

# ALL THE DIFFERENCE IN THE WORLD: LISTENING AND HEARING THE VOICES OF WOMEN

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*“Even when people say they are listening, it is not clear that they actually hear anything more than what they want to hear.”<sup>1</sup>*

## INTRODUCTION

It does not take a symposium on violence for any of us to appreciate that gender inequality persists worldwide: gendered decision-making by the political majority continues to marginalize the interests of women, and domestic violence and abuse affect the life choices of women in stunning<sup>2</sup> ways. As I write this essay, there are news reports that regulators in Japan have quickly approved the availability of Viagra for use by men in that country, while they continue to withhold easy access to birth control pills for women.<sup>3</sup> And from Italy comes a ruling from the third division of the Supreme Court of Appeals in Rome that a rape conviction should be overturned because the victim wore jeans; the court concluded that there could be no “unconsented to” sexual act committed on a jeans-wearing woman.<sup>4</sup> Television images of the white male managers of the United States

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1. Isabelle R. Gunning, *Uneasy Alliance and Solid Sisterhood: A Response to Professor Obiora's Bridges and Barricades*, 47 CASE W. RES. L. REV. 445, 452 (1997) (part of Colloquium: Bridging Society, Culture, and Law: The Issue of Female Circumcision). Professors Melissa Harrison and Margaret E. Montoya capture a similar idea in an epigram they borrow from the work of Sarah Williams, *Abjection and Anthropological Praxis*, 66 ANTHROPOLOGICAL Q. 67, 74 (1993): “The mind knowing doesn't always make a difference that matters.” They quote this epigram at the beginning of their article and incorporate it later in their colloquy, emphasizing “the persistence we must show in acquiring multicultural competence.” Melissa Harrison & Margaret E. Montoya, *Voices/Voces in the Borderlands: A Colloquy on Re/Constructing Identities and Re/Constructed Legal Spaces*, 6 COLUM. J. OF GENDER & L. 387, 394 (1996).

2. See Penelope Andrews, *Violence Against Women in South Africa: The Role of Culture and the Limitations of Law*, 8 TEMP. POL. & CIV. RTS. L. REV. 425 (1999).

3. See Michael A. Lev, *Japan Quick to OK Viagra; Women Still Await the Pill*, CHI. TRIB., Feb. 1, 1999, available in WL2839953. (noting that Viagra was approved after six months while the pill has been under review for 35 years, one legislator and feminist, Akiko Domoto said: “I was speechless . . . You'd have to say it's discrimination, or maybe that Japanese men want to control women.”). See also Mary Jordan, *In Tokyo, Viagra Is One Hot Commodity*, WASH. POST, July 18, 1998, at A1.

4. Alessandra Stanley, *Ruling on Tight Jeans and Rape Sets Off Anger in Italy*, N.Y. TIMES, Feb. 16, 1999, at A3. The Italian court concluded that a finding of rape was not appropriate since “jeans cannot be removed easily and certainly it is impossible to pull them off if the victim is fighting against her attacker with all her force.” *Id.*

House of Representatives presenting their case against President Clinton reminded us that women remain underrepresented in the halls of Congress while sexism and power prominently shape the course of political events. Less vividly portrayed by the news media, yet more poignant than these stories is the silence which seems to reflect lack of concern of most Americans about the impact of welfare changes that became effective in early March 1999, and that threaten to leave many poor women and their families without welfare assistance or other safety nets for survival.<sup>5</sup>

We also know that evidence of persistent gender inequality is not confined to what men do or do not do to promote inclusion and justice. What has become obvious in the nineties (perhaps because of continued sensitivity spawned by antiessentialist feminist writing following the eighties<sup>6</sup>) is the fact that women do not speak in one voice about the meaning of equality or other concerns, and that women's perspectives about justice are sharply defined by experience and culture. An example of this insight can be found in conflicting conceptions reflected in highly racialized responses to what is just in the affirmative action controversy—a social issue affecting women as well as people of color who are not women.<sup>7</sup>

As women continue to work for equality and to address gendered privilege in this country and elsewhere, these differing perspectives and the

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5. See Andrew C. Revkin, *Welfare Policies Alter the Face of Food Lines*, N.Y. TIMES, Feb. 26, 1999, at A1 (reporting low-wage workers, retirees and refugees from public assistance are swelling soup kitchen lines); Andrew C. Revkin, *As Need for Food Grows, Donations Steadily Drop*, N.Y. TIMES, Feb. 27, 1999, at A1 (noting that food charities scurry to keep shelves full to meet higher demand as food donations fall). Notably, the second article of this two-part series was located next to a report of near record-breaking economic growth in the economy, marked by extraordinarily high production and consumption. See *id.* See also Rachel L. Swarns, *Welfare's "Job Centers" Bring High Hopes and Thin Results*, N.Y. TIMES, Feb. 23, 1999, at A1. For a critique of the new welfare and immigration "reform" legislation, demonstrating that these laws target Latinas and Latinos (mostly Mexicans and Central Americans), have disproportionately harsh impact on women, and negatively affect children, in violation of established international norms, see Berta Esperanza Hernandez-Truyol & Kimberly A. Johns, *Global Rights, Local Wrongs, and Legal Fixes: An International Human Rights Critique*, 71 S. CAL. L. REV. 547, 570-80 (1998).

6. See *infra* note 46.

7. See *Third Circuit Task Force on Equal Treatment in the Courts*, 42 VILL. L. REV. 1347, 1539 (1997) (Report of the Committee on the Intersection of Race and Gender of the Gender Commission) (report I helped to draft as committee co-chair with Professor Annamay Sheppard of Rutgers University School of Law). See also *Race and the Law, A Special Report by the ABA Journal and the national Bar Association Magazine*, 85 A.B.A. J., Feb. 1999, at 41-70 (noting disparity in views of black and white lawyers concerning whether inequality persists). Notably, minority and white lawyers are at polar extremes on the question whether women of color are treated less fairly than white women lawyers in hiring and promotion. See *id.* at 57. For a discussion of how experiences of women lawyers have shaped competing feminist legal theories of equality in the United States, and how theory, in turn, has shaped these women's experiences, see Cynthia Grant Bowman & Elizabeth M. Schneider, *Feminist Legal Theory, Feminist Lawmaking, and the Legal Profession*, 67 FORDHAM L. REV. 249, 255-66 (1998). See also Elvia R. Arriola, *March!* 19 CHICANO-LATINO L. REV. 1, 23-24 (1998) (noting that for most Americans, male or female, Latinas are thought of as workers in pink collar ghettos and as "illegal aliens.").

potential for women to participate in the subordination of other women must be confronted. This project is complex; it entails according proper respect for differences as we seek to identify commonalities in women's experiences, and recognizing our own opportunities to perpetuate subordination as we exercise our own power and privilege. It necessitates being skeptical of our own ability to move beyond our cultural chauvinism about the meaning of equality, as we are conscious of the cultured condition of the perspectives of others. The tension inherent in this task cannot be minimized.

In the international arena, since Beijing,<sup>8</sup> feminists working on a human rights agenda have experienced the sometimes conflicting interests of women. For human rights proponents, the challenge has been to promote universal guarantees that are sufficiently mindful of cultural differences, yet do not succumb to paralyzing relativism.<sup>9</sup> Thus, in constructing the human rights agenda, as in the domestic campaign for social equality, the task is to recognize the danger of ignoring or trivializing difference. Global feminists<sup>10</sup> have sometimes paid a price for their commitment to universal human rights, including charges of cultural arrogance, imperialism, and alienation.

Symposia like this one help us to make connections between evolving international human rights theory and our equal protection framework for understanding equality. We learn that undue focus on domestic boundaries can lead us to ignore the ramifications of a worldwide, gendered problem like domestic violence. We also better appreciate how transportation and technology have made these boundaries more artificial. Technology has provided a window to even the most remote places in the world, affording us the opportunity to learn about the lives and cultures of women who struggle daily.<sup>11</sup> Vivid images of violence visited on women and children have led women to press forward the project to impose universal principles outlawing these acts. The reality of travel and immigration opportunities, moreover, has left few problems, like violence or abuse purely local problems.<sup>12</sup> As a

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8. The Fourth World Conference on Women (1995).

9. See Tracey E. Higgins, *Anti-Essentialism, Relativism, and Human Rights*, 19 HARV. WOMEN'S L.J. 89, 102-04 (1996). Professor Higgins theorizes as to how feminism should accommodate the competing essentialist and antiessentialist positions in human rights scholarship. See *id.* For a more recent reflection on feminist legal theory and the challenges feminists face in forging alliances and exploring possibilities for international feminist politics, written in the context of describing exchanges between women from the United States and women from Central and Eastern Europe, see Frances Elizabeth Olsen, *Feminism in Central and Eastern Europe: Risks and Possibilities of American Engagement*, 106 YALE L. J. 2215 (1997).

10. See Higgins, *supra* note 9, at 98.

11. See, e.g., Jane Perlez, *Talks on Kosovo Near Breakdown; Deadline Is Today*, N.Y. TIMES, Feb. 23, 1999, at A1. The picture accompanying the headline of fleeing Ethnic Albanians (many of whom are women and children) leaving Pantina, near Pristina, captures the desperation occurring in that part of the world. See *id.* Similar pictures have brought home the horror of war and plight of refugees in the Near East, South and Central America, and parts of Africa. See, e.g., Paul Lewis, *U.N. Presses for Truce to Help Refugees Trapped in East Zaire*, N.Y. TIMES, Jan. 25, 1997, at A3; *After the War; Hepatitis Strikes Refugees*, N.Y. TIMES, Apr. 26, 1991, at A9.

12. Compare, e.g., Neil MacFarquhar, *8 Tourists Slain in Uganda, Including U.S. Couple*, N.Y. TIMES, March 3, 1999, at A1, with, e.g., Anthony Lewis, *The Quality of Mercy*, N.Y. TIMES,

consequence, violence against women, once thought to be a domestic, private issue, has become identified as a human rights issue.<sup>13</sup> Through scholarly presentation of the interrelationship of inequality and violence, including the critical assessments of the political choices about how to respond to them, we can map more clearly our roles as women seeking change.<sup>14</sup>

Symposia which examine the “cultural collisions”<sup>15</sup> that characterize the task of eliminating subordination of women help us to explore new pathways for transformative work promoting equality. Indeed the context of the panel discussion of female genital mutilation [hereinafter “FGM”] and domestic violence and rape in South Africa has led me to reshape my commitment to dialogue. It made more clear for me the danger that consensus, which I have emphasized in other writing as the goal of dialogue,<sup>16</sup> can unduly focus attention on moving others to embrace a different world view and can undermine the obligation of all participants in the conversation to undergo critical self-reflection in the obtainment of knowledge. The objective of promoting dialogue should be to learn more about *ourselves and others* in order to build coalitions to address oppression. In some contexts we may confront the possibility of irreconcilable differences about strategies that best promote the interests of women. That possibility should not lead us to avoid confronting the consequences of our decision-making; rather we should explore the ways that our own exercise of power perpetuates subordination and exclusion. This change in focus, emphasizing the process of exchange more than resolution or agreement on universal principles, reflects renewed

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Feb. 27, 1999, at A31 (noting that 1996 immigration law makes deportable young Iranian whose family fled Iran after Islamic revolution and who may risk torture and execution if returned). The liberalization of immigration laws in the United States in 1965, lifting some of the previous restrictions on non-European immigrants has resulted in larger numbers of people from Mexico and South America immigrating to the United States. A similar movement of non-European immigration has occurred in parts of Europe and ambivalence about the status of these immigrants is reflected in the French public's reception. See Ben Barber, *France Finds Bitter Tests at Bottom of Its Melting Pot*, NEWS WORLD COMMUNICATIONS, INC., Feb. 8, 1999, at 42. The influx of these people of color has been controversial and often resistance to rapid assimilation has been seen as threatening to the dominant culture. Amid charges of racism and stereotyping, some conservative commentators have questioned the United States' ability to absorb these new immigrants. See, e.g., PETER BRIMELOW, *ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER* (1995); CHILTON WILLIAMSON, JR., *THE IMMIGRATION MYSTIQUE: AMERICA'S FALSE CONSCIENCE* (1996).

13. See Dorothy Thomas & Michele Beasley, *Domestic Violence as a Human Rights Issue*, 15 HUM. RTS. Q. 36, 37 (1993); Andrews, *supra* note 2, at 428 n.19 (recognizing domestic violence as interfering with woman's right to security, equality, health and development, and in violation of the South African government's obligation under CEDAW ratified in 1995).

14. See e.g., Higgins, *supra* note 9, at 102-04 (noting effects of postmodern and critical race stance on discussion of universality of rights); Gunning, *supra* note 1, at 448-53 (noting danger of oversimplifying lives and experiences of women that is risked by Western women as well as their critics).

15. Doriane Lambelet Coleman, *The Seattle Compromise: Multicultural Sensitivity and Americanization*, 47 DUKE L.J. 717, 717-18 (1998).

16. See, e.g., Phoebe A. Haddon, *Rethinking the Jury*, 3 WM. & MARY BILL OF RTS. J. 29 (1994); *Baby Doe Cases: Compromise and Moral Dilemma*, 34 EMORY L.J. 545 (1985).

appreciation of the danger of chauvinism and fear of relativism that feminists inevitably experience in their efforts to promote an equality-promoting agenda. It entails a commitment to diversity, including the voices of the most marginalized, and not essentializing their experiences. As Professor Tracey Higgins warns:

[W]hen feminists aspire to account for women's oppression through claims of cross-cultural commonality, they construct the feminist subject through exclusions, narrowing her down to her essence. . . . [T]hose excluded domains return to haunt the "integrity" and "unity" of the feminist "we."<sup>17</sup>

In the old parlance of early-day feminist work, the exchange between women sharing experiences about their daily lives was called consciousness-raising and included the uncovering of false-consciousness about pathways to equality in one's own thinking and the thinking of other women. Although the proverbial kitchen table around which women could talk has been expanded and is vastly more complex today than in earlier conceptions, the symbolism for inclusion and respect for different voices that is linked to the concept of consciousness-raising, is still apt.<sup>18</sup>

### I. RECONSTRUCTING THE CONVERSATION ABOUT FGM

For the last two decades Western feminists have written about and consequently engaged American women in the controversy over infibulation or female genital surgeries, also called female genital mutilation, or FGM.<sup>19</sup>

17. Higgins, *supra* note 9, at 102. See also Olsen, *supra* note 9, at 2229. Professor Olsen notes that:

Western feminists may try to 'construct [for women] a transnational identity as woman . . . coherently rooted in the shared *experience* of gendered oppression' and believe they have thereby produced a shared international agenda. Yet by focusing on the experience of women as victims of or resisters against male domination, these feminists 'take for granted a transnational community of women,' instead of laying the proper foundations for an alliance among women. (citations omitted).

18. For a moving early account of the difficulties women faced in coalition building, including the kind of self-conscious exploration of commonalities and differences in which we must engage, see Bernice Johnson Reagon, *Coalition Politics: Turning the Century*, in HOME GIRLS: A BLACK FEMINIST ANTHOLOGY (1983). In working on this essay I found that Elvia Arriola recently made a similar allusion to the "kitchen table" as she describes the diverse work of Latino/a scholars at the *LatCrit II Symposium*. See Arriola, *supra* note 7, at 26. Professors Melissa Harrison and Margaret E. Montoya have adopted the concept of "borderlands" as a way of capturing a "bilingual, bicultural, biconceptual reality," enabling us to make "critical linkages between our own stories and the stories of cultural others," while pressing us to be "constantly aware of difference and not to expropriate the stories of others" in order to make linkages. Harrison & Montoya, *supra* note 1, at 440. See also Berta Esperanza Hernandez-Truyol, *Essay: Borders (En)Gendered: Normativities, Latinas and a LatCrit Paradigm*, 72 N.Y.U. L. REV. 882 (utilizing borderlands metaphor drawn from work of Gloria Anzaldua).

19. Professor Holly Maguigan has noted that even the decision as to how to characterize the practice of FGM reflects the underlying ambivalence about engaging in this discussion experienced by women. See Holly Maguigan, *Will Prosecutions for "Female Genital Mutilation" Stop the Practice in the U.S.?*, 8 TEMP. POL. & CIV. RTS. L. REV. 391, 392 nn.4-5. (1999)

FGM continues to be practiced in over forty countries in the world, many of them in Africa and Asia.<sup>20</sup> The practices are wide-ranging, reflecting the variety and complexity of the cultures which recognize the practices. Invoking the language of human rights, women pressing the campaign to eliminate the practices abroad and in the United States have sought recognition that the surgeries violate basic guarantees to which all human beings are entitled and which are captured in the UN Declarations and in constitutional and other domestic legal documents of many countries—even some which tolerate the practices.<sup>21</sup> This work has led to federal and state responses in this country, addressing the situation of thousands of African and Asian immigrant girls living in the United States.<sup>22</sup>

Scholars like Holly Maguigan join the choir expressing concern about the abuse of young women who are forced to undergo circumcision or other cutting, endangering them in ways poignantly highlighted in the effort to obtain protective *asylum* for Fauziya Kassindja;<sup>23</sup> but Professor Maguigan cautions us that in this context and others implicating the clash of cultures, we ought not to rely unquestioningly on the law to respond to violence against women. This is an important and provocative warning. In addition to explaining why legal sanctions, particularly criminalization, prove ineffective, Professor Maguigan argues that education is more likely to promote change than criminal sanctions or constitutional and statutory guarantees. She also identifies some of the unintended practical consequences of legal responses which may harm the victims of abuse and violence and create schisms in the

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(hereinafter “Maguigan”). The choice of terms is significant since language can appear judgmental and can mask the fact that women who seek to perpetuate the practice believe they are doing something good. See Gunning, *supra* note 1, at 459 n.24 (noting that some African feminists are rightly insulted by term “mutilation” and that “circumcision” creates false sense of parity with male circumcision); Isabelle Gunning, *Arrogant Perception, World-Travelling and Multicultural Feminism: The Case of Female Genital Surgeries*, 23 COLUM. HUM. RTS. L. REV. 189, 193-94 n.15 (1992). See generally Coleman, *supra* note 15, at 730-36 nn. 33-56, 62 (discussing cultural and religious bases for continuing practices and noting that terms adopted by those who would allow some form of the practices to continue are problematic, too). See *id.* at 725 n.17.

20. See Maguigan, *supra* note 19, at 392 n.7.

21. See Barrett Breitung, *Interpretation and Eradication: National and International Responses to Female Circumcision*, 10 INT’L L. REV. 657, 678 (1996); Maguigan, *supra* note 19, at 404-12 nn.71-133 (discussing legislation in United States) (Tables I). See also *Declaration on the Elimination of Violence Against Women*, U.N. GAOR, 48th Sess., U.N. Doc. A/RES/48/104 (1994).

22. See Linda Burstyn, *Female Circumcision Comes to America*, ATLANTIC MONTHLY, Oct. 1995, at 34. One commentator has coined the controversy concerning how to approach the interest in continuing the practices in this country a “cultural collision.” Coleman, *supra* note 15, at 717-18.

23. See FAUZIYA KASSINDJA & LAYLI MILLER BASHIR, DO THEY HEAR YOU WHEN YOU CRY (1998); Layli Miller Bashir, *Female Genital Mutilation in the United States: an Examination of Criminal and Asylum Law*, 4 AM. U. J. GENDER & L. 415 (1996). At the Symposium, Ms. Miller Bashir presented an eloquent account of Ms. Kassindja’s determination to escape the cutting, and their efforts to secure asylum for Ms. Kassindja, despite resistance from the immigration authorities, and offered her position that the legal response is appropriate to protect young women.

movement to promote equality.<sup>24</sup> She challenges us to seek better ways than criminalization to address the continuing reality of subordination and violence against women, mindful of both our common gendered experiences and the cultural differences of women.

Professor Maguigan's observations and reasoning led me to revisit the problems related to essentializing women's struggles which have troubled women of color and other feminists in this country as we have attempted to construct a shared meaning of equality. In the context of building an agenda for a "global" feminist movement<sup>25</sup> the concerns about marginalizing some voices and privileging others in presenting claims of right also surface, exposing gross disparities in power.

Although many global feminists continue to press the universality of human rights, charges of imperialism and ethnocentric myopia have figured prominently in discussions about human rights and women and are conspicuous in the discussion of FGM. Isabelle Gunning and others have observed that these charges have been felt keenly by Western women of color.<sup>26</sup> As we continue to appreciate how closely connected we are, the danger of chauvinism does not lessen. The FGM controversy exposes tensions between addressing inequality and uncovering racial and gender dominance which continue to be part of our own domestic struggle to define identity.<sup>27</sup> Conversations about FGM practices should expose the privileges and inequalities that persist in our own culture.<sup>28</sup>

Professor Gunning and other scholars have documented how the discourse about FGM has silenced and left some immigrant women, who have a profound stake in the outcome of the discussion, on the fringe of the discourse. Unlike rape and domestic abuse in South Africa, we cannot treat FGM as the distant problem of "others," but we have treated those women who seek to continue the practices as cultural outsiders. Commentators have

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24. See generally Hope Lewis & Isabelle R. Gunning, *Clearing Our Own House: "Exotic" Familiar Human Rights Violations*, 4 BUFF. HUM. RTS. L. REV. 123 (1998); Maguigan, *supra* note 19, at 396 n.23 (anti-immigrant perception of § 116).

25. Higgins, *supra* note 9, at 90.

26. See, e.g., Gunning *supra* note 1, at 447-453. Compare Coleman, *supra* note 15, at 735 n.55.

27. See Coleman, *supra* note 15, at 717-18, who argues that the FGM debate concerns protection of American "traditions," captured in the concept of ordered liberty, that must be respected by immigrant groups if their practices are in conflict. See *id.* at 774 nn.242 & 259-67 and accompanying text. Ms. Coleman acknowledges that the Supreme Court's application of this ordered liberty conception can be narrow. See *id.* In fact, Justice Douglas was prompted by the majority and concurring opinions to observe that limiting autonomy rather than tolerance for nonconformity was more threatening to the deeply rooted values enshrined in the concept of ordered liberty of the due process clause. See *id.* at 718 n.5. Under the majority's narrow view, the equal protection clause, and not the due process clause, becomes the primary source of protection of minority values. See *id.*

28. Compare e.g., Gunning, *supra*, note 1, at 452 with, e.g., L. Amede Obiora, *Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign Against Female Circumcision*, 47 CASE W. RES. L. REV. 275, 314 (1997) (noting that "culture . . . is never neutral [and] integrates and incorporates inequalities . . .").

reminded us<sup>29</sup> that FGM causes Americans to confront the current influx of “culturally distinct” (non-European) immigrants, exposing the tension between liberal tolerance for difference and concern for protecting moral traditions which the majority defines as “American.”<sup>30</sup> To many immigrant women, the political responses and strategies for changing conduct in the United States and other Western countries on this issue reveal ambivalence about the presence of these immigrant women that is racialized and has overtones of religious intolerance.

Moreover, in focusing on this problem, we have undervalued the rest of the story of these women and their families. Holly Maguigan’s discussion of the state and federal preferred policy choices to criminalize the conduct of African and Asian Muslim immigrants who continue to practice FGM while providing only hortatory (symbolic) support for education locates the crux of the problem for feminists interested in coalition-building: criminalization leaves little if any opportunity for public conversation which might reveal the complexities of the debate for women or reveal insights into their experiences. Despite evidence of firmly held beliefs supporting the practices, effort at compromise which might promote dialogue has been discouraged.<sup>31</sup> Criminalizing this conduct not only silences voices, there is little proof that it is effective at changing behavior.<sup>32</sup> Noting the “fascination and horror” American women have expressed toward the practice of FGM, Frances Olsen has argued that focusing on whether the practices are good or bad overlooks a more “salient concern” for feminists. Professor Olsen proposes that we be concerned about the disproportionate resources channeled to this issue, rather than other manifestations of sexism such as poverty or maternal mortality rates.<sup>33</sup>

That law operates to privilege certain perspectives is not a new insight,<sup>34</sup> but it is one that legal scholars and promoters of equality for women and

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29. See Coleman, *supra* note 15, at 717-18.

30. See Coleman, *supra* note 15, at 718. A similar threat can be said to be found in the due process claims in *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986). See also *supra* note 27.

31. See Coleman, *supra* note 15, at 738-50 (describing ultimate rejection of Seattle Harborview Hospital’s effort to arrive at compromise.) Several European countries have adopted statutes which explicitly protect ritual nicking. See Maguigan, *supra* note 19, at 409 n.104.

32. See Maguigan, *supra* note 19, at 394-402. Like others, I am not advocating acceptance of a particular FGM practice, nor do I promote uncritical compromise concerning FGM, but I do seek to underscore the importance of exploring ways to act with sensitivity and respect for the deeply held beliefs of other women, fostering recognition of their agency and will.

33. Olsen, *supra* note 17, at 2223-224. Professor Olsen describes the cultural imperialism with which Western feminists have been charged as “lead[ing] one to distinguish the self from the other, generally valorizing the self as more advanced, civilized liberated, and so forth.” Compare Hernandez-Truyol & Johns, *supra* note 5, at 570-80 (arguing that welfare and immigration “reform” in United States violates international human rights norms because of their disproportionate and harmful effects on immigrant women and children).

34. See GUIDO CALABRESI & PHILIP BOBBITT, *TRAGIC CHOICES* (1978). See also Regina Austin, *A Nation of Thieves: Securing Black People’s Right to Shop and Sell in White America: Symposium: Violence and the Outlaw*, 1994 UTAH L. REV. 147.



other marginalized people ought to press others and themselves to consider, the more so in a campaign to eliminate oppression. Thus, even the call for increased education of immigrants in support of eliminating FGM seems too simplistic a response to the currently popular criminal response to FGM. As women—and it has been mostly women who have engaged in this debate<sup>35</sup>—we cannot afford to ignore the danger of adopting solutions without skepticism about how our choices promote privilege and cultural chauvinism. What provisions can be made to monitor the impact of federal and state laws on the communities most affected, immigrant women and young girls? In addition to exploring alternatives which are available instead of criminalizing conduct, is it not important to assess the consequences of the policy choices we have taken at the local and federal level? Are there practices that we tolerate that are not condemned in the same drastic way?<sup>36</sup> Is a health-focused compromise possible that acknowledges the importance of interests in bodily integrity and autonomy but also takes account of other cultural values important to the population that seeks to continue the practice?<sup>37</sup>

Noting the danger of cultural relativism,<sup>38</sup> some women have argued that

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35. Not only is most critical commentary written by women, the practices are generally performed by women in the community. As one commentator observes:

The irony in this arrangement is extraordinary, for not only is the ritual patriarchal in nature, but the culture has evolved the added bonus for men that they do not even have to think about the pain and suffering that is being inflicted on their girls . . . The fact that in some communities the procedure also is said to provide a bonding experience for the girls and women merely increases this irony. The mothers do it to their daughters, like footbinding, like suttee or widow burning, like mothers in America telling daughters to be a certain thing, to be like this, and not like that. The mothers always do it to their daughters—the men's culture relies on this complicity for this is the role of the vanquished to be intimately involved in their own oppression and to perpetuate . . . leaving the culture intact, the culture of men.

Coleman, *supra* note 15, at 736 n.62 (quoting Kay Boulware-Miller, *Female Circumcision: Challenges to the Practice as a Human Rights Violation*, 8 Harv. Women's L.J. 155, 158 n.21 (1995) (quoting Conklin, *Women's Culture: Whose Culture?*, in FRAN HOSKEN, FEMALE SEXUAL MUTILATIONS: THE FACTS AND PROPOSALS FOR ACTION 20 (1980)). Compare Gunning *supra*, note 1, at 457 (noting that some efforts at reform and compromise are complicated by the fact that traditional circumcisers are women).

36. See, e.g., Gunning, *supra* note 1, at 454 n.36 (comparing American's treatment of body piercing and breast implants as a matter of personal choice). Of course, these procedures are not considered analogous in the sense that they are not forced upon young children, although it has been argued that they are reflective of Americans' preoccupation with finding the perfect body. See Coleman, *supra* note 15, at 757-58 nn.185-195. Experts have recently more firmly challenged the argument that health advantages are attributable to male circumcision (and have rejected the argument that the surgery has no pain). See Deborah Stead, *Circumcision's Pain and Benefits Re-examined*, N.Y. TIMES, Mar. 2, 1999, at F6.

37. See Maguigan, *supra* note 19, at 409 n.104 and accompanying text (discussing countries which have attempted to provide some measure of compromise). See also Gunning, *supra* note 1, at 454-54 (admitting her discomfort with clinicalization efforts at compromise).

38. Cultural relativism reflects the notion that variations in moral rules and social institutions should be beyond criticism by others because it is impossible to avoid ethnocentrism. Cultural relativists view universalism as barely disguised ethnocentrism and view cultural imperialism as the consequence of ethnocentrism and arrogance. See Coleman, *supra* note 15, at 729 n.29 (quoting from cultural relativists and arguing that Western cultural relativists cannot be

protection of bodily integrity, a universally accepted human right, leaves no room for such “second-guessing.”<sup>39</sup> Because of my experiences as an African-American, I seek ways to promote inclusion of marginalized women’s voices through a process of dialogue aimed at exposing dominance implicit in some policy choices; this purpose is distinguishable from cultural relativism, which has been identified with one aspect of the human rights project.<sup>40</sup>

Law—particularly criminal law—is often used to suppress conflict. It is important for feminist law professors therefore to seek opportunities to uncover the cultural clashes underlying decision-making and destabilize established claims of right. In this way we can come to terms with our potential to marginalize and subordinate other women’s claims. Consistent with this end, Professor Maguigan rejects the cultural defense in criminal trials but encourages the introduction of cultural information at criminal trials in the context of proving *mens rea* and other elements of the crime. While I agree that we cannot dismiss FGM lightly—for example, as no different than male circumcision, which many Americans find unobjectionable—both the history of female surgeries in this country and the current body piercing fad of young people seems to suggest that there are inconsistencies in our willingness to tolerate body mutilation or non-health related surgery. Feminists should face these inconsistencies in discussions about FGM. Problematizing the conclusion that a particular cultural practice is outside accepted morals and traditions may help us to find better ways of addressing this controversy and is a role that law professors and feminists can assume.<sup>41</sup> It is true that:

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imperialists in their own country). *But see* Gunning, *Arrogant Perception, World Traveling and Multicultural Feminism: The Case of Female Genital Surgeries*, *supra* note 19, at 190-94. For a well-developed discussion of the problem of cultural relativism see Higgins *supra* note 9, at 98 nn.31-38.

39. *See, e.g.*, Maguigan, *supra* note 19, at 396 nn.25-27 and accompanying text; Coleman *supra* note 1, at 746-48.

40. *See* Higgins *supra* note 9, at 120-26. Of course, we all are shaped by our culture and other experiences, including reading, writing and interacting with others. My own views have recently been affected by living in Tokyo, Japan for six months and being exposed (though only at the margins) to a culture that is richly different than my American environment, an experience I hope to write about.

41. *See* Higgins, *supra* note 9, at 121-24 (noting risk of assuming commonality among women as well as risk of undermining collective work by ignoring differences and possibility of division); Harrison & Montoya, *supra* note 19, at 398 (adopting border identities and being aware of Other and of blurring identities as dislocating. “This may mean that we look for conflict rather than consensus . . . to make collective decisions, to resolve disputes, in new, probably time-consuming and awkward ways.”).

It bears mentioning that the FGM controversy is already richly complicated by the variety of practices that are included in the controversy, the competing values that are offered in support and against it, and by the fact that women passionately defend the practices as good for their young children. In fact, it may well be that children are the most marginalized voices. *See* Ian Fisher, *Sometimes a Girl’s Best Friend Is Not Her Father*, N.Y. TIMES, Mar. 2, 1999, at A2 (noting Masai’s resistance to modernization in Kenya, including imposing marriage and FGM on young girls); Stead, *supra* note 36, at F6 (describing mother’s discussion of her negative reaction

Feminist consciousness . . . must be understood as consisting of multiple and sometimes competing critical stances toward cultural oppression. These critical stances emerge from the political activity and theorizing of women whose experiences are both partially determined by oppression and partially independent of it . . . . Recognizing both the constraints of culture and the possibility of increased freedom, feminists must examine the complicated and sometimes conflicting cultural texts of their own lives and those of other women. Simplistic assumptions about universality or cultural particularity are inadequate. Instead, differences must be explored critically with the goal of better understanding the multiple ways in which gender hierarchy may be imbedded in culture.<sup>42</sup>

## II. FOCUSING ON VIOLENCE AGAINST WOMEN OF SOUTH AFRICA

Like at home, in an increasingly smaller, more connected world, it becomes clear that the meaning of human rights must take account of the complexities of cultures and religions that are foreign to Western thinking, challenging us to define equality-promoting work as more than merely concerned with nurturing and educating women to come to accept our world view. As one commentator has observed: "It becomes increasingly clear that the impending challenge is for us to confront the question: 'In the face of profound cultural difference among women, how can feminists maintain a global political movement yet avoid charges of cultural imperialism?'"<sup>43</sup>

This question has linkages to the one which has been posed by women of color concerned with the risks of essentializing women's experiences in the United States and finding that our stories are left out.<sup>44</sup> In both contexts, we confront the reality that the intersections of women's lives affect our experiences and perspectives. Thus not only gender, but race, religion, wealth, sexual orientation, and language shape identity. Through her writing on the experiences of women in South Africa, Penny Andrews again reminds us of the futility of making assumptions about what is common in our experiences as women without appreciating the complexities and differences in our lives.

Statistics about crime, particularly concerning violence against women in South Africa are stunning.<sup>45</sup> They demonstrate the reality of continuing oppression of women in that country but they also offer eloquent insights about what women of color and other women in this country have labeled "intersectionality" in the last decade.<sup>46</sup> Professor Andrews' work documents

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to male circumcision).

42. Higgins, *supra* note 9, at 119-20.

43. Higgins, *supra* note 9, at 89.

44. See, e.g., Arriola, *supra* note 7, at 23-25.

45. See Andrews, *supra* note 2.

46. See generally Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (impact of race and gender); Angela B. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L.

how sexism and gender inequality can get lost in the discussion of racial liberation and cultural hegemony. The apartheid legacy and the continued consequences of this country's Jim Crow past suggest that there is much we can identify as common in the enterprise of talking about women's rights. Yet, Professor Andrews' description of the social and economic conditions in South Africa both before and after apartheid ended also remind us that the cultural differences between women's experiences in South Africa and the United States are substantial. Notably, she recognizes that it is the role of women, particularly women acting collectively in the liberation struggle, which supports her optimism about the prospect for change in South Africa. This optimism is strongest during the period following the adoption of a democratic government when expectations of progress are high.<sup>47</sup> The hope is complicated, however, by the cultural reality that women's rights have been marginalized and their interests undermined in pre-liberation government, and their subordination has more subtly but profoundly continued in the atmosphere of post-liberation violence. This is so, notwithstanding the extraordinary political arrangement which secured seats for women in parliament and assured them leadership positions in government.<sup>48</sup>

Professor Andrews concludes that so far, neither the Constitution nor detailed laws which have been drafted to address inequality, violence and domestic abuse have substantially changed the experiences of women. Though formally enfranchised, it is clear that widespread violence in the private lives of women leaves them subordinated to men in South Africa. This oppression is exacerbated by the complex social and economic conditions of that country, including the legacy of apartheid.<sup>49</sup> But Professor

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REV. 581 (1990). Early theoretical discussion of intersectionality has been given practical substance in subsequent work. *See, e.g., Black Women Law Professors: Building a Community at the Intersection of Race and Gender: A Symposium*, 6 BERKELEY WOMEN'S L.J. 1 (1990-91) (presenting essays by women of color who are law professors on their experiences in legal education); Sumi K. Cho, *Multiple Consciousness and the Diversity Dilemma*, 68 U. COLO. L. REV. 1035 (1997); Tina Grillo & Stephanie Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (or Other -isms)*, DUKE L. J. 397 (1991); Barbara J. Flagg, *On Selecting Black Women as Paradigms for Race Discrimination Analysis*, 10 BERKELEY WOMEN'S L.J. 40 (1996); Elizabeth Iglesias, *Structures of Subordination: Women of Color and the Intersection of Title VII and the NLRA. Not!* 28 HARV. C.R.-C.L. L. REV. 395 (1993); Lisa C. Ikemoto, *The Fuzzy Logic of Race and Gender in Mismeasures of Asian American Women's Health Needs*, 65 U. CIN. L. REV. 79 (1997); Margaret E. Montoya, *Mascaras, Trenzas, y Grenas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse*, 17 HARV. WOMEN'S L.J. 185 (1994). Notably, in early writing, women of color were critical of feminists ignoring or marginalizing race and other aspects of identity in their descriptions of gender subordination. In the experiences of South African women of color, concerns about gender seem to have been devalued by efforts to end racial subordination. *See Andrews, supra* note 2, at 441.

47. *See Andrews, supra* note 2, at 441.

48. *See Andrews, supra* note 2, at 441.

49. An interesting insight offered in Professor Andrew's work is that both African culture and tradition as well as the culture of apartheid are responsible for the subordinated status and that the struggle between the two contributed to the widespread violence against women. *See*

Andrews also lays some blame on the domination of the liberation movement by urban elites who neglected questions of custom and ethnicity, leaving African laws and customs at the margins. (Perhaps understandably so, as customary law had proved useful in maintaining apartheid and destroying indigenous solidarity. Such customs include the important tradition of communalism and collective women's work.)

Improving economic and social conditions, such as the elimination of the migrant labor system and the predominant domestic labor alternative for women, hold further promise that meaningful change will occur, according to Professor Andrews. She therefore challenges us to consider whether privileging political rights over economic and social and cultural rights to ensure human well-being is justified, at least in the context of the culture of South Africa. And we can better appreciate the role that economic conditions and political forces play in the development and perpetuation of violence in the United States by studying the experience in South Africa.

Acquiring some sense of the enormous social and economic challenges confronting South Africa and other countries leads women to reexamine violence, challenging traditional liberal conceptions of the boundaries of law<sup>50</sup> and the choice of legal sanctions. Indeed some commentators have argued that work and strategies for addressing economic and social conditions rather than bodily integrity and sexual autonomy should be identified as paramount human rights issues for women in much of the world, including poor women in the United States.<sup>51</sup> Rather than pose the debate as polar, I prefer to emphasize the insights we can draw from discourse about the lives of other women. Such insights are possible, however, if they are based on a better understanding of the complex and fluid nature of cultures. It is perhaps somewhat easier in the context of South Africa to understand that culture is, at once, not fixed but constantly evolving,<sup>52</sup> and profoundly

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Andrews, *supra* note 2, at 437 (noting historic manipulation of African custom opportunistically by proponents of apartheid to continue marginalization of Black Africans—and women, and envisioning new opportunities to identify and incorporate other indigenous cultural values which sustained African people during Apartheid). See Andrews, *supra* note 2, at 441. For example, Professor Andrews identifies the powerful African value of communalism and self-help as important cultural foundation for liberation and the promotion of women's rights. See Andrews, *supra* note 2, at 441.

50. See Gunning, *supra* note 1, at 455 n.39 (citing *Subcommission on Prevention of Discrimination and Protection of Minorities, Commission on Human Rights*, U.N. ESCOR, 43d Sess., at 17, UN Doc. E/CN.4/Sub.2/1191/6 (1991), and Special Working Group on Traditional Practices Affecting the Health of Women and Children: Final Report of Special Rapporteur, Mrs. Halim Warzazi).

51. This is the insight of women of color who write in the human rights area. See, e.g., Adrienne Katherine Wing, *Critical Race Feminism and the International Human Rights of Women in Bosnia, Palestine and South Africa: Issues for LatCrit Theory*, 28 U. MIAMI INTER-AM. L. REV. 337 (1996-1997). Moreover, feminists have begun to see work, rather than choice, in connection with the right to abortion, as an important strategic focus of rights discourse. See, e.g., Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559 (1991).

52. See Obiora, *supra* note 28, at 314.

affecting women's outlook on justice and equality, and on the use of law to effect change. But all culture is evolving and American culture has been and will continue to be profoundly affected by the experiences of the richly diverse women who make their homes here and what we can learn from others.<sup>53</sup>

The question of how to address the problem of violence against women in the United States and in other countries like South Africa presents an opportunity for dialogue among women that crosses traditional boundaries in ways of thinking about law such as human rights and civil rights equality. It can also cause us to be more circumspect and creative about how to take account of culture. As law professors and students of the law we have been trained to ask questions and to look in dark places<sup>54</sup> and shed light on how the legal system perpetuates inequality and privilege. As women we have the opportunity in this context to move theory beyond the polar positions of essentialism and relativism—beyond privileging our own ethnocentric view of violence or being paralyzed by cultural clashes that challenge our sense of right.<sup>55</sup>

Symposia like this one are effective if they cause us to explore our own cultural attitudes and unravel the intersections of power and privilege, leading us to appreciate our own gendered reality and chauvinism as we continue to seek, tentatively and self-critically, to explore whether there is agreement about the meaning of equality. Theories about equality and human rights must take account of what we can understand about women through examination of our own biases and by listening to and accounting for the particular *experiences* of other women, especially “those on the margins of power.”<sup>56</sup> We can learn a great deal by talking together but only if we are also prepared to listen.

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53. See Olsen, *supra* note 9, at 2232-47 (discussing insights American women can learn from studying experiences of Central and Eastern European women concerning “marketplace strategy” and usefulness of law to effect change).

54. See CALABRESI & BOBBITT, *supra* note 34, at 26-28, 198-99.

55. See Higgins, *supra* note 9, at 95 (postmodern and critical race theory have made us skeptical of universalism; we need history, individual choices and experiences).

56. See Higgins, *supra* note 9, at 91. See also Olsen, *supra* note 9, at 2247-57 (arguing continued collaborative work between American feminists and Central and Eastern European women is important for both groups but noting that American women need to be more conscious of politics of what they do and must devise strategies to readjust divisions of power and wealth).