequality solely based on group identity will not rectify sexist policies. Presenting the problem as one of discrimination, CEDAW presumes that those who are not women, i.e., men, are the perpetrators of this discrimination. This binarist construction of gender inequality erroneously presumes a universe of two genders, but excludes men from the diagnosis and the remedy to gender oppression. It frames men as wrongdoers and women as innocent victims, devoid of agency.

The use of “women” instead of “sex” or “gender” has hobbled the treaty’s efficacy at the international level. It has led to the insistence on Otto’s female subjectivities instead of a full range of women. These subjectivities center on constructing women as victims and reifying the binarism between “men” and “women.”

CEDAW presumes that identity is the true marker of status for protection under its mandates. Yet this same clarity also surfaces to link women with a victim status. As other scholars have noted, the international women’s rights movement has reinforced the image of the woman as a victim subject, primarily through its focus on violence against women.<sup>299</sup> This argument is a strong one, but it does not go far enough: it is not simply “international law efforts” that portray women as victims; it is the very language of the principal women’s rights treaty. CEDAW sits at the core of such international law efforts, painting women

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Although she includes no particular examples, Mittelstaedt states that “[t]he Principles...reveal a trend toward utilizing nonstate actors to impose international law and norms upon *unwilling, or at least resistant, nations.*” (emphasis added) *Id.*

<sup>299</sup> Kapur, *The Tragedy of Victimization Rhetoric*, *supra* note 163.

as victims, subject to a wide array of discriminatory practices. Singling out “women” for the protections of the Convention implies victim status.

#### A. Trans-ing International Law

As Part II conveys, CEDAW’s reliance on “women” supports the construction of humanity as a binary of two sexes. One’s gender identity may defy simple categorization due to biology – there are many biological factors that constitute “sex”<sup>300</sup> – or by intent to change one’s identity.<sup>301</sup> Some would even argue that there are as many genders as there are people.<sup>302</sup>

Beyond the blurred divide between “men” and “women,”<sup>303</sup> and the reality that sex exists on a continuum,<sup>304</sup> transgender rights advocates have demanded the legal recognition of the multiplicity of gender identity.<sup>305</sup> Transgender rights

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<sup>300</sup> See Rosenblum, “Trapped” in *Sing Sing*, *supra* note 139, at 504; see, e.g., Ehrenreich & Barr, *supra* note 141. In the mid-1990s an intersex rights movement began to form. Intersex Society of North America, *What’s the History Behind the Intersex Movement*, <http://www.isna.org/faq/history>. Taking inspiration from the successes of feminists and gay rights activists, the intersex movement sought similar reforms and an open discussion of the issues that intersex people confront in a world where gender identity exists as a binary. *Id.* A central concern of the movement is its effort to transform the method of treatment for babies born intersex. *Id.* Intersex comes in a multitude of shapes and forms, both visible and non-visible, but throughout the 20<sup>th</sup> century, the treatment and surgical techniques were devised with the goal of maintaining a world with two separate sexes --- male and female. *Id.* The medicalization of the intersex condition made it easy for parents and doctors to avoid grappling with the much more challenging issue of the child’s gender identity. *Id.* Today, the movement calls on doctors and parents to deal with the health concerns that some intersex babies face at birth while postponing ‘genital normalizing’ surgery until the patient is older. This allows patients to consent before performing a surgery that may be at odds with their gender identity. *Id.* The movement wants people to be aware of and understand the intersex condition so that society stops trying to “make it disappear” and instead starts trying to ensure that these individuals may live prosperous lives with a stable gender identity. *Id.*

<sup>301</sup> Many transgender people transition from one gender to another, with or without medical assistance, without the purpose of “passing” as the other gender. See generally BORNSTEIN, *supra* note 142, at 65-69.

<sup>302</sup> See STOLTENBERG, *supra* note 145, at 28. The failure to recognize this diversity is a particular failing of this culture. Cultures from Ancient Greece to India, as well as various others around the world, recognized the existence of hermaphrodite, or inter-sex, individuals and cross-gender identified individuals without forcing them into either of the male or female genders. See LESLIE FEINBERG, *TRANSGENDER WARRIORS* 39-47 (1996).

<sup>303</sup> AMERICAN HERITAGE DICTIONARY, *supra* note 80, at 1595 (defining sex as “either of the two divisions, designated female and male, of this classification”).

<sup>304</sup> See Douglas, *supra* note 146, at 972; see also Rosenblum, “Trapped” in *Sing Sing*, *supra* note 139, at 504. Fifteen years later, the New York Supreme Court of New York County used the exact formulation cited above in *Maffei v. Kolaeton Indus., Inc.*, 626 N.Y.S.2d 391 (N.Y. Sup. Ct. 1995) (holding that a pre-operative transgendered female was protected by New York City’s sex discrimination statute as a member of the class of males).

<sup>305</sup> In August of 1992, the International Conference on Transgender Law and Employment Policy (ICTLEP) set out to draft a “Gender Bill of Rights”. Phyllis Randolph Frye, *The International Bill of Gender Rights*, in *TRANSGENDER LAW* 327 (Paisley Currah et al. eds., 2006). The following August, the Conference presented a first draft that they proceeded to revise and amend at the

advocates assert an absolute right to gender identity, in which individuals can choose a gender identity that reflects that individual's self-understanding.<sup>306</sup>

The focus on “women” in CEDAW leaves transgender individuals in the difficult position of questionable international law subjectivity. Is a man who becomes a woman a “woman” for the purposes of CEDAW? What about a woman who becomes a man? As with all juridical constructs, the sex binary legitimizes certain acts and identities while delegitimizing others, generally leaving out transgender individuals.<sup>307</sup> CEDAW's exclusion of multiple sexes has serious consequences. Transgender individuals lack the social position ascribed to “men” in the sex binary and lack recourse to the remedies promulgated by CEDAW.

Transnational law is distinct from international law.<sup>308</sup> International law reflects agreements and responsibilities between states, whereas transnational law reflects a broader set of legal interactions, involving states, non-state actors, and the interaction between domestic legal structures and international ones. It reflects a cosmopolitan goal of fostering interactions and even harmonization among legal systems.

As transnational law advocates push for thinking about international law in more complex ways, CEDAW, as the international law dealing with women, sex and gender, should be “trans-ed.” It should include all sexes, even those who fall outside of the sex binary. Numerically, however, the largest sex identity excluded by CEDAW is men.

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following three annual meetings. *Id.* The product purports to enumerate a set of universal civil and human rights that if honored will all persons' gender identity without regard to “chromosomal sex, genitalia, assigned birth sex, or initial gender role.” *Id.* On its own the Bill is without the force of law, recently however, local governments peppered across the United States have begun to recognize some of the rights as have foreign governments including Canada, South Africa, Australia, Great Britain, and other Western European countries.

<sup>306</sup> *Id.*

<sup>307</sup> See EQUAL AND INDIVISIBLE, *supra* note 284.

<sup>308</sup> Transnational law represents a hybrid of domestic and international law. See Harold Hongju Koh, *Why Transnational Law Matters*, 24 PENN ST. INT'L L. REV. 745, 745 (2006). In 1956, Judge Philip Jessup famously defined the term in his Storrs Lectures at Yale as “all law which regulates actions or events that transcend national frontiers . . . [including] [b]oth public and private international law . . . [plus] other rules which do not wholly fit into such standard categories.” *Id.* (quoting Philip C. Jessup, *Transnational Law* 2 (1956)). While the definition is still applicable today, Koh has expounded on the term in his analyses on transnational legal process. According to Koh, transnational law encompasses all laws that are not purely domestic or purely international law. See *id.* His operational definition consists of 1) laws that are “downloaded” from international to domestic law; 2) laws that are “uploaded” from domestic to international law, then “downloaded” back to domestic law; and 3) laws that are borrowed or “horizontally transplanted” from one national system to another. See *id.* at 745-746. Not surprisingly, transnational law has become increasingly significant to our lives given the globalized nature of law and legal studies. *Id.* at 746. This prominence is reflected in transnational legal process, in which public and private actors, including nation states, corporations, international organizations, non-governmental organizations, and individuals, interact in a variety of fora to interpret, enforce, and ultimately internalize, rules of international law. See Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 183 (1996). The key elements of this approach are interaction, interpretation, and internalization. *Id.*

## B. Include Men

CEDAW should reference all genders. And if CEDAW errs in solely referencing “women,” a large part of its error is the exclusion of men. During the 1989 bicentennial of France’s Declaration of the Rights of Man, feminists questioned the textual exclusion from the Declaration of women by covering posters around France with the words “and women.” It is equally appropriate to ask the reverse of the question with respect to CEDAW: why focus solely on women when gender inequality afflicts people of all genders?<sup>309</sup> Although men benefit in terms of wealth and power from their “insider” status, men also suffer from gender inequality by the constraints of rigid gender norms. To eliminate discrimination against women, men must be included in the design and implementation of remedies. Men must be allies in a battle on gender inequality, and without men, broader goals for gender equality will remain unrealized.

### 1. Men in CEDAW

CEDAW’s title and text generally center on women, to the exclusion of men. CEDAW includes men in certain contexts, but largely as a reference point for the ideal of equality between men and women. Article 1 defines equality between men and women as a basis for its antidiscrimination norms.<sup>310</sup> Subsequent articles continue to reference men in this fashion. For example, Article 7 guarantees access to participate in political life “on equal terms with men.”<sup>311</sup> Article 8 uses the same language.<sup>312</sup> Article 9 guarantees women “equal rights with men” to self-determination over nationality.<sup>313</sup> The language of Article 10 typifies CEDAW’s use of language: “States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women....”<sup>314</sup>

Men here serve as a yardstick, as CEDAW seeks “equal rights with men,” “on a basis of equality of men and women,” and it is against this yardstick that the core, formal-equality chunks of CEDAW measure women’s progress.<sup>315</sup> Dianne Otto’s female subjectivity of formal equality only exists in comparison with men.

As men play the yardstick, they also play the foil in CEDAW’s text. CEDAW’s description is strikingly similar to John Grey’s portrayal of “men” and

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<sup>309</sup> Here I build on two works regarding men’s relationship to feminism. Nancy Levit, *Feminism For Men: Legal Ideology and the Construction of Maleness*, 43 UCLA L. REV. 1037, 1038 (1996); PAUL NATHANSON & KATHERINE K. YOUNG, *LEGALIZING MISANDRY: FROM PUBLIC SHAME TO SYSTEMIC DISCRIMINATION AGAINST MEN* (2006).

<sup>310</sup> See United Nations Division for the Advancement of Women, *Full Text of the Convention in English*, available at <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm>.

<sup>311</sup> *Id.*

<sup>312</sup> See *id.*

<sup>313</sup> *Id.*

<sup>314</sup> *Id.*

<sup>315</sup> Otto, *supra* note 97.

“women” in which “Men are from Mars, Women are from Venus,” – a portrait of stark differences.<sup>316</sup> In short, CEDAW’s emphasis on women, to the exclusion of men, reifies the gendered nature of power, leaving men out of the equation both as a subject of analysis and as a subject of rights, except insofar as their socio-economic position can measure law’s (and, since CEDAW is the law, “women’s”) success at combating sexism.

One element of CEDAW stands out from this obsessively identitarian text. Article 5(a) appears to reference men toward a different end – the elimination of sexist and stereotyped roles for either men or women. Article 5(a) seeks to “modify the social and cultural patterns of conduct of men and women, with a view of achieving the elimination of prejudices and customs which are based on the idea of the inferiority or superiority of either of the sexes or on stereotyped roles for men and women.”<sup>317</sup> Article 5(a) recognizes that men *and women* play a role in the practices that perpetuate gender discrimination. Thus, in Article 5(a), the drafters of CEDAW seemed to have expanded the scope of the treaty language to include practices by both genders. This particular language suggests protections for men – the treaty calls for the elimination of “practices which are based on the idea of the inferiority or superiority of either of the sexes.”<sup>318</sup> The inclusion of men and acknowledgment of women’s roles in patterns of conduct represent a break with the language of other sections of the treaty focusing particularly on women.

CEDAW’s problem is that the reference to men in Article 5(a) is an isolated one, raising the question of why the drafters chose to include men in this one section but not elsewhere. Their exclusion elsewhere raises the question of whether it was consistent to include them in this one section. Seeking solutions involving only women fails to account for the complex issues that go well beyond group identity - issues that deal with the fundamental set of power relations that define all societies and states in the international system, in which subordination based on gender constitutes the norm for political, economic and familial institutions. Given that CEDAW’s reference in Article 5(a) stands as a limited intervention toward thinking about gender beyond “women,” we can safely conclude that CEDAW is largely silent on how international law should govern gender issues as they relate to men, except insofar as it seeks to limit men’s dominance in public power.

CEDAW’s flawed discussion of men is echoed in subsequent feminist international efforts that reflect an even deeper ambivalence toward the recognition of male suffering from gender imbalances.

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<sup>316</sup> JOHN GRAY, *MEN ARE FROM MARS, WOMEN ARE FROM VENUS* (HarperCollins 1992).

<sup>317</sup> Andrea Vesa, *International and Regional Standards For Protecting Victims of Domestic Violence*, 12 AM. U. J. GENDER SOC. POL’Y AND L. 309, 328 (2004).

<sup>318</sup> *Id.*

## 2. Masculinity's Harm to Men

Readers attuned to the ravages of sexism on women may exclaim “cry me a river,” dismissing men’s suffering. Some may argue that limiting men’s oversized role in public power is, in itself, sufficient as an aspiration for men. Yet men too suffer from gender inequality. Men may obtain more responsibility in society, along with more money, but these benefits come with the cost of reduced family and leisure time.<sup>319</sup> In certain vocations, men are placed on the frontlines in battle and down in the mines, exposed to physical danger.<sup>320</sup>

Beyond the fact that men deserve attention for gender inequality, an element to be addressed, recent feminist international interventions point toward a presumption that these issues are secondary. Janet Halley’s recent studies of feminist interventions in international criminal law demonstrate something is amiss. In her *Rape at Rome* article, she criticizes feminist internationalists for overstepping feminist norms in their zealotry during the negotiations over the International Criminal Court.<sup>321</sup> The feminist consensus on international criminal law that came out of these efforts represented not a middle ground between conservative and leftist feminist ideologies but rather a firmly structuralist approach that conceived international criminal law in terms of male domination and female subordination.<sup>322</sup> Halley, as referenced in Part II, calls this “Governance Feminism” or GFeminism. Its proponents, GFeminists, achieved remarkable success (particularly for feminists) in creating a “near-seamless consensus” that pervades scholarly and popular writing in this area.

Although Halley recognizes some value in the recognition of rape as a war crime in certain contexts,<sup>323</sup> Halley questions whether the Gfeminists’ intervention was good for men, women, and international criminal law.<sup>324</sup> For example, GFeminists did not settle for the Geneva Convention’s classification of rape as a crime against humanity: they “did not want women’s physical integrity to be a subset of universal human integrity.”<sup>325</sup> Instead, they believed that a woman’s right to be free from sexual assault was “universal in scope,” and that this right should not be shared with men, but established as a separate

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<sup>319</sup> See Kari Palazzari, *The Daddy Double-Bind: How the Family and Medical Leave Act Perpetuates Sex Inequality Across All Levels*, 16 COLUM. J. GENDER & L. 429, 430 (2007) (addressing the difficulty dads in America face as they attempt to strike a balance between their work and their families); see also Nancy Gibbs, *Viewpoint: Bring on the Daddy Wars*, TIME, Feb. 27, 2006, available at <http://www.time.com/time/nation/article/0,8599,1168125,00.html> (reporting on the need for greater recognition of the plight of fathers in the national work family debate).

<sup>320</sup> See, e.g., Bureau of Labor Statistics, *Census of Fatal Occupational Injuries by Selected Worker Characteristics and Selected Event or Exposure*, 2007, <http://www.bls.gov/news.release/cfoi.t04.htm> (showing that men account for 92% of occupational fatalities).

<sup>321</sup> See Halley, *Rape at Rome*, *supra* note 78.

<sup>322</sup> *Id.* at 3.

<sup>323</sup> *Id.* at 123.

<sup>324</sup> *Id.* at 4.

<sup>325</sup> *Id.* at 67.

protection.<sup>326</sup> Some GFeminists argued that sexual assault should sit alongside the worst international criminal law violations of crimes against humanity and genocide.<sup>327</sup> The Rome statute adopted this idea: persecution based on gender, including rape, is a crime against humanity.<sup>328</sup> The recourse to criminal law on the international stage is one fraught with complications.

GFeminists failed in their attempt to include gender violence, including the gendered social constructs that support male dominance, in the list of sexual offenses.<sup>329</sup> This reform was yet another effort to regulate everyday sexism even when not related to armed conflict.<sup>330</sup> One compelling example Halley notes is the issue of child soldiers, most of whom are boys. Their reasoning for objecting to child soldiers is that trauma to boys ratifies patriarchal values, and thus harms women.<sup>331</sup> Halley points out that this reasoning fosters an indifference to the suffering of men.

Others go further than Halley in condemning feminist efforts as damaging to men. Paul Nathanson and Katherine Young argue that ideological feminist<sup>332</sup> efforts have succeeded in replacing a male-dominated legal structure with one that favors women at men's expense, replacing discrimination against women with a legislated double standard against men.<sup>333</sup> They describe this force as misandry, "the idea that men can be classified only as evil or inadequate, or as honorary women."<sup>334</sup> In this gynocentric worldview, women's membership in a victim

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<sup>326</sup> *Id.* at 167.

<sup>327</sup> *Id.* at 123 (citing Samantha I. Ryan, *From the Furies of Nanking to the Eumenides of the International Criminal Court: The Evolution of Sexual Assaults as International Crime*, 11 PACE INT'L L. REV. 447, 450 (1999)).

<sup>328</sup> One FU advocate suggests that "every rape is an expression of male domination and female subordination and thus a persecution on the basis of gender." *Id.* (quoting Rhonda Copelon, *Surfacing Gender: Reconceptualizing Crimes Against Women in Times of War*, in MASS RAPE: THE WAR AGAINST WOMEN IN BOSNIA-HERZGOVINA 212-213 (Alexandra Stiglmyer ed., Marion Faber trans., 1994). Halley vehemently disagrees with advocates of FU and their attempts to frame an armed conflict like the war in the Balkans as a "war-against-women." *Id.*

<sup>329</sup> *See id.* at 83.

<sup>330</sup> *Id.* at 84.

<sup>331</sup> *Id.* at 85. Feminist Universalism does not recognize masculinity in itself as a "site of harm." *Id.* at 86. Halley explains why such a concession would be antithetical to the FU vision as it would "relinquish not the commitment to seeing domination in sexuality and gender, but the commitment to seeing that domination as structurally committed to male domination and female subordination." *Id.*

<sup>332</sup> As Nathanson and Young use the term, "ideological feminism" means the dualistic world-view that characterizes woman as victims and men as oppressors. The authors also list the following as characteristic features of ideological feminism: essentialism-the emphasis on the unique qualities of women; hierarchy-indirect or direct suggestion that women are superior to men; collectivism-the communal goals of women outweigh the rights of individual men; utopianism-establishing an ideal social order in history; selective cynicism-systematic suspicion directed only toward men; revolutionism-political agenda that supersedes reform; consequentialism-the idea that the ends justify the means; and quasi-religiosity-a secular religion created. NATHANSON & YOUNG, *supra* note 309.

<sup>333</sup> *Id.* at 264.

<sup>334</sup> *Id.* at xiii.

class situates men as “collectively guilty.”<sup>335</sup> Nathanson and Young state that “[d]iscrimination against men is by now so pervasively institutionalized that it is best described as systemic and characteristic of the legal system as a whole.”<sup>336</sup> This systemic shift has occurred in courts, classrooms and at the international level.<sup>337</sup>

Within the international context, CEDAW, as well as the Beijing Platform for Action and a special annex to the Declaration and the Platform most clearly exemplify legalized misandry. Nathanson and Young point to the elision of human rights into women’s rights. They criticize efforts to delete references to human rights, and convert discussion of women’s needs into rights assertions.<sup>338</sup> The authors sum up these documents as forcing a complete destruction of cultural differences in favor of a feminist conformity with an ideological vision of utopia.”<sup>339</sup>

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<sup>335</sup> *Id.* at xi.

<sup>336</sup> *Id.* Nathanson and Young argue that the legal system, through the participation of the media, has fostered a radical shift in the perception of men. The authors argue that the media has placed men on public trial by its coverage of heinous male-on-female violent crimes, of sexual harassment cases, and of male-child sexual abuse cases. By highlighting four particular incidents—a California child sex abuse/Satan worship case, the Lorena Bobbitt incident, the Anita Hill/Clarence Thomas scandal, and the “Montreal Massacre” on a Canadian College Campus—Nathanson and Young support their thesis that ideological feminists view the class of males as oppressors and women (and children) as a class as victims. They note the role psychologists, therapists, psychiatrists and other clinicians played in each of the aforementioned scenarios. In each case, according to the authors, ideological feminists used the media’s, along with a host of “experts,” coverage of bizarre, even grotesque, events to support their own claims that male biology was evil. Other feminists utilized these incidents as a backdrop for their own theses that such instances of wrongdoing merely demonstrated the result of masculine socialization. By the end of these “public trials,” Nathanson and Young argue that the accused in each case were portrayed to represent the entire class of men and that even where courts had decided otherwise, the verdict against these men—against all men—was guilty. *Id.* at 315.

<sup>337</sup> Ideological feminist efforts have succeeded in positioning women’s rights as superior to the rights of men. Nathanson and Young cite examples from both Canada and from the United States, and do so “[b]ecause both countries have been heavily influenced in the recent past by a common worldview promoted by the United Nations. Based either explicitly or implicitly on postcolonialism, the international version of postmodernism, it is highly receptive to ... ideological feminism.” *Id.* at 80.

<sup>338</sup> *Id.* at 393-94. Interestingly, the authors point to the dominance of Western feminists as a key factor in the support for these ideological feminist assertions. Nathanson and Young also note the lack of participation in the debate by non-Western delegates. The authors suggest that these non-Western feminists view Western ideological feminism as the “newest form of Western imperialism.” *Id.* at 395. They take the argument further, writing that ideological feminism is a secular religion, functioning as a rival to traditional religions. As Nathanson and Young see it, one of the ideological feminists’ ultimate goals is to eliminate all traditional religions, which would also lead to disappearance of the cultures associated with those religions. *Id.* at 395.

<sup>339</sup> *Id.* at 501-2. Some notable examples of language include: the Annex urges countries to develop “policies and implement programmes, particularly for men and boys, on changing stereotypical attitudes and behaviours concerning gender roles and responsibilities to promote gender equality and positive attitudes and behaviour,” *id.*; failure to define the term “gender,” but nonetheless using the term in a gynocentric manner (as opposed to “gender” referring to both males and females), *id.* at 397; inclusion in the Annex of the term “herstory” to refer to historical and

Although these authors muster some evidence to support their assertions, they deliberately overstate the case for dramatic effect. To take one example, affirmative action and quotas, it is difficult to argue that a quota that provides for political representation for women subjugates men when they constitute 85% of public officials in most democracies. Halley provides a less overreaching assertion that certain feminist engagements threaten to devalue men. Nations that follow CEDAW may weaken men's social position, but not to the extent that it would institute some purely gynocentric governance. Here, Halley's argument centers on the ethical problems of using a coercive prosecution model to pursue women's rights.<sup>340</sup> The principal problem with the extent to which CEDAW and other feminist international efforts look at men is the way in which these considerations ground the shift in terms of what would prevent violence against women. Although that is a worthy goal, bringing men into sex or gender equality efforts will require a more direct engagement of their issues.

### 3. Men's Potential Contribution toward Gender Equality

Men do perpetuate gender inequality, but they are by no means the only actors, and women are not the only victims. Sexism also oppresses men, and to eliminate discrimination, men must be included in the design and implementation of remedies.<sup>341</sup> CEDAW's title and text should utilize language that includes men.

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contemporary perspective from a female point of view, *id.* at 397; inclusion of the term "empowerment" where the implication is that only men hold power and only women lack it, *id.*; the suggestion that families depend primarily on the support of the mother, *id.* at 399; the implication that families headed by lesbians or by single mothers benefit children as much as a family headed by a mother and a father, *id.*; the treatment of poverty and tyranny as symptoms of women's suffering, not as causes, of violence against women and of trafficking, *id.*; the rhetorical suggestion that the rights of women and girls are either not covered by human rights, or that the rights of men and boys simply do not matter, *id.*; and endorsing quotas and affirmative action as means to achieve gender balance. *Id.* at 400.

<sup>340</sup> In addition to Halley, others have argued the dangers of a prosecutorial model for women's rights efforts. See, e.g., John Valery White & Christopher L. Blakesley, *Women Or Rights: How Should Women's Rights Be Conceived And Implemented?*, in *WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW* 51, 60 (Kelly Askin & Dorean Koenig eds., 1999). The authors extol the virtues of the probable cause and proof beyond a reasonable doubt standard, as well as other rights of the accused. They discuss the tenuous balance of protecting the rights of victims and the accused, and continually assert that "eroding protections for the accused will ultimately have the effect of eroding all human rights." *Id.* at 68.

<sup>341</sup> This sexism extends well beyond the same-sex sexual harassment of *Oncale*. See *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998) (holding that same-sex sexual harassment, in this case harassment of a male worker on an oil rig in the ocean, may constitute sex discrimination). Men's suffering is invisible to CEDAW. Although feminist international efforts have focused largely on female victims of rape in the context of war, male rape has become a powerful and increasingly common weapon of war in the Congo. Jeffrey Gettleman, *Symbol of Unhealed Congo: Male Rape Victims*, N.Y. TIMES, Aug. 4, 2009, available at <http://www.nytimes.com/2009/08/05/world/africa/05congo.html>. The American Bar Association's sexual violence clinic in Goma has male victims in over ten percent of its cases. Although male rape cases still happen considerably less frequently than female rape, aid workers

These arguments have played a large role in public debates over gender equality in Scandinavia, both within feminist circles and in government policies.<sup>342</sup> Within U.S. feminist circles, the most persuasive theorist on these issues is Nancy Levit, who articulated a role for men in feminism in a positive fashion. In *Feminism For Men: Legal Ideology and the Construction of Maleness*, Levit notes the extent to which legal scholarship falls short of other disciplines in understanding the role of men and masculinity. The extent to which men suffer from male stereotypes has been addressed by legal scholars, but largely in an incidental fashion. Feminist legal theory, Levit asserts, has omitted men “as participants in the reconstructive project.”<sup>343</sup> Her goal is to focus on relational justice in which men are “invited into the discourse.”<sup>344</sup> Levit argues that “it is not only possible for men to become feminists, but imperative that they do.”

Exploring how patriarchy harms men, Levit hopes to enlist men in the feminist fight against it.<sup>345</sup> Legal doctrine perpetuates harmful stereotypes of men,<sup>346</sup> such as the requirement that they suffer in silence and reserve their emotions. This silencing of male victims isolates men who suffer from sexual violence and harassment.<sup>347</sup>

Although Levit agrees with feminists’ assessments that men’s experiences are considered the “norm,” she asks “who is the generic man that typifies the norm...”<sup>348</sup> The radical feminist method of consciousness-raising, Levit argues, should be put to use to “test the ways in which society has relegated men to

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in Congo suggest that men have a more difficult time recovering from these attacks. *Id.* Indeed, the humiliation is often so severe that men only seek medical attention if their injuries are severe, like stomach swelling, continuous bleeding, or even castration. *Id.* In fact, two men whose penises were cinched with rope died because they were too embarrassed to seek help. *Id.* Male rape is a problem in many societies, from prison rape in the United States to sexual violence in places like Dubai. See, e.g., National Prison Rape Elimination Commission Report, June 23, 2009, available at <http://nprec.us/publication/> (last visited August 21, 2009). In one notable case, a French 15-year-old was raped by an acquaintance and his friends after they offered to give him a ride home. Thanassis Cambanis, *In Rape Case, a French Youth Takes on Dubai*, N.Y. TIMES, Nov. 1, 2007, at A1, available at <http://www.nytimes.com/2007/11/01/world/middleeast/01dubai.html>. Although Alex and his family went to the authorities, the police were unwilling to help, and threatened to charge him with criminal homosexual activity if he persisted, reflecting cultural norms that prevent men from presenting themselves as victims. *Id.*

<sup>342</sup> See generally SCANDINAVIAN CRITIQUE OF ANGLO-AMERICAN FEMINIST THEOLOGY (Hanna Stenstrom et al. eds., 2007).

<sup>343</sup> Levit, *supra* note 309, at 1038.

<sup>344</sup> *Id.*

<sup>345</sup> *Id.* at 1040. After a lengthy survey of several strands of feminist theory (liberal, cultural, radical and postmodern), and how they have all either vilified or omitted men from their discourses, Levit expresses her concern that “men have no history as gendered selves” because “no work describes historical events in terms of what these events meant to the men who participated in them as men.” Within legal theory, there is also a severe dearth of scholarship exploring legal conceptions of masculinity and how they affect both genders. *Id.*

<sup>346</sup> *Id.*

<sup>347</sup> *Id.* at 1063.

<sup>348</sup> *Id.* at 1089.

stereotypically male roles,” although the groups should be composed of both genders.<sup>349</sup> This point leads to Levit’s conclusion. Feminists must pay heed to society’s treatment of men: “stereotyping harms to one gender also rigidify role expectations of the other gender.”<sup>350</sup> Parenting is a perfect example of the negative effects of this rigidity.

#### 4. A Concrete Example: Parental Leave

An example surfaces in recent social science literature as crucial to gender equality efforts: parental leave.<sup>351</sup> Public norms over women’s ability to choose to work or stay at home have shifted over the past few decades.<sup>352</sup> Stereotypes of men dictate that men are not suited to family and caretaking roles, which is played out in the fact that women can take parental leave more readily than men and men are often discounted from receiving custody of their children.<sup>353</sup> This male stereotype harms women as well as men, by acting as an “impediment to the equal division of childcare responsibilities.”<sup>354</sup> Empirical studies of parental leave reflect this reality. On their face, policies providing parental leave for women benefit individual women. Economists point out, though, that such policies make women employees more expensive than men employees, leading to the hiring of fewer women and reinforcing sexist norms of work and income.<sup>355</sup> Men, product of stereotyping, tend to only take parental leave when forced to do so, out of fear that they will be perceived in the workplace as inattentive toward work issues.

Taking the United States’ Family and Medical Leave Act (FMLA) as an example, it requires up to twelve weeks of unpaid time off for so-called parental leave.<sup>356</sup> One of the purposes of passing FMLA was to further the position of

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<sup>349</sup> *Id.*

<sup>350</sup> *Id.* at 1112.

<sup>351</sup> Another example reflects the potential role of men in gender equality: female genital cutting (“FGC”). This example is at once more controversial and less prominent in recent social science literature. FGC served as one of most critical and divisive issues in the international women’s movement. See Ehrenreich, *supra* note 141; see also Obiora, *supra* note 86. Often overlooked in this debate is the extent to which discussion of the issue as a women’s issue is self defeating because it leaves men out of the solution. Eliminating the practice involves finding ways to restrict the practice or reduce the harms resulting from the practice. One core component of this solution involves convincing men to accept a wife who has not undergone the procedure. For example, the wife of Egyptian President Mubarak, Suzanne Mubarak, plays a significant role in making the public aware of the dangers of female genital circumcision. See ELIZABETH HEGER BOYLE, *FEMALE GENITAL CUTTING: CULTURAL CONFLICT IN THE GLOBAL COMMUNITY* 105 (2005).

<sup>352</sup> See generally LINDA HIRSCHMAN, *GET TO WORK: A MANIFESTO FOR WOMEN* (2006). Although Hirschman describes a shift away from women’s ability to choose to work, even she would agree substantial progress has occurred.

<sup>353</sup> Levit, *supra* note 309, at 1073.

<sup>354</sup> *Id.* at 1074.

<sup>355</sup> In this sense, the stereotypes reinforce men’s financial advantage over women. Their benefit from this stereotype does not, however, ameliorate the cost of not having time with their families.

<sup>356</sup> Chuck Halverson, *From Here to Paternity: Why Men Are Not Taking Paternity Leave Under the Family and Medical Leave Act*, 18 WIS. WOMEN’S L.J. 257, 258 (2003).

women in the workplace.<sup>357</sup> Although the statute employed gender-neutral language, men take less advantage of the parental leave benefits. Private corporate initiatives may suggest that male paternity leave is on the rise,<sup>358</sup> data collected from surveys suggest otherwise.

Women take far more parental leave than men. Rather than relying on FMLA or company paternity leave policies, the men who took family leave relied primarily on their vacation time (average of ten days).<sup>359</sup> Halverson argues that the reason men do not rely on the FMLA for paternity leave is based on five obstacles: (1) paternity leave is still stigmatizing in the workplace, (2) most men cannot afford to take twelve weeks of unpaid leave, (3) many men do not realize that the FMLA covers paternity leave, (4) the FMLA places an administrative burden on employers hence creating obstacles for men taking FMLA paternity leave, and (5) the Act was not created to further the cause of fathers who want to bond with their newborns.<sup>360</sup>

The basic premise of the stigma in taking paternity leave is because society views men as breadwinners and women as caregivers and that “men are less attached to their children.”<sup>361</sup> Hence, “parenthood remains a highly gendered concept in our culture.” These gender stereotypes attribute to the low number of male leave takers despite the Act’s gender-neutral language. For newborn child care “men receive subtle messages from employers that their place is at the office and their wives’ responsibility is child care.”<sup>362</sup> In fact, many law firms require that male employees meet the “primarily caregiver” benchmark prior to taking a *paid* paternity leave. In sum, there is a double standard because successful working women are perceived as bad mothers while male are successful fathers only if there are successful at work.<sup>363</sup>

On the other hand, “men of the younger generation ‘seem far less burdened by the macho [and incompetent dad] stereotypes . . . than their

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<sup>357</sup> *Id.*

<sup>358</sup> For example, Ernst & Young created an internal campaign in 2006, featuring senior manager Rob McLeod, 32, speaking enthusiastically about his experience when he took four weeks of paternity leave. The purpose of this campaign was to help men feel more comfortable taking advantage of family-friendly benefits. Karen Holt, *Good for the Gander*, WORKING MOTHER, Aug. 22, 2009, available at <http://www.workingmother.com/web?service=direct/1/ViewAdvancedPortalPage/PortalBlocks/dlinkArticle&sp=S1667&sp=94>.

<sup>359</sup> The 2000 U.S. Department of Labor (DoL) statistics showed that only 13.5% of male and 19.8% of female employees took family leave. Halverson, *supra* note 356, at 259. Moreover, the same survey showed that women comprised 58.1% of leave takers in general and were more likely than men to take the leave. The survey was conducted over five years and the trend showed that the percentage of overall male leave takers in general declined by almost two percent (43.8% to 41.9%) while women leave takers increased by the same increment (56.2% to 58.1%). *Id.* at 260-261.

<sup>360</sup> *Id.* at 258.

<sup>361</sup> *Id.* at 262.

<sup>362</sup> *Id.*

<sup>363</sup> *Id.* at 263.

predecessors.”<sup>364</sup> The expectations of younger males are changing and a strong paternity leave policy may help recruit male employees. Even if this is the case, the persistence of norms by which men do not take paternity leave will continue in practice given the sharp disparities between men and women taking family leave.

One study points to factors that demonstrate that the gender gap should have disappeared but for the parental responsibilities of women.<sup>365</sup> The consideration of these offsetting factors creates a self-perpetuating mechanism - if employers believe that women are mostly responsible for household work, then they expect women to put less time and effort into their jobs and hence offer them lower jobs and earnings.<sup>366</sup> As a result, women assign more time for house responsibilities because it is more financially efficient. Subsequently, there is a slow decline of the gender gap in wages and home responsibilities even though women no longer have a comparable advantage to stay home.

More generous maternal leave policies are counterproductive because such policies reinforce a division of labor; they encourage women to stay home more and work less. A model in which fathers’ paternity leave becomes mandatory may be a good alternative. This Swedish model reduces gender asymmetries in the allocation of parental responsibilities because its mandatory father’s leave policy “decreases the potential for statistical discrimination that leads to gender inequalities specifically in wages.”<sup>367</sup> Sweden has a gender-neutral paternal leave system that is a strong model of family policy. It is “widely regarded as the most comprehensive” system that currently exists as it is based on the recognition that

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<sup>364</sup> *Id.* at 264.

<sup>365</sup> For example, Keith Cunningham argues that “work-life balance” is extremely important and one of the determining factors for new associates in choosing a law firm. Keith Cunningham, *Father Time: Flexible Work Arrangements and the Law Firm’s Failure of the Family*, 53 STAN. L. REV. 967, 970 (2001). He proposes and argues the following:

“In any business setting, successful adoption of alternative work schedules will only occur once clear support of the policies are given from upper management, which in turn will lead to a critical mass of men using these programs. The lesson to large firms is unmistakable: Having a family-friendly policy on paper means nothing in an environment that fails to honor a man’s simultaneous commitments as lawyer and father.”

*Id.* at 973. Albanesi & Olivetti wrote a commentary on researched-based policy analysis regarding gender roles and technological progress. The commentary discusses that medical advances of the twentieth century, particularly with regard to child-bearing, increased a fraction of a woman’s life that could be devoted to the labor market. Based on the results of the quantitative analysis, they predicted that the “labor force participation rate of married women should be the same as men’s and that the gender wage gap should have virtually disappeared by 1970.” *Id.* However their model did not account for various offsetting factors including presence of “marriage bars,” cultural forces and women’s unique biological roles. See Stefania Albanesi & Claudia Olivetti, *Gender Roles and Technological Progress*, NBER WP 13179 (July 20, 2007), available at <http://voxeu.org/index.php?q=node/402>.

<sup>366</sup> *Id.*

<sup>367</sup> *Id.*

the traditional family roles have changed.<sup>368</sup> Two employed parents are entitled to a combined eighteen months of parental leave. Either parent may use this benefit in its entirety or apportion it. The first 390 days is paid at 80 % of a normal salary - and the remaining 90 days at a flat fixed rate. To encourage paternal involvement in child rearing, Sweden has a rule requiring three months of that time allowance to be used by the father. The parents have the option to return to work on a part-time basis until the child reaches eight.<sup>369</sup>

Rather than focusing on gender as the primary basis to receive the benefits, the Swedish system focuses on the child's ability to spend equal time with both parents. As such, the Swedish gender-neutral system "alleviates feminist concerns about disparate treatments involved with 'maternity' leave" because it does not penalize women who desire both a career and children.<sup>370</sup> However, in the early 1980s, there was an apparent reluctance and difficulty for males to take parental leave primarily attributable to traditional sex roles. In order to change the low social acceptability of paternity leave, the "Swedish feminists proposed that the government mandate paternity leave."<sup>371</sup>

By the early 1990s, "almost fifty percent of men with children took paternity leave."<sup>372</sup> As more men took paternity leave, it became more socially acceptable. Likewise, because paternal leave was socially acceptable, more men subsequently took the leave.<sup>373</sup> The model appears healthy and self-perpetuating because it promotes social advancement and results in less hiring discrimination because men and women take equal parental leave. Therefore, the Swedish system is not only generous but it is highly effective in diminishing at work discrimination based on gender and traditional parenting roles.

As the parental leave example demonstrates, laws that seek to ameliorate women's situation by focusing on women actually reinforce gender disparities. Laws that address issues with attention to both men and women achieve more success in improving women's lives and decreasing gender disparities.

### C. Recognize Women's Agency

This is not solely about including men; it's also about recognizing women who are not victims. As Third Wave Feminist theory has explored, feminism must champion women's agency to remain relevant.<sup>374</sup> Women are not simply,

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<sup>368</sup> Michelle Ashamalla, *A Swedish Lesson in Parental Leave Policy*, 10 B.U. INT'L L.J. 241, 243 (1993).

<sup>369</sup> *Id.*

<sup>370</sup> *Id.* at 244.

<sup>371</sup> *Id.*

<sup>372</sup> *Id.*

<sup>373</sup> *Id.*

<sup>374</sup> Third-Wave Feminism may be defined generationally as the brand of feminism created by those who developed their political conscience in the 1980s and 1990s but also thematically as a movement characterized by: (1) dissatisfaction with earlier feminists; (2) the multiple nature of personal identity; (3) the joy of embracing traditional feminine appearance and attributes; (4) the centrality of sexual pleasure and sexual self-awareness; (5) the obstacles to economic

always, and irreducibly victims – they play a substantial role in the maintenance of gender inequality. Again, think of female genital cutting, much of which is committed by women on their daughters. In this and many more subtle ways, women are complicit in our world of gender inequality.

Dianne Otto points to CEDAW’s reference to prostitution as an example of the importance of the victim subject in CEDAW. The CEDAW provision calling for the “suppression...of the exploitation of prostitution of women” exemplifies the vulnerable female representation’s presence in the document.<sup>375</sup> By not acknowledging women’s “right” to work as prostitutes, CEDAW characterizes “...all prostitution as ‘exploitation,’” and all sex workers as apparently in need of protection from those which exploit them.<sup>376</sup> A gender-based treaty, recognizing both women’s agency and men’s non-enemy status, would achieve far more than the CEDAW model has or could.

Positing that women are victims relies on the currency of essentialist notions of both sex and culture in the international women’s human rights arena.<sup>377</sup> This element of the CEDAW critique draws on Ratna Kapur’s work on the victim subject. First, she points to the problem in the presumption of a coherent group identity even among different cultures. Kapur points to the international law’s liberal discourse that overlooks multi-layered experiences that take into account perspectives of class, race, religion, ethnicity, and/or sexual orientation.<sup>378</sup> This cultural essentialism, some have argued, has become displaced onto a divide between the developed and the developing worlds.<sup>379</sup> International women’s rights discourse has yet to find a full resolution of this intersectionality critique.

Second, Kapur points to the problems with a focus on violence that reinforces the depiction of women in developing countries as perpetually marginalized. These cultural depictions often rely on tropes that ignore important

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empowerment; and (6) the social and cultural impact of media and technology.” Crawford, *supra* note 79.

<sup>375</sup> Otto, *supra* note 97, at 118-19.

<sup>376</sup> *Id.* at 119.

<sup>377</sup> Kapur, *The Tragedy of Victimization Rhetoric*, *supra* note 163, at 2. Essentialism is the fixing of certain attributes to women that are assumed to be shared by all of them. *Id.* at 7. Experiences of gender oppression cannot be extricated from experiences of racial oppression because they simultaneously occur. *Id.* at 8.

<sup>378</sup> *Id.*

<sup>379</sup> Kapur argues in favor of transcending the victim subject and disrupting the cultural and gender essentialism that now characterize feminist legal politics. *Id.* at 2-3. Western feminists often perceive cultural practices in overly simplistic ways that presume broader mistreatment based on different practices. The veil, for example, is assumed to be an oppressive and subordinating practice that typifies Islam and its degrading treatment of women. *Id.* at 12. In *The Politics of the Veil*, Scott argues that Western feminists critique Muslim women who wear the veil because the French in general and French feminists in particular fail to understand different constructions of sexuality. See SCOTT, *supra* note 114. Scott, like Kapur, rejects the concept of a feminist universalism and argues in favor of interpreting women’s choices in their cultural context. See *id.*; see also Sunder, *supra* note 115; Bennoune, *supra* note 112.

parallels and distance other women based on cultural difference.<sup>380</sup> As Lama Abu Odeh adroitly notes, a crime of “passion” bears far more similarities to “honor” killings than Western feminists care to admit.<sup>381</sup> Western feminists react with horror to the kerosene-laden deaths of women in the “East,” and advocate for international legal intervention to protect these women victims.<sup>382</sup> Simultaneously, international advocates leave protecting women from relationship violence within their own countries to others. Kapur notes, as others have, that such feminist interventions echo “imperial intervention in the lives of ‘backward’ native subjects.”<sup>383</sup>

I want to recognize the utility of this focus before extending Kapur’s critique. Violence is a real problem – women do suffer extensive violence at the hands of men. Violence, when framed in a transcultural fashion as Abu Odeh does, can serve to unite feminists around the protection of women. Violence served as the centerpiece of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women of Belem do Pará, uniting countries with disparate norms around this goal.

Yet a violence-centered approach to women’s rights suffers from multiple flaws. The violence against women agenda in some ways reifies cultural and religious presumptions, both of non-Western cultures as primitive and of non-Western women as needing to be saved by outsiders.<sup>384</sup> Viewing these women as victims creates an opposition to the Western subject, as was implicit in Laura

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<sup>380</sup> Culture has been used as a way to explain the different violence against women in the post-colonial Third World. Kapur, *The Tragedy of Victimization Rhetoric*, *supra* note 163, at 13. But cultural explanations reproduce the native subject of colonial discourse. Cultural explanations neither challenge nor take control of the problem and they deflect attention from the broader and more prevalent crime of domestic violence and the other reasons that women are abused or killed. Instead of cultural explanations, there is a need for economic, social, and institutional analysis in order to create better strategies. *Id.* at 16.

<sup>381</sup> Abu Odeh uses a comparative method to critique “the legally sanctioned violence against women (for intimate or sexual reasons), of both the Arab legal system and that of the American, which, she argues, “reveals the fallacy of both the orientalist construction that the East is different from the West.” Abu Odeh exposes the “deep similarities between the internal tensions within each legal system as to what constitutes a killing of women that is legally tolerated (either fully or partially), and that these tensions, although sometimes defined differently, have been surprisingly resolved in the same way.” Odeh, *supra* note 98.

<sup>382</sup> Jon Boone, *Desperate Women Choose Death by Fire*, FIN. TIMES, Aug. 4, 2008.

<sup>383</sup> Kapur, *The Tragedy of Victimization Rhetoric*, *supra* note 163, at 2.

<sup>384</sup> *Id.* This has reinforced the representation of Third World women as disempowered, brutalized, and victimized. The image of the Third World woman is reminiscent of the colonial construction of the Eastern woman who is sexually constrained, tradition-bound, incarcerated in the home, illiterate and poor. The author critiques Kathleen Barry’s work on trafficking, in which Barry argues that any woman who migrates to work in the sex trade is a victim of human rights violations. *Id.* at 18 (citing KATHLEEN BARRY, *FEMALE SEXUAL SLAVERY* (1979)). Barry’s representation of the Third World woman infantilizes, assumes she is backward, incapable of autonomy, and reproduces the colonialist rationale for intervening in the lives of the native subject. *Id.* at 19. Barry draws no distinction regarding consent and non-consent in trafficking and women who move are regarded as “victims.” These representations invite state responses that perpetuate gender and cultural stereotypes. *Id.*

Bush's efforts to publicize the plight of Afghani women.<sup>385</sup> This construction of the victim subject risks denying women the agency that they demonstrate throughout their lives.<sup>386</sup> Though the victim subject provides a foundation for a shared movement, the victim subject is ahistorical and reinforces imperialist responses towards women in the developing world.<sup>387</sup> As Kapur points out, efforts to counter essentialism have been approached through the spectrum of violence, which has reinforced cultural essentialism and the construction of the Other as backward and uncivilized.<sup>388</sup>

Third world feminists deploy the victim narrative in different but perhaps equally problematic ways.<sup>389</sup> Some non-Western feminists engage in similar tropes of essentialism, in the example Kapur uses, characterizing all "Indian" women as a monolithic group.<sup>390</sup> Violence against women thus serves as a site for an alliance between Western and non-Western feminists, each of which use the construction for legitimation of their goals in their pursuit for the recognition

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<sup>385</sup> Ratna Kapur, *Un-Veiling Women's Rights in the 'War on Terrorism'*, 9 DUKE J. GENDER L. & POL'Y 211, 219-20 (2002).

<sup>386</sup> Kapur, *The Tragedy of Victimization Rhetoric*, *supra* note 163, at 2.

<sup>387</sup> *Id.* at 17.

<sup>388</sup> *Id.*

<sup>389</sup> Kapur notes the ways in which feminists have capitalized on nationalist sentiment to distinguish themselves from Western feminists and thus advance their agenda domestically. Using India as a post-colonial example, Kapur notes that nationalism and feminism have taken on different meanings. Though the modern post-colonial Indian state continues to take an anti-imperialist stance, nationalism is playing a conservative rather than a progressive role. *Id.* at 23. With the rise of the Hindu Right and Hindu nationalism, some modern Indian feminists have embraced nationalism and seek to distinguish themselves from Western feminism, which is perceived as decadent. *Id.* at 24. Sometimes these efforts on the part of post-colonial feminists contribute the construction of post-colonial women as victims. The field of sex work is an example. *Id.* at 26. Feminists assume that choice is possible in the West, but not in Asia. Asian women, perceived as chaste and vulnerable to exploitation, are set in opposition to the promiscuous Western woman. *Id.* Thus, the discourse of feminists in this instance is embedded in the idea of an authentic Indian subject and the construction of the woman in prostitution as a victim of the market. The victim status conferred on women by some post colonial feminist positions becomes indistinguishable from the discourse on the purity of the nation and the preservation of Indian womanhood that characterized the Indian nationalist discourse in the early twentieth century. *Id.*

<sup>390</sup> The Indian feminists' idea of an "authentic victim subject" (in the example of India) operates under the assumption that Indian women are a monolithic victim group who are all similarly oppressed, and that there is an essentialized Indian culture and Indian woman. *Id.* This position has resulted in the exclusion of other subjugated identities and has set up Western culture against non-Western culture. *Id.* at 27. The legitimizing of the Indian feminist position has demanded a repudiation of Western feminism. The construction of the authentic victim subject position, constantly in opposition to imperialism or the West, is critical to the legitimacy of Indian feminism. *Id.* at 28. As noted in the sex worker example, the Indian subject is distinguished from the West and the Western feminist through their position of victimization. *Id.* Thus the victim is prioritized as the true symbol of Indian feminism and allows the Indian state to take a protectionist role with regard to women. *Id.* The victim subject has become a de-contextualized, ahistorical subject, disguised superficially as the dowry victim, as the victim of honor killings, or as the victim of trafficking and prostitution. *Id.*

of human rights.<sup>391</sup> In the international arena, the victim subject may foster racist perceptions of non-Western women.<sup>392</sup> The victim subject disempowers women, encouraging nation states to take on protectionist roles and morally regulate women.<sup>393</sup>

Third, constructing women as the subjects for protection reinforces state paternalism that often takes a conservative form. One example is restrictions of women working at night;<sup>394</sup> another is Renu Mandhane's example of Nepal's restriction on women's movement without male guardians.<sup>395</sup> As Kapur states, "[r]eforms are used to justify state restrictions on women's rights in the name of the protection of women."<sup>396</sup> The creation and reinforcement of a victim subject has not empowered women and may be a setback to the broader recognition of women's human rights.<sup>397</sup>

Kapur proposes a recognition of the intersectionality of gender and the multiplicity of historically and cultural contingent identities.<sup>398</sup> Discourse on violence can emphasize not only the ways in which men victimize women, but the sites of resistance to encourage women's own agency in combating the problem.<sup>399</sup> Non-state actors may play a central role in this effort.<sup>400</sup>

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<sup>391</sup> *Id.* at 29.

<sup>392</sup> *Id.*

<sup>393</sup> *Id.*

<sup>394</sup> Article L.213-1 of the French Labor Code banned women's working at night in any night work of almost any nature. The European Community Directive 76/207 of February 9, 1976 sets forth a general principle of equal treatment for men and women workers with respect to working conditions. The European Court of Justice overruled this French law and condemned the French Government for failing to eliminate this rule from its labor laws. In November 1998, the European Commission began a procedure under Article 171 of the Treaty of Rome which allows the Commission to propose financial sanctions against member states of the European Union which fail to conform their laws to EU Directives. Eventually, the French government adapted its laws to comply with European Community Law. See Equality Now, *France's Labor Code*, available at [http://www.equalitynow.org/english/wan/beijing5/beijing5\\_economic\\_en.html](http://www.equalitynow.org/english/wan/beijing5/beijing5_economic_en.html). French and European court cases illustrate the limited policy shift in individual rights as a result of the Europeanization of gender rights. In a domestic case, decided in La Rochelle, a police court ruled that Article L.213-1 violated the European Equal Treatment Directive (ETD). On the other hand, the case of *Levy*, ruled on by the European Court of Justice (ECJ), acknowledged that while the French Labor Code had to comply with the ETD, an exception existed because the code implemented a prior international agreement. See MARIA GREEN COWLES ET AL., *TRANSFORMING EUROPE: EUROPEANIZATION AND DOMESTIC CHANGE* 35-36 (2001); see also PAUL P. CRAIG & GRÁINNE DE BÚRCA, *EU LAW: TEXT, CASES, AND MATERIALS* 919, 926 (2007) (illustrating the limited policy transition through ECJ cases).

<sup>395</sup> Renu Mandhane, *The Use of Human Rights Discourse to Secure Women's Interests: Critical Analysis of the Implications*, 10 MICHIGAN J. OF GENDER AND L. 275 (2004). Mandhane presents an example of the construction of women as victims in her article on Nepalese women's rights. She discusses the Nepalese abortion campaign, which served both as a moment of resistance for Nepalese women but also as a site where women's victim status becomes clear.

<sup>396</sup> *Id.*

<sup>397</sup> *Id.* at 36.

<sup>398</sup> *Id.*

<sup>399</sup> *Id.*

<sup>400</sup> A final required shift is to examine the implications of non-state actors emerging as significant contenders to state power. *Id.* Projecting a woman (i.e.: a sex worker) exclusively in terms of her

We can understand the preeminence of victimhood in the construction of women's rights better by reconsidering what Janet Halley calls the Injury Triad. Women are not innocent in the construction of a sex-based hierarchy. The Injury Triad, Halley tells us, is "female injury + female innocence + male immunity."<sup>401</sup> This combination of a self-perception of constitutional innocence with a presumption of guilt on men's part leads some feminists to draw significant policy conclusions from circumstances that involve a great deal more nuance. We see the consequence explains how feminists, despite their inclusive methodology, moved from consciousness-raising ethos to disregard some of the consequences of their actions. To connect the dots more closely, the Injury Triad is responsible for the lack of self-consciousness within women's human rights efforts.

Feminists may respond to this argument with the point that women are indeed often victims, and that in violence between sexes, they are far more likely to be victims, and their victimization surpasses that of men. I do not deny that this may be the case. The point here, as supported by Kapur, Otto and Halley, is that solely focusing on these incidences of victimization empties women of their agency.

## V. Conclusion

CEDAW is the pinnacle of the advancement of women's human rights. Underneath it lays gender mainstreaming efforts and other attempts to bring gender into international law. Unsexing CEDAW would flip the architecture of international women's human rights to focus on gender, with women included under that rights umbrella.

My direct criticism of CEDAW's text may offend the many feminist international lawyers who sought the enactment of CEDAW and implemented it over nearly thirty years. For them, given the beating CEDAW has taken from conservative forces, it is apostasy to challenge CEDAW. Certainly, these lawyers have made hard-fought and fragile gains. Moreover, their concerns that criticism may undermine these gains are real and legitimate.<sup>402</sup>

That does not dispatch the nagging questions of whether CEDAW's focus on women is accurate or effective. It is neither. CEDAW is not accurate because the real sex and gender engagements must include men, women who are not victims, transgender people, and even the panoply of gender-related Yogyakarta

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experience of victimization and violence ignores her struggle for, and claims to, rights in her multiple capacities. *Id.* at 36. Identifying her claims for rights as moments of resistance validates the sex worker's agency without invalidating the harms to which she may have been subjected. Through her claim for rights in these different guises, she challenges legal and non-legal responses from state and non state actors that treat her exclusively as a victim in need of rescue and rehabilitation or as a criminal to be incarcerated. *Id.* Such responses leave her without any tools with which to fight violence, exploitation, or discrimination. *Id.*

<sup>401</sup> HALLEY, SPLIT DECISIONS, *supra* note 14, at 324.

<sup>402</sup> In private conversations, many of its most ardent supporters recognize that were they to redraft the Convention *tabula rasa*, they would place "gender," rather than "women" in the foreground.

Principles. CEDAW is also not effective – its many successes have still not yielded the broad transformation promised.

It cannot yield this transformation with the focus on women as a group. Recognizing what’s wrong with women’s rights requires us to substitute “sex” or “gender” in the place of “women.” This change is no mere semiotic shift. “Gender” moves beyond the limits of essentialist notions of womanhood toward reducing gender inequality and guaranteeing universal human rights.

CEDAW’s problem is a problem for women’s rights as well. Although such a broad argument is beyond the scope of this paper, the international women’s rights context reflects the extent to which the focus on women as a group will fail as long as it ignores the extent to which men are excluded from any serious consideration. It would be all too easy for feminist to ignore my point as an ignorant, androcentric backlash against women’s rights. Gender inequalities box all humans into a preordained set of advantages and disadvantages. With contemporary understandings of sex, gender, and sexuality serving as the foundation for a new treaty, international law might come closer to reflecting reality and pushing it toward greater equality. Unsexing CEDAW is not just a remedy to a shortcoming in international law, but a model for thinking about gender issues as a human rights question for all people.