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INTRODUCTION

The *Michigan Journal of International Law* Symposium[1] poses the question of whether "the international legal regime should accept a collective or individual paradigm to protect women." The posited choice between collective and individual paradigms can be interpreted in a variety of ways, as "collective" may be set off against "individual" in a number of different legal, political, and philosophical contexts.[2] What

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1. *See* Symposium, *Dueling Fates: Should the International Legal Regime Accept a Collective or Individual Paradigm to Protect Women's Rights?*, 24 MICH. J. INT'L L. 347 (2002) (transcript).

2. "Collective" might signify, *inter alia*: legislative measures or class-action litigation, as opposed to individual discrimination lawsuits; preferences and quotas for the inclusion of women in historically male-dominated institutions, as opposed to efforts to address discriminatory treatment of individual women; funding and autonomy for exclusively female educational and other institutions, as opposed to the integration of women into male-dominated institutions; a focus on the disparate burdens on women that result from predations inflicted upon underprivileged collectivities, as opposed to a focus on the impingements on

follows presupposes a particular way of conceptualizing the distinction, without meaning to deny or disparage other senses of "individual versus collective" that have applicability to the wide-ranging field of women's rights.

This Article will identify the individualist paradigm with the main current of contemporary liberal-individualist political thought, and more specifically with the approach to women's rights reflected in the International Covenant on Civil and Political Rights (ICCPR),[3] which can be read most straightforwardly as reflecting a liberal-individualist conception of how the individual, society, and the State interrelate.[4] This approach, dominant in the international human rights system as well as in the legal systems of some of the most influential States, can usefully be identified as that of the political Center.

Confronting this approach are the contrasting collectivisms of the traditionalist Right and of the feminist and socialist Left. The former regard mainstream liberalism as excessively egalitarian, to the disparagement of traditional (or even "natural" or "organic") hierarchies on the basis of which certain communities are ordered, whereas the latter regard such liberalism as insufficiently egalitarian in regard to economic and social outcomes. As applied to women's rights, right-wing collectivisms suggest a wide margin of appreciation for legal regimes that provide women with differential protections, as befit the differential social roles and statuses assigned the two sexes in (purportedly authoritative interpretations of) par-

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women's options as individuals within privileged collectivities; a relationship-oriented ethic of care as opposed to an autonomy-oriented ethic of abstract justice; an understanding of the human person as radically situated in unchosen (and perhaps hierarchical) relationships with involuntarily incurred responsibilities, as opposed to endowed with the capacity and the right to determine one's life plan based on the reasoned exercise of free will.

3. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 [hereinafter ICCPR].

4. I do not mean to suggest that a distinctively liberal-individualist interpretation of the ICCPR is legally binding on the States Parties. *See* Vienna Convention on the Law of Treaties, May 23, 1969, arts. 31–32, 1155 U.N.T.S. 331, 340 (treaties to be interpreted according to the "ordinary meaning" of terms in light of the instrument's "object and purpose," with recourse in cases of ambiguity to the preparatory work and circumstances of conclusion, and with attention to any subsequent agreement of the parties on interpretation, as established formally or through practice). Although the structure and content of the document are suggestive of a particular comprehensive understanding of the role of the State in social life, neither the ordinary meaning of the Covenant's specific terms (given their usage in ideologically diverse contexts) nor the object and purpose of the treaty as a whole can properly be read through an exclusively liberal-individualist lens. Given the widely variant principles of public order articulated by States during the relevant period, recourse to the circumstances of conclusion and the preparatory work tends to highlight rather than to resolve ambiguities and obscurities in the text. Subsequent express and tacit agreement of the parties can be found to render specific provisions more determinate, but sweeping agreement on the Covenant's *telos* must, for now, be seen as aspirational. Still, the ICCPR language is unquestionably congenial to the liberal-individualist project.

ticular cultures, whereas left-wing collectivisms suggest wide-ranging State obligations, in keeping with an aggressive interpretation of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),[5] to transform the social conditions that deny women full practical equality in the realms, not just of law and politics, but of economy, civic association, and family.

This Article is primarily concerned with the latter form of collectivist challenge to the liberal-individualist approach. There is already a substantial literature covering both the CEDAW and feminist approaches to international law, and no effort will be made here to reinvent the wheel.[6] What this Article intends to contribute is the (perhaps unnerving) suggestion that the CEDAW, construed to give effect to its "fullest meaning,"[7] represents a more deeply collectivist challenge to mainstream liberalism than is generally recognized—a challenge which, ironically, bears a structural (though not a substantive) similarity to the challenge from the Right.

On its face, the CEDAW works to extend the reach of overt collective decision making in social life by imposing obligations on the State to remedy detrimental non-State action, whether that detrimental action takes the form of discrete instances of disparate treatment or systemic practices that have a disparate impact on women's lives. This is the quantitative aspect of the CEDAW's augmentation of State duties, and takes the CEDAW beyond the scope of the ICCPR, though not in itself beyond the pale of mainstream liberal-individualism.

At a deeper level, however, the CEDAW suggests an extension of the reach of overt collective decision making in a more qualitative, and potentially radical, way. It represents a quest for "positive liberty" that calls

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5. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

6. For the basics of feminist international law jurisprudence, see generally HILARY CHARLESWORTH & CHRISTINE CHINKIN, THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS (2000); RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW (Dorinda G. Dallmeyer ed., 1993); Symposium, *Feminist Inquiries into International Law*, 3 TRANSNAT'L L. & CONTEMP. PROBS. 293–467 (Christine Chinkin & Hilary Charlesworth eds., 1993).

7. It is generally accepted that treaties should be interpreted "so as to have the *fullest* value and effect consistent with their wording (so long as the meaning not be strained) and with other parts of the text." G.G. Fitzmaurice, *The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points*, 28 BRIT. Y.B. INT'L L. 1, 8 (1951). This is ambiguous as a guide to legal interpretation. The failure of the States Parties to adopt more expansive or explicit language is frequently deliberate and, indeed, indispensable to ratification. I have elsewhere argued that "teleological" interpretation, while legitimate, requires a balanced, rather than tendentious, assessment of the instrument's overall *telos*. Brad R. Roth, *What Ever Happened to Sovereignty? Reflections on International Law Methodology*, *in* TOWARD UNDERSTANDING GLOBAL GOVERNANCE 69, 77–86 (Charlotte Ku & Thomas G. Weiss eds., 1998).

on the State to undertake a project of social transformation informed by a "public truth" about gender relations, a project in tension with main-current liberal commitments to the priority of negative liberty and to the pursuit of a distributive justice that is "neutral" with respect to diverse conceptions of how life ought to be lived. Viewed in this way, the CEDAW is a more genuinely collectivist—and therefore more provocative—document than many observers appreciate.

I. THE ICCPR AND THE CEDAW: CONTRASTING LEGAL APPROACHES

The ICCPR is the primary treaty of the international human rights system. Opened for ratification in 1966 and coming into force in 1976, it is a somewhat more legalistic and detailed expression of the civil and political rights contained in the 1948 Universal Declaration of Human Rights (UDHR)—with the notable subtraction of the right to property and the notable addition of the right of peoples to self-determination. A second treaty, the International Covenant on Economic, Social, and Cultural Rights (ICESCR),[8] contemporaneously gave legal effect to the rights contained in UDHR articles 22 to 28.[9]

The bifurcation of the human rights project is instructive. ICCPR rights are primarily, though not exclusively, negative rights against direct external assaults on individual dignity and autonomy, whereas ICESCR rights are primarily, though not exclusively, affirmative rights to the conditions and resources that make possible a life befitting a dignified being and containing prospects for autonomous activity. ICCPR rights give rise primarily to negative duties of the State to refrain from abusive action (along with affirmative duties to provide mechanisms for ensuring that the State's agents refrain from such action); ICESCR duties, by contrast, characteristically call for affirmative State measures. The ICCPR entitles all individuals, regardless of constitutive characteristics or social stratum, to equal legal status and equal treatment by the State; measures to broaden access to the material requisites of effective participation in so-

8. International Covenant on Economic, Social, and Cultural Rights, 993 U.N.T.S. 3, 6 I.L.M. 360 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

9. The United States is almost alone among ICCPR ratifiers in failing to ratify the ICESCR, and in rejecting on principle (under some administrations) the inclusion of economic and social rights in the international human rights scheme. The division undoubtedly reflects, however, a broadly held view that economic and social rights cannot be implemented in as straightforward a manner as civil and political rights, and a strongly held concern that the special difficulties of their implementation not be allowed "to rub off on" civil and political rights. *See, e.g.*, Maurice Cranston, *Are There Any Human Rights?*, 112 DAEDALUS 1 (1983) (disparaging economic and social rights as inherently aspirational rather than immediately applicable norms).

cial life are primarily left to the ICESCR. States "undertake to respect and to ensure to all individuals" the rights contained in the ICCPR,[10] whereas they "undertake to take steps . . . to the maximum of [their] available resources" for the progressive realization of the rights contained in the ICESCR.[11]

The ICCPR makes several references to discrimination against women. The parties "undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights" (article 3), and indeed "to respect and to ensure to all individuals" these rights without distinction on account of sex (article 2(1)); moreover, States are bound to accord women equality before the law and equal protection of the law (article 26). Thus, the Covenant embodies the principle of formal equality: women are entitled to the same rights, and the same enforcement of those rights, as men. Beyond that, States must affirmatively "prohibit any discrimination," and "guarantee . . . equal and effective protection against discrimination," on grounds of sex (article 26). "Effective protection" may or may not be read to include a duty to address facially neutral practices that cause women, by virtue of being differently situated, to be excluded and subordinated.[12]

ICCPR provisions on family (article 23) and minority culture (article 27), though troubling in their potential implications, should not be read to undercut directly the Covenant obligations to respect and protect women. Although the instrument recognizes the family as "the natural and fundamental unit of society . . . entitled to protection by society and the State," States have the obligation to "take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution" (article 23)—albeit an obligation presumably limited to legal rather than social practice.[13] Moreover, the

10. ICCPR, *supra* note 3, art. 2(1), 999 U.N.T.S. at 173, 6 I.L.M. at 369.

11. ICESCR, *supra* note 8, art. 2(1), 993 U.N.T.S. at 5, 6 I.L.M. at 361.

12. The ICCPR's supervisory body, the Human Rights Committee, has construed article 26 to bar "any distinction . . . which *is based on* any ground such as . . . *sex* . . . *and which has the* purpose or *effect of* nullifying or *impairing the* recognition, *enjoyment or exercise* by all persons, on an equal footing, of all rights and freedoms." Commission General Comment No. 18, U.N. Hum. Rts. Comm., 37th Sess., 948th mtg. ¶ 7, U.N. Doc. CCPR/C/21/Rev.1/Add.1 (1989) (emphasis added). It is unclear how far this is intended to reach beyond discrete discriminatory acts to disparate underlying social realities. At any rate, the Committee's interpretations are not binding on States, and on several occasions have been open to the charge of exorbitance. *See* Roth, *supra* note 7, at 85.

13. The Human Rights Committee has asserted that under article 23, equality of rights and responsibilities in the family "extends to all matters arising from their relationship, such as choice of residence, running of the household, education of the children and administration of assets." General Comment No. 19, U.N. Hum. Rts. Comm., 39th Sess. ¶ 6, U.N. Doc. HRI\GEN\1\Rev.1 (1990). However meritorious the suggestion, this conclusion appears (as do others contained in the Committee's General Comments) to exceed the Covenant's specifications.

minority rights clause is carefully worded to avoid any direct implication of a group right to cultural autonomy at odds with the exercise of individual rights: the right "to enjoy" one's culture belongs to "persons belonging to such minorities," although that enjoyment is understood to be partaken of "in community with the other members of their group" (article 27).[14]

Although the women's rights provisions of the ICCPR are fairly robust, the focus (apart from the guarantees of equal formal status) is on discrete acts of discrimination, whether by State or non-State actors, rather than on the disparate economic, social, and cultural conditions that women face. The counterpart instrument concerned with underlying conditions, the ICESCR, also inveighs against discrimination, but while its concreteness arguably makes it of special value to women,[15] its implicit focus is on class rather than sex.

By contrast, the CEDAW seeks, through a wide range of affirmative measures, to effectuate a substantive equality of women in all realms of social life. It reflects an awareness "that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women."[16] The most sweeping obligation embodying this approach is found in article 5:

> State Parties shall take all appropriate measures:
>
> (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women. . . .

This provision can be said to embody a "collective" rather than an "individual" approach to women's rights in at least two ways. The first is relatively straightforward: the CEDAW in this respect seeks, not to liberate women one at a time by vindicating the legal rights of each, but to transform conditions affecting women collectively. The second is more subtle and profound. Taken to its furthest conclusion, the CEDAW man-

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14. *See* Lovelace v. Canada, Communication No. 24/1977, U.N. Hum. Rts. Comm., 13th Sess., *in* Selected Decisions Under the Optional Protocol, at 83, U.N. Doc. CCPR/C/OP/1 (1985) (Human Rights Committee opines that article 27 was violated by revocation of native woman's communal rights for marrying outside her native community).

15. *See* Barbara Stark, *The "Other" Half of the International Bill of Rights as a Postmodern Feminist Text*, *in* RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW 19 (1993).

16. CEDAW, *supra* note 5, pmbl. ¶ 14, 1249 U.N.T.S. at 15.

dates compulsory collective decisions in realms that liberals frequently seek to maintain as domains of individual and associational prerogative.

The "collective" nature of the CEDAW's approach is the most significant impediment to United States ratification of the instrument. Even lawmakers supportive of CEDAW ratification, who briefly held the upper hand in the U.S. Senate prior to the 1994 Congressional elections, proposed reserving, in effect, to all new obligations not already binding on the United States by virtue of ratification of the ICCPR. The proposed reservation contained in the Senate Foreign Relations Committee majority report read, in pertinent part, as follows:

> [I]ndividual privacy and freedom from governmental interference in private conduct are ... recognized as among the fundamental values of our free and democratic society. ... The United States [therefore] does not accept any obligation under the Convention to enact legislation or to take any other action with respect to private conduct, except as mandated by the Constitution and laws of the United States.[17]

Even where the concern about "freedom from governmental interference in private conduct" does not lead to such blanket repudiations of the CEDAW's object and purpose, it can still prompt efforts to limit the Convention's reach. For example, Theodor Meron worries that article 5(a)

> might permit States to curtail to an undefined extent privacy and associational interests and the freedom of opinion and expression. Moreover, since social and cultural behavior may be patterned according to factors such as ethnicity or religion, state action authorized by [paragraph] (a) ... may conflict with the principles forbidding discrimination [on those bases].
>
> The danger of intrusive state action and possible violation of the rights of ethnic or religious groups might have been mitigated by limiting state action to educational measures.[18]

Meron does not regard his suggested limitation on the scope of article 5(a) as a curtailment of the overall project. "Social and cultural practices of conduct," he maintains, "could be regulated by the substantive provisions [of the CEDAW] which govern actual practices in a

17. S. EXEC. REP. NO. 103-38, at 10 (1994).

18. THEODOR MERON, HUMAN RIGHTS LAW-MAKING IN THE UNITED NATIONS 66 (1986).

particular field, for example employment practices, without loss of substantive rights under the Convention."[19]

This attempt to "square the circle" assumes, however, that the tension between women's substantive equality and other human rights interests is a product of sloppy drafting rather than social reality. This assumption reflects the prevalent prejudice among human rights activists and scholars that internationally-acknowledged human rights, however sweeping their implications for political and social order, represent a coherent system of mutually reinforcing principles and norms rather than a long list of potentially-clashing human interests and values. If, to the contrary, one regards human rights discourse as political and ideological contestation by other means, one does not expect to find such tidy solutions.[20] It may well turn out that measures genuinely necessary to the liberation of women entail costs to other interests and values favored by the international human rights system.

The latter part of this Article will demonstrate the systematic nature of the tensions between the CEDAW's vision of substantive liberation and the liberal-individualist concern to limit the scope of collective decision making in social life. In doing so, it will revisit an old debate on the content of the freedom that the human rights regime seeks to further. One approach to human rights regards freedom as, first and foremost, non-interference with choices among options that already exist and are available to the chooser; a competing approach emphasizes instead the social systems in which particular options (and not others) come to exist and in which particular individuals (but not others) come to the point of having those options within reach. The latter approach is more profound, but contains notorious dangers that need to be confronted.

Before entering into the debate about the nature of individual freedom and the appropriate role of the collectivity in its pursuit, however, it is first necessary to situate that debate on the theoretical landscape. Both sides of the debate operate from a set of common premises about political life, in contrast to illiberal alternatives that seek, in the name of the collective, to negate the moral significance of the individual and, almost inevitably, the moral equality of women.

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19. *Id.*

20. *See* JOHN GRAY, TWO FACES OF LIBERALISM 69–104 (2000) (arguing that genuinely vital freedoms are often rivals, and that "a regime in which all basic liberties are fully protected is not even conceivable.").

II. INDIVIDUALISM, COLLECTIVISM, AND THE PREMISES OF HUMAN RIGHTS DISCOURSE

The idea of human rights, however variously it may be interpreted, rests on a distinctive intellectual tradition, that is, the tradition identified with "liberalism," in the broad sense of that term. Because that tradition originated in a particular place and time under the influence of particular historical developments, human rights discourse has frequently been subject to the charge that it is essentially a parochial undertaking with universalist pretensions—i.e., that it represents cultural imperialism. This charge has been ably rebutted by many authors on grounds that need not be fully rehearsed here, namely: that the rise of liberal ideals has in all regions and periods corresponded with the emergence of the distinctive circumstances and challenges of the modern State; that liberalism has had a substantial following, albeit of varied sizes and strengths, in societies the world over; that charges of cultural inauthencity leveled at local liberals are both arbitrary and reflective of power struggles internal to those societies; that critiques of liberalism on the merits as frequently derive from within, and are as applicable to, Western as non-Western societies; and that the claim for the universality of liberal normative criteria in no way implies a claim that specific rules, processes, and institutions associated with liberalism in the West can be transplanted without modification to variant economic, social, and cultural contexts.

It is, however, worth briefly reviewing the essential premises of liberal political thought, as an inoculation against the exaggerations and caricatures that often plague debates about the roles of the individual and the collective in human rights discourse. Specifically, because the intellectual tradition underlying human rights is associated with a focus on the individual, it is often thought to embody a peculiarly Western exaltation of individual prerogatives over collective values and needs. This Article will argue briefly below that this is true to a much lesser extent than is commonly imagined, and that to the limited extent that it is true, relatively few critics would truly wish to associate themselves with the alternative. The Article will further contend that the most important and challenging issues regarding the relationship of the individual to the collective arise *within* the essential premises of the liberal human rights discourse, not between that discourse and its root-and-branch repudiators.

A. *Foundational Premises of Liberalism*

The irreducible core of liberal thought is the proposition that the legitimacy of the exercise of power is, *everywhere and always*, conditioned on *rational* justification from the standpoint of every *individual* subject to it.[21] (It is not necessary that the individuals in question actually agree, only that a rational basis for their agreement can be asserted.) Embedded in this proposition are four premises. First, the individual is the appropriate unit of analysis in the evaluation of political arrangements, as opposed to some larger social whole; the individual, however socially engaged, has an inherent dignity, respect for which cannot be collapsed into respect for his or her role as a component of an organic social entity. Second, human beings stand in relation to each other as presumptive equals, without a natural hierarchy that establishes some as inherently fit to dominate others for the former's benefit; obligations of obedience and licenses for compulsion require special justification, plausible from the standpoint of the obligated and compelled. Third, the legitimacy of political arrangements must withstand the tests posed by the exercise of human reason, rather than being conclusively established by invocations of revelation or tradition. Fourth, these basic principles of political morality are applicable to all human beings in all places and times, irrespective of communal customs to the contrary.[22]

Thus, the essence of liberal political thought entails individualism, egalitarianism, rationalism, and universalism, but in highly limited senses of these terms. Nothing in this mode of thought excludes the moral significance of collectivity, authority, spirituality, or particularity; what it excludes is embracing these unreflectively, as first principles of political morality. Indeed, arguably the most important concrete accomplishment of the universalization of human rights discourse is that it has placed an onus on those who predicate exercises of power on appeals to collectivity, authority, spirituality, or particularity to justify themselves further in ways that are cognizable in accordance with the essential liberal premises.

It is, of course, possible to deny the liberal premises. Elaborate philosophical objections have been lodged to deriving universal propositions of political morality from an abstract conception of the in-

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21. For a useful summary of liberalism's theoretical foundations, *see* JEREMY WALDRON, LIBERAL RIGHTS 35–62 (1993).

22. For a more elaborate discussion of these premises and their implications, see Raimundo Pannikar, *Is the Notion of Human Rights a Western Concept?*, 120 DIOGENES 75 (1982); Chandran Kukathas, *Are There Any Cultural Rights?*, *in* THE RIGHTS OF MINORITY CULTURES 228 (Will Kymlicka ed., 1995).

dividual human subject, without regard to the contexts of fixed ends and communal attachments that condition human experience. These "communitarian" objections maintain, to varying degrees, that human beings are "radically situated" in, to the point of being actually constituted by, communities—that they are, in essence, formed by unchosen ends rather than being autonomous choosers of ends.[23]

Few of the well-regarded communitarian theorists, however, are willing to take the critique to its natural conclusion: a corporative approach that posits the individual as essentially a component of an "organic" community that is the authentic bearer of moral personality. Such an approach would reduce the dignity of the individual to the dignity of the player of a preassigned role within that corpus. The individual's aspirations, well-being, or even life might be sacrificed whenever that is authoritatively deemed to serve the interests of the social whole—interests, moreover, not derived from the sum of the equally-weighted interests of its individual members. This identification of the human individual's moral essence with one's role as component of a larger unit tends additionally to the view that a wrong committed by certain members of a particular community can justify retaliation against other members of that community, selected at random.

These illiberal propositions are, in fact, embraced by a larger or smaller faction of innumerable societies throughout the world.[24] They have, it need hardly be added, special—often deadly—consequences for women.[25] To derive "a collective paradigm for the protection of women" consistent with such propositions would be a challenging intellectual enterprise indeed. (I wish the best to anyone who undertakes that project, but it is, most assuredly, not my project.)

At any rate, whatever the ontological truth of the matter, the notion of "constitutive communities" seems of far lesser political significance than is generally supposed. Even if individuals are best understood as constituted by the communities in which they are involuntarily

23. *See, e.g.*, MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982) (elaborating this thesis). *But see* MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE ix–xvi (2d ed. 1998) (in the preface to the second edition, Sandel substantially qualifies his adherence to this view); YAEL TAMIR, LIBERAL NATIONALISM 7 (1993) (observing that "national, religious, and cultural movements [would not] be so fearful of conversion and assimilation were it not clear that individuals do indeed have a choice in these realms").

24. *See, e.g.*, Stephen Holmes, *The Permanent Structure of Antiliberal Thought*, *in* LIBERALISM AND THE MORAL LIFE 227 (Nancy L. Rosenblum ed., 1989) (highlighting the inhumane developments historically associated with anti-liberal thought).

25. These consequences may include such atrocities as persecution (and even prosecution) of rape victims for their supposed failure to uphold communal or familial honor, "honor killings" of women by male relatives (often officially semi-tolerated) in retribution for unapproved romantic relationships, and mass rapes of women as an instrument of warfare against the communities of which those women are members.

embedded, there is little reason to think that these communities are coextensive with *political* communities.[26] Rather, these communities of attachment, which even in non-cosmopolitan settings are typically multiple and overlapping, must range from much smaller to much larger than the population encompassed by any political entity: members of an extended family; residents of the home village; members of the same ethnic group dispersed in other territories; adherents of the same religious faith dispersed throughout the world; and so on. To be sure, individuals are not monads, but nor are they reducible to components of an organic political entity, fascist representations to that effect notwithstanding. For the purposes of deriving political rights and duties, an approach that ignores constitutive attachments is analytically more persuasive than—and normatively far preferable to—one that fetishizes them.

Moreover, the image of liberal thought as essentially atomistic is grossly overdrawn. All variants of liberal thought accept that most individual lives are lived in, and most of their fulfillment derived from, interconnectedness with others. They all further accept that individuals bear not only rights, but also responsibilities for and to the collectivities of which they are members. While the variants of liberal thought differ vastly in the nature and extent of the responsibilities they ascribe to individuals, no widely held liberal theory celebrates selfishness or a casual severing of ties that bind individuals to their families, their local communities, or their wider societies. In addition, while all liberalisms are centrally concerned with individual freedom—conceptualized in widely differing ways—they all have also made their peace with the coercive power of the collectivity; the characteristic liberal project is precisely the remaking of State coercion as a component of "ordered liberty."

B. *The Question of Liberal Neutrality*

Herein, however, lies the fundamental problem that fragments liberal thought into competing tendencies. Freedom is straightforwardly reconcilable with coercion where freedom has determinate ends, in the service of which coercion operates. Freedom is then freedom to live a particular way of life, and it is legitimate to suppress all impediments to that way of life, even including temptations to stray from the path (especially since straying by some would present impediments for others), in the name of that freedom. It was no less a liberal hero than Montesquieu who affirmed that "liberty can consist only in having the power to do

26. *See, e.g.*, JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE 119 (1989) ("communitarian defenses of traditional practices usually cannot be extended to modern nation-states").

what one *should* want to do and in no way being constrained to do what one should not want to do."[27]

To posit determinate ends seems, however, to stand freedom on its head. An essential characteristic of freedom, as that term is ordinarily understood, is the indeterminacy of its objects. "The only freedom which deserves the name," declared John Stuart Mill, "is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it."[28]

The main current of contemporary liberal thought is individualist in the special sense that Mill's maxim suggests, a sense that goes well beyond the foundational individualism of the liberal theoretical tradition. Although it accepts that collective decision making does and must impinge greatly upon the scope of individual and associational activity, this brand of liberal-individualism holds out for a qualitative limitation on the reach of that collective decision making. The advocated basis of limitation is the principle of State "neutrality" in regard to conceptions of the good life and the proper objects of human striving.[29] The neutrality limitation is not intended to preclude the State from extensive compulsory measures—particularly not those, such as taxation and economic regulation, calculated to make available to individuals on a more equal basis the resources and conditions that expand the scope for meaningful choice.[30] It nonetheless rules out compulsory measures that presuppose a collective commitment to a particular vision of human flourishing at the expense of competing visions that individuals might adopt.

In response to this neutralist liberalism, the following objection can be raised, fully within liberal theoretical premises, both from the Right (by conservatives) and from the Left (by socialists and feminists). The

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27. MONTESQUIEU, THE SPIRIT OF THE LAWS 155 (Anne Coher, Basia Miller & Harold Stone et al. eds. & trans., Cambridge Univ. Press 1989) (1748) (emphasis added).

28. JOHN STUART MILL, *On Liberty*, *in* UTILITARIANISM, ON LIBERTY, AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 65, 74 (H.B. Acton ed., J.M. Dent & Sons 1972) (1859).

29. *See* JOHN RAWLS, POLITICAL LIBERALISM 190–95 (1993) ("[T]he [S]tate must not favor any comprehensive doctrines and their associated conception of the good . . . ."); *see also* Ronald A. Dworkin, *What is Liberalism?*, *in* A MATTER OF PRINCIPLE 181, 192 (1985) (contrasting liberalism with the view that "the treatment government owes citizens is at least partly determined by some conception of the good life," a view he associates with both "American conservatism and various forms of socialism or Marxism").

30. "[T]he capabilities citizens need to function as equals in civil society count as neutral goods for purposes of justice not because everyone finds these capabilities equally valuable, but because reasonable people can recognize that these form a legitimate basis for making moral claims on one another." Elizabeth S. Anderson, *What is the Point of Equality?*, 109 ETHICS 287, 330 (1999). Note, however, that this statement assumes it to be possible to make a "neutral" assessment of "what capabilities citizens need to function as equals in civil society."

objection asserts that the social dimensions of "our own good" and "impede" inevitably tie freedom to collective judgments about the comparative worth of rival ways of life. Living the good life is ultimately not separable from living in the good society, and the indirect consequences of organizing society in particular ways (rather than other ways) may impede the pursuit of the good as effectively as direct interferences. Mill's attempted neutrality implies that the meaning of freedom is apolitical, even pre-social; that collective decisions in a complex modern society—which create and condition life's public and even private spaces—can be oriented toward freedom in the absence of collective decisions about what human beings ought to be left free, or set free, to do. Arguably, however, freedom to pursue any given conception of the good life requires the creation, through compulsory collective decisions, of social conditions non-neutrally tailored to that pursuit. Collective decisions are inevitably made—even in societies nominally committed to "neutrality"—that effectively specify what ways of life shall count as the worthy objects of freedom, in the service of which State coercion shall operate. That these decisions may occur tacitly or by default does not alter this reality.

If this contention is correct, liberal neutralism in reality represents a commitment to a peculiarly individualistic understanding of the requisites of human flourishing. That commitment may be defended on the merits,[31] but it may equally be attacked for what models of flourishing it excludes.

A characteristic assault emanates from the Right. From this standpoint, it is preposterous to demand that State power not be used to reinforce traditional patterns of social life that are judged virtuous. The State encroaches on freedom, as conservatives understand it, only when the State employs its power to reform the prevailing (and perhaps, "natural") orders of economy (as by redistributive taxation), civic association (as by requiring the Boy Scouts to admit gays), and family (as by interfering with the parental prerogative of corporal punishment). Where the State acts to reaffirm and reinforce those orders (as by enforcing property rights, censoring "obscenity," and restricting divorce), it bolsters rather than undermines the freedom with which conservatives are concerned: Freedom to live a virtuous life in a community committed to supporting virtuous lives.[32]

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31. For an attack on neutralism by an author sympathetic to the policies that neutrality is typically invoked to defend, *see generally* GEORGE SHER, BEYOND NEUTRALITY: PERFECTIONISM AND POLITICS (1997).

32. For an intellectually formidable attack on liberalism from the Right, see JOHN KEKES, AGAINST LIBERALISM (1997) (arguing that the liberal imperative of increasing individual autonomy disables the State from suppressing evils that are traceable to human nature

In response, liberals, socialists, and feminists alike point out that the prevailing orders of economy, civic association, and family are determined by inherently political, rather than natural, processes, and that the purported virtues of these orders are contestable. Moreover, the specific ordering principles to which conservatives are partial tend to be highly inegalitarian in both design and effect, and thus unattractive to the Left.

At a higher level of abstraction, however, aspects of the conservative critique of liberal neutrality can be adapted to socialist and feminist efforts to implement substantive freedom on an equal basis. Critiques from Right and Left alike may identify meaningful freedom with embeddedness in a supportive social environment that needs to be sustained by a shared commitment to certain of what Wilmoore Kendall, in his conservative critique of Mill, termed "public truths"—standards upon whose validity a society is entitled to insist.[33] From the socialist and feminist standpoint, commitment to such truths may entail requiring non-State institutions, *inter alia*: to include meaningfully, rather than to tolerate grudgingly, persons irrespective of constitutive characteristics such as gender, race, ethnicity, religion, or sexual orientation;[34] to reject and to suppress unwarranted prejudices and stereotypes associated with those constitutive characteristics; and to forsake organizing principles that, though neutral on their face, have the effect of excluding or subordinating persons as a result of those constitutive characteristics. Resulting policies would involve, at minimum, active governmental promotion of these public truths, and perhaps—subject to countervailing considerations that can also be acknowledged—active defense of them (e.g., non-value-neutral restrictions on freedom of expression and association). Insofar as the term "political correctness" has a meaning apart from its use as an epithet, it reflects precisely this commitment to public truths.

From a feminist perspective, neutrality means nothing more or less than leaving in place established social dynamics that systematically subordinate women. The liberal tradition only belatedly came to acknowledge women as falling within the sanctified category of "individuals," that is,

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rather than to imperfect institutions). For a provocative, if debatable, characterization of the mindset of American conservatives, see generally GEORGE LAKOFF, MORAL POLITICS: WHAT CONSERVATIVES KNOW THAT LIBERALS DON'T (1996).

33. *See* Wilmoore Kendall, *The 'Open Society' and Its Fallacies*, 54 AM. POL. SCI. REV. 972, 974 (1960).

34. There is no similar requirement for civil society to accept fully all others *qua* bearers of divergent conceptions of the good life. One's conception of the good life is not *ipso facto* a constitutive characteristic—one which, like religious faith or cultural affinity, is central to a person's identity, even if not strictly immutable. There are, of course, some genuinely constitutive characteristics to which civil society must deny equal acceptance on the ground of incompatibility with the scheme of equal membership, but such incompatible constitutive characteristics are far fewer than incompatible conceptions of the good life.

bearers of the rational capacity to develop and to pursue one's own life plan. Once it did so, it proceeded not by reconceptualizing social life to account for women's distinctive experiences of deprivation of autonomy (let alone any distinctively female perspective on the attributes of an autonomous life), but by a formula that has been cannily described as "add women and stir." Liberalism was founded as a response to the deprivations of autonomy feared most by those already possessed of the economic, social, and cultural bases of autonomy; it only gradually—and, critics say, incompletely—came to acknowledge the class, race, and gender disparities in access to those bases. Contemporary neutralist liberalism, while seeking to "level the playing field" through economic redistribution and prohibition of discrete acts of discrimination, continues (to the extent of its "neutrality") to identify freedom with the absence of State regulation of interpersonal processes, even while the terms of those social processes remain responsive to the hegemony of the traditionally dominant participants (for example, upper-income, white, straight males). The "prejudices" and "stereotyped roles" of which the CEDAW complains are instruments by which seemingly "voluntary" processes produce skewed social outcomes.

The extension of the qualitative reach of collective decision making beyond the bounds of liberal neutrality has thus historically been, for the Left, a corollary of the quest for realization of a fuller individual freedom on an equal basis. That quest seeks to actualize, not so much freedom *from* the deliberate interferences of individuals, society, and the State ("negative liberty"), as freedom *to* realize one's full potential as a rational and social being ("positive liberty"). Since it is just this quest that Isaiah Berlin famously associated with the descent into totalitarian coercion, this approach to freedom warrants fuller examination.

III. POSITIVE LIBERTY AND THE OBJECTS OF CHOICE

A. *Negative and Positive Liberty*

In his elaboration of the "Two Concepts of Liberty," Isaiah Berlin makes the case that authentic liberty is simply the absence of coercion, "the deliberate interference of other human beings within the area in which I could otherwise act."[35] The significance of his essay, however, lies in his elaboration of the (in his view, fatal) attractiveness of a more full-bodied version of the concept. "The 'positive' sense of the word 'liberty,'" according to Berlin,

35. ISAIAH BERLIN, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY 118, 122 (1958).

> derives from the wish on the part of the individual to be his own master. I wish my life and decisions to depend on myself, not on external forces of whatever kind. I wish to be the instrument of my own, not of other men's, acts of will. I wish to be a subject, not an object; to be moved by reasons, by conscious purposes which are my own, not by causes which affect me, as it were, from outside. I wish to be somebody, not nobody; a doer—deciding, not being decided for, self-directed and not acted upon by external nature or by other men as if I were a thing, or an animal, or a slave incapable of playing a human role, that is, of conceiving goals and policies of my own and realizing them.[36]

Berlin argues that the descent into totalitarian coercion can be occasioned precisely by the ambitious quest for a fuller human freedom for all on an equal basis. Berlin traces the historical progress ("not always by logically reputable steps") of the notion of freedom as self-mastery through freedom as self-discipline to freedom as obedience to laws that are, in not a real but a purely allegorical sense, "prescribed to oneself." Freedom itself is thus, on his account, transmogrified into the very coercion that is properly its antonym.

As contributions to the effort to develop a compelling political program, both negative and positive ways of conceiving liberty present serious drawbacks. To define liberty in purely negative terms, as the absence of direct interference by other individuals, society, or the State with one's range of chosen activity, is to neglect that one's reason for valuing that liberty rests entirely on the range of meaningful choices that would be open to the individual absent such direct interference. This range of choices, in turn, depends on the physical and social context of one's life. Some aspects of that context are structured by forces of nature, but many more are structured, at least in part, by acts and omissions of social institutions (pertaining to economy, civic association, and family), which are in turn subject to some process of political decision. Thus, a line between "direct" and "indirect" interferences with the range of chosen activity seems not only arbitrary, but potentially obfuscatory, absolving politics of responsibility for the greater part of the real impediments to chosen activity, and characterizing as "free" a polity in which individuals are as effectively constrained, perhaps, as those in an "unfree" polity.

Moreover, not only does the concept of negative liberty fail to recognize "indirect" interferences, it also lends itself to the tendency (which Berlin himself, to his credit, resists) to ignore direct interferences where

36. *Id.* at 131–32.

these interferences reaffirm and reinforce the decisions that have structured the context of activity. Thus, the use of the police to oust a squatter from privately owned land, as a furtherance of "ordered liberty," is seldom counted as interference with the squatter's range of life choices, even if it reduces that range to the vanishing point. From Locke onward, liberal thought has most typically differentiated liberty from license. The distinction between the two, however, is best understood as a reflection of the governing ideology—no less so when expressed in terms of natural law, or of respect for the "equal" freedom of others. The parameters of even negative liberty, then, tend to reflect a substantive conception of what one ought to be free to do.

On the other hand, a positive approach to liberty, in emphasizing the life choices that members of the society are actually free to make, cannot meaningfully assess freedom of choice in the value-neutral terms of quantity. The inevitable focus on the quality of the available choices, however, tends to collapse the distinction between liberty and all other social virtues. True freedom is freedom to live a life that has the various characteristics (for example, material security, a sense of communal belonging, decent conditions of work, outlets for the expression of creativity, an unpolluted environment) that human beings value, or ought to value, most. At the far end of the spectrum, this includes freedom from the distortive influences that might lead individuals, as though entranced, to make choices (only superficially their own) that contradict their own better judgment and authentic nature.

Berlin's classic defense of negative liberty is an effort to maintain the integrity of freedom as a category separate from other social virtues. If Berlin can afford not to treat freedom as the repository of all social virtues, it is because he does not assert the maximization of (net) freedom as an unconditional priority. He accepts it as reasonable, in appropriate circumstances, to trade some freedom for other social goods. Berlin even concedes that "to offer political rights, or safeguards against intervention by the [S]tate, to men who are half-naked, illiterate, underfed, and diseased is to mock their condition; they need medical help or education before they can understand, or make use of, an increase in their freedom." He insists, however, that "liberty is liberty, not equality or fairness or justice or culture, or human happiness or a quiet conscience." He contends that to collapse the category itself into a substantive conception of well-being helps to lay the normative foundation for tyranny.[37]

The problem with the positive formulation of liberty is that it tends to differentiate between one's "true" free will (what one's essential or

37. *Id.* at 124–31.

rational self would will) and what one wills at any given moment (prompted by base inclinations to which one's better nature is enslaved). That differentiation has a certain plausibility in light of the widely recognized need, in certain contexts, "to coerce men in the name of some goal (let us say, justice or public health) which they would, if they were more enlightened, themselves pursue, but do not, because they are blind or ignorant or corrupt."[38] One exercising this coercion is tempted to proclaim that within those subject to coercion exists "an occult entity—their latent rational will, or their 'true' purpose," which is "the only self that deserves to have its wishes taken into account."[39]

> Once I take this view, I am in a position to ignore the actual wishes of men or societies, to bully, oppress, torture them in the name, and on behalf, of their "real" selves, in the secure knowledge that whatever is the true goal of man (happiness, performance of duty, wisdom, a just society, self-fulfillment) must be identical with his freedom—the free choice of his "true," albeit often submerged and inarticulate, self.[40]

Insofar as this "true" self is thought to have a social aspect to its essence, Berlin observes,

> the two selves may be represented as divided by an even larger gap: the real self may be conceived as something wider than the individual . . . as a social "whole" of which the individual is an element or aspect: a tribe, a race, a church, a [S]tate, the great society of the living and the dead and the yet unborn. This entity is then identified as being the "true" self which, by imposing its collective, or "organic," single will upon its recalcitrant "members," achieves its own, and therefore their, "higher" freedom.[41]

Ultimately, Berlin argues, positive liberty—freedom *to*—becomes nothing other than freedom "to lead one prescribed form of life."[42]

Therefore, falling back on Mill's assertion that "the only freedom which deserves the name is that of pursuing our own good in our own way," Berlin concentrates on defending a sphere of autonomous conduct from the direct and deliberate encroachments of others. Whatever compromises are to be made for the sake of other social goods, "a frontier must be drawn between the area of private life and that of public

38. *Id.* at 132–33.
39. *Id.* at 133.
40. *Id.* at 133.
41. *Id.* at 132.
42. *Id.* at 131.

authority."[43] Reasonable persons may well differ over the placement of the demarcation line, but liberty can be understood only as "the absence of interference beyond the shifting, but always recognizable, frontier."[44]

Critics have pointed out a number of crucial weaknesses in Berlin's dichotomy between negative and positive liberty. They have demonstrated that the concept of negative liberty fails, as noted above, to take account of interferences with autonomous conduct that are indirect—mediated, most notably, by market mechanisms—and nonetheless ultimately attributable to exercises of human will, often even in the form of political decisions, rather than to forces of nature. They have further demonstrated that the extent of negative liberty itself cannot be meaningfully evaluated in the absence of substantive judgments about the relative importance of the choices that may be obstructed (as Charles Taylor illustrated in noting the negative freedom conferred by the absence of traffic lights in Stalinist Albania[45]). Moreover, they have pointed out that Berlin's concept of positive liberty tends to lump together a range of notions that have widely varying implications for encroachment upon negative liberty.

These criticisms, however valid, are tightly focused on the question of whether Berlin's dichotomy can be philosophically sustained. There is, however, a much more important question that arises from Berlin's essay, or more specifically, from what is missing in the numerous efforts to refute it.

B. *Two Concepts of Positive Liberty*

Most instructive among the responses to Berlin is that of C.B. Macpherson. After attacking Berlin's failure to account, within the concept of negative liberty, for the extractive aspect of economic arrangements that result from societal decisions, Macpherson asserts a conception of positive liberty as developmental power, by which he seeks to emphasize the material prerequisites to meaningful choice without dictating the content of choice thus empowered. Whereas Berlin understands positive liberty to entail the principle that "the ends of all rational beings must of necessity fit into a single, universal, harmonious pattern,"[46] Macpherson contends that "if the chief impediments to men's developmental powers were removed, if, that is to say, they were allowed equal freedom, there would emerge not a pattern but a proliferation of

43. *Id.* at 124.
44. *Id.* at 127.
45. Charles Taylor, *What's Wrong with Negative Liberty*, *in* LIBERTY 150–51 (David Miller ed., 1991).
46. BERLIN, *supra* note 35, at 154.

many ways and styles of life which could not be prescribed and would not necessarily conflict."[47]

Macpherson thus introduces the distinction between "PL^1," the open-ended version of positive liberty, and "PL^2," the freedom "to lead one prescribed form of life."[48] Though not employing Macpherson's terminology, a great part of contemporary liberal theorizing, even where not expressly focused on the question of freedom, presupposes the sustainability of this very distinction.[49] To the extent that neutral positive liberty (PL^1) fails as a policy guideline, the alternatives are to pursue a non-neutral positive liberty (PL^2) or to insist on a neutrality that leaves the defense of negative liberty as, if not a categorical priority, the only priority properly associated with the term "liberty."[50] Thus, the most important question for political theorists to address is not whether Berlin is correct that negative liberty can be distinguished analytically from positive liberty, but whether Macpherson is correct that PL^1 can be distinguished practically from PL^2.

Unfortunately, Macpherson's distinction, though analytically sustainable, is not fully persuasive as a practical matter. Macpherson envisages a positive liberty that, while indeterminate in its objects, can be exercised equally by all without collision. Yet equal empowerment of all to act in accordance with their conscious purposes would seem to occasion disequilibrium, with furtherance of the conscious purposes of some indirectly undermining the developmental powers of others.[51] To

47. C.B. MACPHERSON, DEMOCRATIC THEORY: ESSAYS IN RETRIEVAL 111–12 (1973).

48. *Id.* at 108–09.

49. The relevance of Macpherson's categories to the current debate can be seen most clearly in Martha Nussbaum's effort to limit the political project to the furtherance of "central human capabilities," as opposed to the furtherance of any particular model of "human functioning." While acknowledging that Aristotle and Marx, her sources of inspiration, can be invoked for both projects, she asserts that "there is a big difference between pushing people into functioning in ways you consider valuable and leaving the choice up to them." MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 101 (2000). If, however, "capabilities" and "functioning" are interdependent—if proper functioning is indispensable to the social conditions needed for capabilities to be developed, or, worse, if proper functioning is the ultimate test of the *true* realization of capabilities—neither the firm distinction between PL^1 and PL^2, nor the neutralist wall of separation between "the right" (moral judgments about fairness to human subjects) and "the good" (moral judgments about the proper objects of human striving), can be sustained.

50. A reluctance to sacrifice negative rights, even for the sake of other aspects of "neutral" justice, is characteristic of the main currents of both human rights activism and contemporary liberal theory. *See, e.g.*, JOHN RAWLS, A THEORY OF JUSTICE 60, 302–03 (1971) (positing a "lexical" priority of his first principle of justice (civil and political liberty) over his second principle (equity of distribution)). *But see id.* at 542 (dire social conditions may justify sacrifice of liberty).

51. As Macpherson implicitly acknowledges, resolution of such clashes cannot be found in a neutral principle of commensurate limitation, such as is typically proposed to resolve clashes in the realm of negative liberty. Rawls's principle of conferring "the most extensive basic

posit that no such conflict would occur, one must posit some aspect of humanity's "true" nature—freed of the "stunting" and "debasing" influences that Macpherson attributes to existing institutional structures[52]—that entails compatibility of all genuinely conscious activity.

As such compatibility is not manifest in the world as we currently know it, Macpherson falls back on a classic Marxian response to this problem: the promise of the abolition of scarcity. With sufficiently abundant resources and the overcoming of "a class-divided market society which lives on the postulate of infinite desirousness," he contends, "diverse, genuinely human (not artificially contrived) desires can be simultaneously fulfilled," leading to "a society of non-conflicting but non-prescribed ends."[53]

This recourse neglects two crucial objections, both of which Macpherson acknowledges, but neither of which he convincingly answers. First, the abolition of material scarcity raises a conceptual problem that begs the original question. If scarcity is defined as the inadequacy of available resources to satisfy all wants, it is a permanent condition, as the satisfaction of an existing set of wants inevitably leads (even without entrepreneurial machinations) to the development of new wants, and so on endlessly. Therefore, scarcity is susceptible of abolition only if it is instead defined as the inadequacy of available resources to satisfy all *needs*. This is, indeed, what Macpherson intends.[54] What counts as a genuine need, however, turns on one's substantive conception of the proper ends of human endeavor, authoritative judgment on which Macpherson hopes to eschew. It is true that resolution of the question of need does not necessitate the positing of "one prescribed way of life" in

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liberty compatible with a similar liberty for others," *id.* at 60, aims to establish not only mutually compatible and morally equivalent, but also symmetrical—and therefore neutrally delimited—spheres of immunity from direct interference with individual activity. Each individual's negative liberty is thus thought (plausibly or implausibly) to be limited not only equivalently, but similarly. Once liberty entails affirmative empowerment of individuals to pursue asymmetrical sets of "conscious purposes," however, it becomes impossible to suppress the question of whether essentially different liberties are morally equivalent, and difficult to answer that question without assessing the comparative moral worth of the pursuits being empowered. The "easy out" is to posit that human beings' developmental powers are non-rival, so that the need for limitation does not arise.

52. MACPHERSON, *supra* note 47, at 106–07.

53. *Id.* at 112–13.

54. For Macpherson,

> the standard of material wants from which scarcity is to be measured is the amount of material goods required to enable everybody to use and develop fully his human capacities (rational, social, aesthetic, emotional, and productive in the broadest sense) . . . [and not] the amount needed to meet the supposed or projected actual wants of men culturally conditioned to think of themselves as infinite consumers.

Id. at 61–62. He does not, however, specify who decides on the former, or by what standards.

the narrowest sense, but Macpherson fails to consider adequately how many ways of life will inevitably be foreclosed, through exclusion of their inputs from the category of "need," by political decision (albeit so as to avoid the foreclosure by default of other, more worthy ways of life).

Second, not all of the anticipated collisions are the result of a scarcity of resources. The pursuit of the good life may require a nurturing community that reinforces the human potential for appreciation of worthy ends, and that protects the integrity of cooperative institutions through which individuals achieve, directly or indirectly, a large part of their fulfillment. Given this, the distinction between removing impediments to developmental power and imposing lifestyles is hardly self-evident.[55] The eradication of "stunting" and "debasing" influences can just as plausibly be the former as the latter, not merely for the paternalist reason that the influenced individual is diverted from the path of "true" fulfillment, but because the individual so diverted is likely, by acts and omissions, to impair the ability of others to pursue the good life.[56] Familiar examples concern the propagation of vices: those who succumb to the temptation to use drugs or gamble are more likely to fail in their job and family responsibilities, or to resort to stealing; those who watch pornography that eroticizes subjugation and humiliation or who listen to diatribes or jokes that demean groups of people may be more likely to engage in discrimination or violence against others. The problem goes far beyond this, extending to temptations to opt out of, and thereby to degrade, social institutions that cooperatively produce public goods of all kinds.[57]

Thus, Macpherson's distinction between PL^1 and PL^2—the effective equivalent of the studied neutralism of the better-known works of contemporary egalitarian liberalism—amounts to a sleight-of-hand. Any political project dedicated to the realization of positive liberty must identify in advance the human potential that the new order seeks to tap.

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55. Macpherson insists that "the exercise of his [essentially] human capacities by each member of a society does not prevent other members exercising theirs." The basis for this insistence, however, seems to alternate between faith and tautology. *See id.* at 54–55.

56. Stunting and debasing influences, it is worth noting, operate not merely by temptation, but frequently by the threat of social estrangement. As highlighted in the work of the economist Robert Frank, failure to partake in the activities and to adopt the goals of one's fellows—for example, the activities and goals of consumerism and materialistic status seeking—can lead to exclusion from economic and social networks significant to material and spiritual well-being. *See* ROBERT H. FRANK, CHOOSING THE RIGHT POND: HUMAN BEHAVIOR AND THE QUEST FOR STATUS (1985). Refusal to purchase fashionable clothes can involve a serious cost, as can refusal to drink alcohol in certain settings, or refusal to partake (or at least acquiesce) in a common disparagement of disfavored groups.

57. *See, e.g.*, Charles Taylor, *Cross-Purposes: The Liberal-Communitarian Debate*, *in* LIBERALISM AND THE MORAL LIFE 159 (Nancy L. Rosenblum ed., 1989) (arguing that "republican solidarity underpins freedom").

If social conditions are to be put in place to empower all human beings equally to exercise meaningful life choices, it is inevitable that some lifestyles, by virtue of incompatibility with others, will be excluded from the objects of choice. What remains can be characterized as "a proliferation of non-conflicting patterns of behavior," but "non-conflicting" is a highly significant limiting condition from the standpoint of the excluded. One person's PL^1 is another's PL^2. Put another way, a proliferation of non-conflicting patterns of behavior and a single harmonious pattern may be the same phenomenon examined at two different levels of abstraction: whether differences in modes of behavior are deemed significant enough to make for a proliferation rather than a single pattern likely rests on whether or not the modes conflict.

To affirm that positive liberty entails designating a substantive content to human freedom's ends is not, of course, to concede the whole of Berlin's progression. To say that true freedom is not identical with freedom to do whatever one happens to will at any given moment (the freedom that, in the crudest account of ordered liberty, is simply maximized by barring its exercise in trespass of another individual's sphere of autonomous activity) is not to say that true freedom is obedience to anyone possessed of the "truth." It is, however, to say that an ambitious project of human liberation, in order to sweep away impediments to the development of the power of genuinely self-directed human activity, must take a position on what it means to be fully human and, at least in some manner, assert that position in contradiction to what inclination might from time to time dictate.

Although Berlin's austere negative liberty is unsatisfying as an exposition of the essence of freedom, Berlin's most incisive observation withstands the attempted refutation in significant part: the coercive consequences that he attributes to the notion of positive liberty cannot be wholly banished by refining the definition of the latter term, since these consequences derive from the very nature of political life. Thus, neither Berlin nor Macpherson succeeds in breaking the paradoxical bond between freedom and coercion, a bond that inheres in the ineluctability of the question of what, concretely, human beings ought to be free to do.

This bond has profound implications for the liberation of women. The dilemmas presented by the effort to overcome capitalism are equally presented, *mutadis mutandis*, by the effort to overcome patriarchy. Eradicating impediments to women's developmental power requires, as a practical matter, remaking institutions so as to bring to the fore women's latent capacities and aspirations—including capacities and aspirations of which, due to the stunting and debasing influences of patriarchal structures, many individual women may not themselves be fully conscious.

Prevalent prejudices and stereotypes that "naturalize" the subordination and exclusion of women, as well as the systematic overvaluing of characteristically male traits by nominally neutral but patriarchally oriented social institutions, function as limitations both on what empowered men will let women become and on what disempowered women can envisage themselves as becoming. Only a non-neutral approach to women's liberation, operating on radically different suppositions about the nature of the good life for women *and* men, can fully address the structural impediments to women's flourishing. Equally, such an approach requires the extension of *overt* collective decision making into realms that the main current of contemporary liberalism seeks to maintain as reserves of individual and associational prerogative.

IV. Toward a Collective Commitment to a Feminist Conception of the Good

The pursuit of positive liberty for women, on effectively equal terms with men, is in tension with the liberal-neutralist commitment to a qualitative limitation on the reach of collective decision making in social life. Without adopting a "comprehensive doctrine of human flourishing"—or at least ruling out some such doctrines *ab initio*—a State can hardly hope to fulfill its obligation "to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."[58] Because the main obstacles to women's flourishing derive from the present organization of economic, social, and cultural life, rather than from discrete encroachments by the state apparatus, the conditions of women's flourishing cannot be pursued without a preconceived notion of what women need to be free to do and to be—and indeed, of what the society needs to be if it is to be adapted to the intrinsic needs and characteristics of men and women equally. "Prejudices" and "stereotyped roles" can be so characterized only once a particular conception—or determinate range of conceptions—of women's flourishing has been authoritatively adopted.

Moreover, potent non-State actors may systematically perpetuate these prejudices and stereotypes through the exercise of their ICCPR rights, such as "freedom to manifest one's religion or beliefs" (article 18(3)),"freedom of expression" (article 19(2)), "freedom of association with others" (article 22(1)), protection of the family as "the natural and

58. CEDAW, *supra* note 5, art. 5(a), 1249 U.N.T.S. at 17.

fundamental group unit of society" (article 23(1)), and the right of members of ethnic minorities "to enjoy their own culture" (article 27). All of these rights are, of course, subject to express or implied limitation under the Covenant to the extent "necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others" (article 18(3) and others). Such limitation clauses have typically been interpreted, however, in accordance with a distinctively male-oriented (because distinctively status quo oriented) understanding of what count as cognizable threats to these values.[59] Such threats have been acknowledged where they have been threats posed *to* the status quo—such as the threat posed by "obscene" expression to the tranquility of an existing community that establishes the good order within which the good life is enjoyed—not threats posed *by* the status quo. Associative and expressive practices that perpetuate social patterns of exclusion and subordination represent a different species of threat: They reaffirm and reinforce the bad order within which the bad life is endured.

The CEDAW reaches into aspects of social life that the ICCPR neglects. In vast parts of the world, these aspects of social life are precisely the ones that pose the greatest imminent peril to women's physical—let alone dignified—existence. Female infanticide, spousal abuse, honor killings, retributive rapes, genital "surgery," deprivation of health care, and other abuses suffered at the hands of family members and local communities are matters of life and death for millions of women.[60] One can (and should) broadly construe the ICCPR as covering these as discrete acts (even though committed by non-State actors), but the ICCPR has little to say about the economic, social, and cultural infrastructure of these abuses: attitudes and behavioral patterns prevalent within families, local communities, and societies at large, often rationalized in terms of religious and cultural expression and practice, that cut off at-risk women from the educational opportunities, economic resources, and social support structures by means of which they might effectively resist predation.

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59. Article 20 of the ICCPR nonetheless adds to the article 19(3) limitations on freedom of expression an affirmative requirement to ban "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence." ICCPR, *supra* note 3, art. 20, 999 U.N.T.S. at 178, 6 I.L.M. at 374. Although gender-based hostility was not included, the principle underlying article 20 can be used to influence the interpretation of "public order . . . or morals" under article 19(3), and thus to support analogous prohibitions protecting women.

60. *See generally* INTERNATIONAL HUMAN RIGHTS IN CONTEXT 158–224 (Henry J. Steiner & Philip Alston eds., 2d ed. 2000) (excerpts of wide-ranging accounts of conditions facing women in different parts of the world).

The CEDAW assigns to the State apparatus the imperative of transforming these social patterns.[61] At what point, and to what extent, this imperative should yield to ICCPR protections of religious exercise, expression, association, family, and culture remain open questions. One can scarcely deny, however, that fundamental interests rest on breaking the grip of those well positioned to use negative rights as a shield behind which to exercise social power in ways that are detrimental to women's flourishing. It is even possible to offer a highly nuanced account of liberal "neutrality" that can accommodate State measures against presumptively ICCPR-protected practices that bolster the extreme forms of subordination, exclusion, and violation of women alluded to above, although there comes a point at which nuance redeems the concept of neutrality only at the cost of denying it any remaining "bite."[62]

At any rate, whatever the potential clashes over the permissibility of specific remedial measures, the dire circumstances referenced above

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61. Feminist legal scholars, in their efforts to unmask the patriarchal underpinnings of international law as a whole, have singled out the role and prerogatives of the State for withering criticism. *See, e.g.*, CHARLESWORTH & CHINKIN, *supra* note 6, at 124–70. There is abundant foundation for feminist hostility to the State. On the one hand, traditional "sovereignty" doctrine assigns the State extensive prerogatives: not only is consent of the individual State a presumptive requisite of binding legal obligations, but even consented-to obligations are presumptively applicable to persons within States only to the extent provided for in domestic law, and external efforts to coerce the State to implement its acknowledged obligations remain presumptively barred. *See generally* Roth, *supra* note 7. On the other hand, the linchpin of international recognition of both the sovereign entity and the government that acts on its behalf has traditionally been "effective control," that is, widespread patterns of obedience, by whatever means established (so long as these can be characterized as "internal processes"). *See* BRAD R. ROTH, GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW 137–42 (1999). As a result, authority in the international system has systematically been identified, as a practical matter, with the manifest will of armed males.

Although exalting the role of the State may thus seem an improbable feminist strategy, alternative instruments of societal reform are in short supply. Moreover, the State apparatus is likely to be more susceptible of democratization than other potent social institutions, and direct implementation of women's rights by external forces seems an unlikely scenario (except in extraordinary cases, such as the recent intervention in Afghanistan). International action is therefore most prudently aimed at transforming, rather than transcending, the role of the State in the lives of women.

62. Rawls limits his insistence on the priority of basic (negative) liberties to circumstances in which prevail "reasonably favorable conditions" for the "effective establishment and the full exercise of these liberties." RAWLS, *supra* note 29, at 297. Relatedly, he insists that the State's duty of neutrality does not entail a duty "to ensure for all citizens equal opportunity to advance any conception of the good they freely affirm," since conceptions of the good that violate his scheme of "justice as fairness" (by incompatibility with equal opportunities for others) cannot be permissibly "advanced." *Id.* at 192–93. However, the text is unclear as to whether mere inculcation of unjust conceptions of the good, however effective, can be suppressed in the name of (a favored conception of) a just distribution of opportunity, or whether the prevalence of encroachment on individual liberties by non-State actors counts as an unfavorable condition sufficient to trump basic liberties against the State. The more flexible one's reading of neutralism, the less practical guidance it provides.

undeniably offend liberal principles of neutral justice. Closer to home, less extreme conditions of the sort that the CEDAW may condemn are more likely to provoke controversy, and it is to such matters that the remainder of this Article will be devoted.

To illustrate the nature of controversies to which collective decisions about the role of women in the good society are relevant, I have selected two very different United States constitutional cases: *United States v. Virginia*,[63] and *American Booksellers Association v. Hudnut*.[64] The first, the Virginia Military Institute (VMI) admissions case, highlights the failure of the individual rights paradigm to address stereotypes and prejudices that are manifest in nominally neutral standards of qualification and achievement. The second, the Indianapolis pornography ordinance case, poses the question of whether the constitutional bar to non-neutral regulation of expression exposes women to predation.[65]

A. *The Equal Right to Achieve a Stereotypical Standard: The "Rat Line" as the Path to Civilian Leadership*

One of the recent achievements of American equal protection jurisprudence has been the court-mandated admission of women to State-sponsored institutions of higher education organized on the model of armed services academies. With the outcome of the VMI case, another bastion of male exclusivity was made permeable to such women as may be drawn to its qualities and as may be able to stand up to its rigors. While the value of this success to that specific group of women is not to be disparaged, the legal controversy seems somehow to have missed a larger point about the nature of gender discrimination.

One of fifteen public colleges in the state of Virginia, VMI was the only one that remained a single-sex institution at the time of the lawsuit. VMI characterized its mission as the production of "citizen-soldiers, educated and honorable men who are suited for leadership in civilian life and who can provide military leadership when necessary."[66] The distinctive aspect of a VMI education was an "adversative" approach that featured the "rat line." According to the Fourth Circuit Court of Appeals:

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63. 976 F.2d 890 (4th Cir. 1992), *cert. denied sub nom.* Virginia Military Institute v. United States, 508 U.S. 946 (1993).

64. 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986), *reh'g denied* 475 U.S. 1132 (1986).

65. That these cases come to mind is owing to their inclusion in an excellent collection from which I routinely teach: PHILOSOPHICAL PROBLEMS IN THE LAW (David M. Adams ed., 2d ed. 1996). This collection also contains excerpts from the works of Wilmoore Kendall, Martha Minow, and Catharine MacKinnon discussed herein.

66. *Virginia*, 976 F.2d at 893.

> The rat line refers to the harsh orientation process to which all new cadets ("rats") are subjected during their first seven months at VMI. Designed to be comparable to the Marine Corps' boot camp in terms of physical rigor and mental stress, the rat line includes indoctrination, minute regulation of individual behavior, frequent punishments, rigorous physical education, and military drills. . . . [T]here is a total lack of privacy in the barracks, where cadets are subjected to constant scrutiny and minute regulation, all intended to foster cadet equality and to induce stress.[67]

The first-year experience was thus presented as tantamount to a prolonged hazing, designed to produce toughness, bonding, and commitment to the institution for which so much is endured.

The Fourth Circuit found the prospect of the admission of women to present a real dilemma. On the one hand, the evidence adduced below established that "the deliberate harassment that upperclassmen give to 'rats' would play out differently when the upperclassman is of one sex and the 'rat' another."[68] On the other hand, "the various systems in place at VMI are integrated and interdependent, and several of them cannot be changed without materially affecting others."[69] The court thus perceived a "Catch-22": "the admission of women to VMI to give them access to this unique methodology . . . would deny those women the very opportunity they sought because the unique characteristics of VMI's program would be destroyed by coeducation."[70]

The Fourth Circuit accepted that the adversative method required a single-gendered context, but not that it required a specifically all-male context. Its solution was to hold that Virginia could maintain the male-only VMI only if it created a functionally similar institution for women.[71] Given institutional practicalities, however, the failure of this approach was foreordained, and VMI was ultimately compelled to become coeducational.[72]

The VMI case is noteworthy, not for its weightiness, but for its blatantly skewed assumptions, which a CEDAW-based approach brings into focus. "Prejudices" and "stereotyped roles" work to "naturalize" the subordination and exclusion of women in two distinct ways: by unwarrantedly attributing to women disqualifying traits, and by unwarrantedly characterizing stereotypically male traits as qualifications. Here, the

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67. *Id.* at 893–94.
68. *Id.* at 896.
69. *Id.* at 894.
70. *Id.* at 897.
71. *Id.* at 899–900.
72. *See* United States v. Virginia, 518 U.S. 515 (1996).

"citizen-soldier" ideal, even if it is reasonably designed to produce a reserve corps of military personnel, represents an overtly patriarchal conception of the qualities possessed by a person "suited for leadership in civilian life." Surely it is idiosyncratic to think that enduring the "rat line" is what produces the qualities required for participation in the upper echelons of civilian institutions (the doors to which are presumably opened by "old boy networks" that the VMI elite bonding experience generates).

Most skewed assumptions about qualifications and standards are subtler. Martha Minow has noted the "unstated male norms" by which women are frequently regarded as "different"; for example, employer accommodation of pregnancy is seen as "special treatment" for women, as a result of the unquestioned acceptance of a male-oriented standard.[73] Efforts to remedy disparities by reference to "neutral" standards of distributive justice may miss the need for collective decisions about the character of economic life, which may be of disparate importance to women. Mere inclusion in existing institutions on the same terms as men "allows women only access to a world already constituted by men, not to a world transformed by the interests of women."[74]

The CEDAW focuses attention on the need to resolve collectively, not only how women are to be properly perceived, but how social goals are to be perceived if society is to function in accordance with the distinctive interests of its female members. Women's liberation will not be achieved by rendering neutral justice, one woman at a time; what is required is an overall reassessment of societal priorities, carried out in processes of collective deliberation.

B. *Viewpoint-Neutrality in the Regulation of Expression: The Fate of Professor MacKinnon's Pornography Ordinance*

The apotheosis of liberal neutrality is to be found in U.S. constitutional jurisprudence on freedom of expression. It is here that the writings of John Stuart Mill have taken greatest hold. Mill affirmed—primarily on the ground that society's pursuit of truth is maximally furthered by a free market in ideas, but also in the service of an individual's essential interest in acting "according to his own inclination and judgment in things which concern himself"[75]—that there should be "absolute freedom of opinion and sentiment on all subjects, practical and speculative, scientific, moral, or theological," and that the "liberty of expressing or

73. MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 56–60 (1990).

74. CHARLESWORTH & CHINKIN, *supra* note 6, at 248.

75. MILL, *supra* note 28, at 114.

publishing opinions . . . resting in great part on the same reasons, is practically inseparable from [freedom of opinion and sentiment]."[76] He did concede, however, that

> even opinions lose their immunity when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act. An opinion that corn-dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer, or when handed about among the mob in the form of a placard.[77]

Precisely this model of distinguishing expression from action has been adopted by the U.S. Supreme Court.[78] Mill was resistant to all limitations on "intemperate" modes of discussion, but he acknowledged that "denunciation of these weapons would deserve more sympathy if it were ever proposed to interdict them equally to both sides" of a debate;[79] so, too, the Supreme Court has held that restrictions on "fighting words" are permissible only where they apply irrespective of the content of the attitudes the restricted words express.[80]

It is against this backdrop that an Indianapolis ordinance sponsored by feminist legal scholar Catharine MacKinnon sought to establish pornography, defined specifically in terms of "the graphic sexually explicit subordination of women, whether in pictures or in words," as an actionable violation of the civil rights of women. The ordinance applied, *inter*

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76. *Id.* at 75. Mill's neutrality, it should be noted, was confined to opposing the use of State power, or even social pressure, to favor a particular conception of truth. His grounds for that neutrality differed sharply from those embraced by the main current of contemporary liberalism, which is Kantian in its foundations. The latter, "deontological" liberalism claims neutrality with respect to competing "comprehensive doctrines of human flourishing," prioritizing respect for the individual freedom to adopt and pursue diverse conceptions of one's own flourishing, whereas Mill's neutrality is purely instrumental to his own theory of what human flourishing requires.

77. *Id.* at 114.

78. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action . . . .").

79. MILL, *supra* note 28, at 112.

80. R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992) (striking down a ban on fighting words that insult "on the basis of race, color, creed, religion or gender" on the ground that " 'fighting words' that do not themselves invoke race, color, creed, religion, or gender—aspersions upon a person's mother, for example—would seemingly be usable *ad libitum* in the placards of those arguing *in favor* of racial, color, etc., tolerance and equality, but could not be used by those speakers' opponents").

alia, to the presentation of women "as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display."[81]

The outcome was doctrinally compelled, and could have been reduced to a single sentence of the Seventh Circuit opinion: "The [S]tate may not ordain preferred viewpoints in this way."[82] What is notable about Judge Frank Easterbrook's opinion is just how much ground he was willing to concede to MacKinnon's view that pornography presents real social harm to women:

> People often act in accordance with the images and patterns they find around them. People raised in a religion tend to accept the tenets of that religion, often without independent examination. People taught from birth that black people are fit only for slavery rarely rebelled against that creed; beliefs coupled with the self-interest of the masters established a social structure that inflicted great harm while enduring for centuries. Words and images act at the level of the subconscious before they persuade at the level of the conscious. Even the truth has little chance unless a statement fits within the framework of beliefs that may never have been subjected to rational study.
>
> Therefore we accept the premises of this legislation. Depictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets. In the language of the legislature, "[p]ornography is central in creating and maintaining sex as a basis of discrimination. Pornography is a systematic practice of exploitation and subordination based on sex which differentially harms women. The bigotry and contempt it produces, with the acts of aggression it fosters, harm women's

81. Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323, 324 (7th Cir. 1985). Other actionable pictures or words included those in which:

> (1) Women are presented as sexual objects who enjoy pain or humiliation; or (2) Women are presented as sexual objects who experience sexual pleasure in being raped; or (3) Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or (4) Women are presented as being penetrated by objects or animals; or (5) Women are presented in scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual . . . .

Id.

82. *Id.* at 325.

opportunities for equality and rights [of all kinds]." Indianapolis Code § 16-1(a)(2).[83]

A more eloquent statement of the case for censorship of pornography can scarcely be found.[84] Easterbrook acknowledges not only the harm, but also the subconscious level on which pornography works the harm. As MacKinnon has pointed out, pornography is not an argument that can be rebutted intellectually in a marketplace of ideas; rather, it normalizes an image of women that the affected men have the power to transpose into reality, by means ranging all the way from the brutality of rape to the subtlety of office politics.[85] Easterbrook admits that pornography's opponents cannot negate its harm by competing with its message in a marketplace of ideas.

Nonetheless, he observes, "A power to limit speech on the ground that truth has not yet prevailed and is not likely to prevail implies the power to declare truth."[86] Such a power would contradict the neutralist dogma that, from a constitutional standpoint, "there is no such thing as a false idea."[87]

The paradox of the constitutional protection afforded "pornography," as "non-neutrally" defined in the Indianapolis ordinance, is that no such protection is afforded to what the Supreme Court has designated as "obscenity." Just as article 19(3) of the ICCPR allows for "restrictions necessary to public morals," so too U.S. constitutional jurisprudence establishes an exemption:

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83. *Id.* at 328–29 (citation omitted). Judge Swygert concurred separately, complaining that Easterbrook's "questionable and broad assertions regarding how human behavior can be conditioned by certain teachings and beliefs . . . are unnecessary" to resolution of the case. *Id.* at 334.

84. MacKinnon makes this argument and many others, sometimes in such heated rhetoric that the most intellectually persuasive points are obscured. *See* CATHARINE A. MACKINNON, ONLY WORDS (1993); *see also* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 195–214 (1989).

85. It is true that pornography's causal connection to these harms is speculative, in that social science methods have yet to yield—and may never be able to yield—convincing proof of it. But absence of evidence is not evidence of absence; the shortcoming may well lie in the inaccessibility of the causal connection to social science methods. Regarding rape, for example, the appropriate empirical issue is not whether happy, healthy, well-adjusted males, once exposed to pornography, are thereby transformed into rapists; the issue is whether, in some substantial number of borderline cases, an individual with the potential for sexual violence is drawn over the edge by the ready availability of pornographic imagery. The lack of an available experiment to test this hypothesis does not render pornography's alleged contribution to women's perils any less plausible.

86. *Am. Booksellers*, 771 F.2d at 330.

87. *Id.* at 331 (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974)). For a contrasting approach, see Regina v. Butler, 70 C.C.C.3d 129 (1992) (Canadian Supreme Court upholds prohibition of degrading and dehumanizing pornography on the ground that prevention of the attendant harms, including the potential adverse impact on attitudes and beliefs, is of fundamental importance in a free and democratic society).

> To be "obscene" under *Miller v. California*, 413 U.S. 15 (1973), "a publication must, taken as a whole, appeal to the prurient interest, must contain patently offensive depictions or descriptions of specified sexual conduct, and on the whole have no serious literary, artistic, political, or scientific value." Offensiveness must be assessed under the standards of the community. Both offensiveness and an appeal to something other than "normal, healthy sexual desires" are essential elements of "obscenity."[88]

Thus, status quo oriented limitations on sexual expression—those that take as a given existing community sensibilities, prevalent conceptions of the "normal" and the "healthy," and established notions of what has countervailing "value"—are accepted as "neutral." A consistent neutralist might object to *Miller* on just this ground, but it is worth noting how easily the status quo can, in practice, come to be taken as neutral,[89] and just as important to note how difficult a truly rigorous neutrality would be to effectuate.

Unlike obscenity, pornography, as defined in MacKinnon's terms, "is not bad manners or poor choice of audience." As she points out, "[t]o define the pornographic as the 'patently offensive' . . . misconstrues its harm." MacKinnon wonders "why prurience counts but powerlessness does not, why sensibilities are better protected from offense than women are from exploitation."[90] Moreover, since its harm lies not in challenging the status quo but in reinforcing it, the presence of eroticized female subordination in "legitimate settings," such as works deemed to have artistic or literary value, allows pornography's contribution to women's "trivialization and objectification" to elude perception. Perhaps overstating the point, MacKinnon asserts that "[e]xisting standards of literature, art, science, and politics are, in feminist light, remarkably consonant with pornography's mode, meaning, and message."[91]

A still bolder assertion by MacKinnon brings us back to the "stunting and debasing influences" theme in Macpherson's conception of positive liberty: She decries not only pornography's impact on the objective contexts within which women's lives are lived, but also on women's subjective understanding of their own role and potential. Against the argument that some women enjoy the very imagery that she condemns, MacKinnon retorts that "when women are aroused by sexual violation, experience it as women's sexuality, . . . [t]he male supremacist definition of female sexuality as lust for self-annihilation has won." Indeed, the

88. *Am. Booksellers*, 771 F.2d at 324 (citations omitted).
89. *See* MINOW, *supra* note 73.
90. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 84, at 204.
91. *Id.* at 202.

feminist critique of the sexual status quo "requires an account of women's experience of being violated by the same acts both sexes have learned [to experience] as natural and fulfilling . . . ."[92] It also, not incidentally, requires recourse to a "vanguard" mentality of the sort that Berlin cited in associating positive liberty with totalitarianism.

Even if not all of MacKinnon's contentions are fully persuasive, the essence of the argument is worthy of the most serious consideration (as Judge Easterbrook, not known for his feminist leanings, acknowledges). The neutralist liberal response, however, is not to take issue with her argument as a matter of sociology or psychology, but to *rule out in principle* any encroachments on freedom of expression that might be predicated on it.

Neutralism must ultimately rely on a direct/indirect test for what will count as legally cognizable harms. For example, expression that works its harm by depriving an individual of the legitimately expected benefits of public spaces, thus amounting to harassment or intimidation, can properly be suppressed; expression that works its harm by propagating attitudes that increase the incidence of such deprivations, with the causal connection intermediated by the mental processes of others, must be left sacrosanct.[93] According to Ronald Dworkin, although "the moral environment in which we live is in good part created by others,"

> we cannot count, among the kinds of interests that may be protected [by prohibitions of harassing or intimidating speech], a right not to be insulted or damaged just by the fact that others have hostile or uncongenial tastes, or that they are free to express them or indulge them in private. Recognizing that right would mean denying that some people—those whose tastes these are—have any right to participate in forming the moral environment at all. . . . In a genuinely egalitarian society, . . . those views cannot be locked out, in advance, by criminal or civil law;

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92. *Id.* at 211–12.

93. For a heterodox reading of Mill's harm principle that eschews such direct/indirect distinctions and seeks to reconcile Mill with MacKinnon, see David Dyzenhaus, *John Stuart Mill and the Harm of Pornography*, 102 ETHICS 534 (1992). Dyzenhaus characterizes "the power exercised by men over women through pornography as a pernicious kind of social and moral coercion." *Id.* at 544–45. He ascribes to Mill's writing on the social oppression of women a "willingness to deem coercive what has the appearance of consent," and thus imputes to Mill the classic Left perfectionist identification of genuinely free choice with what one *would* choose if conscious of one's true interests and human potential. *Id.* at 540–41; *cf.* JOHN STUART MILL, *The Subjection of Women*, *in* THE BASIC WRITINGS OF JOHN STUART MILL 123 (Dale E. Miller ed., The Modern Library 2002) (1870). Pornography then counts as a source of the "social tyranny" that Mill feared even more than governmental regulation. Whatever may be said for this argument on the merits, it is sharply at variance with conventional interpretations of Mill.

> they must instead be discredited by the disgust, outrage, and ridicule of other people.[94]

This statement expresses the core of the "neutrality" principle's practical implications. Equality is taken to entail equal respect for each individual as a rational actor capable of moral deliberation. Equality thus demands that each person's pursuit of a self-defined conception of the good life, however questionable, must be facilitated to an equal extent as all others' similar pursuits. Limitations can be justified on the basis of incompatibility of one's pursuit with another's, but only on considerations of fairness that are independent of any judgment of the comparative worth of the pursuits in question (though such pursuits can be condemned if unfairness to others—sadism, for instance—is directly a part of their essence).

A direct/indirect test for incursions on individual's spheres of autonomous activity may seem a practical proposal for engaging in such "neutral" arbitration.[95] In fact, however, any connection between the "directness" and the extent or gravity of an imposition on another's pursuit of the good life is, at best, tenuous. Moreover, the direct/indirect test presupposes an image of human beings who live the most essential aspects of their lives apart rather than together,[96] and that what Dworkin aptly describes as "participation in forming the moral environment" does not amount, in intent or effect, to the exercise of power over others.[97] In real-

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94. Ronald Dworkin, *Women and Pornography*, N.Y. REV. BKS., Oct. 21, 1993, at 36, 41. The straw reference to the "right not to be insulted" is inapposite to the arguments discussed here. From MacKinnon's perspective, as from my own, pornography, like hate speech, is not wrong because it is offensive; it is offensive because it is wrong (and wrong because it works real deprivations of the conditions of a dignified human existence).

95. It may seem an additional advantage that the directness of harm causation turns on the absence of intermediation by minds that are, in principle, to be respected as capable of rational moral decision. Yet liberalism does not, in any other context, propose institutional solutions that leave provision for individuals' vital interests contingent on a hoped-for exercise of rationality by others. Liberals are not utopians: their idealistic accounts of human beings' essential nature ground normative standards, not empirical projections, of human behavior.

96. The neutrality doctrine is, as a matter of intellectual history, derived as an extrapolation from an older doctrine of religious tolerance. Putting aside the thorny question of whether religiosity can be properly understood as essentially private in the way that the older doctrine presupposes, contemporary liberalism's broader effort at neutrality seems to founder on the intertwined and interdependent nature of the good lives that individuals seek to live.

97. Dworkin goes so far as to contend that the First Amendment "forbids censoring cranks or neo-Nazis not because anyone thinks that their contributions will prevent corruption or improve public debate, but just because equality demands that everyone, no matter how eccentric or despicable, have a chance to influence policies as well as elections." Dworkin, *supra* note 94. This seems exorbitant, even within Dworkin's own scheme. Political participation is overtly an effort to impose policies that affect the conditions of others' lives, and Dworkin himself has famously (and quite correctly, I think) argued in favor of using judicial power to frustrate anti-egalitarian political influences. *See* Ronald Dworkin, *The Moral Read-*

ity, the life projects of individuals—which may include acting as buyers and sellers in a market for imagery that normalizes and eroticizes the subordination of women—are too closely connected to, and exercise too much influence over, those of others for the terms of interaction to be established without regard to the comparative worth of those projects. Neutral fairness either becomes unworkable or retreats to so high a level of abstraction as to lose all practical significance.

In his critique of Mill, Willmoore Kendall observed, citing Socrates, that "he who teaches my neighbor evil does *me* hurt."[98] His argument for a collective commitment to public truth, though made in the service of conservative substantive views, should resonate with feminists (and socialists) who understand that genuine social equality cannot be pursued through governmental "neutrality" where patriarchal (and capitalist) assumptions pervade the underlying social context. Rejection of neutrality does not necessarily imply an embrace of censorship, which can be opposed on many other grounds of principle and pragmatism;[99] it does, however, require grappling with the merits of censorship far more elaborately than suggested by prevailing U.S. constitutional jurisprudence.

In sum, the CEDAW represents an assertion that the struggle for women's human rights is inseparable from the struggle over what shall count as public truth about gender relations. This is to say not that it dictates particular public truths (since what count as "prejudices" and "stereotyped roles" remain largely open questions, as to which competing feminisms may derive very different answers), but that it acknowledges, in ways that the ICCPR does not, the inherently political nature of individual rights. It thus highlights the need for collective decisions that favor particular conceptions of human flourishing over others,

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ing and the Majoritarian Premise, *in* DELIBERATIVE DEMOCRACY AND HUMAN RIGHTS 81 (Harold Hongju Koh & Ronald C. Slye eds., 1999).

98. Kendall, *supra* note 33, at 977. He further noted "the pains Mill takes, throughout his main argument, to reduce the question, 'Should some types of expression be prohibited in civilized society because the ideas they express are wicked?' to the question, 'Should some types of expression be prohibited because they are intellectually incorrect?' " *Id.* at 975.

99. First of all, one can assert, with Mill, that the substantive contribution of freedom of expression to individual and societal flourishing exceeds any benefit to that flourishing that censorship would yield. This makes that argument contingent on instrumentalist rationales of the sort that "deontological" liberals seek to exclude, but Mill was confident that his position could be defended on just this terrain. Beyond this, perhaps the strongest arguments against censorship reflect what we know empirically about the operation of institutions; however enlightened in principle, censorship in practice has a peculiar tendency (more so, perhaps, than other exercises of governmental power) to produce arbitrary (and even "just plain stupid") outcomes, and to create discretionary authority that can be too easily turned to the advantage of interests other than the ones intended to be furthered. Moreover, the forsaking of censorship can legitimately be part of a political compromise between factions representing competing interests and values. None of these rationales requires the philosophical neutrality of the Rawls-Dworkin school.

so as to serve the interests and values that individual rights, in one or another of the competing conceptions of their content, exist to protect.

CONCLUSION

To a greater or lesser extent throughout most of the world, gender inequality is deeply entrenched in economic, social, and cultural life, largely withstanding the achievement of formal equality and even the prohibition of discrete acts of discrimination. The CEDAW therefore assigns to the State apparatus an affirmative and expansive role in implementing a feminist agenda of social transformation. This alone renders the CEDAW a collective approach to the protection of women, as the collective power of the body politic is brought to bear on the reserves of gender inequality located within the "private" spheres of family, civic association, and economy.

More profoundly, though, the CEDAW implicitly predicates the collective decisions it mandates on a "public truth" about gender relations, against which can be identified the "prejudices" and "stereotyped roles" that are slated for elimination. In embracing a collective commitment to a particular understanding (or at least, a particular range of understandings) of gender relations and of the requisites of female (and male) flourishing, the CEDAW suggests a qualitative extension of State authority in ways that may conflict with the postulates of the main current of contemporary liberalism. Individual and associational rights may be limited, not only to the extent that their exercise produces direct inflictions on others in violation of neutral fairness, but also to the extent that their exercise jeopardizes the character of the moral environment that must be sustained if the good life is to be effectively pursued. The structure of this argument for limitations of rights, abstracted from its feminist substance, is remarkably similar to that of the arguments put forward by conservative critics of liberal individualism.

The CEDAW, interpreted in this way, is therefore a collective approach in a more significant sense. Although it shares with main-current liberalism a common set of foundational premises—premises that set the Left, the Center, and the moderate Right apart from the "organic" collectivisms that reduce individuals (and, above all, women) to players of preassigned roles in unquestioned hierarchical structures—it requires specification of collective ends that go beyond rendering society safe for the pursuit of diverse individual ends.

None of this is to say that the CEDAW is a direct threat to rights contained in the ICCPR.[100] The ICCPR includes limitation clauses that seek to reconcile individual rights with other fundamental human interests that democratic societies pursue. Although main-current liberalism proposes that this reconciliation be founded on neutrality among competing conceptions of the good life and the proper objects of human striving, such neutrality is hardly compelled by the Covenant itself and is rarely in evidence in its concrete applications, even within liberal-democratic systems. To the contrary, status quo oriented societal interests—which often presuppose collective decisions, express or tacit, about the nature of the common good—are regularly accommodated. The impact of the CEDAW on the ICCPR is to establish, as among the societal interests to be accommodated, the transformation of the status quo in the pursuit of women's flourishing. The terms of that accommodation remain to be set by collective processes of debate and deliberation.

Still, much is at stake in the collective decision making to which the CEDAW is a catalyst. The removal of "the chief impediments to [wo]men's developmental powers" may indeed (to invoke Macpherson's rhapsodic account of positive freedom) lead to "a proliferation of many ways and styles of life," but not without the cost of the preclusion of others. As John Gray has pointed out, autonomy presupposes "an environment which contains an array of options worth choosing," and "our judgment of how much freedom there is in any given context follows from our values."[101] These values are prone to clash, and hard choices are inevitable; absent authoritative collective assessment on the merits, some will be favored over others simply by default. What the CEDAW accomplishes is to relocate such clashes from the shadows into the light of day, and to instigate a collective debate in which the obligatory considerations include women's distinctive interests regarding the social patterns that condition women's prospects for flourishing.

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100. Still less would U.S. ratification of the CEDAW jeopardize constitutional protections of individual rights. In addition to being open to a wide range of legitimate interpretations as to the kinds of measures it mandates, the CEDAW would undoubtedly be made subject to reservations exempting the United States, at minimum, from obligations to impinge on constitutionally protected individual rights, as these are currently construed. Moreover, the treaty would, as a matter of domestic law, be both subordinate to the Constitution and non-self-executing. The principal role of CEDAW ratification in the United States would be as a conversation starter.

101. GRAY, *supra* note 20, at 100, 95.