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TRANSCRIPT

DUELING FATES: SHOULD THE INTERNATIONAL LEGAL REGIME ACCEPT A COLLECTIVE OR INDIVIDUAL PARADIGM TO PROTECT WOMEN’S RIGHTS?

UNIVERSITY OF MICHIGAN LAW SCHOOL
ROOM 250 HUTCHINS HALL

SATURDAY, APRIL 6, 2002

INTRODUCTION

STEPHANIE BROWNING: Good morning. My name is Stephanie Browning; I’m the Editor in Chief of the Michigan Journal of International Law. On behalf of the Journal, I am pleased to welcome you to the Dueling Fates Symposium. Our next day and a half together promises to be provocative, perhaps even somewhat contentious, and will certainly stretch us all as scholars, while hopefully reminding us that the subject of our Symposium, women’s human rights, is ultimately remedied on the ground.

As we prepared for the Symposium, both as organizers and participants, we faced a multitude of questions and concerns regarding the topic. The subject of women’s human rights is emotionally fraught and disputes rage as to whether the remedies are already in place in international law, or whether these remedies are toothless theories. We organizers have received responses prior to today’s gathering that exemplify strong and sincere beliefs in the individualist paradigm, and challenge the raison d’être of the Symposium, claiming that the debate between paradigms is simply a false debate. Others have responded that claiming one paradigm over the other is in effect supporting a false universalism. Still others maintain that it is irrelevant whether the debate is true or false, but rather that the international legal regime is so tied up in the theoretical debate that it has failed to institute remedies that women can actually, practically reach. Is either paradigm really effective, or were they co-opted as an answer to women’s rights because they were already established in international law when women’s rights gained force? How do supporters on either side answer the criticism that both paradigms were developed from paternalistic societies in patriarchal times when women in either paradigm were grossly underrepresented?
Ultimately, the debate about the paradigms should be lively and insightful. I encourage you, however, to include in your discussions and thoughts the impact that these paradigms, or the lack of a paradigm, will have in the real world. How will the collectivist approach impact the daily lives of working-class Muslim women in Cape Town? How will the individualist paradigm affect the strategies of women promoting democratization in Venezuela? If the results of this Symposium can persuade players in international law to move beyond the theoretical debate and target the actual problem by utilizing a more effective framework, then this Symposium will have achieved its goal. Now I am pleased to introduce the dean of the University of Michigan Law School, Dean Jeffrey Lehman.

WELCOME AND INTRODUCTORY REMARKS

DEAN JEFFREY S. LEHMAN: Well, good morning. It is great to see so many people out here early this morning. I think this is an unusual Symposium, unusual in several ways. It's unusual in its form. The idea of three panels today followed by a collective project, tomorrow morning (originally styled a communiqué, I think now it's being styled a synopsis) I think is a terrific idea. It is innovative, and I think it's important, and I think it could provide a model for future symposia on difficult issues. I think it's also unusual for its substance. This is going to be a serious exploration of the way in which international law sometimes seems to discuss the rights of women as individual persons and sometimes seems to discuss the rights of women as members of groups, whether the group is all women or perhaps other group identities. Sustained attention to the sources and the implications of these two alternative perspectives on the experience of women in the world can force engagement with a host of other related questions as today's panels make clear.

The first panel will be considering whether a group perspective might provide a more direct path to the elaboration of unique claims for women within the international legal regime. The second panel will consider the interaction between the individual and collective paradigms, and the familiar conundrums that are created by claims of religious and cultural autonomy. And the third panel will consider the legal problems of implementation, of implementing rights that are developed under the two different paradigms. I would like to thank Stephanie and Hamid and the other editors of the Journal for bringing together a group of participants who hold deep expertise in a wide variety of disciplines in order to engage these subjects so seriously. And I would like to also add my own
thanks to the many sponsors of this Symposium who have made it possible. And so, without further ado, let's begin with the first panel. Whoops, with further ado from Hamid.

PLENARY ADDRESS

INTRODUCTION

HAMID M. KHAN: Good morning. My name is Hamid Khan. I am one of the Articles Editors and the Symposium Editor. So, if there's a little bit of blame, or a little bit of throwing a few things, you can all certainly do it at me.

This morning we begin on basically what has been a journey for the Journal of International Law. A journey that began with an idea, a conception, and really begins and ends with all of you, which we now see as a new beginning. First of all, we'd like to acknowledge all of the people who have come from very great distances on such short notice. We would like to extend our thanks to all of you for coming this early Saturday morning. Luckily, the weather has been cooperative. In addition, I would like to pay special thanks to the moderators of our Symposium this morning. We have learned that, due to unforeseen circumstances, Professor Simma will not be able to join us. In his place, Dean Caminker will moderate the first panel. In addition, I would also like to extend my thanks to Professor Mayer from the University of Pennsylvania, the Wharton School of Business, who has agreed to moderate as well. She has devoted a lot of time studying and researching Islamic law with regard to contemporary problems and human rights issues in both North Africa and the Middle East. She has published extensively in law reviews including the Michigan Journal of International Law, and has done comparative law work. Her recent book, Islam and Human Rights, is now in its third edition. 1

In addition, in the last few months, we have been fraught with many images and questions and speculation as to the meaning of [Islamic law]. The events of September 11 have affected all of us, and will be one of the topics of our Symposium here today and in future symposia. We are privileged to have with us today Professor Abou El Fadl from the University of California Los Angeles Law School. Professor El Fadl has been a personal inspiration to me. He has written extensively on Islamic law and the tolerance of Islam. You have probably seen him in numerous publications throughout the world. He has been an advocate for the many

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silent voices among Islam. So, it is without further ado that I present to you this morning's plenary address from Professor Abou El Fadl. Thank you.

**Plenary Address I**

**Khaled Abou El Fadl**: When we consider the dynamics between international law and the paradigms of cultural and moral uniqueness or particularity, we ought to think about two distinct aspects of this relationship or dynamic. On the one hand, there is the issue of whether international law ought to care about unique and particular manifestations of culture and morality. This is especially so when we talk about the relationship of international law to religion. International law—in particular the human rights tradition within international law—represents a set of normative claims about the way that human beings ought to act and behave, and even, at times, think. As such, international law makes intrusive demands upon the moral space in which human beings function. But this is the same moral space for which claims of moral particularity or religion competes, and the pertinent question is: Should the proponents of international law defer, in any fashion, to the competing claims, for moral space, that are made by the proponents of moral particularity or religion? On the flip side of this equation is an equally compelling consideration, and that is: Whether particular or unique religious systems or cultural paradigms ought to care or defer to the competing claims of international law? In essence, the question can be posed with equal force to both paradigms: the paradigm of internationalism, and the paradigm of moral uniqueness.

I will be arguing that in fact, both paradigms have no alternative but to be concerned with what the other has to offer, and I will do so on the basis of a theoretical exposition. Coherent theoretical stands are often the only safeguard against result-oriented activism. When human rights activists and religious activists act without the restraint of reflective and self-critical pauses, they often end up violating the moral space in which human beings function. Instead of presenting claims that could be evaluated and negotiated, their behavior starts to resemble an arrogant and self-absorbed invasion of the moral space of the “other.” But, as we encounter in the doctrine of humanitarian intervention, intrusive invasions of the moral space of others is at times well justified and clearly warranted, but it ought not be done lightly. At a minimum, any act of moral interventionism, in which internationalists challenge and attempt to deny more particular visions of the right or good life, must be justified in coherent and accountable terms—otherwise, moral interventionism starts
appearing whimsical and despotic. I should note that my own expertise comes primarily in the Islamic context and so much of what I’m going to say will relate to the context of Islamic law and Islamic tradition, and their interaction with the international context.

Returning to the main issue at hand, the question I pose is in two parts: (1) Should international law be concerned in what the paradigm of uniqueness—sometimes referred to as cultural relativism or cultural specificity—has to say?; and (2) should the culturally relative be concerned with what international law has to say? As to the first part, international law is, by its very structure, an amorphous and rather negotiable construct. While it is possible to pretend that international law can reduce itself to a positive and particularized set of commands, often, what we observe taking place in international law is an implementation of particular commands, within a certain hierarchal structure of priorities, that are based on moral imperatives. These moral imperatives—if international law is to mean anything at all—are supposed to transcend the particular and the unique to the general and universal. It would not make any sense if international law created imperatives that simply were bound to each specific context, because then, logically, each specific context, if given its full extent, would completely negate international law. The very logic of international law is one of universality and generality—international law cannot be made to defer to specific or particular conditions, and, at the same time, retain its integrity as an international, or multinational legal system. But at the same time that international law is supposed to transcend the particular and the unique, like all legal systems, it is founded on the assumption that it has legitimacy. And, in fact, it is reasonable to maintain that international law, in particular, has a functional need to bolster and deepen its claim to legitimacy. In addition, I would argue that, even if one assumes a natural law premise, the legitimacy of international law must necessarily rely on one form of consent theory or another. So, even if, per international law, one asserts a right to dignity, the person who exercises the right must consent to being dignified—he must desire it, and even, in certain circumstances, demand it. Interestingly, it becomes undignified, or it becomes a negation of dignity, to force someone to be dignified, if they do not wish, or desire dignity. Therefore, the legitimacy of international law distills itself in a presumed paradigm of collective consent, not necessarily the consent of each individual person, but some degree of collectivity by which a people relinquish an amount of autonomy in exchange for a regime of rights and duties. In a sense, the collectivity, however it is defined, relinquishes something of its particularity and specificity in return for an international regime of safeguards and protections, whether such
safeguards and protections accrue to the benefit of the collectivity or the individuals who constitute the collectivity. To be quite clear about the premises of international law, and what international law means: International law is premised on a consensual relinquishing of a degree of autonomy in return for a generalized regime of rights and duties.

Significantly, the age-old presumption, often made by international lawyers, that consent is dependent on a State or government, which represents the collectivity, by now, has become thoroughly flawed and discredited. There are many reasons for this, but, at a minimum, the State is often an imperfect, and indeed inadequate, conduit for legitimacy and consent. Whether the State binds itself to an international obligation, or dissents from it is not particularly informative or telling as to whether the collectivity, which the State is supposed to represent, in fact, agrees or disagrees with the position of the State. Put more simply, governments are institutions that develop their own sets of vested interests, and their own mechanics and dynamics of power. Reliance on the State, or the governments that represent States, as the main agency for obtaining legitimacy and consent, effectively means nothing more than dealing with an elite within the State—the elite that claims to represent the State. In other words, the reality is that when we deal with the State, we are not dealing with the collectivity that a government claims to represent, but with a particular set of vested interests within the collectivity, and those interests are often the interests of an elite, and not the collectivity, as a whole. Of course, on this point, democracies cannot be equated with despotic systems of government. Democratic governments can more convincingly claim to represent the genuine interests of their collectivities, but it would be a mistake to presume that democracies are perfect in this regard. Even democracies do not equally represent the interests of their own collectivities because of the social and political imbalances, and economic, racial, and class inequalities that plague most, if not all, democracies in the world. Especially when it comes to matters that implicate international law, democracies do not equally represent the interests of their citizens. From a sociological point of view, in democracies, matters that relate to international law are usually part of the realm of consciousness of the most educated and privileged classes within society. For the least empowered classes in a democracy, matters that implicate international relations or the law of nations are usually too remote and intangible to be seriously experienced and engaged. In addition, to the extent that democracies defer to the will of majorities, the interests of minority groups continue to be in a disadvantageous position as far as the processes of international law are concerned.
Accepting the argument that the State is an imperfect representative—an imperfect conduit for legitimacy and consent in international law, and that for international law to be meaningful, one must transcend the traditional dependency on State representation and State consent, we are then left to deal with the actual international collectivity, i.e., human beings. It is important to emphasize what ought to be rather obvious, and that is, it is human beings who are the actual source of legitimacy for the regime of duties and rights under international law. In order, however, for the legitimacy of international law to be effective—if we are going to avoid the age-old problems of majoritarian dictatorships, cultural hegemony, or the autocracy of an elite—we must acknowledge that, as a corollary to the right to consent, and also as a corollary to the process of relinquishing autonomy voluntarily, uniqueness is important. Uniqueness or the freedom to be unique and take exception is not simply a concession made by international law to cultural relativism. Rather, it is a necessary, and inescapable, acknowledgement of the requirements for the legitimacy of international law.

Most importantly, uniqueness, however, is not simply the right to dissent from the imperatives set by an international regime. Often, when international lawyers approach the issue of cultural relativism, they speak in terms of whether international law ought to incorporate a system of uniqueness, and by that they mean, whether international law ought to incorporate a system of dissentions or exceptions. But this is a very limited and partial, and indeed often unhelpful, way of understanding the issue of uniqueness. In fact, uniqueness is not simply the right to dissent in particular circumstances, but it is the right to contribute to the formulation of international imperatives so that this uniqueness becomes the right to shape the ultimate form of international obligations—the ultimate form of the international regime. In this sense, the answer to the question whether international law ought to care about uniqueness must inevitably be yes. International law in fact has no choice but to care about the particular and unique. But I think that it is helpful that international lawyers not be focused on the unique as simply a process of dissenting or a paradigm of exceptionalism, but the unique as the process of contributing one’s own identity—one’s particular identity—into the ultimate shape of international law, and the ultimate shape of rights and duties that arise within that paradigm.

Now that I have discounted the State as an appropriate representative of legitimacy and consent, we then get into the problems of international law as it is shaped in the present international context. On this point, I think it is quite right to say that international law often experiences a failure of process. This failure of process is due to the fact that the ability
of the unique to contribute to the formation of international law, like many other things in life, is vulnerable to power dynamics, class interests, patriarchy, and a whole host of other limitations that influence, subvert, and even undermine the process. I would argue that in order for international law to have a meaningful impact, and as a part of grounding itself in legitimacy and consent, while engaging in the process of incorporating the unique, we need to think very particularly and specifically about the means of democratizing the processes of international law, and the means by which it integrates, in its own formation, the views of those who are typically not represented. In this context, unless one has been sleeping through the past few centuries, one must fairly conclude that among the views that have not been represented and have not sufficiently been capable of giving consent and legitimacy, are the views of women. International law in its historical processes has been a patriarchal institution. Having said that, the failure of process identified here does not create a presumption in favor of particular determinations or conclusions, but such a systematic historical failure does create a particularized burden—the burden created is for further integration of the voice of women into the formulation of international law. I am going to come back and tie the idea of failure of process and the burdens of inclusion that such failures generate later, but for now, let’s move to the other half of the inquiry regarding the unique and its response to international law.

Should the unique care about what international law has to say? I will rely on the Islamic context because that is what I am the most comfortable with, but much of what I will say is generalizable to other religious traditions, and other morally particular paradigms. Most fundamentally, the biggest challenge to the idea that the Islamic ought to care about the international is a rhetorical point, but it is a rhetorical point with a significant amount of persuasive force. If in Islam, God is sovereign and God sets the priorities and imperatives that ought to be followed by the followers of the religion, then in a moral sense what ultimately should matter is God and God alone, and not what the international community thinks or demands. International law relies on the consent or will of those governed, but Islam relies on the will of God, who is the real sovereign and source of legitimacy. On its face, it is as if the religious answers to a different master, and thus, could not possibly be reconciled with any claimed universalism that does not answer to the same source of legitimacy and legality. This is the typical argument one encounters when one speaks about an Islamic uniqueness, and whether it should care about what international law mandates. Typically, the argument is that Muslims—and I think you can generalize this to other
religious traditions as well—have a different master, a different source that they must answer to—a source that is not interested in international legal obligations, and that is not bound by anything other than itself. Therefore, according to this view, whether international law says: “Give $x$ more rights,” or, “give $y$ less rights,” ought not to matter to a religious system, or to a system that is not bound by human will and consent as its source of legitimacy.

Although this argument is popular, it is flawed. There are what might be described as external and internal objections to this argument—the external objections have to do with the process of international law, and the internal have to do with the epistemology and hermeneutic processes of religious determinations. The religious argument presented above does not adequately acknowledge the paradigm of consent and legitimacy in international law. Those who make this argument often assume that international law acts as if a God is legislating ultimate morality without the involvement of various participants, including the involvement of the religious, unique, and particular, into the process of formulating international law itself. In principle, international law could incorporate determinations that are based on God’s sovereignty or religious pietistic views concerning what ought to be binding upon all human beings. Since, unlike, for instance, American constitutional law, international law does not need to worry about the doctrine of separation of church and State, religious law could be incorporated into international law, as part of what represents the consent and will of the governed. Conceptually, there is no reason for religious determinations not to become part of the universals of international law. If religious perspectives desire to be included in the paradigm of international law, these perspectives need to be accountable and accessible to the other. If a good portion of the world becomes persuaded that a particular determination ought to become binding on all human beings, the fact that this determination was derived from a religious tradition is not in itself disqualifying. There is no reason that the religious should abandon international law, and there is no reason that international law should become the exclusive realm of the secular. If the religious is convinced that what it adheres to is good for and generalizable to humanity, then being involved in the international legal process means that the religious must find ways of making its assertions about good and evil or right and wrong accessible and accountable to the “other.” By accessible and accountable, I mean the ability to make the determinations of the religious coherent and sufficiently convincing, so as to persuade the other. For example, the Natural Law tradition has had a powerful impact upon the field of human rights, and has contributed to the globalization of the
paradigm of inherent and fundamental human entitlements. Although the Natural Law tradition grew out of a Christian religious experience, at the international level, it was forced to find ways of communicating, persuading, and influencing the Muslim, Hindu, Buddhist, theist, and every other convivial system in the world. There is no doubt that the process of international engagement led to transformations in the Natural Law tradition that forced Natural Law lawyers to revise many of their constructs and arguments. Whether the revising and recasting of the Natural Law tradition was a worthwhile act to the Christian champions of the doctrine depends on the level of commitment that these champions might have had. Arguably, for example, it is worthwhile for John Finnis, who is an influential committed Catholic and Natural Law jurist, to modify his arguments for Natural Law in such a way that his beliefs and convictions might become more accessible and persuasive to those who do not share his religious convictions. In this regard, Finnis might be forced to de-emphasize his references to Catholicism or otherwise downplay the role of his religious convictions in articulating his Natural Law theory; but at the same time, he is able to make his approach more persuasive to Muslims, Jews, or any other non-Christian group. At the rhetorical level, one might even say that by influencing the international, the religious is able to expand the realm of God's sovereignty and will on this Earth. The more the world follows what would be consistent with the demands of the divine, and incorporates these demands into a system of international obligations, the more difficult it is to imagine a loss to the idea of divine sovereignty.

But I think the problem goes deeper than that because from a religious perspective, this functional approach is not persuasive. As such, the question is: "Why should the religious get involved in the process in the first place? Why not simply abstain from the process, because ultimately, the international process is irrelevant to the religious frame of reference and structure of authority?" To argue that the unique or religious ought to work through the international paradigm in order to accomplish incremental achievements is not, by itself, compelling for a paradigm of uniqueness. We need to look more specifically both at the internal processes of the unique or religious, and, shifting the gaze, we need to look at the unique or religious as the potential universal.

Proponents of cultural relativism, and more specifically Islamic exceptionalism, often ignore the fact that Islam, and most religious

traditions, are the product of cumulative interpretive communities. Importantly, the participants in these interpretive communities have not been primarily divine but human. In other words, we ought not ignore the process that generated Islamicity in the first place, and the pivotal role of the human agent in the formulation of Islamic law. To the extent that the religious demands conviction from its adherents, it necessarily relies on a consensual model for the establishing of orthodoxy and the creation of dogma. Despite the claims of divinity, it is important to think about the socio-historical processes that generated these convictions in the first place. In the case of Islamic law, for example, there is an authorial enterprise behind many of the determinations that are treated as orthodox or as the established dogma of the religion. I am not denying the possible divine origin of many of the legal prescriptions found in Islam. As a believing Muslim, I developed the conviction that much of what Islam asserts is the truth is in fact divine. But I also recognize that although there is a divine core to the religion, much of what defines Islam today is the product of the cumulative efforts of various interpretive communities that constitute the collective authorial enterprise behind many of the determinations associated with the religion.\(^3\) In other words, like international law, the unique or religious is subject to a sociology of process that reflects the power dynamics and social biases that prevailed, or continue to prevail, within the interpretive communities of the religion. As such, the unique or religious is subject to a failure of process, which in this context means a systematic exclusion of the voices of particular groups from the authorial enterprise that formed the determinations of the unique or religious. Importantly, often these failures of process can be pointed out by outsiders to the tradition—those who are not so intimately involved in the tradition itself. Such critiques by outsiders, if done in an arrogant or even what might be called an imperialistic fashion, are most certainly alienating to the unique or religious. But, in principle, we ought to recognize that the participation of outsiders in a discourse with the various traditions of the world, offers these traditions an opportunity to notice entrenched failures of process, and to at least consider whether corrective measures are warranted. Examples of this are abundant in the international discourse over the institution of slavery, child labor, trafficking in women, and women’s rights. I am not advocating a one-way moral monologue by a party claiming to represent the international to the unique or religious. In fact, the international paradigm is subject to its own failures of process

\(^3\) On the authorial enterprises and cumulative interpretive communities in Islamic law, see \textit{Khaled Abou El Fadl}, \textit{Speaking in God’s Name: Islamic Law, Authority, and Women} 98–133 (2001).
that can benefit enormously from the critiques of those who have traditionally been excluded or underrepresented. A participatory and cooperative model that recognizes the right of dissent, not as a right of exception, but as a right of heightened contribution, allows for a strong role to be played by any discourse that impacts upon the consciences of the international or the unique. In this paradigm, any good faith discourse that appeals to the consciences of the interpretive communities that form either the international or the unique is seen as a moral and ethical good—not as an intrusion or a form of interventionism. The insularity and exclusiveness of the unique or religious will only help shelter possible failures of process, and will permit whatever hegemonic powers that might have become established within a particular tradition to go unchallenged. This is not a minor point because human experience has shown that ethically troubling practices, such as child marriages, physical abuse of women and children, female genital mutilation, poor health care, exploitative labor practices, or homelessness, flourish behind a veil of secrecy, and that often they are resisted when challenged by outsiders to the culture. Importantly, such practices are rarely sanctified within a particular culture unless there has been a failure of process that has contributed to the desensitization of that culture to the social harm that results from these practices. This is exemplified by the fact that the failures in process are often identified and analyzed by internal voices to the culture, and these internal voices are usually the same individuals who have been the primary victims of this process failure. But if the criticism by outsiders lacks good faith, or is a one-sided monologue, such criticism will fail to persuade insiders to the culture—who are ultimately the ones who have to become convinced—that there has been a process failure or that there is a need for reform.

The second point to make here relates to the nature of the claim of uniqueness. I have been referring to the universal and unique as if they are objective categories, where one represents the mainstream and the other the exception to the mainstream. But in reality, the claim of universalism can be made on behalf of an international system or by a particular religion or culture. For instance, many religious systems do not claim uniqueness as an individualized exception or particularized prerogative. Rather, such systems present an often comprehensive view of the moral or just life, and whether such a view is presented in the form of a demand upon the world or not, it is not morally or ethically neutral. In other words, often it is not the case that a so-called unique or religious system is simply demanding that it be allowed an exception without further normative implications. In claiming dissent from the larger world context, a system with a comprehensive view of the good and
just life is making a normative argument about the nature and value of human beings, and the purpose and meaning of life.

In the Islamic context, this may be called the universalistic imperative of Islam. Islam, like many other religious systems, does not simply claim to regulate the life of a small group of individuals living out their own particularities—for example, Islam does not limit itself to regulating the life of the Arabs of Saudi Arabia. Instead, Islam is presenting a universal and comprehensive vision of morality, ethical values, and human worth. Therefore, in the very act of dissenting from the international paradigm is an offer of an alternative way of life. If, as in the case of Islam, what we have been, rather inaccurately, calling the unique is actually universal—in the sense that it is making comprehensive and transcendent claims about the good life—then every engagement with the world constitutes an affirmative position. If one universal system claims dissent from another universal paradigm then, in effect, it is clashing or at least competing with the alternative. Put differently, when a universal paradigm seeks to dissent, it cannot simply claim cultural relativism as justification, unless it is willing to relinquish its claim of universalism. Why is this important? Because when looked at from this perspective, for instance, in the case of Islam, the very claim of universality by the Islamic system must come to terms with the fact that the audience is the world at large. It is notable, for example, that the holy text of the Qur’ān speaks to humanity at large, and not just a specific race or culture. If Muslims insist on a paradigm of relativism and particularness, and claim Islam as a specific phenomenon unrelated to the rest of the world, this ultimately deconstructs and delegitimates the universalism of Islam. Muslims cannot ignore the international audience without ultimately deconstructing and marginalizing Islam as a world religion. But a religion, such as Islam, transcends not only territorial boundaries, but also many cultural manifestations. Consequently, Muslims cannot claim that all universalisms are fundamentally false without making the universalisms of Islam false, as well. If Muslims accept the possibility of universalism and also accept that the audience is the world at large, then even in objecting to an imperative of international law there is no peaceful alternative to discourse and the attempt to persuade. But if the discourse has integrity, it cannot be based on the dismissiveness of claimed exceptions, or unaccountable entitlements. I will develop this point below.

Thus far, I have argued that the international and unique cannot ignore each other without undermining their own legitimacy, and that failures of process, experienced in each of the paradigms, can be detected and corrected only through a cooperative and participatory paradigm of serious discourse. But there are difficult practical problems
that confront us on this point because the discourse, when it exists, is marred with defects and failures. Nevertheless, if I am correct that the international cannot ignore the unique, and the unique cannot ignore the international, failures in the discourse should not determine whether there ought to be a discourse in the first place. If we recognize the importance of the engagement between the international and unique, discourse failures are only augmented if either the international or unique submit to the unhelpful logic of privileged exceptions or unaccountable entitlements. To be more concrete, entering reservations to human rights treaties where, in effect, a country accedes to the obligations set by the treaty but only to the extent that such obligations conform, for instance, to Islamic law or American law would be an example of the logic of exceptionalism, which undermines the integrity of the discourse. It would be of far greater integrity to refuse to sign the treaty, and justify such a position to the world community, and if the position is not justifiable, to bear the consequences of such an abstention. Similarly, the unaccountable privilege of veto power that some nations enjoy in the Security Council is another example of a practice that is irreconcilable with the integrity of discourse.

The engagement between the unique and international is premised on the assumption that the discourse between the two must be open, accessible, and responsive. In fact, it must meet what I will refer to as the conditions of integrity in discourse, namely: diligence, honesty, self-restraint, reasonableness, and comprehensiveness. I would argue that each of these conditions is necessary for both the integrity of the discourse within the unique, and also between the unique and international. The conditions of integrity in discourse aim to limit the possibilities for abuse and despotism that often result from the failures of process experienced within the unique or the international. I have argued elsewhere that the violation of the conditions of integrity strongly contributes to the legitimating or construction of authoritarian dynamics that undermine and paralyze the process of discourse.

In practice, there are many problems that affect the integrity of the discourse within the unique and also between the unique and international. For example, one serious problem that many commentators have already addressed is the problem of hypocrisy in the assertion of international human rights. For example, few are interested in the plight

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4. For a justification of these conditions of integrity, see EL FADL, supra note 3, at 53–58.
of Palestinian women, in terms of health care and education, under Israeli occupation in the West Bank and Gaza, while a far greater number of people were interested in the plight of women under the Taliban. One can provide endless examples of hypocrisy and very selective levels of sensitivity in the discourses between the unique and international, and in fact, I think that if one had to identify the most difficult challenge to the necessary integrity in discourse, it would be both the actual and perceived hypocrisy and double standards that plague this field. However, it is important to note that the same type of hypocrisy and selective sensitivity exist in the inner dynamics of the unique as well. For instance, the suffering of women or insular minorities within specific paradigms of the unique do not receive the same level of sensitivity or attention as other more politically empowered groups.

This leads us to another one of the recurrent problems plaguing the integrity of discourse. Many claims of uniqueness are made simply as a point of political empowerment, and not as a point of moral empowerment. The unique itself is frequently hindered by the rampant use of apologetics, primarily as a defensive response to the international. For example, in the Islamic context, claims made within the unique and to the international are often made not to explore or explain Islam, but as a defensive response toward the other. Many claims made within the Islamic context are motivated by the sole desire to prove Islam’s ability to compete morally with every other paradigm. So when some, for instance, say, “Islam liberated women,” they do not say it as an assertion to be analyzed and disputed and proven, but simply as a point of cheerleading for the tradition in order to score a point against the other—typically, the West. But the rampant use of apologetics by the unique, or Islamists, does not only lead to the failure of discourses within Islam, but also to the failure of the international to take the claims of the unique seriously. The use of apologetics, and the reaction to such apologetics, lead to a situation where statements made about what Islam is, or is not—whether such statements are made by the participants internal to the unique, or by the international in response to the unique—are often based on the most impressionistic and politicized pieces of evidence that in fact have nearly nothing to do with the mechanics and the realities of the Islamic tradition. Put simply, the use of apologetics and defensive discourses within the unique lead to a denigration of the quality of discourse either within the unique or between the unique and the international.

On the same theme of exploiting the unique and international to seek political empowerment, one finds the unique is frequently constructed primarily as a means of asserting a separate identity of the other. Importantly, as frequently the outsiders dealing with a tradition are eager
to accept the claim of uniqueness, but primarily as a means of distinguishing and denigrating the other. While we find that some claim an exaggerated sense of uniqueness in search of a separate identity, we also find that the acceptance of these claims are sometimes motivated by the same desire for distinction and autonomous identity. Examples of this process are easily found, for instance, in the assertions of Muslim fundamentalists about Islam’s attitude towards women, and the eager willingness of Western fundamentalists to accept these assertions as true. In this context, Muslims who attempt to find grounds of commonality between Islam and the West find themselves accused by both sides—the Islamist and the Western—of lacking legitimacy or genuineness. So for example, as an Islamic scholar, I can look into biographical dictionaries that were written six hundred or even one thousand years ago, and find that these biographical dictionaries list hundreds of Muslim women jurists. On one occasion, I found a reference about a woman jurist who used to pray in the midst of men—right there in the same line as men prayed. A jurist, named Abu Layla, asked her to move from the men’s prayer rows, and join the women. She said, “They are not more knowledgeable than me, so why should I?” In the midst of rampant apologetics, and in the midst of highly politicized assertions of Islamic authenticity, which are not necessarily vouched for by the actual historical record, it becomes exceedingly difficult to speak about the possibilities that contextual examples such as this may offer for curing failures of process within Islam, and finding commonalities with other human beings. My point is that the historical record offers possibilities that could enrich the internal and external discourses, but that are inadequately exploited because of the lack of integrity that often plagues such discourses. In the case of Islam, the historical record is often not consistent with the typical assumptions that either insiders or outsiders hold about what Islam is, or is not. But engaging the historical record critically, honestly, and rigorously, is often hampered by the primacy of political considerations that derail serious investigations of the tradition. Importantly, the failure of international law practitioners to take the processes of international law seriously, and the use of these processes as a stick to smack people on the head instead of engaging them, leads to the corruption of the discourse with the unique. Put differently, too many practitioners of international law seek to find a uniqueness or difference when such differences are in fact not compelling, or at least, not inevitable. Similarly, the apologetic and defensive practitioners of the

5. For an example of this, see my essay on tolerance in Islam and the responses to my essay, especially the response by Stanley Kurtz in Khaled Abou El Fadl, The Place of Tolerance in Islam 51–55 (2002).
Islamic tradition do not take the Islamic tradition very seriously, but often claim it as a way of affirming a distinctive identity—affirming a perceived uniqueness that does not necessarily exist.

In studying the arguments of those who have argued that uniqueness is dispositive, and that most universals are false, one is struck by the fact that, especially in the Islamic context, nearly every claim of relativism—and nearly every claim of uniqueness—is expressed on a foundation of cultural arrogance. For example, I recently wrote a review of a book that argues that Muslims have their own sense of reality; they do not really have a Western sense of time, and really do not have the same sense of reality that Westerners do. According to this book, Muslims must be accommodated in their own way because they have a very different way of seeing and understanding life. The most striking thing about this book is the extent to which its ostensible accommodationist approach to Islam masks an undeniably condescending attitude toward Muslims. For accommodationists, such as the author of the book I reviewed, the claim of deference to uniqueness amounts to nothing more than saying: “Muslims have a right to be uniquely ugly, uniquely stupid, or uniquely despotic!” This surreptitious concession to the integrity and autonomy of the other is actually nothing more than another manifestation of the lack of integrity in discourse. The point is not that every claim of uniqueness must be treated as inherently suspect, but that a healthy dose of skepticism would be advisable when dealing with a claimed uniqueness either by insiders or outsiders to a tradition. Because of the failures of process that contribute to the lack of integrity in discourse, those who claim uniqueness ought to be looked at with a healthy dose of skepticism, and those who claim established universals ought to be vigorously questioned about the failures in their own processes and the integrity of their own discourses.

I will close with a note about a possible universal that might help establish common grounds for a cooperative and participatory collaborative venture for the international and the unique. When one looks at the tradition of discourse in the international context, and when one looks at the tradition of discourse in many of the unique contexts, particularly those that are religious, one will find that what unifies them is a preoccupation with discovering the aesthetic of the sublime—with discovering beauty in the human condition. I have not yet found in the Islamic context—or in my readings in Judaism or Christianity—a single authority who says: “We particularly cherish the ugly.” And I have not found ugliness cherished by anyone writing on behalf of the

international or unique. I would suggest the aesthetic of the sublime—the idea of beauty and the conditions that promote what is beautiful—as a unifying goal of humanity. The sublime is a state of human goodness in which people feel safe, healthy, fulfilled, dignified, and free from suffering. I think that intuitively we sense that suffering, including suffering because of a patriarchal context, is never a beautiful thing. And from the perspective of the Islamic, it would be truly difficult to argue that God finds beauty in the suffering of a human being. Furthermore, I would argue that in direct proportion to the spread of suffering is the regression of the sublime and beautiful in human life. The greater the amount of social and economic hardship and misery, the lesser the ability of human beings to reach for the aesthetic of the sublime, including the ability to overcome the physical limitations of life, and reach for the transcendent. If a human being does not feel a sense of significance in life, a sense of dignity, and safety, the conditions for the creation of beauty, including the transcendent are seriously compromised. I would argue that belief in religion, the generation of folklore, art, thought, fidelity, and love are parts of the aesthetic of the sublime, but that such metaphysical accomplishments without the fulfillment of physical needs, such as safety and health, are very difficult. I think that if we get beyond the failures of process, and the lack of integrity in discourse, we are forced to confront the humanness of human beings, with all its physical, metaphysical, and transcendent aspirations. Whatever quashes the human being and forces him or her to live in a state of mere subsistence, without the ability to think, learn, dream, and hope, cannot be considered beautiful. According to this paradigm, it is reasonable to assert that whatever increases the suffering of human beings, and robs them of their physical well-being and transcendental abilities should be subject to heightened levels of scrutiny, and an added burden of explanation and justification. If there is evidence that the members of a society are denied the ability to engage in the aesthetic of the sublime, whoever claims that such a condition is justified, either under the paradigm of internationalism or uniqueness, must be subjected to closer scrutiny, and should shoulder a heavier burden of justification. The aesthetic of the sublime, I think, might be a good starting point for a discursive process that can be integrative, legitimate, and ultimately end up in an institution that is collaborative, and truly human, with all the sublime qualities that are inherent in the word human.
SESSION I:
THE SIGNIFICANCE OF UNIQUENESS

EVAN CAMINKER: Good morning. I'm Evan Caminker. I am a Professor of Law here, as well as the Associate Dean of Academic Affairs. That means I'm not Bruno Simma, as promised to you, and I'm very sorry to say he had a medical emergency with a family member this morning, and that is why he's not with us. I'm sorry for you all, because he's a lot funnier than I am early in the morning. But I will do my best to stand in, sit in, I guess, and bring you as well my welcome from the University of Michigan. It's wonderful to see you all here participating in our Symposium. I thank also the Journal for doing such a wonderful job of bringing together a fine set of panelists to discuss some incredibly important issues, ones obviously of great topical significance.

The first panel this morning is called the "The Significance of Uniqueness," and it will focus on the status of women in society, both under State and international law. I'm very pleased to be able to present three distinguished panelists that will be with us this morning. The first is Professor Elisabeth Jay Friedman. She is a Professor of Political Science at Barnard College at Columbia University. She has a B.A. from Barnard Columbia, as well as a Masters and Ph.D. from Stanford. Her areas of scholarly specialty include work on gender in politics, comparative politics, and Latin American politics, and as just one recent example of her work, we can point to her book, called Unfinished Transitions: Women in the Gender Development of Democracy in Venezuela 1936–1996.7

We also have with us today Professor Rhoda Howard-Hassmann. She's a Professor of Sociology at McMaster University in Ontario, Canada. She's also the Associate Director of the Research Institute on Globalization and the Human Condition there. She holds a Ph.D. in sociology from McGill University, and is a Fellow of the Royal Society of Canada. Her areas of specialty include many human rights issues, particularly women's rights and refugee rights in both Canada and Africa. One example of her work is her book Human Rights and the Search for Community.8

And finally, we're proud to have one of our own on the panel, Christina Brandt-Young. She is a J.D. student who will be graduating next month from this school. Before joining us she earned a Bachelors and Masters of Music at Northwestern University, and also has a Masters

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of Arts from the University of North Carolina at Chapel Hill. She has worked on a number of issues with respect to Muslim law at the Parliamentary Office of the Governmental Commission for Gender Equality in Cape Town, South Africa, and has also done a great deal of human rights work in Phnom Penh, Cambodia, as well as South Asia and New York. She's a shining example of why the faculty here are extremely proud of our student body. So I welcome them all. Each of them will present their ideas for I think approximately thirty minutes. Then we will have plenty of time for discussion and questions afterwards. Thank you. Professor Friedman.

ELISABETH JAY FRIEDMAN: Thank you very much. Thank you all for turning out at the early hour of before ten o'clock on Saturday morning. I would like to particularly thank all of the staff at the Michigan Journal of International Law, in particular, Hamid, for putting this together, and for inviting me to be part of this panel and this fascinating Symposium. I have been compelled by the issues that we are discussing today now for several years, but perhaps from a slightly different perspective than many of the other panelists you will be hearing from today. I have not studied law. I do not teach law, and I am certainly not an international lawyer. But before I disqualify myself any further, please allow me to tell you what I have done. For the last decade, I have been studying how women organize transnationally and also in the Latin American region, engaging in research that has taken me from the Vienna Human Rights Conference of 1992 to the Beijing Fourth World Conference on Women in 1995. My research has taken me from Jujuy in Northern Argentina to San Salvador, El Salvador. And as it turns out, it is impossible to do this sort of research and not be struck over and over again by the importance that the international arena has in the pursuit, the very active pursuit, of women's rights. Whether women are literally knocking on the U.N.'s doors, sending e-mail across the globe, or contemplating how international legislation can help win national battles for women's rights. I have also been able to see the intense opposition generated to some women's rights claims in international fora, such as the U.N. conferences that were so plentiful in the 1990s. So these observations have led me to try to understand the importance of the international legal regimes that we are discussing today.

Now that you know where I am coming from, I would like to start with some reflections on a question posed for our panel: Why women's rights require protection under both State and international law. In a perfect world of States that really devoted themselves to the egalitarian development of all their citizens, women's rights would not require protection under international law, because State law would be doing the
job very nicely. But history has shown differently, and shown differently over and over again that not only women, but many other groups have suffered at the hands of domestic decision makers who did not take into account their needs and demands. This, of course, explains the work being done by women and men across the globe to change State or national level law to protect and promote citizens of both genders. But international law can be another important resource.

Now, don't get me wrong here. I am not a world government type who believes that we could set down what is right and wrong for everyone in every country, and then hold governments accountable for every individual case of mistreatment in world courts. For me, international law—which is occasionally very effective for particular individuals, including within world courts—serves mainly as a forum for global debate and international norm setting.

So why do women need this forum for global debate, and why do they need these international norms set? Because international law can establish egalitarian gender norms that women's rights activists can hold their own governments up to once the governments have signed on to it, or perhaps even if they do not. They can hold these up as international standards that the governments have promised or should promise to meet. And when dealing with issues as sensitive as the structure of gender relations, such as what roles women and men should play in families, how much autonomy they should have in reproductive decision making, and how their sons and daughters are educated, domestic education may not be enough. You may need the weight of the world to throw around occasionally, at least at the rhetorical level.

To concretize this claim, let me speak briefly about a few cases from the region of the world I am most familiar with besides the United States, that would be Latin America, and the international treaty that is most clearly focused on women's rights, which you all, I am sure, know is the Convention for the Elimination of All Forms of Discrimination Against Women, or CEDAW.\(^9\) Many of you are probably familiar with CEDAW, but for those of you who may not be, a quick description. The treaty seeks to defend women's legal rights to nondiscrimination in areas ranging from political participation, to employment, to the family, but it also focuses on women's reproductive rights and speaks to the importance of insuring women's social and cultural equality by achieving the modification of social and cultural patterns of conduct that lead to stereotyped roles and hierarchies between the genders. To insure women's rights, CEDAW makes States responsible, once they have signed

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on, for adopting legislation refraining from discrimination against women, and taking "all appropriate measures" to eliminate discrimination. These most famously include the special temporary measures aimed at accelerating de facto equality between men and women, which have been translated into things like quotas for female legislators or affirmative action employment policies for women.

Although CEDAW was adopted by the U.N. General Assembly in 1979, it is far from a static treaty. The committee that oversees CEDAW uses its General Recommendations to interpret and reinterpret the treaty in light of more contemporary issues. Just a couple of examples of course would be the General Recommendation Number 18 that requires that States that are submitting reports on the status of women in their countries also report on the situation of disabled women. Or the General Recommendation Number 19, which interprets gender-based violence, whether committed by State actors or private actors, as discrimination within the meaning given in article 1 of the treaty.

CEDAW has 168 State Parties. How is it made effective? Well, there is the reporting requirement that every four years the States submit a progress report on the status of women according to CEDAW in their particular countries. That is gone over by the commission in charge of CEDAW, and suggestions are given back to the governments about what they ought to do in the next four years. You probably also know that CEDAW now has an Optional Protocol that States can sign, which entered into force in December 2000, which enhances the mandate of the CEDAW committee. It can now receive individual complaints, and initiate inquiries into serious or systematic violations of women’s rights. It is designed to provide international recourse when it is not available anywhere: that is, when individual actors within domestic contexts have already exhausted any possible domestic remedy. Thirty-three States have now ratified the Optional Protocol and seventy-three have signed onto it.

So there is your most prominent international treaty. Why has it been used in Latin America? Latin American legislation historically was quite influenced by traditional Catholic beliefs, particularly in the case of gender relations, as well as European norms, with the Napoleonic Code, of

course, being the basis for legislation across the region. The church remains a very important actor in reform processes, particularly around legal issues that have to do with gender relations, and the strength of the church is often directly correlated to how much reform can happen at the national level in different Latin American countries. And let me illustrate the spectrum of the strength of the church throughout the region; it is by no means a monolith. On one end of the spectrum, you have Cuba, which outlawed religion for quite a long time, with legal divorce, legal abortion, and legislating equality between men and women in the home to the extent that they are also supposed to share household duties equally. That would be childcare and the dishes. That is part of the Cuban Family Code of 1975. On the other end of the spectrum, you have Chile, which does not have legal access to abortion or divorce.

Now, Latin American legislation has been changed periodically through reforms, but there is still a lack of agreement among the major bodies of Latin American law, including civil codes, penal codes, and national constitutions when it comes to various issues of gender equality. So many gender equality advocates have turned to international legal regimes to help bring pressure on domestic governments to end discrimination. There are many contextual reasons for that, and I would be happy to go into that further if people are interested during the discussion, but part of this comes from Latin America’s unfortunate, but deep and long lasting experience of scrutiny on the part of the international community because of the massive violations of human rights that have happened periodically in the region. So human rights activists have become quite aware of the importance of legal remedies at the international level, and human rights have been interpreted quite broadly throughout the Latin American region, which has not only to do with its specific context of human rights violations, but also with the development location of the Latin American region in the Third World.

Specifically referring to CEDAW, gender equality advocates have adopted CEDAW domestically. They have used it in legal reform attempts, and even in court cases. And please allow me to give you some examples, because this is the fun stuff. Brazil signed on to CEDAW in 1981 in the middle of an authoritarian period, and they took several reservations to CEDAW on aspects they felt contravened the domestic law of the time, including things like women’s equal right to movement, and freedom to choose the home domicile—measures to insure the same rights to women and men—and to enter into marriage, and their equal rights and responsibility during marriage and divorce and so on. Now, there was a democratization period, you will be happy to know, in

Brazil, at the end of the 1980s. It was accompanied by an extremely strong women’s rights movement, and the Brazilian State took off most of its reservations to CEDAW in 1994, although it was only the quite recent 2002 revision of the Brazilian Civil Code that insured these measures in Brazilian law itself.¹⁵

But here’s perhaps a more interesting story from this particular country. In the state of São Paulo, which is a very important and powerful state within Brazil, a state government institution that is responsible for overseeing women’s rights worked hand in glove with organizations from the state level women’s movement and passed a state version of CEDAW called the “Paulista CEDAW.” The Paulista CEDAW has been signed onto by municipalities that represent 45 percent of the population of this state.¹⁶ I just thought I would show you a couple of illustrations about how they are going about using CEDAW, since you might be interested to know how effective international law is for domestic women’s rights. [Illustrations presented.] So here is one description of the women’s convention. You can see that they believe that the women of the world should unite. But more to the point, the Brazilian women’s movement is very well aware of Brazilian gender relations, and here is one of the nice pamphlets they have used to talk about what CEDAW does. You will notice that the word “respect” is written in lipstick. What it says here is that we have succeeded in passing the law, and now we must look to practice. And inside, they describe how CEDAW is going to be used in Brazil once a municipality has signed onto this State level legislation. The signatory, they say, who does not fulfill the convention will not suffer material sanction, but will certainly experience political and ethical disapprobation, or shaming. To make sure of that, they published yet another document. Yet more lipstick. This document is called “The Law and Life.” It has about five chapters that have to do with big issues of women’s rights, including childcare, health, violence against women and work. In each of the chapters, the Brazilian legislation including CEDAW is set out on one side. On the other side is the reality of the situation that the law is speaking to. So here you have law and life. And then, at the end of each chapter they have several suggestions about how to make life look more like what the law says life should look like.

You might be interested, if you do not know already, that a city in the United States has also passed CEDAW. That city, of course, would be

San Francisco, California, where I am from. It passed it in 1998. Interestingly enough, with similar cooperation among city, women’s, and human rights organizations. As you have heard, I have spent a lot of time looking at the Venezuelan women’s rights movement, which when visible is quite legally oriented. They have repeatedly used CEDAW to try to convince lawmakers and the public in their campaigns for gender equality, whether this was a reform of family code or the civil code aspects that have to do with family law, a campaign to promote women as legislators, or the gender sensitive aspects of an overhaul of the national labor law. Essentially they said, as the Brazilians are saying, “Hey, Venezuelan government, you signed onto CEDAW in the early 1980s, and now you have to keep your promises. You have to fulfill the legislation that has been sanctioned by the international community.”

In Colombia, in 1991, there was a constitutional reform process, and women’s groups united all of their different platforms around a call to put CEDAW principles directly into the constitution, and they succeeded in many areas. As cited by UNIFEM, two organizers explained the importance of CEDAW. They said,

The strengths of the proposals . . . lay not only in their recognised support by the women’s organisations, but in the fact that they emphasized that the principles embraced in their proposals were mandates contained in international human rights instruments, such as CEDAW. They won legitimacy by being framed as internationally recognized human rights provisions. In this case, the use of human rights language proved to be an effective strategy for introducing women’s rights into the constitution, taking advantage of the fact that Colombia is a country that is constantly scrutinised by the international community for its compliance with human rights principles.

Extremely strategic. There you have another reason for the effectiveness of these norms when a country is already under scrutiny for its compliance with various aspects of international rights law.

In Argentina, women’s rights advocates also used the opportunity of the constitutional reform, again in 1994 here, to give CEDAW an explicit constitutional rank along with several other international treaties to which Argentina is a signatory. They are encapsulated in article 75 of the Argentine Constitution if anybody is interested in doing some follow up. Another thing in Argentina was that in 1991, a national women’s

17.  *Id.* ch. 3 (National Laws).
18.  *Id.* ch. 1 (Constitutions).
ministry was set up with the explicit purpose to oversee fulfillment of CEDAW, which is a common enough excuse given for setting up what people have been calling women's spaces in the State, generally in the executive branch. If any of you are familiar with the actions of these spaces, you will know that they are often faulted because they are under-funded, understaffed, and routinely ignored by national State actors. However, their creation is not insignificant, primarily because they often serve as catalysts for women working in different spheres of political activity, such as civil society, as well as within political parties, and this ends up being really a channel or a conduit for their demands directly into the State.

Finally, how about using CEDAW directly as legislation. I have an example from Costa Rica. In 1991, Alda Facio, of Comité de América Latina y el Caribe para la Defensa de los Derechos de la Mujer (CLADEM), which is a regional women's human rights network, challenged the practice that women must have their husbands' consent to sterilization as against the constitutional principle of equality. She challenged this in front of the constitutional court of Costa Rica. Since gender equality is not specified in the constitution, she brought in CEDAW, to which Costa Rica is a signatory, and on the basis of its article 16, which provides that States shall ensure equality in marriage and in family relations, the court found that the practice violated women's equal rights, and that the government should ensure that the practice be stopped, which it largely did.

Finally, another way that CEDAW is used by women's rights advocates in Latin America and many other countries is in the shadow document process. Every time a government presents its required report on the status of women in their country to the CEDAW committee, nongovernmental organizations get together. They write a shadow report that is introduced at the same time as the governmental report, and often serves as the basis for the committee's critique of the governmental report.

So there are a few examples of the why and how of women's use of international law in the Latin American region. I would like to spend the remainder of my time reflecting quickly on another assignment of this panel, to explore what the unique rights of women are, why these rights have not thus far been adequately protected under international law, and whether these unique rights can be more successfully protected in a Western individual rights paradigm, or—and perhaps we were missing

an adjective here—is it an Eastern or a Southern collective rights paradigm? I will leave that up to you to answer.

Not small questions here. I will not do them justice. But let me make a first attempt. What are the unique rights of women? And here clearly I am interpreting the questions of uniqueness quite differently from our first speaker. Well, let's think about what we commonly associate with women's rights struggles: the formal political and civil rights demands, such as the right to vote, the right to serve in government; to participate in political life and public life more generally; economic rights, such as equal pay for equal work, equal access to economic decision making, whether at the family, the governmental, or the workplace level; welfare support; social rights, such as equality in marriage and divorce; equality in decision making where children are concerned; inheritance rights; equality in education; freedom from violence; and of course, reproductive rights, which clearly include the right to choose the timing, spacing, and number of children, to have good reproductive health, and have recently been extended to also speak about having full autonomy over the exercise of an individual's sexuality. It is quite obvious that many of these rights claims are not asking for something that is unique for women, but simply extending to women the rights that men already have. One right that is avidly discussed in the realm of international women's human rights activism—which I have had the privilege to observe in some detail—is the right to a life free of violence.

Now, the question is, is this a unique right of women? And I am here to tell you that this is a debate that rages right here in Ann Arbor. I did a little field research last night in the bathroom of Zanzibar [a local restaurant]. Have you seen this pamphlet? Okay. Maybe somebody here is responsible for these pamphlets. I have seen them in bathrooms all over Ann Arbor. I made a little tour yesterday. "There is no excuse for violence against women." [Title of pamphlet.] And this one happened to be up in one of the stalls at Zanzibar. So if you doubt my field research methods, you can go and check it out. I hope they have not taken them down.

So there was a little collection of these in an envelope on the side of the stall. And of course, there was graffiti next to it. One piece of graffiti read, "Shouldn't this be up in the men's john?" Clearly indicating that this was something that men should pay attention to, because it affected women. And men were causing the violence against women. Then the other piece of graffiti pointed at "There is no excuse for violence against women." And it said, "Or against anyone else." Nicely illustrating that you could consider that violence against anyone is a violation of their rights. So that is the argument. That ending violence is not something
that women are uniquely in a position to receive or to benefit from, but men also have that right.

Historically it is true that international human rights law has not protected women against a great deal of the violence that they do experience, since it has focused on eradicating abuse at the hands of so-called public agents controlled directly by the State, or supposedly controlled by the State. Much of the violence that women experience is at the hands of private actors, such as family members or partners. International human rights law, like many bodies of law, political thought, and political structures is, as our morning speaker [Khaled Abou El Fadl] would say, patriarchal—initially developed with male individuals in mind by male individuals. And that is not surprising, since historically men were considered the principle actors in public life. So taking women into account requires a translation and a reinterpretation of things like traditional human rights law to make sure that the perpetrators of all violence are made accountable. But not only women experience violence at the hands of private actors. Girls and boys and men do also. So the right to a life free from violence, whatever its source, is not a unique right that only women should have protected, although it is well worth remembering that it is focusing on women’s experience of violence that has brought this to light. So it is one of the many rights that going truly gender neutral, that is, thinking about everyone’s experience, and not just men’s, can help to identify.

Of the initial list that I put out there, the area where women really do seem to have unique rights are reproductive rights. Because at least at this point in time, women are uniquely able to bear children. Perhaps if we have this conference again in twenty years, I will take that one off the list, too. Now, I do not mean to imply by this that men are somehow exempt already from concerns around fertility, birth control, etc., and they also of course have rights to full information about how their bodies work, what it means to be autonomous with respect to their sexual health, and to their sexual decision making. However, as long as women are bearing children, there are going to be ways in which their reproductive rights will differ from men’s. And of course there will be quite different consequences of whether or not they have reproductive rights.

I am going to just bracket that for the moment, and note that for the vast majority of the rights claims that I put out for consideration, it is not really a matter of recognizing that women have unique rights, but ensuring their equal rights with men, or recognizing that focusing on women can reveal certain universal rights that men and women share that may have been neglected in an overall patriarchal rights framework. This is not to claim, for example, I am not going to stand up here and
say, “Men and women experience domestic violence at the same rates,” although I know that that is contested data. So it is not that men and women will share the use of the rights that they have in common, necessarily, or need them protected in the same way, right? Because, of course, talking about this stays at the level of the rights that you have, and does not broach the subject of rights fulfillment, and the implementation of rights may well require policies that target women uniquely, and it is one reason why CEDAW covers the so-called proactive policies that States are supposed to put into place to ensure gender equality. But whether you think that women indeed have unique rights, or simply need the spectrum of their rights claims fulfilled, it is still well worth considering, as this panel asks us to do, whether women’s rights can be better protected under an individual rights paradigm, or a collective rights paradigm.

The debate over which half of this duality is better for women occurs most starkly when some observance of what could be considered women’s individual rights, such as the right to equal inheritance, the choice of a life partner, or reproductive autonomy, somehow comes into conflict with the assertion of the rights of a collective to support its families in a certain way, to maintain a traditional or religiously mandated set of unique roles for men and women, or simply to promote the biological growth of the collectivity. Here supporters of individual rights will say that women’s individual rights must be protected, notwithstanding the desires of any collective to which she may belong. Supporters of collective rights will say that as a member of the collective, women’s rights will be protected within and as an integral part of a framework of a particular society. That, of course, raises the issue of who women are. Are they fundamentally women, individuals, or individual women, or fundamentally part of different collectivities? The answer is not hard: they are both. Women, like men, are both individuals and part of collectives, or collectivities, though sometimes the salience of one or the other identity will shift, depending on the context. That means that they have the right to be protected in both these identities. And we can certainly imagine many times that these rights do not come into conflict. Perhaps they reinforce each other. When say, girls from an indigenous group have the right to education and the right to an education in their own language. It is only when these rights come into conflict that this issue of which is better for women, as I said before, comes up.

It is my opinion, from the research that I have done, that far too often collective rights are used as a pretense for the continued discrimination against women in the name of culture, or religion, or nationality, when we know quite well that these claims are historically
determined, subject to interpretation, and not at all set in stone. In a research project I have been working on for about five years that looks at debates over issues of States’ rights, or sovereignty debates, that emerged at the U.N. conferences of the 1990s—which are wonderful opportunities when the global debate over pressing issues is most visible—my fellow researchers and I found that women’s rights and references to gender relations, including, very importantly, the structure of families, were the most consistently contested issue over a range of conferences. This came out in the debates on the floor or in reservations taken by particular countries to final documents, and as you might imagine, many of the objections raised and the reservations taken framed the objections of particular countries as that there were particular principles in these documents that contravened either Catholic or Islamic faith. This was not only evident at the Fourth World Conference on Women in Beijing, but also conferences on the environment, on human rights, on population, and even on housing.

It is also worth noting here that CEDAW is one of the most, if not the most, heavily reserved international treaties, and that fifty-five of the signatories to CEDAW have reservations that are based on supposed violations of national legal or cultural norms. Why is it that women’s individual rights are often perceived as threats to national or cultural collectivities in these spheres of debate at the global level? Women are often the literal and figurative bearers of culture and nationality, as well as religious belief. Moreover, tradition is passed on by mothers to the children they always bear, and are quite often responsible for raising. Thus, without pretty tight control over women’s activities, it is difficult to ensure the biological propagation of a country, certainly its racial, national, or religious coherence. Clearly, one of the central elements to control is women’s sexuality, whether the restriction of their reproductive rights, or orientation of their sexual life toward reproduction within marriage. This sought-after control explains the threat posed by women’s ability to abort or even learn contraceptive techniques, and to exercise their sexual autonomy, including entering into lesbian relationships, choosing whether to have children, and choosing whether or not to marry the fathers of their children.

Moreover, since the family is often seen as the literal building block of society, any threat to the gender relations underpinning men and women’s “natural” roles in the family, or the family’s structure itself may be read as a threat to the collectivity as a whole. So it is no wonder that the supporters of collective rights are wary of individual rights claimed for women that might seem to undermine the literal existence of the collectivity. But instead of confronting such a supporter with a firm
“individual rights only please,” it is much more constructive, I believe, to think about in which specific situations contextually situated women need their collective rights protected, and in which ones individual, and how to ensure that they have effective access to both. It is also quite crucial to understand that the articulation of rights is not necessarily an objective process, whether we are talking about individual rights or collective rights. It is important to listen to different informants within national cultures, and different interpretations within particular countries when trying to decide what women’s rights can be in a particular context. But it is interesting to note that many of the instances where women’s individual rights are being claimed to threaten community and the rights of the collectivity do involve precisely those few unique rights I bracketed before, particularly around reproductive autonomy.

A final reflection. I think that given the region of the world that I look at, it would be disingenuous for me to end without observations that critics have made about the efficacy of using international law to ensure women’s rights at the national level. Leapfrogging, as it is called, the national State to try to pull in international norms or international law can bring accusations down on the heads of women’s rights activists or gender equality advocates of imperialist Western feminism: “You’re bringing in inappropriate, acultural, and often Western ideas and concepts where they don’t belong.” And that can often be a very severe accusation that can alienate possible supporters for gender equality. Also, legal solutions are not always the appropriate solutions to entrenched social problems, which are often caused in great part by deep-seated structural inequalities, particularly global economic disparities.

A final critique is that the State, particularly in the region of the world that I look at, as well as other world regions, is not always available as an agent of protection or promotion of women, particularly in countries where the rule of law is not a given. But while international legal remedies are no panacea, they certainly have been, and I believe will continue to be, important resources for women’s rights activists at the local, national, and regional levels. Thank you very much.

Evan Caminker: Thank you very much, Professor Friedman. I am actually not sure if there was an assigned order. Yes there is. So, let’s now hear from Professor Howard-Hassmann. Time out for a little technology.

(Brief pause)

Rhoda E. Howard-Hassmann: Good morning. I also would like to thank you very much for inviting me to a very interesting
conference. My paper is called “[Dis]Embedded Women.” I am venturing into postmodernism, etc. I have put brackets around the [Dis], to talk about what the state actually is of women. Their sociological state.

The central question which was sent to me some time ago was the following: Which international legal approach more effectively promotes women’s rights, the collective or the individual? Now, I am a political sociologist. I have no legal training. We could discuss the state of admissions of women to law school in Canada in 1969 to explain this. But I have been publishing in the field of international human rights for twenty-two years, and I believe quite a number of lawyers do occasionally read me. I am particularly known for my defense of the universal individual human rights, and I am somewhat known for my defense of economic rights. My regional areas of expertise are sub-Saharan English-speaking Africa and Canada. So I am not going to comment directly on the law. I want to rather make some remarks about the underlying assumptions about the nature of society and women’s roles in it that are pertinent to this question.

So my position is that women’s rights are individual rights, and I am going to defend this by making seven points. I like the number seven. Firstly, the dichotomy between Western individualism and non-Western collectivism is false. Secondly, much of the debate regarding women’s roles and women’s rights confuses interest and identity. Thirdly, women do not necessarily constitute a social group. Fourthly, women’s rights are actually universal human rights. They pertain mostly to women, but also to men. Fifth, the debate about whether women are a social group is rooted in part in differing conceptions of women’s embeddedness in society. Sixth, the debate is also rooted in part in differing conceptions of women’s embeddedness in their own religious group. And seventh, even though women’s rights are not collective rights, they will only be obtained in situations in which women and some men act collectively.

Now, to start with this business about the unique women’s rights, and whether they can be more successfully protected in a Western individual rights based paradigm or a collective rights based paradigm, I really do not like dichotomies. I am a sociologist. I study social change, and the world is not divided into dichotomist units. The tension between individualism and collectivism is not a tension between the West and elsewhere. There is a continuum of social practices from extreme individualism to very tight collectivism, and this continuum is evident both in the West and in the non-Western societies.

So there is this common perception that the West is individualist, while other parts of the world are collectivist. But it is wrong to say that there are no collectivist strains in the West. One of the reasons I got into
the human rights business was because I studied and learned about fascism and communism, both of which are Western-origin political systems, both of which were collectivist, and both of which violated human rights in very extreme ways. There are other tendencies in Western society which are not necessarily rights-violative at all, but do reflect Westerners' thinking about what is problematic about the way they live. Those are communitarian and conservative perspectives as, for example, evidenced in the United States by the sociologist Amitai Etzioni, who has started a communitarian movement. It is also wrong to assume that the United States is a paradigmatic Western society, and I spend my life running around the world saying, “The United States is not the West.” The United States, in many ways, is an outlyer. It is very unusual, very different from other Western states. For example, many states in the United States practice capital punishment, which has been outlawed in Canada and by the European Community. Canada is somewhat more collectivist than the United States. Much of Northern Europe is far more collectivist than the United States. In these countries, we still have influential social democratic parties. In fact, in some countries, we still have communist parties, and there is still a strong influence of Christian communitarian thought, both Protestant and Catholic varieties. Nor is it correct to assert that there are no individualist tendencies in the non-Western world. There are, from my understanding of it, strong individualist tendencies within Islam focusing on the individual’s relationship with Allah, including the individual woman’s relationship. Many African religious and moral systems also stress what we might anachronistically call individual rights and responsibility, as do many Asian systems.

In any case, whatever the original religious texts are, we live in a social world. The world we live in is one in which for the last fifty years, if not longer, in all of the world, people have been experiencing the social processes of urbanization, industrialization, and secularization. And in these worlds, the real world, not the world stipulated by religious texts, individuals frequently act on their own desires, hopes, and ambitions. For example, women in Africa may move to the city to follow their husbands. But they also may move to escape nasty marriages, to escape witchcraft accusations, or merely because they would rather go and live in the city.

There are schools of thought that promote supposedly particularistic, unique conceptions of human rights. You can find in the literature Asian conceptions of “human rights,” “Muslim,” African, and “indigenous” conception of “human rights.” And many of the scholars who write essays will claim that their conception is unique to their part of the world.
or their religion. They are wrong. If you put these schools of thought together, you will see that they bear marked resemblance to one another. Assuming for a moment that there is no political interest in making these assertions, which is a big assumption, what these assertions are is a reflection of a nostalgia for a world more recently lost in Asia, Africa, Latin America, and so on than in the West. It is a nostalgia for a rural society in which families are embedded in their village communities, everybody practices the same religion, there is social homogeneity, and consensus on social values and roles. This world has been lost in the West for over one hundred years. It is more recently lost in the non-Western world.

I would contend that in discussing strategies for women’s rights or anyone else’s rights, we should not be influenced by myth or nostalgia. We should be influenced by a realistic picture of women’s lives today in actual communities subject to control by familial, religious, and State authorities. We must be aware that men act in their own interests. Their interests are often in the continuation of patriarchy, which provides them with both material and symbolic satisfaction, as well as not having to change the diapers. And we need to be aware that religious authorities, as well as patriarchal or political authorities, can also have patriarchal interests, be corrupt and be extremely abusive of individuals’ rights.

Now, the next section I wanted to talk about here is the problem of confusing identity and interests. Given the real world, rather than the mythical world, in which women live, it could be argued that they share a common identity. They are part of one collectivity, and therefore they need collective not individual rights. One argument here is rooted in shared biology. Women, not men, bear children. Women are much more likely to be raped than men. Women are much more likely to suffer physical abuse in the household than men. Nevertheless, identity is a social and not a biological matter. And again, identity is not interest. Common biology is not enough to distinguish common interest, even regarding rights to security of person. Some women think all women should have the right to abortion as part of their physical integrity. Lots of other women disagree. Some Catholic or Jewish women, Orthodox Jewish women, think that birth control is wrong. Some very conservative Christian women even think that a husband should have a right to physically chastise his wife.

Another argument that posits that identity and interest are synonymous draws more generally from theories of patriarchy, and assumes that all women share the identity of persons oppressed by patriarchy. Therefore their interest, their shared interest in overcoming patriarchy is sufficient to indicate a shared identity. It is true that women frequently
do get together in large numbers to protect their own interests, but that does not mean that they identify themselves primarily as women. For example, I might take part in the feminist movement precisely because I do not identify myself primarily as a woman. I just want to have equal rights with men, get on with my own private life. My principal reference group might not be other women. Reference group in sociology means the group to which you refer in thinking about yourself, or different aspects of yourself. My principal reference group might be my family, my ethnic group, my religious group, my fellow professionals, or a host of other reference groups. In my personal case, this includes my middle-aged respectable ladies’ book club that I go to every couple of months.

So I am arguing here that statistical aggregates are not groups. You wouldn’t think that people who play ping-pong or who own summer houses are groups for any social purpose, unless of course we start banning [playing] ping-pong or owning summer houses, in which case they would become an interest group, but not necessarily an identity group. A statistical aggregate, moreover, is not a collectivity. My view is that a collectivity is a group of people who share a lot in common: culture, language, religion, lifestyle, frequently (not always) territory, and historical memory. A collectivity’s culture is indivisible in the sense that if others in the collectivity do not enjoy a culture, an individual cannot enjoy it. So for example, Aboriginal women—Aboriginal women in Canada—need collective rights to enjoy their own language and religion and to have rights to their own territory, because if they do not have that in common with other Aboriginals, their sense of being a collectivity will disappear. But women as such do not need membership in an all-women collectivity to have an identity or to enjoy their human rights. Again, they may achieve their identity through membership in many other social groups, such as religious, ethnic, or national groups. And they share membership in these groups with men, although I personally do not. I mean, there are no men in my book club, not yet. So they achieve their identity through diverse roles in public life, in professions, occupations, in friendship networks, even in the family. They may be in families where there are no other women, or they may be in families where their relationships with other women are not relationships of solidarity, but are antagonistic. If you look, for example, at mother-in-law/daughter-in-law relationships in some traditional households in India. So why then would you say that women’s rights are separate from human rights?

Now, in partial but very minor disagreement with Professor Friedman—if I heard her right—I would say I cannot think of any human right that women ought to enjoy, or enjoy that men do not also
need. I would not say men already have these rights. I think one of the
great strengths of the international feminist movement is that it has
brought to our attention a whole range of violations of rights that were
not originally thought of in the United Nations documents. It has brought
to our attention the capacity to violate rights in the private as well as the
public sphere and so on.

With regard to reproductive rights, as Professor Friedman has already
indicated, men also need reproductive rights. During the period of the
emergency in India in the mid-1970s, men—especially Muslim men—
were subjected to compulsory sterilization. Men as well as women are
subjected to compulsory sterilization in China. This is a violation of their
reproductive rights and their right to have a family.

Another area of concern in Canada (you very rarely hear this
mentioned in the United States, which I am sorry to tell you, is
extremely backward in this regard) is the question of maternity or
parental leave. Article 25(2) of the Universal Declaration described the
need for mothers and children to have particular care and attention. CEDAW
refers to parents and children. In Canada—if any of you
would like to migrate or claim refugee status—if you have a baby, you
are entitled to a year maternity leave. And they have to keep your job for
you, and I think now, six months of that is paid through unemployment
insurance and other private things. So some of you younger women may
wish to migrate for a while. We now split this up and, if they wish, the
mother can take it for part of the time and the father can take it for part
of the time. Because we are good people, [joke] and we realize how
important father-child bonding is. This is very important. People talk a
lot about single parent families, and they think about it as mothers, but in
1996, 12 percent of families in Canada were single parent with mother
only. But another 2.5 percent of families in Canada were single parent,
father only. Again, with regard to sexual assault, we think of this as a
women’s issue, but in Canada in 1995, 15 percent of victims of sexual
assault were male. I did check the data. It exists.

Even the question of rape in warfare. Men are also subjected to se-
vere sexual torture in warfare. The fact that this is usually imposed by
other men does not mean they are not victims of human rights violations.
Adam Jones has recently brought to our attention in genocide studies the
question of gendercide: the rounding up of men “of battle age,” whether
or not they are military, and their subsequent murder, as happened to
Armenian men during the genocide in Turkey in 1915, and as happened

22. Universal Declaration of Human Rights, art. 25(2), at G.A. Res. 217A(III), U.N.
23. CEDAW, supra note 9, art. 16(d), 1249 U.N.T.S. at 20.
most recently in Srebrnica [Bosnia], when over 7,000 men, Muslim men, were rounded up and brutally slaughtered.

The only right I can think of that women need that men do not need is abortion. This is not a human right, although in some countries it is a legal right in law. We could discuss whether this ought to be a human right as well as a legal right, but it is the only one I can think of that women would need and men would not. If all the other rights that feminists claim on behalf of women are rights that men also need, then it is difficult to see why they would be considered to be a group right. They are universal rights, and they pertain to the human group.

So what is going on here? Now, I need my assistant to come help me with the overheads. So why is there discussion of this. Why are people even thinking women’s rights are group rights? Part of this is because of different ideas about women’s embeddedness in their communities. If women are more strictly embedded in their communities than men, and if their identities and roles are more circumscribed than those of men, then perhaps they constitute a cohesive social unit. If women also are more deeply embedded in community, culture, or religion than men, then perhaps their group interests undermine more drastically than men’s these crucial aspects of social life. As Professor Friedman has already said: Let your women loose, and who knows what is going to happen.

So I am going to give you some ideal types. There was a German sociologist named Max Weber, who came up with the idea of ideal types, which simply means subjective impressions of social worlds. And I would argue that much of this dichotomist discussion that I hear all the time has to do with people’s ideal types.

Okay. I have a wonderful research assistant named Anthony Lombardo, and he drew these nice pictures for me on the computer. This is a diagram of an ideal type of women’s embeddedness in the community. [Diagram I: Women as Embedded in Community, p. 234 of this volume]. In this diagram you will see the self is the woman in the middle. She has a very loose sense of herself, signified by the dotted lines and by the fact that the dotted lines are permeable. Outside her we have concentric circles representing her embedded membership: family, religion, community.

Now, this kind of society has existed in the West and in other parts of the world, although it is disappearing. If you believe an Islamic State, for example, also represents Islam, or that the rabbis who run personal law in Israel also represent the Jewish people of Israel, then you would say that the State should actually be part of this, and this should just be a dotted line. I put a strong line there, because I argue that the State represents political interests, it is a political and legal entity, and it does not
represent the community. So that is the ideal type which is often envisioned by people who say that a woman cannot be viewed separate from her community.

So now we will do ideal type number two. [Diagram II: Women as Individual Entity, p. 235 of this volume]. Ideal type number two is the nasty selfish woman who lives in the United States [joke], and thinks about nothing but herself, and does not even care about her children. All right? The children will all be brats. They will be rude to their parents, and they will wear baseball caps backwards. The girls will get pregnant when they are thirteen. Okay, this is a stereotype. So here is your woman as individual entity. I should have had a dark circle there. She is very tightly bounded within her own identity. She is the center of her own circle. All of her social relationships are symbolized by choice. Some of them have nothing to do with family, religion, or community. For example, her job, her friends—she may be hanging out with people you do not want her to hang out with—her private interests, she may go to book clubs, she may sit in front of the TV like I do crocheting baby blankets for people who do occasionally have babies, at least in Canada. Or her religion or her country. Right? There are very loose, if any, connections among these. So if we were to put all these together, they would be very loose. People who work with her may not know anybody in her family or her religious group or so on. She might actually—I do not want to say this too loudly—she might be an atheist. Twelve percent of Canadians have no religion. They do not believe in God. So we would have to even take religion out of there. So this is the ideal autonomous woman or threatening American woman. Next one please. I found myself saying to a very nice person I met at a conference a couple of weeks ago who was holding her baby, “I’m so glad to see you. I thought you were one of these horrible selfish American women who didn’t like children.” And then I thought, Rhoda, you are now promulgating the stereotype you usually criticize, and this is really bad.

Okay. [Diagram III: Women’s Complex Reality, p. 236 of this volume]. This is the kind of life that most women in the West lead, and that is increasingly characteristic of women in the non-Western world. This is actually my friend, Grace. She is not here today, but this is my friend, Grace, a very nice lady. It is a picture of the way one individual woman may view her relationships and her roles and her sense of self. I picked Grace because Grace, unlike me, was born in Canada, and she lives in the same part of the world as her family does, and it is where she grew up. So she is more tightly embedded than I would be in life. So she has a core sense of self. But it is permeable, and she has multiple commitments. She has commitment to the family, although the family in
North America may include a blended family, or even a lesbian family. She has commitment to her religious group. She also has commitments to community and so on. But aside from all that, she has her professional identity, her private interests, and her friendships. In the case of Grace, also [a friendship] with me, God knows why. Right? This is an individual woman in a society which is not repressive and which does not force her into particular roles and particular ways of living. It is not an ideal type description, every woman in this room could draw her circles in a different way. But it is a description of how women actually live their lives.

The problem is that many of those who oppose women’s rights, as Professor Friedman has said, want to keep women in ideal type number one, tightly embedded in family, community, religion, with very permeable sense of self. They are supposed to reproduce their community, not only biologically, but also culturally.

Now, to counter this coerced embeddedness, some theorists think women would be better off seeking collective rather than individual rights. I have a couple more big points to make. A sub-theme of this Symposium, especially as it was originally designed, is the relationship of women to their religious communities. Professor Mayer has actually written a very good paper, which she is refusing to give. But I have read it, and it deals very effectively with this issue. In some societies and some communities it is thought that to promote women’s rights will undermine the religious group, and this is true. If you let women have individual human rights, they may very well undermine their collective membership in their religious groups. For example, if they exercise their right freely to choose or to leave their religion—if you give them the right to apostasy, the right to be an atheist, the right to marry outside the family—then a community, especially a small community, may very well be undermined. My understanding, for example, is that the Jewish community in Canada and the United States is very concerned about out-marriage, because out-marriage means that fewer and fewer children will be raised as Jews and may be raised as some other religion.

A scholar named Ahmad Farraq in 1990, in a book that I read, quite frankly—it’s actually unusual to see this—quite frankly said, “As a Muslim, I cannot support Article 16(1) of the Universal Declaration, which gives everyone the right to marry without limitations due to race, nationality or religion,” because he believed a Muslim woman should not marry a man who was not a Muslim. 24 Fortunately, it is not that hard to convert to Islam, for those of you who are not Muslim and might want to

marry a Muslim woman [joke]. So I mention this to you in passing. I checked it with someone last night.

Okay. One might also suppose, nevertheless, given this you might think, “Well okay, then a woman who is subjected to normative or religious controls that deny her equality, will remove herself from that community.” But this is not what happens. Many women will voluntarily submit themselves to the control of their religious community. In Orthodox Judaism, there is a procedure called a *Get*, G-E-T. A woman cannot be divorced unless her husband gives her this *Get* and permits the divorce. Some Orthodox Jewish women accept this as a reasonable limitation on their rights, just as some Catholic women, for example, will vote for political parties in places like Poland, which prohibit birth control or abortion. Many Jewish or Catholic women, rather than renouncing their religion, will strive for greater equality within their religious group, and try to move it towards equality through greater internal debate, and through reference to more liberal interpretations of their religious text. They will not leave their religious community, which will be, for them, a very important reference group. They will rather try to reform it. They may very well not want to discuss discriminations against them with women who are not Catholic or not Jewish, or in the case of Muslims, women who are not Muslim. Especially women who belong to religious groups that suffer discrimination or that feel besieged because of their minority position would be unwilling to undermine their communities by making public collective feminist demands in concert with women not members of their own community. For example, Jewish and Muslim women might very well decide that they would rather not wash their dirty linen in public. So they may be part of the statistical aggregate of women, but their sense of identity is not bound up with that aggregate.

Final point here. Women’s rights, I have argued, are actually universal rights that were heretofore neglected, and the international women’s rights movement has brought this to our attention. Again, especially with regard to the private sphere. Nevertheless, women must act for these rights collectively. All rights are, in the end, struggled for and gained from below. Law is the icing on the cake. Law reflects and in some cases can encourage social change, but social change comes from below. So it is necessary to act collectively, sometimes in concert with men. But that does not mean that women’s rights are collective rights.

A final word here, I have spoken here as a sociologist, so I am arguing that women, in a sociological sense, are individuals. Very few women’s identities are consequences solely of their embeddedness in their communities. Most women, the vast majority, have roles and
interests separate from their relationships to their families, ethnic groups, and religious communities. Moreover, not all women identify only as women. Nor do they act in the public sphere only as women. They may be disembodied not only from their communities, but from their gender identities. Thanks very much.

EVAN CAMINKER: Thank you very much, Professor Howard-Hassmann. And now we are pleased to also have Christina Brandt-Young participate in this panel.

CHRISTINA L. BRANDT-YOUNG: Good morning. I want to thank the organizers of this symposium for allowing me to speak here today on a topic that is near to the hearts of many at the Law School. I’m honored to be able to contribute my thoughts among such distinguished panelists as Elisabeth Jay Friedman and Rhoda Howard-Hassmann. I am the only lawyer on the panel. It is delightful to speak to non-lawyers. But instead of beginning at this abstract issue of “what are women and what are their rights?” and moving down to the issue of law, I am going to start at the issue of law, and move back out more generally toward the question of “what are women within collectivities and as individuals?” I fear this will bore you all to death, because you are accustomed to hearing that kind of thing in this room and sleeping through it. So I apologize in advance for that.

I would like to discuss an important aspect of women’s social and economic rights, which is female poverty occurring because of divorce, desertion, or disability. This is a problem that is widespread. It resembles other major human rights crises for women like domestic violence in that it happens in a multiplicity of States, and in a multiplicity of cultures. And yet the details for how to solve these problems are so particular to the societies in which they occur that it is very difficult to generalize about it, and to speak of it in abstract terms. I am going to anyway. And something that should be pointed out here is that, as both Professors have mentioned, one of the advantages of thinking about women as having human rights on a global scale is that women can borrow each other’s solutions. This is one of the advantages of talking about women’s rights in an abstract way. So I am going to talk about post-marital property division and child and spousal support, which do occur all over the world, although not everywhere in the world, and whether reforming these locally could make traditional marriage, where women do not participate in a traditionally male wage economy structure, less economically risky for women. There are two reasons why we might want to do that.

The first is that trying to create better economic equality for women in other ways, through education for instance, involves an awful lot of infrastructure change. It is expensive. It takes a really long time, and
reforming post-divorce property division could provide faster, short-term relief. The second reason that I am focusing on traditional marriage structures, and again, that is a very broad thing to say, would be because that is exactly the solution that some women want. They cherish and value traditional ways of life, and the international human rights regime is sympathetic to that, and believes that equality is an important issue, but participating in a cultural community that means something to you, and participating in a way of life that you find meaningful, is also very important. I am going to focus on traditional marriage structures for those two purposes so that I can make a suggestion and so that I can ask a question.

The suggestion is that when it comes to the family, perhaps the individualistic-collective dualism that we have been deconstructing up here this morning really is irrelevant because of patriarchy. I think both panelists have addressed that very well. I am going to start with the legal effects and move back toward why that dualism isn't necessarily very helpful.

And the question is, is implementation and enforcement in court orders in this area of post-marital property division so difficult to implement that in fact we should not even try, and that instead the long-term solution, the fastest solution, really will be to focus on making women more economically independent within their families? This might imply that traditional marriage, whatever that means, cannot be made risk-free such that it can be "saved." It is a problem that States need to grapple with. It is a problem that women all over the world grapple with every day, and it is something that we grapple with in part because the Universal Declaration on Human Rights states that "the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

I would like to talk about this problem of poverty for women after divorce, desertion, or disability. Looking through the lens of an economist and a political philosopher Amartya Sen and Ayelet Shachar—and again, notice how I am focusing on one individual problem here as opposed to the more global issues that the other panelists have addressed—this one problem is huge. It happens everywhere. There have been fascinating court cases in recent decades about just exactly what women are entitled to when a marriage ends in Canada and in India. There has also been very interesting legislation on that topic in South Africa, in Malaysia, all over the world. Women all over the world have this problem.

Another interesting thing to note, of course, is that it doesn't affect all women. Many women choose not to marry precisely because of this

25. Universal Declaration of Human Rights, supra note 22, art. 16(3).
issue. But this incidence of post-divorce female poverty strikes everywhere. More importantly, it also strikes in every kind of post-marital property regime. When I was working in South Africa, it was necessary to try to master three legal systems at once. I was a disaster. But what I did notice was that daily we got calls on our phone from Afrikaaner women who had been married in Dutch Roman law, which has community property—everything split 50/50—and they would call us terrified because their husbands were about to leave. They were terrified that they would have no way to support themselves and their children. We got similar calls from Muslim women, who are married entirely in separate property. They had the exact same concern. We also spoke with women who lived in polygamous relationships under customary African law. They had the same concern. (I am looking at primarily lower-class, less privileged women. For upper-class women, the issues are there, but they are slightly different. I won’t be addressing those, sorry).

The fear of post-divorce poverty strikes regardless of your marital property regime, and it also strikes regardless of how low your divorce rate is. In Egypt, the 1986 census determined that the divorce rate was about 2 percent. But mothers are still training their daughters to go to school, to get educations, to get wage-earning jobs, because they are terrified of the consequences of divorce.

So the incidence of divorce is not what’s relevant to women. It is the ramifications of divorce that are relevant. And in that sense, not all women have this problem. It does not happen everywhere, but the problem is very, very similar across many different countries in ways that suggest that patriarchy exists. Amartya Sen discusses how families deal with economic difficulties generally.\(^{26}\) His concepts are cooperation, competition, and entitlement. He notes that household prosperity depends simultaneously on patterns of cooperation and conflict within families. Family members will work together to maximize their resources, for the most part, wherever possible, and especially when the marriage is going well. But they still have to decide who does what, and who gets to consume what, and who gets to make which decisions. Social patterns, to a strong extent, influence what people do and who makes the decisions. They also influence perceptions of who is producing things, who is bringing things into the family, and who is making it better off. That influences the perception of what people’s entitlements are, which decisions they are allowed to make, how powerful they are in relation to one another. This type of power in the family is an issue for women before divorce.

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happens, and it influences both the threat of divorce and what happens after divorce as well.

In short, in many cultures the work that women do is not valued economically. Everybody agrees that what women do is important and the families would fall apart without it. But—and again, this is a gross generalization, for which I apologize—that does not mean that women get to make big economic decisions within the home. And it does not mean that women are compensated upon divorce for their contributions and how they allow other economic decisions to be made possible. That is why women's living standard in the United States, for instance, drops—and this is across all classes—by at least one-third when a woman gets divorced.

So obviously this can lead women to the possible conclusion that traditional marriage is a bad financial risk, and that they should not get involved in one. Where possible, women are deciding that they should work outside the home in order to hedge their bets. In some places, that is not possible. The educational systems are not developed enough, or they do not have access to education, job training, a discrimination-free workplace, or the ability to travel to work. All those things sometimes make it impossible for women to hedge their bets in that way, and so their strategy becomes to avoid divorce at all costs. Sometimes this involves hideous abuse. When there is not the kind of property structure that allows women to leave without starving, they get trapped.

And so there are four related problems here. There is a problem of post-divorce poverty. There is a problem of the undervaluation of traditionally female work. There is a problem of power imbalances within the family. Some people are allowed to make more of the decisions and some people are allowed to make certain threats based on what they know the financial ramifications will be. And lastly, there is the loss of certain meaningful traditions. Sometimes societies are forced to change because of these economic costs.

You may feel that these costs are outweighed by the benefits to women; I know I usually do. But nonetheless, the costs of losing these traditional societies are real ones.

Ayelet Shachar, in her book Multicultural Jurisdictions theorizes a system in which cultural minorities and States agree to overlap their jurisdictions to deal with precisely that problem. For instance, the local group gets to decide demarcation rules. (Are you a Muslim woman? Are you an African woman? Are you a woman who is going to be married under civil law?) But the State takes over all the ramifications of

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property. This is an interesting way to arrange things, and it seems to be based especially on a political judgment about what minorities really want and what women can realistically get.

I would like to focus on this distributional aspect of what States can do in order to deal with post-divorce property. The idea is the same idea that Sen has, namely that the State can act to rectify financial fairness issues within groups such that women can gain more power. The theory is, and you can tell me whether you think that this is actually going to play out, that if a woman is going to have a decent financial settlement after divorce, it is precisely because the State considers her contributions in caregiving to be important: cooking, we’ve mentioned cleaning, we’ve mentioned childcare, we’ve mentioned elder care, and cooking, don’t forget cooking.

RHODA E. HOWARD-HASSMANN: Diapers.
CHRISTINA L. BRANDT-YOUNG: Diapers, thank you. When people know that someone is going to be remunerated at divorce for those actions, then they start to take on more value within the marriage itself. We hope this will change the system of entitlements, who has access to what, who gets to take what decisions, whose contributions have been so important that their voices should be listened to. So, there is the possibility that gender relations within marriages will be changed in terms of power without people necessarily having to get rid of gender traditions that are meaningful to them. And again, we will ask the question, is that really realistic? Is that really going to happen? But that is the theory. It is an interesting theory that I think we can discuss today.

So there is the question of changing the system of entitlements and power within marriage and then there is the hope that if a marriage does end through divorce, desertion, or disability of some kind, that women will be protected, that children who live with those women will be protected, that there will not be this horrible sense that the moment a man leaves, even if you are glad to see him go, “Oh no, what do I do now?”

But before we even start to talk about what this regime would look like, we have to make a couple of assumptions. There are always assumptions and disclaimers when we are talking about things at a vague level like this. So assume that in these orders for separation of property, and for spousal support and child support, that there would actually be enough resources to meet the needs of two households. Assume that local communities would work together and cooperate with governments so that people would be able to figure out what their contributions really are and what a fair and useful way of separating property is. Assume, furthermore, that governments could enforce those things. What do
Shachar and Sen's suggestions say about collectivism and individualism for women in traditional arrangements?

As both panelists have already stated, to a certain extent, every family is a collective. Aspects of competition and cooperation and a system of entitlements exist in every family. This “divide” between individuals and collectivism really operates as a continuum, as has already been stated. And it is a continuum along which men and women occupy very different places. Subject to the intersections of race, class, religion, and other categories, especially age, men dominate the public sphere and they have more autonomy. They have better access to resources of all kinds. They receive more social affirmation for deciding upon and pursuing what they want, irrespective of the needs of others, than women do.

So from the perspective of women's rights, in the family at least, patriarchy renders the individualist and communitarian debate almost irrelevant. No matter which community, women are called upon to sacrifice their individual interests for the good of the collective—the family—to a greater degree than men are. That's why divorce is frequently economically catastrophic for women and just is not for men.

So based on this idea that the collective or individualist paradigm is not useful when we are talking about property division, how should property division actually work? Usually the elements of post-divorce property settlements are the division of the marital assets, the support orders for children, and support orders for the spouse. And this may be based on basis of need. It may also be based on the idea of compensation for contributions. What do you think the basis of alimony, if any, should be? CEDAW makes many proclamations about this issue. In their General Recommendation Number 21, the CEDAW Committee states that “the premise that a man alone is responsible for the support of the women and the children of his family and that he can and will honorably discharge this responsibility, is clearly unrealistic.”

It does happen, but as a social safety net it has a lot of holes. Women frequently fall through those holes. The CEDAW Committee also states that financial and non-financial contributions to the marriage should be accorded equal weight in assessing the marital assets to be distributed, such that raising children, caring for elderly relatives, and discharging household duties should be counted as contributions.

Work in the economic sphere cannot exist without this kind of work in the reproductive sphere. They are inextricably intertwined. This is reflected not only in the CEDAW

29. Id. ¶ 32.
Committee’s recommendations in terms of divorce, but also that the domestic activities of women should be measured, quantified, and recognized in national statistics, so that all national economic analyses reflect the work of women.\footnote{General Recommendation No. 17, CEDAW Comm., 10th Sess. (1991), in Compilation of General Comments, \textit{supra} note 28.} Nothing else can happen without it. CEDAW General Recommendation Number 21 also reminds us that the rights of women who have not married formally also need to be protected.\footnote{General Recommendation No. 21, \textit{supra} note 28, \textsection{} 18.} If they have entered into long-term economic cooperation agreements with a man, especially if there are children, then the Committee recommends that those kinds of things should be remunerated.

And finally, the CEDAW country reports remind us that CEDAW article 16, on the family, is expected to be applied to all ethnic groups within a country: ethnic groups, religious groups, community groups.\footnote{See, \textit{e.g.}, Committee on the Elimination of All Forms of Discrimination Against Women, Concluding Observations/Comments on the State Party Report of Singapore, 25th Sess. \textsection{} 54–96, \textsection{} 74, U.N. Doc. A/56/38 (2001).} Those groups should be consulted about developing marital laws that are locally appropriate and that conform to the CEDAW guidelines.

The other thing to remember is that the International Covenant on Civil and Political Rights reminds us in article 27 that people have the right to participate in the cultural community of their choice. The exact text is that “persons belonging to minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.” And our own Robert Howse, and a colleague of his, Karen Knop, who was recently published with the \textit{Journal},\footnote{Karen Knop \& Christine Chinkin, \textit{Remembering Chrystal Macmillan: Women’s Equality and Nationality in International Law}, 23 MICH. J. INT’L L. 523 (2001).} have made a couple of comments about that right. Namely, that being “[d]eprived of [one’s] own language and cultural community as a living context for political, social, and artistic discourse”\footnote{Robert Howse \& Karen Knop, \textit{Federalism, Secession, and the Limits of Ethnic Accommodation: A Canadian Perspective}, 1 NEW EUR. L.R. 269, 278–79 (1993) (citations omitted).} is unacceptable. Therefore “Individuals should not have to choose between accepting disadvantage, discrimination, and loss of dignity in the larger society on the one hand, and retreating into the protective but stifling shell of the group on the other.”\footnote{\textit{Id.} at 282.}

So the question remains, if we could implement reforms of post-divorce marital property law, would women’s non-financial contributions

to very traditional living arrangements be valued more? Would this give women more power within their families? Would they fear the consequences of divorce less because they know that they are going to get a fair deal in the end? As a consequence, would this strengthen traditional families? Or would the subtle cultural changes that would accrue be intolerable? Just two weeks ago, on this very stage, the *Michigan Journal of Gender & Law* held a symposium on marriage law, asking whether it was obsolete or cutting edge. And Lynn Wardle of Brigham Young University of Law School, who I have been instructed to say is a proponent of traditional, American families, was lamenting the fact that American women feel less free than before to be traditional stay-at-home wives and mothers. He sees this as a loss of the range of choices for women. But I see it as a recognition that it is a bad social and financial risk. But I wonder whether he would advocate precisely these kinds of reforms in order to lessen the risks that accrue to women of not supporting themselves independently, but rather by doing non-remunerative work in the home.

This speech addresses only certain aspects of post-marital, post-divorce, post-desertion, so on and so forth, property division. But there are other global trends that we need to keep in mind and to take into account, namely that support for caregiving activities and for helping women to obtain useful wage jobs will become only more important in the future as a means of assisting female heads of household, which are on the rise all around the world. Economically driven trends of urbanization, migration, and industrialization mean that more and more families are accruing their primary wealth in wages, rather than in agriculture, rather than in land ownership, rather than in petty trading. Because of all this moving around, they are starting to live in smaller nuclear families, rather than extended ones. So as the family sizes shrink and extended families live together less, strain is being put on those who perform caregiving for the ill, the young, the elderly. This has traditionally been the work of women. So this is a problem whether we reform post-marital property division or not. Women are still experiencing the loss of the extended family as creating burdens for them as caregivers and it is creating burdens for those who need the care.

So these are problems that are going to have to be solved regardless of our post-marital property division issue. Governments and communities will have to work together to support those caregiving activities. To the best of their ability, they are going to have to subsidize health care.

They are going to have to build clinics and daycare centers for children and for the elderly. There will have to be access to social security and other types of subsidies. And there will have to be the keeping of careful and accurate statistics on the activities of caregivers, for the purpose of understanding the scope of, and later rewarding in post-divorce situations and other situations, the contributions that these kinds of caregivers make to the general economy and to families as well. Most countries do not have this kind of money, yet these changes are important and necessary, regardless of whether we want our society to be more individualistic or more collectivist. Caregiving for children, and for the ill, and for the elderly, is, as the Universal Declaration of Human Rights says, entitled to protection by society and by the State.

And this is where we need to bring back in all of those assumptions that I asked you to make, and we are going to have to put back on the table the problem of implementability, whether these property structures, these reforms can really be implemented. Most States cannot keep track of the unions that people make. There are a lot of informal unions. There is also a lot of bad reporting. People make their marital and religious decisions without reference to the State itself. Sometimes they register it, sometimes they do not. Most families do not have enough resources to support two households when they split up. Even if the rules for dividing up marital assets were completely fair, they would still not result in enough assets to support two households. And this problem only increases when a man remarries and has more children. The households keep growing after they split up. Governments in North America and in Western Europe have had a terrible time keeping track of ex-spouses. They have had a terrible time enforcing precisely these kinds of orders, despite the fact that their court systems are sophisticated, despite the fact that these nations have fairly transparent financial systems and it is pretty easy to follow someone’s paycheck, and despite the fact that they have the resources to go after these ex-spouses. Child support collection in the United States is not happening. And then we also have the simple problem that it is very difficult to divide up family property. Determining what these solutions should be on a local level is very, very difficult.

So given the fact that reform of post-marital property division may create only limited change for women within marriage and would probably create only limited economic success, in terms of preventing poverty, and given also that a rising number of families are participating in industrialization, migration, and waged economies, creating strain for caregiving activities, perhaps using alimony, child support, and property separation as a short-term solution really is not much of a short-term solution at all. Perhaps it is going to be just as effective for governments
to start at the other end and just provide women with better tools to be economically independent. Maybe instead of trying to support traditional structures through these alimony laws and property division laws, maybe we should just be leaving those family structures to individual choice. Governments will have to fulfill promises made to women at the international level about equal education, about skills training, about pay structures, about workplace discrimination, and about maternal and paternal leave policies. Either way, regardless of whether we try to look at this as wanting to preserve individual rights or preserve collective rights, whether we want to preserve a traditional family or empower a changing family, again the Universal Declaration of Human Rights says the family is the natural and fundamental unit of society and it is entitled to protection by society and the State. Thank you.

[Applause]

EVAN CAMINKER: Thank you, Christina. I want to thank all three panelists who have put a great deal of food for thought on our tables for this morning. We still have some time now for some questions and answers and perhaps discussion among the panelists. Maybe in compensation for having this moderator's task thrust upon me, I might take the prerogative of asking the first question, and it's for Professor Howard-Hassmann. The question is the following: In offering your argument as to why it is that we should view women as voluntary members of an interest group, rather than members of an identity group, I wasn't sure if your real argument was that there is no such thing as an identity group; since I was having a hard time in my mind imagining who might fit into that classification. I was wondering if you might comment on whether or not you are suggesting there really is no membership in a set of identity group politics; or is there something distinctive about women as a group?

RHODA E. HOWARD-HASSMANN: No, it is not an argument about what should be, it is an argument about what is. I am sure there are some women whose primary sense of identity comes from being female. That could be the traditional female that the professor from Brigham-Young wishes to defend or that could be your lesbian activists or that could be your feminists. But there are a lot of women, I would argue, who have an interest in women’s rights without necessarily making their primary identity the fact that they are female. It is not a moral argument. If you are asking me what I think about identity politics and the rhetoric of identity politics, I think it is grossly exaggerated, especially in the Academy. I think the rhetoric is grossly exaggerated, but I am certainly not arguing that it does not exist. Does that answer your question?
EVAN CAMINKER: Well, I did not mean to ask it as if it were a normative question. I meant more even in terms of your description of what it is. Are there, out there, groups that you would identify as identity groups?

RHODA E. HOWARD-HASSMANN: I think that that is a term that is retrospectively being applied to some social movements. I do not think, for example, that the social movement for more women’s rights in the 1970s was primarily identity politics. I think identity politics suggest that you are so bound up within your identity as woman, gay or lesbian, African-American or whatever, that you find no sense of commonality with people who do not share that identity and therefore you would find it difficult to compromise with people who have a different identity, or perhaps even also to act with them, to have them in your own group. I mean off the top of my head. I think, therefore, it is not correct to say that all social movements, in favor of rights for previously and still subordinated people are movements of identity politics.

EVAN CAMINKER: Thank you. Any questions from the audience? Yes, thank you.

QUESTION: Question for Mrs. Brandt-Young. Given the complexities and the difficulties that occur when caregiving structures break down, would that warrant any merit to an argument for polygamy being a possible solution? Predicated on much more rigorous, prohibitive measures for divorce and property division, as well as maintaining that social, marital contract being a legally binding concept for the first spouse as well as the second. Particularly in cases where one spouse is disabled.

CHRISTINA L. BRANDT-YOUNG: All right, you have a lot of concepts in there. [Laughter] So, let me ask you what I think you said. You can tell me which parts I am missing. You mentioned the complexities of what happens to families when they split up, and by complexities you could mean a lot of things, but I am going to assume you mean financial issues and how difficult those problems are to solve. I followed you for the question of, does that mean that there might be a place for polygamy, especially in comparison with the troubles of no-fault divorce. And what was the bit after that?

QUESTION: Particularly when women become disabled.

CHRISTINA L. BRANDT-YOUNG: It is interesting that you mention that. I was actually thinking of traditional communities where the male is usually considered the only appropriate wage earner and he becomes disabled. I actually was not thinking of the wife becoming disabled. So I will try and answer in terms of that. You mentioned that usually marriage is a civil contract and it can be divided. In my limited
experience in South Africa, that meant that divorce happened in families with only one husband and one wife. And it also happened in polygamist marriages. If it is complicated when you only have two people, just imagine how complicated it is when you have many more. It is exponentially more complex. So it is a very, very difficult issue. There are a lot of perceptions of polygamy that cut against this issue of women having more influence in marriage. When I spoke with Muslim women in South Africa about polygamy, they desperately wanted for it to be recognized as a legal possibility, because it is part of the Shari’ah, and therefore it ought to be legal. That being said, they also want to regulate it to the extent that it would become a practical impossibility, because they did not actually want it to occur. It makes the issue of how to separate property when you have three wives and one of them leaves even more complex and even more frustrating. The problem of when you separate a household into two and there is not enough money, well when it is two and a half households, three and a half households, that means that there’s even less to go around. But the issue of caregiving is also a very complex one, polygamy makes it even more complex.

As I mentioned, there was a symposium here two weeks ago and they were discussing how when a parent becomes ill—when a mother becomes ill—her gay and lesbian children are the ones who are called in to drop what they’re doing, to move to wherever Mom lives, and take over her care. This is because their families are valued less and they are perceived to have nothing else that they need to do, no one else whose needs they are obliged to meet. So caregiving, and the decision about who has to do it, has a very complex calculus to it. And not knowing a lot of polygamist families intimately myself, I have to say rather than making things less complicated, more caregiving duties might make them much, much more complicated, in all the areas that you have mentioned.

Evan Caminker: Yes, question in the back?

Question: I think the whole nurturing of polygamy that people talk about academically, they seem to kind of picture the ideal situation where all participants are necessarily treated with equity. And I do not want to say just equally, but with equity. And in the ideal case I have seen many situations where in some situations it is very, very ideal and all participants are treated with equity and they are very happy with the situation. But when some people are not happy that also presupposes that each of the women. . . . And I have had situations where it is one man, but that kind of assumes that all wives are treated equally and in many

cases that just does not happen. Not all of the wives are treated equally. In fact, some are treated very, very badly and like any traditional patriarchal family structure, when it deteriorates into a situation of inequity, it deteriorates very, very fast. And of course, again, that’s where the State is necessary as an agent of change or equity.

**Evan Caminker:** Would anybody like to comment on that, or—

**Rhoda E. Howard-Hassmann:** Polygamy sounds great if you are the number one wife and you can boss around all those little girls that your husband picks up, just to introduce a note of levity, but also I think to make the point you are making, it has all those problems too. I just suggested [polygamy] to my husband, but he refused. [Laughter]

**Evan Caminker:** Yes.

**Question:** Those were three excellent presentations. I have two questions. The first question is [inaudible] that is a law—it seems that when these things are formulated, it is [inaudible] impose on people who do not have the leisure time to think about these and complete change [inaudible] impact on the way the [inaudible] families. I do think that this concept is imposing our values on non-Western societies.

**Evan Caminker:** Why don’t we stop there on that.

**Elisabeth Jay Friedman:** How about shall I start and you continue, or do you want to start and—

**Rhoda E. Howard-Hassmann:** You can start and I will continue.

**Elisabeth Jay Friedman:** Okay. Maybe you will fill in the exact background for CEDAW, but CEDAW as an international rights treaty, went through—and there are many more experts on how those treaties were put into place, so I will let them field that. But it is not simply a matter of people who are interested in getting together in a room and imposing their values and since there is more leisure time in the West and, in fact, the CEDAW Committee, for example, you will be interested to know, rotates and rotates very carefully to represent different world regions. So that when the governments have to put their reports in, there is going to be a woman from Zimbabwe, and a woman from Norway, and a woman from the United States, and a woman from the Cameroon, and then it will change. And there are more women than I have just named.

So one issue is the process by which international legislation is developed. And of course there is a huge debate about who gets to take part in that and whether they are truly representative. Although we do want to be careful there to not come up against the problem you always have when you have political decision making which is the automatic
sort of devolution into “what we really need is direct democracy to have everybody’s views represented,” because of course it is completely unworkable at the international level. However you do want to have representatives who are representing major schools of thought and people who have had the time to reflect on, for example, gender equality. Not necessarily people with more leisure time, but people who have had experiences in different cultures and communities. I think that there is certainly a big case to be made. Just one final reflection on that is that the idea about how representative are these international documents is a question that comes up repeatedly in an area that I study, which is the outcome documents of the U.N. Conferences. Now, as you know, these are not binding documents. These are not treaties that governments sign onto and then have some way, through an optional protocol or regular reporting process they are held accountable for, although they are asked to lend their name to it, and that is why many governments take reservations to the final documents of conferences.

Often because women's rights activists at home will then say, “well you were at Beijing, and here’s the Beijing document, and what about all of these things that we’re not doing in this country.” The argument for non-representation is a little bit lessened there, since any government that belongs to the U.N. can send representatives and many, many, many governments do send delegates. The other question of representation is debated quite widely in whether it should just be governmental representatives that should have a voice when they are sitting down and essentially trying to say, “Here is what the status of women looks like around the world, and here’s what we suggest governments, nongovernmental organizations, the U.N., different financial institutions, should do about it.” That is why there has been an ever increasing move on the part of nongovernmental organizations to send representatives to at least do what they can. They can do quite a bit, in terms of lobbying on that document. Then there is a big debate about how representative they are. So these questions of representation go down the line. But I do want to be careful in the idea that representation means everybody gets to have a voice when you are talking about things that have to be written down at some point.

RHODA E. HOWARD-HASSMANN: Well, I would reiterate my objection to the use of dichotomist variables in these kinds of discussions. There is no such thing as a uniform West and there is no such thing as a uniform homogeneous non-West either. There are multiple political views. Now one might argue, in the United States, that there is an absence of a Left, of a political left wing. Nevertheless, there are debates among Americans, among Canadians, among Westerners,
etc. There are also very serious debates among people in the rest of the world. Even the poorest people of the world can think. In fact, the poorest people of the world often think a lot. They think about why they are poor. And if somebody comes along and says, “Guess what? It really isn’t a good idea for the State to be allowed to remove you from your land, torture your sons, and starve your children to death,” many of those poor people say, “Gee, that’s a good idea.” So it is not dichotomist. It is not West–non-West. The question of elites: I read recently an article by Arvonne Fraser, an American activist for women’s rights, in Human Rights Quarterly. She pointed out that people never go around complaining that international laws and social changes and political policies instituted by men are not representative, because the elite. . . .

It comes up a lot more with regard to women. Yes, it is an unfortunate circumstance that it is often people who have leisure time or other kinds of assistance, who lead movements for social change. The women who led the struggle for the suffrage, the right to control their own income and so on, in the United States were women who had household help. This is actually one of the advantages of polygamy. If you are an older woman with a Ph.D., you can get a younger woman in there to care for the kids for you while you go to conferences. I am not making this up. I heard a Nigerian woman say this once. She said, “I’m here because my junior wife is taking care of the kids.” She got to boss her around, too. This is when I proposed to my husband we get a junior wife. Yes, this is true. But it does not invalidate the thinking of the members of the elite that propose changes. Nor does it invalidate the concern that they have. If Jane Addams opened up settlement houses for the poor in Chicago in the nineteenth century, the fact that she was able to do so does not invalidate what she did for the poor of Chicago at that time. Finally, imposition: The CEDAW does not have a police force. I wish it did. Nobody went after the Taliban while it was oppressing women, right? Nobody went in there and said, “Okay, you can’t do this anymore.” Exchange of ideas is not imposition. It is only imposition if you think people in the non-Western world cannot think, do not have souls, do not have personalities, do not have interests. If you accept that they are human beings who can think, then proposing ideas to them and listening to what they have to say in return is not imposition, in my mind. But perhaps I am imposing this upon you.

Evan Caminker: I know you had a second question, but I do see a couple of other hands, so I will come back to you if there is still time, if that is alright. Karima.

QUESTION: I think there have been really eloquent answers on the question of whether or not [inaudible] the Western imposed set of norms that [inaudible]. Just a couple things I wanted to point out. I participated in the drafting of the Optional Protocol to CEDAW. I was not old enough at the time of CEDAW itself. But seeing in that room there were State representatives from all over the world [inaudible] talked about, about those States not being represented with that then was a universal problem and it was a universal negotiation process. Also I would like to point out that the United States is not a party to CEDAW and Saudi Arabia is. I am not suggesting that there is gender equality in that [inaudible]—[Laughter] But just would like to point that out, as an added fact to this whole debate about Western versus Eastern. And there is a whole international women’s human rights movement out there. Including in the Western world, including in Africa, Latin America, all over Asia that I think would be very upset to hear CEDAW characterized as in some way a Western norm. So I really hope we can listen to what Professor Howard-Hassmann said about CEDAW in particular, and throw out the old [inaudible] Western imposed. The question I wanted to ask is actually to you, Professor Howard-Hassmann, and that is, why have we arrived at this dichotomy? This dichotomous view that the West is individualist and rights promoting, and the East is communitarian and somehow repressive? How did we end up with that and how do we unpack it?

RHODA E. HOWARD-HASSMANN: Okay, well I have this wonderful lecture with overheads. It is essentially called “Why Do They Hate Us,” or “Are Western Human Rights Values Offensive?” I have been running around the United States giving it, unfortunately, since September 11th. Three short reasons. One is blatant political interest. When I first started working on human rights in English-speaking Africa in the Eighties, it was clear these were ruling elites who went around saying, “We reject human rights, because it is not a part of our communitarian or African values.” But they were using that rhetoric so they could stay in power. It is harder for [Robert] Mugabe to do that now. But it was very easy to do this in the Sixties and Seventies. So one reason is political interest. One reason is, I think, however, a real fear of the very quick and abrupt social changes that people are going through in the poorer parts of the world, without the insurance policies that Westerners had. At the time, where the social change was somewhat slower, surplus populations of peasants in Europe could emigrate and conquer the Aboriginal people and get land there and so on. So social change is very abrupt. Rates of unemployment are enormous, as you know. People are frightened. People are very frightened about what is
happening to them. And if you have no role in life anymore, especially if you are a man, if you no longer have land, you cannot get a job, you cannot be a warrior, then you turn back to your values and your culture to validate yourself and your sense of belonging. I think that is one reason. And then a final reason is that the depiction of Western values in the mass media is that Americans, they all have guns in their back pocket. They have sex with one second’s notice, and they ignore their families and so on. I taught an international seminar in Sweden on human rights last year, and I asked the people what percentage of American old folks they thought were in homes. People over sixty-five. They said 50 percent. Maybe I am the oldest person here. If you are approaching sixty-five, beware. [Laughter] And I said no. I checked the data and it is 4 or 5 percent and it is mostly the oldest people between eighty and a hundred. And they said, “But isn’t it shameful?” and they were very surprised that we actually worry about this. So the American mass media gives a very false picture of the way Americans actually behave. So that is the third one. But as I say, I have an hour’s lecture on this, if you would like it.

**EVAN CAMINKER:** Well, unfortunately we do not have time for that lecture right at the moment. [Laughter] Our time for this panel has drawn to a close. Let me, at this moment, reintroduce to you Hamid Khan, to say a few words.

**HAMID M. KHAN:** Before we adjourn for the lunch break, I would like to pay a special tribute to those who traveled quite a distance and of course those who responded to responsibilities we impressed upon them. Evan Caminker, first of all, in appreciation for your efforts.

[Applause]

**EVAN CAMINKER:** Thank you very much.

**HAMID M. KHAN:** Dean Caminker has also supported us and dealt with our idiosyncrasies throughout the time we have conducted this Symposium. In addition, to Professor Abou El Fadl, we would also like to acknowledge not only your speech but having to travel a good distance in such a short period of time. We would like to present this to you as well, as a token of our appreciation.

[Applause]

**HAMID M. KHAN:** Finally, before we adjourn I would also like to present somebody who has meant a great deal to this journal. And for all the other journals at the Law School, we all know her to be resilient, persistent, altogether one of the most organized people I know. This goes to Maureen Bishop, dedicated in her honor for the year long work she has been doing and the help she has given us.

[Laughter and applause]
SESSION II: PERMEATING FUNDAMENTALS

ANN ELIZABETH MAYER: Probably many of you know Hamid Khan who is at the University of Michigan Law School, whose background is in political science, where he received the highest honors from the University of Wyoming. He has had many activities that I can only summarize here. He has served with the Harvard Global Peace Project, Legislative Advisor to the President of the University of Wyoming; served a two-year appointment with the U.S. Commission on Civil Rights Wyoming Advisory Committee, and also served as a summer associate with the firm of Holland and Hart in Denver. He has not only been a Rhodes Scholarship finalist, but was a Harry Truman scholar. He is currently an Articles Editor, and our Symposium Coordinator for the Michigan Journal of International Law. Also, from this institution, although not from the law school, is Professor Sherman Jackson. He is an Associate Professor of Islamic Studies, the Department of Near Eastern Studies at this university, and his areas of specialization are Islamic Law and Theology. He has a B.A./M.A. and a Ph.D. from the University of Pennsylvania. And he has taught at a number of institutions. He is the author of Islamic Law and the State: The Constitutional Jurisprudence of Shihab al-Din al-Qarafi, as well as numerous articles on Islam. He has been teaching Islamic Law at the University of Michigan Law School. It would be very difficult to make any summary of the hyperactive Professor Adrien Wing. One of the most extraordinarily accomplished people I know, who is the Bessie Dutton Murray distinguished professor of law at the University of Iowa College of Law. She has a B.A. with high honors from Princeton, an M.A. in African studies from UCLA, and her J.D. is from Stanford. She is the author of over sixty publications and she is the editor of Critical Race Feminism: A Reader, and Global Critical Race Feminism. Her scholarship especially focuses on women in Palestine, South Africa, and Black America. And she is published in the Michigan Journal of International Law, the Michigan Law Review, and has a forthcoming article in the Michigan Journal of Race & Law. A very impressive trifecta. And she is a consultant for the African National Congress Constitutional Committee. She was active in the years leading up to the first post-apartheid constitution. Obviously I am only summarizing here

from the long list of activities. It is my understanding that we are going
to switch the program around now and start with Hamid Khan.

HAMID M. KHAN: Thank you Professor Mayer. It all must seem
very self-serving for me both to be the coordinator of this Symposium,
as well as a speaker. I assure you, that was not my plan.

First off, I would like to acknowledge some of the distinguished
people I am joining today. Professor Jackson has been influential in
imbuing me with the construct, the classical, and the genius of Islamic
law. So I owe a great deal of credit in a lot of my work to his insights. In
addition, Professor Mayer has written a number of books which have
dealt with the issues that I will speak of and her artful criticisms have
been integral in my studies. Professor Hassmann noted early on that
what we sometimes deal with is a construct, an identity of sorts, that
women and men, of course, have to deal with our sense of identity. And
she identified and parcelled out part of the identity which dealt with
religion. So, in this respect, I will deal with the part of the religious
aspect in namely Islamic Law. Now at the outset, I should identify
myself as simply a law student and a male, which probably makes me
uniquely unqualified to speak up here. But at the same time, it also
makes me qualified, as a student of Islam, and as a follower of Islam, to
articulate some of the views that I have about religion and to propose
some ideas about Islam (as my understanding has given me), albeit
limited. One of the interesting parts about what we speak of in Islam has,
of course, become very evident in the last few months. I intend, in this
short presentation, to give some consideration to the persistence of law
within the Islamic tradition, and speak mostly about the classical Islamic
tradition.

In addition, I will deal forthrightly with the movement we know as
fundamentalism, and really parse this term out in order to identify what
are the evident strains of fundamentalism, in addition to its drawbacks.
In this discussion, I will identify some of what I believe are the growing
fissures among those who claim themselves to be fundamentalists and
see how and what effects that can have on law. These terms that I have
described are the Reformist and the Revivalist, although there are a
number of terms that one could use in order to describe such. When
presenting the Revivalist complaint, I will answer it with the Reformist
response. The last part of my presentation will center on words more
salient to this Symposium—the effect that it has had on the clash of
dialogues regarding women’s rights.

Now I will begin with what I identify as the persistence of law and
acknowledging the very insightful comments of Professor Howard-
Hassmann. There is to be an argument, and a well proffered one, that
religion does play a very imminent and powerful role. I, as a follower of Islam, may perhaps have a biased opinion of the subject. But I think that my biases are tempered more by my experience and perhaps a bit of cynicism about what we consider idealized law, which is what sometimes has been called Islamic law. The persistence of law that I speak of is stretched throughout the world with more than a billion people around the world calling themselves Muslim, and part of that enduring legacy is the fact that they claim an adherence to what we consider law. In a law school setting we can sit there and discuss nice, ephemeral ideas about the law, but Islam is more than just merely law—it is something of an identity. As mentioned earlier, identity is a very powerful way and is paradigmatic of how we view the rest of our lives. In some ways, the modern Muslim, as well as Muslims of the past could be viewed as the Greek god Janus, because we often look toward the future with guidance, sometimes lost in the past, but seeking that guidance is often instructed by what we know. In Islam, we are dealing with two veritable sources: the Prophet Muhammad, and the Qur’an itself. Professor Jackson in his discussion of Islamic law always poses the question of what is Islamic law. Note that I am not using the word Shari’ah, and that is actually from the Qur’an.

The reason I use Islamic law as the distinction, and perhaps just a semantic one, is that the Shari’ah is in some ways eternal, where Islamic law is sometimes human concerts of it. So be warned that those who may criticize me can argue that it is Islamic law that I am referring to, not the ultimate Shari’ah. Now, going back to my earlier discussion—the persistence of law in Islam should not be seen as a means of prejudice. Oftentimes the Islamic tradition has been seen as anachronistic, or somehow incomplete, as if the legal traditions of the Roman civil law or the English common law are somehow in themselves complete in some sense. So we view each other as competing ideologies. I do not view them as competing, I view them as interesting and intertwining. Recently there has been a study that actually points at English contract law as being the idea of contracts that we, as law students, know well about—that it was influenced by the Islamic ideal. We must realize that although nations are quick to refer to Islamic law as a divinely inspired law, a view of it is history, and the methods used reveal that such contention is simply far from accurate. Islamic law is not a solid corpus of law. Rather it is a matrix of legality, derived from various sources and bound by religious idealism. In fact, much of what makes the compendium of Islamic law is often various and sometimes conflicting. A brief study of the sources, the methodologies, and the role of preeminent jurists reveals the indelible, intentional impression left by humanity. Islamic law began as a
genesis of ideas. It was a genesis based on this fundamental notion that as Muslims we would adhere to the word of God and we had, of course, the Prophet before us who sat as the idealized, the human par excellence, who gave us a role to emulate. And so that becomes part and parcel of what we discussed with Islamic law.

We must remember that history cannot be somehow taken away. Just as originalists would like to go to the Constitutional scholars and proffer that as their basis, with the Prophet we have the Qur'an, which is the revelation given to Muslims and is believed to be the word of God. After the Prophet died, that revelation simply ended and we had his guidance, and his life to live up to. Of course, that is just the beginning. It was not merely an instrumental sort of idea that we would follow the Prophet. Rather preeminent jurists searched out and philosophized, crystallized the idea of a hermeneutic, of a source of law and identified what was important and what was not. It is that hermeneutic, that idea, which animates Islamic law today. So we must not be—as Muslims, members of the World Committee—we must not be so hasty to believe that everything that once was cannot be challenged in some respects. Although, again, as I have mentioned, the role of history is an important one. There are just a couple of points that I would like to make which are what I consider the pillars of Islamic law, which is, in particular, the Qur'an. The Qur'an is the primary source of Islamic law and it is considered God's ultimate revelation to humanity, and what John Esposito called the central fact of the Islamic religious experience.42

Now as Muslims and non-Muslims, not only can we appreciate the style, but we can also appreciate that there are ways in which the Qur'an is very distinct. The revelations occurred over several [hundreds of] years or over a period of decades. After the Prophet died, there was a need to establish that the book be codified—that the book actually be brought together. In some respects, that was a difficult process. There are now numerous criticisms from scholars today that much of what the Qur'an was, is not what it should have been, believing that a lot of the verses were disjointed or mixed or because there was no chronology of sorts. And so it became important to the individual follower to identify those things. But the Qur'an is not just that. The Qur'an is also an interplay; a complexity that Bernard Weiss says really requires a code breaker to go into the Qur'an and look in on it.43 I have spent a particular amount of time talking about the Qur'an because it is the primary source of law and perhaps the one that is considered infallible to most Muslims. Every other one could be considered, in some degree, an irrigation [a

cleansing] of the Qur'an and we have the center of the Prophet which is his tradition and his teachings. We have the idea of consensus and we also have analogy. Those are the primary sources of Islamic law. You could sit there and look at all of these to realize the extent and the effort to which these jurists had to go— their ability and, in fact, their fearlessness to delve into questions of law. Questions not of law that merely affect you and I, as participants in the State, but of law that affects us as participants in a religious odyssey. That religious odyssey, of course, extends to the afterlife. So, the benefits and burdens which we would normally find ourselves realizing is merely a shorthand abbreviation of what we normally come up with.

So it is that grappling with the significance of the source of law that I come up with, but what I want to spend more time with is the divide. The divide in Islam, I think, is growing and has made its start. Scholars have alluded to it, few scholars have spoken of it. But it is a question of fundamentalism. I basically define fundamentalism as it was defined in the definitions of the Christian Protestant as a return to religiosity. I don't consider that a negative pejorative term, as it has been identified as such. But I think that there is this willingness or this tendency to look back at religion and see it as important. That doesn't mean, however, that we have come to the point where we have simply tossed away religion. It may perhaps challenge us to look back at what our classical traditions have been.

The Revivalist, as identified by John Esposito—who again I invoke because he has been very insightful in this area—has looked at Islamic law as somehow insular, as somehow a corpus of law that we can all identify and readily grapple with. Well, as any jurist would tell you, and especially Professor Jackson who would argue with me insistently, it is not insular, nor is it a corpus, it is in some ways a struggle to interpret. It was noticed as a struggle to interpret. So, in that respect, there are those Muslims today who would like to look at the Shari'ah and say it is something out there. It is a body, a corpus of law that we can reach out, grab, and take hold of. But there are others who believe, like myself, that there are a vast silent majority of Muslims who look at the Islamic law and look at their tradition and see it as something living and malleable. That is not to say that it is not eternal, but to look at the fact that humans have played an important role in how we perceive Islamic law and the perception should continue. When Islamic law supposedly crystallized and supposedly disappeared with the fall of the Islamic imperial States, many people looked at that as the closing, as the end of some sorts, and that really did codify Islamic law. I think that most Muslims would look
at that and say no, it is living and eternal, and we have volumes of testimony that suggest that.

But Revivalism isn’t that. Revivalism looks at the world in a very different way. You must understand that Revivalism is a consequence of modernity. It is not something of fundamentalism in the past. Modernity that is given a different identity. That they have looked upon themselves with regard to the world that they are living in. And they look at their stage, their countries, and they see themselves not as merely Muslims living in the present world, but somehow formed and crafted of European powers. Now I know we don’t want to talk about Western versus Eastern or Western versus non-Western, but one cannot escape the fact that as Muslims and as many people living in today’s societies, when they look at their economic situation and when they look at where they are in the world, they do not see themselves as controlling their own fate. So in going to the reversion of looking at their culture, their identity, their religion, they seek something out. They seek that religious identity, and in some ways they inadvertently reach for a Shari’ah that probably was never meant to be codified.

Christina Brandt-Young, one of the previous panelists, made a very insightful point yesterday when we were speaking about this, and I think it rings true. And it rings true to the Islamic experience. That the idea of today legislatures codifying the idea of tolerance, codifying the idea of diversity, which is preeminent in the Islamic tradition always seems anachronistic, because in some ways, you cannot look at diversity as being codified. We cannot look at those sorts of things and say that’s codified in stone. The Islamic tradition was as such. But the Revivalist does not look at that diversity and has a hard time dealing with it, and in many ways sees the world as intransigent. They look at the modern nation-state and international law as constructs alien to them. But as I argue at length in some of the comments I have made, in many ways we are not looking at an apologetic approach toward international law. We are not even looking at the nation-state as being inapposite to Islamic law. We are really looking at ways in which we go back to the tradition—the tradition that called forth the intelligence and ingenuity, and most importantly, to give back that religious salience. Religious salience to an idea of the nation-state international law. I do not believe that international law and Islamic law are inconsistent. I believe that they are a part of the same. I believe that the unique is not really a part of the unique. It is only unique because perhaps there has not been enough effort to make it part of the rest. Now this is not to say that we are approaching international law, it simply is approaching it and accepting it. But rather we add our distinctive flavor, and that distinctive flavor has obviously been made by certain
declarations that Islamic law have now only come to realize. The Cairo Declaration of the Human Rights of Islam is one such construct where Muslim countries, perhaps their politicians came together and created what would be in some ways, an Islamic view. But I believe that these things are important, because within the Declaration, you find the important ideas of acceptance—an implicit acceptance of international law and the nation-state, giving the sense that Islamic law can go ahead and overcome the barriers which has happened in the past, and overcome those concerns about whether or not we really are somehow taking God out of the authority and putting man in his place. I think anyone who is a scholar of Islamic law will realize that that has always been the case. That rationality has never been taken out of the Islamic approach, but yet a Muslim’s yearning for the divine has always been preeminent. And that yearning remains, but I think that that yearning is what sometimes the Revivalist would like to complain about. Now these Revivalists I have spoken of and these Reformists are not nascent groups particularly. You see them on TV. We see them—I think we know who to identify. But we must be very careful not to confuse those who want religiosity in their lives with those who seek to deprive the Islamic legal tradition of its ability, of it’s ingenuity. We must look, without prejudice, to the idea that Islamic law is in fact a real source of law and one that will remain with us. If you look at the numerous populations of Muslim countries in the world, the fact that one-sixth of our population, and in fact more, will become Muslim. To disregard Islamic law or the classic legal tradition would, I think, be antithetical to both the international perspective as well as a tolerant one.

But, of course, we are in a discussion about women’s rights and we are in a discussion about fundamentals. I look at fundamentals as the engine—an engine which drives a question of fundamentals, and the engine which pushes us to identify whether or not the “collective” or the individual. Personally, I believe that women can be identified as individuals. The Islamic legal tradition has pronounced this idea of individuality and the relationship with God since the very onset. So I am not keen to believing that there are these constructs, but they are important. I think what the paradigms do—this idea of dueling fates, what it requires is a cognizance and understanding of what we are trying to attempt to do is at least take an appreciation. As we were trying to do with Islamic law, take an appreciation for the martyr, even if we disagree. Even at fundamental levels, we disagree. There should be a

positive impression that perhaps, like everything else in Islamic law, we can incorporate some of those ideas. Women's rights becomes a focal issue for the Revivalist and the Reformist. It becomes a focal issue because oftentimes it becomes knee-jerk reactionary. If you talk about women's rights and CEDAW and article 16, which was one of the interesting stances where Islamic countries decided, “Hey we'll agree to these reservations and we'll invoke the Shari'ah as our excuse.” And I do say it is an excuse. Because I think that anybody who is aware of the Islamic legal tradition realizes that they are carrying a very heavy weight when they recite the Shari'ah as this ideal or corpus of law that somehow, in some ways, makes—or excuses their views. So women's rights becomes an issue that Muslims have to deal with. We all know that when we are talking about women's rights, that women obviously come up. But it is my contention, my argument—and perhaps I am wrong, I am a law student and I could be sorely mistaken—but my tradition as both a Muslim, and a student of Islamic law for such a short period of time, leads me to believe that women's rights are not irreconcilable, and that we really have to go at a struggle. The struggle, however, has to come from within. It was alluded to previously by Professor Abou El Fadl that women jurists are being cited. It is my contention that there is a plea that women jurists come about. Throughout the legal tradition of Islam, it has been through this representative capacity that men have spoken on issues of women. I was recently reading a compendium of the works of some of the jurists who spoke about how women should clean themselves to be pure and I found that very interesting because there was a woman scholar in the audience who pointed out, “This is a really interesting sort of conversation. Why is it that as women we're not represented in this interesting discussion about what we should do.” So I think that when we look at Islamic law, and this is obviously something we are going to deal with, that women's rights will be an issue. It will remain an issue, and as long as Islam remains a powerful religion, it will always influence the way we view things. But I think that Islam has a unique opportunity in the aftermath of colonialism, in the aftermath of really getting a sense of security and hopefully what we hope for will be a sense of economic security. But they will be able to take part in the international legal regime, and as full-fledged members, rather than looking at the international regime as somehow anachronistic or inapposite. My arguments are not necessarily as merely a law student, but more as a plea, as a Muslim myself. With that I think there is something to be said about the role that Islam will play, and also the role that the classical, legal tradition will play.
And so as I would conclude, and obviously my remarks have to be brief, Islamic law is undergoing a process of reevaluation, an era of renewed religiosity in the face of modernity’s perils. Two fashions have emerged, claiming to be faithful adherents to Islamic law and now situated to determine the path the law will take: The Reformist and the Revivalist. The challenge of ideology is not a simple one because one needs to solve the modern Muslim’s need for political and social ills while at the same time justifying their particular paradigm as religiously valid. In order to succeed, they must make the past relate to the present, without ignoring the present altogether. Islamic law and its followers must overcome some of modernity’s most obstinate hurdles, such as changes associated with the evolution of the nation-state and the changes associated with the growth of the international legal regime. Perhaps the greatest challenge for those advocating change is how to deal with the religiously sensitive issue of women’s rights under Islamic law, while at the same time, working through the changing membrane of contemporary notions of international law. It can be done.

I conclude with where I began. What is Islamic law? Although I possess no definitive answers, I believe, like other Muslims, success is often found in the struggle. Quoting our plenary speaker, who wrote this fascinating book—and I encourage you all to read it—about Islamic law and speaking in God’s name:

Islamic law is founded on the logic of a Principal Who guides through instructions. Those instructions are issued to the agents who have inherited the earth and who are bound by the Principal by a covenant. . . . [T]he point of the covenant is not to live according to the instructions, but to attempt to do so. Searching the instructions is core value in itself—regardless of the results, searching the instruction is a moral virtue. This is not because instructions are pointless, but because the instructions must remain vibrant, dynamic, open, and relevant. . . . [I]t is impossible for a human being to represent God’s Truth—a human can only represent his or her own efforts in search of this truth. The ultimate and unwavering value in the relationship between human beings and God is summarized in the Islamic statement, “And, God knows best.”45

Thank you.

[Applause]

ANN ELIZABETH MAYER: Thank you for that eloquent presentation. And now I will turn the microphone over to Professor Jackson.

45. El Fadl, supra note 3, at 265.
SHERMAN JACKSON: First of all, I would like to thank Hamid and all those responsible for affording me this opportunity to come and share some ideas and hopefully get some feedback and come into a deeper, more nuanced understanding of an issue that, as a non-lawyer, I am not used to thinking about. This was a real challenge for me to wrap my mind around, i.e., this whole issue of the role of international law in promoting or protecting women’s rights. And since Hamid sort of started a tradition of truth in presentation by giving you a sense of where his own personal perspective—or shall I say vices—may lie, let me begin by saying that on the issue of Islamic law, I am personally on both sides of the whole issue of how one relates to tradition or not. As a male, and as a Muslim, of course, the tendency is to recognize tradition and confer upon it at least primary if not ultimate authority. At the same time, I am a Westerner who belongs to a culture and a history that was not only alien to that tradition but that in many ways has come to constitute something of a negative category. So whereas all kinds of issues may be viewed in Muslim countries with a presumption of being consistent with Islamic law, the opposite presumption takes place when we look at issues in Western society. Indeed, virtually everything in the West is sort of assumed to be proscribed until proven otherwise, whereas everything in the Muslim world is assumed to be permissible until proven otherwise. And so I come to this whole issue with, I will not say a vested interest, but when I look back at virtually all of my work, I notice that it has all been informed by an attempt to come to terms with how to both obviate the historical dimension in Islamic law—that is, to excavate the manner in which Islamic law evolved through history and was informed by the perspectives, biases, presuppositions, and obsessions of peoples in specific places and times, and under specific circumstances—while at the same time trying to locate in all of this that which is in fact universal about it. What is it in this legal tradition with which I or anyone in the modern world can identify? I mean, if it is all specific to one place and time, does not that undermine its universal authority or its universal appeal? So in a sense, I identify with women in the sense that I think that women generally tend to feel that Islamic law is a law that takes place or takes shape, I should say, during a historical period when women’s interests were not at the forefront of consideration and therefore much of the deliberations were carried out in a manner that is deemed to be, or to have been, prejudicial to the interests of women. I would also like, however, to preface my remarks by stating that in a real sense, we are not simply dealing with Islamic law. What we are dealing with is Islamic law and Muslim civilization in modern times. And I think that the event of modernity and what it introduces into Muslim thinking—into Muslim
juridical thinking and some of the dislocations that has brought about—leaves us in a situation whereby Islamic law is now still in transition, trying to position itself between tradition and modernity, not quite having found its footing yet, but still in the process of weighing and debating the various options that might be available to it. I think that it is a mistake for those of us in the West who want genuinely to understand what is going on in Islamic law in modern times, to ignore the impact of modernity, or to ignore some of the kinds of changes that would affect any legal system that moves from being essentially a jurist’s law—that is a law that is primarily promulgated by substate actors, to being a law that is now the exclusive preserve of a nation-state. I mean, how do you get a genuine legal pluralism which traditional Islamic held in the highest esteem when there is only one law that is to be applied equally across the board as the uniform law of the land? And how does this affect your understanding of your relationship with both the nation-state and the enterprise of legal deliberation? In pre-modern times there was legal pluralism, the State did not have a monopoly on the promulgation of law and you could have two, three, eight, fourteen Islamic laws, all of which were equally orthodox and equally authoritative. All of this is to say that some of the dislocation that we’re seeing in modern Islamic law, it is not simply a matter of what Muslims think on this or that particular issue. It is a matter of trying to weigh the consequences of committing to a particular position in the context of “trying to do Islamic law,” as it were, in a modern State. This is a very important point that I hope we will keep sight of.

Now, I have no idea why Hamid insisted on my coming to this conference. But he did, and I have tried to think very seriously about the meaning of these questions, and I took my assignment quite literally. So what I am going to offer are a few thoughts about the whole issue of the appeal to international law as a means of protecting women’s rights, comparing the collectivist with the individualistic approach. That was my understanding of the assignment.

Let me begin by saying that I can imagine a lot of different definitions of collectivism and individualism. So let me just sort of give a provisional definition that will inform the comments that I am about to make. By collectivism or collectivist approach, my understanding is that this is an approach that would see individuals’ rights, in this case those of women, as belonging to individuals as members of specific groups, and then look at these individuals’ membership in their respective group as a cause for raising certain presumptions or suspicions about whether or not their rights are being violated. So the collectivist approach assumes that certain individuals’ membership in certain groups should make us
more vigilant in terms of asking the question, "Are their rights being protected?" Essentially what we are dealing with are what we might call "suspect classes." That is to say, where an individual is disproportionately negatively affected by a law, we assume that his or her membership in a particular group is, at least in part, responsible for how the law affects that individual. Thus, in addition to any particular right, what we are looking at is whether a law or institution itself was either ignorant or dismissive of a particular group's interest or whether it intentionally undermined or marginalized the latter. On this approach, even if we have an unbiased application of the law, members of a particular group may still be negatively affected because the law was not designed to promote or protect their interests in the first place. What we have to do in such instances is either change the law or create certain exceptions or exemptions from the law that would protect those individuals whose interests were not considered at the time the law was promulgated. This would be, for example, part of the rationale behind affirmative action in American law.

The individualist approach would do something different. It would basically assume that the law is okay, that the law is perhaps even just, but that certain applications of the law negatively affect certain individuals. What we are really looking at here is not so much the substance of the law itself, but how the law is being applied—how it is being carried out.

This is my understanding of the collectivist versus the individualist approaches.

Now, the second thing in my assignment that I want to say a few words about is the whole phrase "protection of women's rights under international law." To my mind, this raises at least three possibilities in terms of what we could mean by this. One, we could mean that we will appeal to international law to protect rights of women that Islamic law recognizes in theory, but in practice does not protect. So for example, according to Islamic law, women have the right to inherit, to own and to dispose of their property, but certain Muslim societies do not recognize these rights. Now, do we mean by invoking international law that international law will come on the scene and insist that the provisions in Islamic law which confer certain rights upon women are recognized and applied? That is one way of looking at the whole issue of invoking international law.

Another construction that could be put on this has to do with rules that are not presently a part of Islamic law, or are not the going opinion of Islamic law, but could very well be so. And these rules, since they touch upon what may be perceived as certain fundamental rights of
women—a suspect class—could be encouraged by an international legal community to be adopted by the Muslims. For example, adultery in Islamic law is a capital offense. At the same time, pregnancy in an unmarried woman is generally taken as proof of illicit sexual activity. So where a woman shows up pregnant and does not have a husband, that is generally taken to constitute proof that she engaged in illicit sexual conduct and is therefore subject to punitive measures under the law. At the same time, however, prostitution by poor or indigent women is generally not prosecuted under the law, certainly in the Mālikī school, which I am most familiar with. That is to say, if a woman is poor or indigent and she engages in prostitution, her poverty is looked upon as a reason to set aside any punishment for this otherwise illicit sexual conduct. Now, none of the schools that I know of combine these two rules to say that if a woman turns up pregnant, especially if she is poor, that courts should simply assume that poverty is the motive and set aside all punishments. That might certainly be a possibility, however, under Islamic law, a possibility consistent with Muslim legal logic. Such a filiation might be encouraged by the international community, which could serve to protect many women in poor African societies, for example. So we could be talking about international law coming on the scene to sort of encourage, put certain pressure on Muslim communities to adopt these kinds of laws.

A third construct, or construction, to be put upon the notion of international law being appealed to protect women’s rights speaks not to the international community confirming Islamic law but to international law as a substitute superceding or overriding Islamic law. That is to say, where Islamic law is deemed to violate certain fundamental rights or certain rights that are deemed to be fundamental by the international community, international law can come on the scene and override Islamic law. So for example, the whole concept of equality would basically say that provisions in the Qur’ān, for example, that award sons more of an inheritance than is awarded to daughters would violate the principle of equality and therefore be a cause for the international community to intervene and override that law.

Now these are all constructions of what might be meant when we speak of international law protecting women’s rights. So let me say a few words about what I think in terms of the Muslim community’s likely response to all three of these constructions and then maybe I will come back, if we have some time, to say a few words about the collectivist versus the individualist approach to these.

If the international community’s or international law’s functioning to confirm Islamic law is what we mean by international law being invoked
to protect women's rights, I do not think that there would be any problem within the Muslim community. Just recently, after 9/11—some of you may have read about this in the newspaper—there was a fatwa, or a religious opinion, that was issued on the question of whether Muslims who are members of the American military are permitted to participate in the war against terrorism. The fatwa basically said that the Muslims should or are permitted to participate in this effort because the perpetrators of the dastardly deeds of 9/11 had themselves violated Islamic law and were, as such, criminals under Islamic law. What the Muslim-American soldiers would be doing, in other words, is simply undertaking an executive function which basically upheld the integrity of Islamic law. Thus, their participation would be permissible.

If this is the logic implied by the appeal to international law, then certainly the appeal to international law as a means of confirming rights that are granted to women under Islamic law but are not being realized or exercised, would not be a problem. I also think that the whole question of the encouragement—i.e., to adopt laws that are Islamic in potentia—would also meet with little resistance. I think, again, there is quite a bit of talk within the Muslim community about this whole issue of Islamic law's relationship to the international community. What is particularly interesting is that a lot of this comes from religious scholars who would otherwise be considered quite conservative. They, too, are recognizing that the Muslim world has to engage the international community and that it cannot do so in isolation. Rather than trying to accentuate differences between Islam and the West, the tendency is now to look for points of commonality. I have with me here a very interesting book by Shaykh Wahbah al-Zuhayli, who is from Syria. In it he talks about the Muslim declaration of human rights. He talks about all of the different levels on which the Muslim community must cooperate with the international community in promoting and seeking to protect rights and interests that they find in common. Al-Zuhayli, we should note, is not by any stretch of the imagination, a shaykh that one would consider to be liberal, by any, any, any stretch. [Laughter] Yet, this kind of talk is even coming from al-Zuhayli. I mean, he even talks about things like the rights of individuals to participate in the process of choosing their leaders and elected officials, etc., with no distinction in religion, for example. Al-Zuhayli, and I could name others, now openly talks of such things.

To summarize my thoughts thus far, I do not think that the issue of appealing to international law to promote rights that are either already or potentially recognized by Islam should be that great of a problem.

When we come, however, to the third and the final construction, that is where the problem arises. And that is where international law and Islamic
law come into conflict, because the issue of overriding Islamic law, through the appeal to a higher or a more authoritative source of law is not likely to be accepted in the Muslim community. This is bound to be deemed a dereliction of duty to Islamic law and to the integrity of Islamic law, and to one’s duty to God to uphold that law. That leaves, of course, the question of how one moves beyond certain rules in Islamic law that are deemed to be both historically informed or determined and at the same time, detrimental to the interests of women. How do you get beyond these laws? Well, I think that greater participation of women, like greater participation of Westerners, in the very process of Islamic legal interpretation is one of the most important ingredients in bringing about the kinds of changes that would be more consistent with their realities and interests. At the same time, I think that I have sensed the manner in which change in the law that is being sought at present is not likely to go very far. Let me explain. One of the great achievements of classical Islamic law was precisely that it developed an independent theory of legal interpretation that was open and accessible to everybody, across cultural lines, across chronological lines, indeed, thus, everywhere Islam went. While we tend to think of Islam as some sort of monolith, we have to remember that Islam started as a small community in Medina, and then after a very short period of time, it goes and spreads all over the world of late antiquity. This world included several cultural, ethnic, religious, and even civilizational zones all of which would come to Islam with different sets of interpretive presuppositions, which would lead, not surprisingly, to different interpretations of the law. In response to this challenge/opportunity, Islamic law developed an independent methodology or hermeneutic that was equally accessible to everyone and could therefore empower people in Egypt to undertake interpretation of the law with the same degree of authority as people in Medina or Khurāsān. The marginalizing, displacement, and reactionary abandonment of the methodology by modern Muslims—including women activists—is, I think, one of the great tragedies to befall Islamic law as we follow it into modern times. I say this, because part of the whole meaning of fundamentalism, and I—shall I differ with you here?

HAMID M. KHAN: You can.

SHERMAN JACKSON: I can, okay. Part of the very meaning of fundamentalism is to throw out that classical hermeneutic on the idea that it raises or it allows for too many possibilities which cannot all be true. This is to say, the classical theory is viewed as a way of allowing all kinds of accretions to creep into the law; and since we want to purify the law, we have to get rid of that classical theory and go directly back to the text, in order to have a “pure” interpretation of the text, unmediated by
history or human situatedness. This is really the meaning of fundamentalism. Women, like Westerners have to make a decision. On the one hand, many of the laws that are deemed problematic happen to come from that classical tradition; so the tendency is to say well let’s throw them out. Well, that independent hermeneutic also comes from that classical tradition. And if you throw that out, then you do not really have a means of authenticating whatever interpretations you come up with. And so there’s a decision to be made. If you want to throw out the classical tradition, then you have the fundamentalists to deal with. If you adopt or accept that classical hermeneutic, then change is going to be a slow and arduous process, because, after all, you are sharing in that process with a whole lot of other people who have, *inter alia*, an incumbency that you do not have. I feel this conflict as a Westerner. And I am sure women jurists feel it as well. But, to my mind, these are the options. Do I have any more time?

**ANN ELIZABETH MAYER:** You have, I think, two more minutes.

**SHERMAN JACKSON:** Two more minutes.

**ANN ELIZABETH MAYER:** But I will be flexible.

**SHERMAN JACKSON:** Okay. The last point that I want to make goes back to the collectivist versus the individualist approaches. I will start with the latter. I do not think that there is very much benefit to be derived from an individualist approach, because I do not think that it affords you the sort of heightened scrutiny that you would need to deal with what has clearly become in a sense a suspect class, i.e., women. I would have said something about the degree to which Islamic law recognizes suspect classes, but maybe that is something we can deal with in the question and answer period.

As far as the collectivist position or approach goes, I do not think that the problem here will be as much a legal problem as it will be a cultural problem. My understanding of the collectivist approach is this: When you want to generate suspect classes, there are two moves that you engage in. The first is to create the suspect class. That is to say, you create a class that will enable you to obviate some of the imbalances that have affected the law in the past, by showing that the law has disproportionately had a negative effect on a particular group. That is step one. Now, once that has been achieved, then essentially what you want to do is destroy that suspect class. In other words, you want to be able then to say, well now that we have undermined the authority of the bad law, we want to be able to produce a new law now, but on the basis of a gender free sort of approach to legal interpretation. So we sort of get rid of gender as a category—as a class. Now, Muslim jurists, believe me, and any of you who ever plan to study Islamic law get ready, because Muslim
jurists are probably some of the greatest scholars who deal with legal fictions that I have ever run across. I mean they are the masters of legal fictions. Legal fictions do not pose a problem for Muslim scholars. All of this is to say that you could, in some sense, get rid of gender and still come to the same conclusions (i.e., on non-gender related issues) that you came to under the old order. That is not going to bother them. The real problem, however, is going to be cultural. That is to say, Muslim societies are likely to be vehemently opposed, at least on my estimation, to the eradication of gender as a category. Indeed, the very proposal of such is likely to raise the ire of Muslim societies for some time to come. And I think that in the interest of women, quite frankly, if I can be a little controversial here, perhaps the time has come to try to think outside of our own box and look at the possibilities of a category other than—or an instrument—other than equality that could promote the interests of women.

Here on this campus, I teach another class, and I will stop after this. I teach a class entitled “African American Religion Between Christianity and Islam.” In that class, last week we were dealing with the whole question of Black women and Christianity and Black women and Islam, but particularly in Christianity. Using as my foil the view of John Stoltenberg, I posed the question as to whether or not the solution that says basically if you want to get rid of sex discrimination, you have to do the same thing you have to do if you want to get rid of race discrimination, namely get rid of whiteness, which results in everybody becoming just human. In other words, you get rid of gender and everybody becomes just human. Well, the Black students in the class, especially the women, said that they did not think that they were ready to get rid of gender. Indeed, they were not at all enamored of the idea of getting rid of gender as a class. I think that is representative of the kind of attitude that you are likely to meet in the Muslim world. So when international law presents itself as being predicated upon the whole principle of there being no such thing as gender, that is not likely to be accepted on a cultural level. Thank you very much.

[Applause]

ANN ELIZABETH MAYER: Thank you for that very provocative presentation. Now I will turn the podium over to Professor Wing.

ADRIEN KATHERINE WING: Thank you. My talk is entitled “Palestinian Women and Human Rights in the Post 9-1-1 World.” I would like to thank the Journal of International Law for inviting me on relatively short notice to participate in this important Symposium. I was glad I could rearrange my schedule to make it.

HAMID M. KHAN: As were we.
ADRIEN KATHERINE WING: I have spoken here several times over the years and I am always glad to be here. I am particularly glad now because I am going to be a visiting professor here this fall semester. I am going to be teaching a new course, a course that I am just teaching for the first time in Iowa, called “Law in the Muslim World.” I hope a few of you will have some interest in it if you are going to be here next year. This course is going to focus not only on the Middle East and the Arab world, but on all the countries in the world that have Muslim populations, and it will look at customary law, religious law, the civil law of the particular jurisdictions, as well as international law. So I hope this will be of some interest to you. I will also be teaching “Critical Race Theory.”

My talk today is an intersection of these two courses: “Law in the Muslim World” and “Critical Race Theory,” because I am going to speak from the perspective of something called Global Critical Race Feminism. That is the title of an anthology that I am the editor of that focuses on women of color around the world. It is a successor to an anthology that I also have out that is called Critical Race Feminism that focuses on women of color, primarily in the United States. I am often asked, as an African American, why am I interested at all in the Middle East? “Don’t you people have enough problems in the United States?” Yes we do. I got involved in this area of the world in 1982. In 1982, I went to Beirut, Lebanon, accompanying my then husband, Rico, who was a medical doctor. He volunteered to work in Beirut during the bombing of Lebanon. He was assigned to an area in Beirut called Sabra & Shatila. We worked there for one month, he as a doctor, and me as a hospital administrator. In September, we came back to the United States to start our new jobs as a budding international lawyer and a doctor. A few days after we left, the now infamous September Sabra & Shatila massacre took place. Because of the fact that we survived a situation that has become known globally as one of the major massacres of Palestinian people, we became involved in the Middle East question. I did not have the joy of being able to study about the Middle East or Islam when I was a student. Over this past twenty years, a lot of my work as an international lawyer and now fifteen years as a law professor has involved the Middle East and the rights of women. A highlight of that work that relates to today’s topic is that in 1996, I was hired by the U.S. Government Agency for International Development to assist the Palestinian Legislative Council with the adoption of the Basic Law, which was supposed to be a constitution for autonomous Palestine under the Oslo accords. It was

46. Global Critical Race Feminism, supra note 41.
47. Critical Race Feminism, supra note 41.
supposed to be a constitution for the period from 1996 to 1999. The latter year was supposed to be the end of the autonomy period, which would have then hopefully resulted in an independent State.

First, I am going to tell you about the perspective I am speaking from—Global Critical Race Feminism. I will also be talking about the Palestinian Basic law as well. I do not have time, of course, to go into the details about Global Critical Race Feminism, but generally this is a term I have invented to categorize the status of women of color around the world, and it draws from Critical Legal Studies, Critical Race Theory, and feminist jurisprudence. The term "global" links into all of the different types of law that are global, whether that be public international law, international humanitarian law, human rights law, or comparative law. In other contexts, I have been here and actually spoken in great depth about Critical Race Feminism. So I will not go into that detail now, except to say one aspect of what we focus on is not only theory, but what we call praxis—the combination of theory and praxis. So like the speakers this morning, I am very much concerned not only with the theory of what should be done in international law, with respect to women, but what is practically being done or what practically could be done with respect to women's rights, whether it is in Palestine, South Africa, or in Black America, the latter two also being areas of my scholarly concern.

Now, one aspect of the theory in Global Critical Race Feminism that I have developed is something that I call "global multiplicative identity." What does that mean? Traditional feminism has looked at gender. Traditional race discrimination theory looks at race. Critical Race Feminism notes that women of color are discriminated against based on race and gender, in a U.S. context. To me, the research that is being done in both the feminist area and even the Critical Race Theory area, is far too narrow, very American, in its orientation.

So as an international lawyer, I have tried to look at all of the identities that are actually out there every day in everyone's life. It is not just that women of color have a gender and a race. White men have a gender and a race as well. It is just that for women of color, globally, their identities are disproportionally leading them to face discrimination, whereas with respect to some other groups in society, their identities are coalescing to disproportionally privilege them globally. So I started deconstructing and figuring out what are all of the identities that women of color have. The problem is the law, though, is not ready to consider all those identities, whether it is international law or domestic law. So there is a need for international law, whether you are looking at it as collectivists or individualists, to start to deal with the multiple forms of discrimination, based on these multiple identities that people have. You can
simultaneously experience discrimination in many of these identities, but you also can simultaneously experience privilege at the same time. So for instance, I am a law professor, upper-middle class, can get on first class on the plane, go over to Sweden, go over to the Middle East. Well that is a very privileging thing, right, that I can get on the plane first class. But I still might be stopped because they look at my skin color, and they do not care what class of ticket I have. For Palestinian women, most identities may lead to oppression. It is important however to see how a particular woman could be in a privileged position compared to another person in her same society at that minute in time.

Also, it is important to note that identity is socially constructed. Every one of the identities that I am going to talk about is socially constructed. It has no meaning other than what human beings have given to it. So for instance, in the United States, I am socially constructed as Black. In South Africa, I am socially constructed as a so-called Colored. In Brazil, I am socially constructed as White, with all the privileges—or discrimination—that each of those statuses gives me in a particular society.

So what does this mean for the topic of the conference? It means that a focus on whether we should prioritize collective or individual rights is a false dichotomy, which is what some of the speakers have already told you. That is not how people experience life. It is not a choice between do I want to vote or do I want to eat. It is that I want to do both. So we must not fall into the trap of attempting, in our limited resources, to say the first generation civil and political rights are more important for people who are starving and have no shelter. Then again, people who are starving and have no shelter would, maybe one day, like to be able to vote as well. We cannot presume that they do not care about that kind of thing ever. They may not care about it at the minute when they are starving, but they may care about it more in the long term. My identity as a potential voter cannot be prioritized over my identity as a consumer of food, education, and healthcare.

Okay, the situation of Palestinian women, with all of their identities, is much more dire after the events of nine-one-one. There is no doubt about that. In the war against terrorism that the United States and the whole world is focusing on, we know that certain types of actions are not being called terrorist, when they are engaged in by certain State actors. Whereas if the same actions are being engaged in by other State actors, then they are called terrorists. So this leaves male and female Palestinians, in a situation where what is being done to them right now by the Israeli government is not being defined by the United States as State terrorism.
Instead, only their activities, as suicide bombers and attacking Israelis, are being looked at as terrorist. There is not a discussion in the United States that frames their situation as being actions of terrorism too. Yet, Israeli Prime Minister Ariel Sharon was found to be a war criminal by his own people as a result of his involvement and oversight of the 1982 Sabra & Shatila massacre. There is a case in Belgium right now trying to consider whether or not he should go on trial for his role in these massacres. He was in charge of the Israeli troops that whole summer, when seventeen thousand people were killed. He was in charge in Sabra & Shatila when he permitted the historic enemies of Palestinians, a group called the Christian Phalangists, to come in and murder hundreds or thousands of people. He was found to be indirectly responsible by his own government and stripped from power then. So now, ironically that he is Prime Minister, there is a suit going on against him, that may be dismissed because they may say he has sovereign immunity. Here is a man who has been indicted, and he is running a government. Yet what he is doing is not being designated as State terrorism.

Now I will detail some of the identities that Palestinian women have, that cause them to face discrimination. Obviously, the first one is their gender identity as women, female Palestinians. And they do have limits placed on them by their female status. There is one very sad example. I looked at the suicide bombers—the three women who have blown themselves up. There is a whole debate as to whether or not any woman should be a suicide bomber at all, whether anyone should be committing suicide. Islam is against suicide. I am against suicide bombing personally. Among the many Palestinians favoring suicide bombers, there are some people praising the women bombers on equality grounds. There are other people condemning them, feeling that a woman should not be a suicide bomber.

In the history of Islam, it is very interesting that women have been warriors. So to argue that women should not be warriors ignores the history. The Prophet Muhammad’s youngest wife, Aisha, after he died, herself took up arms. There is a fourteen hundred year history of women who have taken up arms. The first martyr, shaheda, in Islam was a woman named Samaya who was killed because she had converted to Islam. While some Palestinians and others would distinguish suicide bombers from those historical warriors, there are many others who would note the key role of Japanese kamikaze fighters in World War II who committed suicide in their attacks on the U.S. enemy.

Another identity is nationality—Palestinian, whatever that is. As you know, if you are a Palestinian in the West Bank or Gaza, you have no
nationality. You have no State. The women in the West Bank and Gaza are Stateless, and they are trying to exercise their international right to self-determination. If the Palestinian woman lives in East Jerusalem or Israel proper, she is known as an Israeli Arab—an Israeli citizen, albeit with second-class status.

Another identity is your race. You may say race has nothing to do with the Middle East. I have heard some Palestinians say he or she is a Black Palestinian. Most, however, say they do not recognize race. On the other hand, I have met Palestinian women who have said their mothers actually would not like it if they married a dark man. It reinforces how race is socially constructed, which is a tenet of Critical Race Theory. In my view, the Palestinians are socially constructed as “niggers.” And I use that word as an African American. Some people will even say the Palestinians are “sand niggers.” Because they have been socially constructed globally, particularly by the United States, as niggers, their deaths do not matter. This parallels the U.S. historical context, where the deaths of African Americans have not mattered to the same degree as the deaths of Whites. The Jewish Israelis are socially constructed as “White.” So the death of each Israeli Jewish person is seen as the death of a White person—“one of us.” While there have been far more deaths of Palestinians than Israelis, that is disregarded because the Palestinians have been socially constructed as Black. A million Black Rwandan deaths do not equal the relatively fewer “White” deaths in any conflict involving Whites.

Another identity is ethnicity. I am an African American. In London, I might be an Afro-Carib British person. So you have Palestinians who are Palestinian. You have Palestinian Jordanians, Palestinians in Egypt, the 350,000 Palestinians in Lebanon. Your ethnicity is linked to your culture. Culture includes unwritten customary law. For Palestinian women in each of these societies there are customary laws about bride price, about arranged marriages, about a preference for having males. There is the whole issue of honor killing—that the society’s whole basis is the honor of women, and if women are defiled or are acting in a bad way, then they should be killed.

Everyone has a religious identity. Palestinians are a 95 percent Muslim majority. Yet too often we essentialize and forget that there are four schools of Sunni Islam. The Palestinians are predominantly within one school, the relatively liberal Hanafi. But there are other Palestinians who are identifying more now with the Wahhabi, stricter interpretation that the Saudis favor. There is a whole wider range of Islamic jurisprudential identifications than you might be aware of, with implications for how women are treated under each one.
Then of course, we cannot forget the Christians, the 5 percent
Christian Palestinians. Did you know that? They have Palestinian Samaritans. I just thought that was something out
of the Bible, until I met the Samaritan who was on the Palestinian
Legislative Council. They have one seat reserved for the tiny Samaritan
group. There are about three to six hundred Samaritans who are
Palestinian and Jewish. I have met several of them—very traditional,
very interesting people. Nobody ever thinks of them. You do not ever
hear about them, but they are there as well, and they are Jewish. Now the
religious identity affects the personal status law, the family law. So for
instance, just taking one example—polygamy. If you are a Muslim
woman, how many husbands do you get? One. If you are a Muslim man,
you can have up to four wives. So this is a gender difference based on
religion. In Christianity, one husband with one wife, at a time.
[Laughter] Right? You have limitations on divorce under Islam for
women. It is harder for them to divorce. The Muslim woman must marry
a Muslim man. If she wants to get married to a non-Muslim, that man
has to convert. On child custody issues, often the child goes to the
father's family after a certain amount of time. In inheritance matters,
women get a half share as compared to their brothers.

There is the idea of modest dress in the Qur’ān. What does that
mean? As we know, it can mean anything from people who are wearing
Hijab scarves, all the way to women who are wearing mini-
skirts and spiked heels. They will all say, “Yes, I’m modestly dressed.”
So there is a full range within Palestine, as well, of what women are
wearing. They are going to school right next to each other and are
modestly dressed, each in their own interpretation. The implication for
us in the United States is that we often regard the Muslim religion as this
monolith that is only concerned with collectivism—that does not allow
any individualism. It does permit for some individualism, within limits.
For instance, her religious freedom does not mean that she can have the
four husbands. I often debate this. Why can I not have my four husbands? What if I want four husbands? And all of my Palestinian
friends—the men—they just laugh. Whatever equality is going to mean,
it is not going to mean that I get to have four husbands. Also, no Muslim
can convert out of Islam. That is the crime of apostasy. You cannot do
that. She cannot marry a non-Muslim. That is haram—one of the
forbidden behaviors. She cannot marry more than one man—haram as
well.

Another identity that everyone has is marital status. I was interested
that one of the Palestinian female suicide bombers, was engaged. Appar-
ently she had just talked to her fiancé and then went and blew herself up.
This death was most shocking to me, as she should have had everything to live for!

Parenthood status is very critical for Palestinian women. It is very important to have many children, especially many sons. As a matter of fact, in Palestinian society, a woman and a man are identified primarily by their parenthood status. A woman is called Umm, name of first son, so I am Umm Che. He’s Abu Che. That is a primary identity. One of the suicide bombers, twenty-eight years old, had gotten a divorce from her husband because she could not have any kids. She was prepared to be a polygamous wife, to let him have another wife. Her family actually did not want that, so they got a divorce. He got remarried and lived right near her, and they still got along. Some people say she was willing to blow herself up because she could not have kids, and she wasn’t going to have a certain type of future. Now, who knows if that is true, but that is the social construction of what her marital status meant to some people.

There is another important case you should know. A Palestinian American woman, twenty-one years old, was in her car, with her husband. They were about to drive away somewhere from all the violence. A group of Israelis that were dressed as Arabs—a hit squad—fired on their car, on the husband, the wife, and the wife was holding her baby. They were shot, the husband and the wife. The wife died, and fell over on the baby. The husband found the baby was alive. This horrible event has been protested to the American Embassy. She was an American citizen. Here she was a mother, a wife, and yet once again, because of the social construction of her identity as a Palestinian, as Black, no one is pursuing this case.

Another identity is class. I think of Professor Hanan Ashrawi—very elite, highly educated, Christian professor. In my view she is one of the best Palestinian spokespeople out there. Another identity is sexual orientation. In the Middle East we often, do not talk about that. In other words, there is not an out lesbian movement. Actually some people will tell you there is no homosexuality in the Middle East and Africa. That homosexuality and AIDS is a Western disease.

There are several identities that I do not have time to talk about: age, disability, geographic location, primary language identity, stature (how you look—more attractive people tend to get more positive attention), and ideology, are you a member of FATAH or HAMAS or PFLP or DFLP. The second female suicide bomber apparently was affiliated with HAMAS. But HAMAS’s position is that women cannot be suicide bombers. So she went over to the Al Aqsa brigades of FATAH, and they were willing to let her be a suicide bomber. As a matter of fact, I have read that Al Aqsa is drafting a whole team or brigade of women who are willing to be suicide bombers.
Now I will give you one practical application of all this identity theory, relating to my work with the Basic Law. The Basic Law says that all Palestinians are equal before the law and no discrimination shall be on the basis of gender, color, religion, etc. There is also a clause that says Islam is the national religion. So there is obviously an incredible clash between those clauses, based upon everything that I have just told you. Yet every Arab nation—every Muslim nation has that clause. I was in the room when the clause was inserted about Islam being the national religion. Most of the people in the room were secular Muslims. On the drafting committee, there was one Islamic shaykh who was a member. He was the one that said the clause was needed. Everyone looked at each other. Some people signaled me to come out of the room. They said, "Adrien, do something." And I looked at myself, in my multiple identities: Black American, light-skinned female, upper-class, international law professor, working for the U.S. Government, divorcée, mother, secular Christian, disabled, minority, heterosexual, English speaker. Needless to say, it was not my role to tell them what they should do with respect to this important issue, even though of course, I had an opinion. And I had to tell them, "Yes, every Arab country has this in the constitution. So you must decide what you want to do. You can follow a path like Tunisia, that is very secular on these issues and even banned polygamy. You can follow the most conservative path like Saudi Arabia, or anything in between. It is not for me to tell you what to do. I'm providing you with information."

In conclusion, for the future, what do I see in the middle of all this pain and suffering in the Middle East—for Palestinian women in particular? I spent thirty years of my life dealing with the anti-apartheid struggle in South Africa, and who would have thought that one day we would have a democratic State of South Africa? As bad as everything is in Palestine, I have to be optimistic. I am the mother of five sons. I do not want my five sons to go and blow themselves up. I do not want them to see that there is no future like Black young men who are in south central Los Angeles, who are killing each other. I am hoping there will be an economically viable Palestine, contiguous West Bank and Gaza. They are already discontiguous there. I hope that East Jerusalem will be its capital, that Palestine will one day be able to live side by side next to the State of Israel. I hope that this Palestine will be a role model for the Arab and Muslim world, and the whole world, in that it will be


49. Appendix: Third Reading of the Palestinian Basic Law, 31 Case W. Res. J. Int’l L. 495, 495 (Saladin Al-Jurf trans., 1999) (Article 4(1)).
committed to being a human rights State that will endorse individualistic
and collective norms of human rights, that it will apply and attempt to
apply to the whole population on the basis of the rule of law, on the basis
of a Basic Law. I hope that Palestine will endorse the various
international human rights covenants, and will enforce them, rather than
making so many reservations. I hope that the Palestinian people will be
able to begin a healing process. I dream of a Palestine where a young,
seventeen year old, engaged girl would not feel her only option was to
blow herself up. That she will feel that there is a future for her, her
family, her children, and her nation. Thank you.

[Applause]

ANN ELIZABETH MAYER: Well after this spectacular panel, I
have bad news for you. We only have seven minutes for questions. So I
do not think we are going to do justice to all the very important issues
that this distinguished panel has raised. But we do have these seven min-
utes, so let’s put them to good use. Who would like to ask a question?
Yes?

QUESTION: Recently [inaudible] woman who was tried in adultery
laws. And you said that [inaudible] suggestion of where Islamic law
could go but it has not. And one thing that I have considered, was the
idea of [inaudible]. I remember she was asked by Amnesty International
as a student of Harvard, to write a legal opinion of Islamic people who
would help them in their discussions with the Nigerian Government. [in-
audible] they might have been able to get this argument in the discussion
and the jury might have given a different ruling. So [inaudible] legal rep-
resentation [inaudible] Muslim law [inaudible]—

SHERMAN JACKSON: I do not see why not. And I think that par-
ticularly in this case, in Nigeria, this would have been particularly
apropo, because they were Mālikīs and this is a standard Mālikī opinion.
I mean, there would have been nothing novel or how should we put it—
strained about this opinion. There would have been no aspersions cast on
it. So I think that yeah, that would have been something that could have
been put to very good use. And it would fall into that second tier.

ANN ELIZABETH MAYER: Yes.

QUESTION: Earlier today, we talked about Islamic law [inaudible].
Then Dr. Jackson outlined three possible ways that non-Muslims might
intervene within that. And I am still trying to understand—I think
Professor Wing [inaudible] she talked about her own—you know,
reservations about intervening or how to intervene. So I am trying to
imagine or trying to understand how an outside perspective could be
[inaudible]. I was wondering if [inaudible] issue of how you could
address that issue and is there a [inaudible]?
SHERMAN JACKSON: Yeah, I wish Khaled were here so that we could have this discussion. I think I understand what he means. I am not sure that I fully agree with it. I agree that an outsider to any tradition is privileged in terms of not being imprisoned by the fictions that that tradition generates in order to make itself effective, okay? Where I think I disagree is in his assertion that Muslim jurists were themselves unaware of the many fictions that they were generating. My book *Islamic Law and the State* deals with a number of these fictions that they knew were fictions. But again if you want the law to work, you have to let the fictions work, and you have to pretend that the fictions are real. The only time you challenge a fiction is when you want to change the law. They did that quite frequently. So I do not think it is a matter of outsiders being sort of uniquely privileged. I mean, they have less of an interest or vested interest in upholding the fiction, and I think it is a matter of whether you are inside or outside that may determine how well you want the fiction to work. There is a difference between being a practical lawyer and a theoretical lawyer, as it were. That is the real difference that I see.

ADRIEN KATHERINE WING: I want to add to what he just said. One way you can get involved is to do what I do. Suppose you have a particular viewpoint, like you think women should not wear a burka in Afghanistan. Or that there should not be female genital surgery. Yet you are an outsider, a Westerner, afraid of being accused of being an imperialist. Well, there are going to be groups within that society that actually will feel as you feel. So you can then get involved with those NGO groups, in that society, that are working on that issue. So therefore it is not you as you, but you working within the society for the viewpoints that mirror your own. And you can start doing that as students on internships and then as young pro bono lawyers. You will get to a level where you end up being invited to do things officially and so forth. So there are ways to do this, and I am happy I have been able to somehow carefully do some of this in my twenty years.

Some of you will be policy makers, maybe even in the U.S. government, hard though it may seem to think of at this moment. And you may be able to affect things from that way when at other times of your life you wore other hats or identities.

QUESTION: I have learned so much from this panel, so I hope my somewhat critical question will be taken in that light, but I guess I am in this particular situation of being both an international human rights lawyer and a Muslim at the same time. Although obviously a Muslim from the most liberal end of the spectrum. So if we are going to start talking

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50. **JACKSON, supra note 40.**
about identities, I have to be honest when placing myself. I guess the category I am most trying to deal with as Professor Jackson mentioned, is that last problematic category, of what we do when international law norms and Islamic law norms as interpreted are conflicting with each other. And I wonder if it is really true that appeal to the international norms is inherently something that will not cause trouble in the Muslim community. I guess I am wondering how far we can generalize that because he claimed for example Indian Muslim women saying, “Wait a minute, I have constitutional rights here.” Women in the feminist movement all over the Muslim world, pointing to an international norm that has helped them in the reform process internally. I think that you are right that we have to be really careful about the imperialist dynamics of it. I guess I wonder what space you see for actually using international law in that last problematic category?

SHERMAN JACKSON: I am glad you raised this point, because obviously I spoke of the Muslim world as some kind of monolith, which it obviously is not. I mean there is a spectrum of ideas and approaches to Islam, attitudes toward Islam, understanding of the meaning of integrity to Islam as opposed to a divergence from it. I mean, all over the gamut. I guess my thinking, and this has something to do with the hard wiring up here, is I think in terms of not can it be done—because it can be done. I think in terms of how can it be legitimated? That is why I find a problem. If history has shown us nothing else, certainly modern history in the Muslim world, it has shown us that if it is not legitimated, it may go on for a time, but it is almost of a certainty to come back and bite us. So what I am looking for is not simply whether we appeal to international law. Of course you can do that and it is done all over the place. But, what are the limits to which we can legitimate that appeal? And that is why I see the problem.

ANN ELIZABETH MAYER: I am sorry, we will have to stop at that point. Thanks to everyone on this panel.

[Applause]

SESSION III:
THE LEGAL EFFECTS TEST

ANN ELIZABETH MAYER: I hate to do this when some people may miss a valuable presentation as a result. But I am looking at the clock and the time is flying. So I would like to introduce the members of our last panel. This first speaker will be Reem Bahdi who has a B.A. and an M.A. from the University of Western Ontario, an LL.B. and an LL.M. from the University of Toronto. She is Director of the Women’s Human
Rights Resources Program at the University of Toronto Faculty of Law. Her research and advocacy interests include the rights of non-citizens, children’s rights with a special focus on Palestinian children, and transjudicialism. She has worked on a number of Supreme Court of Canada cases involving the domestic use of international law, including *Baker v. Canada* and *Suresh v. Canada*, and had served as a consultant in various governmental and nongovernmental human rights agencies. She has a number of publications published in major law reviews.

Our second speaker will be Brad Roth who comes from Wayne State University, to the east of us. He is an Associate Professor of Political Science and also teaches at the Law School. He used to be law clerk to the Chief Justice of the New Jersey Supreme Court and holds a B.A. in political science from Swarthmore, a J.D. from Harvard, an LL.M. from Columbia, and a Ph.D. in jurisprudence and social policy from the University of California, Berkeley. He is the author of many publications, including books such as *Governmental Illegitimacy in International Law*, and is a co-editor of *Democratic Governance and International Law*.51

Our last speaker will be Professor Simpson from the University of Michigan Law School, who has an M.A. and a Doctorate of Civil Law from Oxford. He used to be a Fellow of Lincoln College at Oxford and is a Fellow of the American Academy of Arts and Sciences at the British Academy. Again, I am only summarizing a few points. His publications include *Human Rights and the End of Empire* and *Detention Without Trial and War Time Britain*.52 He has also written about cannibalism and the common law, and he and I have something in common because I have spent time in Lake City, Colorado, the home of the notorious Colorado Cannibal, Alfred E. Packer. [Laughter] I’ve actually touched the staircase that Alfred E. Packer walked on once. With that introduction, Reem Bahdi will start.

**REEM BAHDI:** I am not sure if I can follow that introduction, [Laughter] but I will try. We have heard today about the hermeneutic tradition within Islamic legal cultures. I would like to talk about the hermeneutic tradition within international texts. My thoughts on the question of whether international law should take an individual or a collectivist approach to women’s rights has a rather unusual and unexpected genesis. Fairly recently, I went to hear Justice Robert Bork speak. His


Dueling Fates

Fall 2002

Dueling Fates

A talk was entitled “Coercing Virtue: The World Wide Rule of Judges.” Intrigued by the title, I went to hear him talk. He offered an examination of judicial activism in Canada, the United States, and Israel. His main claim was that judicial imperialism has triumphed over parliamentary democracy wherever judges have the power of judicial review. Consequently, courts are reading in Leftist values into their national constitutions and basic laws that were never intended by the drafters. The reason for this judicial coup d'etat is that constitutional interpretation has gone beyond the intent of the framers of these fundamental laws. Justice Bork’s basic point is that if judges would only limit themselves to applying constitutions as their drafters intended, then all would be well with the legal world.

As I listened, it occurred to me that Justice Bork’s approach has much to say to international women’s human rights scholars, and I wondered whether that would shock international women’s human rights scholars or Justice Bork more to hear me say that. [Laughter] His entire theory was premised on the notion that judges can discover the intentions of the framers of the Constitution. If they fail to do so, then they have interpreted the text incorrectly. It did not seem to me that Justice Bork presented a measure or a theory to help gauge when a text has been interpreted properly. The drafters’ intent thesis that he proposed has no way of accounting for the context in which interpretations take place. Indeed, any suggestion that meaning might change with context represented for him a slip into the solopsist abyss, a place where the interpreter’s subjective intent becomes the measure of all meaning and the text is reduced to nothing but an excuse for the individual tastes of imperialist judges.

Judge Bork’s presentation set off a series of questions in my mind. Don’t we, when we think about the domestic use of international law, assume that when judges apply international human rights text they will have the same substantive understanding of what is demanded by that text? To what extent, when we think of international text, do we accept that interpretation will be shaped by the context of the interpreter? Don’t we also worry that if we give up the notion that meaning is inherent within the text, that we are left with nothing but subjective intent? Now in Justice Bork’s world, the idea of subjective intent translates into the Leftist agenda of the judiciary. In the international human rights law framework, our concern over subjective interpretations translates into a concern about cultural relativism. I think we do often make the same kind of assumptions about meaning in text that Justice Bork was making. We give up the importance of domestic interpretive contexts in the quest to maintain meaning. I want to argue that this approach has several consequences that we might agree
are undesirable but that we nonetheless have largely ignored and continued to operate under. In particular, I think that as so many speakers have already said, we are creating a set of false dichotomies: one of them being text versus context and the other international law versus sovereignty. We are creating these dichotomies where they need not necessarily exist.

In order to illustrate this point, I want to examine the use of international law in domestic courts, and I want to pay attention to the interpretive context which shapes the meaning of international law. I want to use the example of motherhood as a collective right to show that sometimes, even though international treaties might put forward a collective right, if that right is interpreted within a legal tradition that is more individualistic in its approach, the court might not be in the position to accept the interpretive signals that the international text is sending. I am going to use the case of Baker v. Canada, a decision of the Supreme Court of Canada, to illustrate my argument. So I need to tell you a little bit about the Baker case.

This case arose in the immigration context. It involved a woman named Mavis Baker who came to Canada in 1981. She came on a six month visitor's visa, but she stayed illegally for twelve years. In 1992, she was ordered deported. But in the meantime, she had had four Canadian born children who were Canadian citizens by birth. Just after she was ordered deported, she applied to remain in Canada on humanitarian and compassionate grounds. There is a section of the Immigration Act that creates an exemption for those who can show that there are sufficient humanitarian grounds to allow them to stay and bypass the normal application of the Act. The main question, as you can imagine, that was raised in this case, is whether Canadian law required immigration officers to consider the rights of Mavis Baker’s children before deporting her back to Jamaica. This case raised squarely the question of motherhood. Immigration officials argued that it did not engage the children's rights because Mavis Baker had a choice. She could either go and leave her children in Canada or she could take her children with her. Mavis Baker ultimately decided the fate of her relationship to her children. But, on the special facts of this case, that was not really true. It was pretty clear that if immigration officials deported her and she was sent back to Jamaica while her children stayed in Canada that the parent-child relationship would be ruptured. But as I said, there are special facts that also meant that even if she was deported to Jamaica and took her children with her, the parent-child relationship and her status as mother would be ruptured.

After the birth of her last child, Mavis Baker developed a condition known as post-partum psychosis. This meant that she needed medical treatment in order to remain mentally healthy and her doctor stressed that if she was deported back to Jamaica, she would likely lapse into severe mental illness because of her poverty and her lack of social support in Jamaica.

So, even if she were deported back to Jamaica and decided to take her children with her, Mavis Baker would likely lose her status as mother. It’s not an exaggeration to say that the issue of motherhood permeated every nook and cranny of this case. But the courts ignored the motherhood issue altogether, at every level. The Federal Court of Appeal, for example, held that the case did not involve the rights of Mavis Baker’s children. This was just a case about the deportation of Mavis Baker. Her children were not being deported. So the children were not involved at all. The Federal Court took motherhood out of the picture by taking her children out of the picture. The Supreme Court of Canada, for its part, reversed the judgment of the Federal Court and made a decision on the basis of the best interest of the child. But in the process of emphasizing the rights of Mavis Baker’s children, the Supreme Court forgot all about Mavis Baker herself. It’s a judgment that is about thirty pages in length and Mavis Baker receives about two lines of consideration in the judgment. She becomes all but invisible as a woman and as a mother. Although the facts cry out for an analysis and a recognition of motherhood and the parent-child relationship as a good in and of itself, those things are not acknowledged or even recognized as rights within the Canadian context.

Now significantly, Canadian scholars recognize Baker as a very, very important case because it emphasized the importance of international law in interpreting Canadian law. As I’m sure you know, international human rights law recognizes a right to motherhood. For example, article 25 of the Universal Declaration of Human Rights, recognizes that motherhood and childhood are entitled to special assistance and care. Several of the public interest interveners that were involved in this case in fact pointed to the international standards that might have directed the Supreme Court of Canada’s attention to the motherhood issue. The Court could have received some very strong signals about the need to understand the plight of Mavis Baker and her children through a collective rights lens. But the Supreme Court of Canada proved unable to fully receive those signals and I submit that one of the reasons, a very strong reason why this is the case, is because they were interpreting a collective right from within the context of Canadian law, which is more individual rights-focused in its approach. So I want to go back to my
original point, the point that I made at the outset. The Baker case, I think, illustrates how international legal analysis is shaped by domestic interpretive contexts. Yet, international lawyers too often proceed on the assumption that meaning resides within the text and that the interpretive context does not shape meaning. Such an understanding, though, as we know, is no longer accepted within philosophical circles, or I think even domestic legal interpretive circles. But we as internationalists continue to operate under the idea that meaning resides within the text.

There are alternative understandings of the way that international law operates, and I think you might be familiar with Ian Johnstone's approach to the concept of meaning and international text. I say you might be familiar because this is a paper that was published in the Michigan Journal of International Law, where Johnstone suggests that international lawyers adopt the interpretive community model of understanding. This argument, stripped down to its basest essential, amounts to the claim that texts do not have inherent meaning but shared understanding remains possible because communities agree on interpretive strategies. So when we argue about the meaning of a text, we are really arguing about the proper interpretive strategy. And the end result is that if an individual disagrees with the interpretive community’s assigned definition of a text, then the individual has signaled her intention to exit from that interpretive community. The implication is that you cannot have membership within a community and difference at the same time. Now this approach seems compelling at several different levels, but ultimately, I think, proves unsatisfying and out of step with international human rights law because it assumes an “either you are for us or you are against us” kind of attitude. And the either-or stance, I would submit, is not conducive to international law, which argues for greater engagement and stresses dialogue as a means of promoting change. Think, for example, of the way that international treaty bodies engage States when they disagree with their interpretation of the international text.

So if the interpretive community model is not fully satisfying, when we are trying to explain international law and how it works, and how we would like it to work, what are the alternatives? I would like to suggest that we look for alternatives within the hermeneutic philosophy offered by Hans-George Gadamer who some of you may be familiar with. I do not intend on offering a lengthy presentation of Gadamer's work. I have done that to the extent that I am capable, in other places. I would like to give you a glimpse of what he has to say. It is the kind of glimpse that you would get from a high speed train. If you blink you might miss it.

But I am hoping to give you enough of an impression to the idea that not only is there a hermeneutic tradition within Islamic discourse for example, but there is also one within international human rights law that suggests the possibility of an engagement between these two regimes.

Gadamer’s central claim is simple, yet poignant. He says every interpretation takes place within a context. There is no objective meaning that transcends context or proves good for all time. The reader always brings their preconception or traditions to the interpretive task. So that means we always see a text through a temporal or cultural veil. There is no pure meaning, as others have said already today, that is unmediated by time and place. Now the fact that we cannot have a transcendental perspective or meaning that is good for all time should make us aware of the contingencies of our thoughts. This awareness of what Gadamer calls our historically affected consciousness should in turn, he says, create an openness to the other. His definition of hermeneutics entails understanding and accepting the possibility that the other might be right.

Some commentators have interpreted Gadamer’s emphasis on tradition and the possibility that the other might be right as dictating that we are trapped in our circumstance. Everything is contingent, everything is created, and there are no universal truths or values. But I disagree with this interpretation of Gadamer for two main reasons. The first is the idea that the other might be right represents a starting point in his philosophy. It is not the ultimate result. It is intended to convey the importance of engaging difference in understanding. His point is that if we open ourselves up to the other, our understanding as shaped by our present condition can change. The text can move us forward, as he puts it, and the openness to the other allows us to project possible meanings.

Second, Gadamer’s theory does not amount to relativism because his entire philosophy is built on the notion of equality between the self and the other. The other is needed to define the self and vice versa. The other is not an altogether foreign and incomprehensible space. It gives the self its meaning. Some might recognize here the influence of existential philosophers like Martin Heidiger in Gadamer’s work, and in fact Gadamer was a student of Martin Heidiger. Ultimately, I think his approach represents an invitation to humility that derives from an awareness of our historicism. Both the notion that we can capture transcendental truths and the claim that we can create them ex nihilo symbolize arrogance from his perspective and philosophy. Instead, what he invites us to do is to discover truth through engagements with other perspectives. In this way, skepticism, cultural relativism, and imperialism are avoided. The possibility of working toward shared truths ousts skepticism. Even though meaning derives from time and place, it can be shared across time and space. Therefore
cultural relativism doesn’t follow. And at the same time, one side of the equation, self versus other, doesn’t seek prominence at the expense of the other. On the contrary, engagement with difference, in Gadamer’s philosophy, is the heart of meaningful interpretation and understanding. It is this engagement with difference that actually opens up both the self and the other to change, thereby avoiding imperialism.

I want to apply Gadamer’s philosophy to international law in domestic courts. And I want to say that it does not represent mere philosophical musings. It is intimately connected to international law’s application in domestic courts. First, his hermeneutic approach recognizes that national court judges will always approach international treaties with their own particular interpretations in tow. They cannot escape their tradition any more than they can escape the finitude of their beings. There is, then, the possibility that judges will not necessarily interpret the same international provisions in the same way. However, national court judges in different jurisdictions are still interpreting the same text and must justify their interpretations in light of that text. Judges must be open to dialogue and engagement with other jurisdictions that differ from their own. They cannot interpret international text in splendid national isolation. Rather they must engage the meaning of international treaty bodies and those of other national courts and canvas as wide a spectrum of decisions as possible. This means that differences in legal context do not create an incommensurable divide but an opportunity for engagement and better judges.

This idea, although it sounds fairly simple, is actually quite radical and in many ways inimical to the common law and the very idea of precedent that underlies the common law, because the common law tells us that continuity is the key to legality.

Think, for example, of the way that Justice Thomas of the U.S. Supreme Court, has refused to consider international norms. For him, the difference between the national and international does not create an opportunity for engagement and reflection. Rather, it is a reason to avoid that which is foreign and un-American.

In the end, Gadamer’s meditations on meaning might not sound radical. They may appear descriptive rather than normative. They might at least sound familiar insofar as international human rights law seeks to impose an obligation of ends and not of means on State Parties; this international law itself seeks room for flexibility and local culture and interpretation. I argue, however, that a disconnect remains between our Bork-like approach to the text and our Gadamer-like aspirations for our undertaking or our enterprise. My argument is simply that we need to pay more attention to the assumptions that we make about language
when we invoke international text in disparate contexts, because after all, language is law's medium. When we ask "what is language?" "how does it operate?" "how does it define meaning?", we are really asking questions about law. If we continue to evoke international law in diverse context but do not adequately engage these questions, our quest to impose text upon context amounts to little more than, to borrow from Judge Bork, "coercing virtue." So I will end as I began with a quote from Judge Bork and I look forward to your questions. Thank you.

ANN ELIZABETH MAYER: Thank you.

[Applause]

ANN ELIZABETH MAYER: Brad Roth.

BRAD R. ROTH: Thank you very much. Thank you all for hanging in there this long on a difficult day. I want to thank the organizers of the panel both for having me and for their magnificent job in putting together this Symposium. And particularly Hamid, whom I have given a very hard time by e-mail these past few months on the framing of the topic of the conference, which I am about to address. But it has been really, I think, quite a remarkable event. It is fitting that I be about to address issues of liberalism and individualism on a day with "Hash Bash" going on in the streets and music blaring. [Laughter]

The question posed by the Symposium, of course, is whether the international legal regime should accept a collective or individual paradigm to protect women. I wanted to explore a little bit some of the assumptions underlying the discussion about this. In particular I want to speak about the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), in terms of what I would characterize as a collective paradigm in a certain sense of that term. We have been discussing collectivism mostly today in terms of what might be called the collectivism of the Right as opposed to a collectivism of the Left. That is to say that collectivisms of the Right are concerned to a much lesser extent—indeed perhaps to a negative extent—with the notion of substantive, particularly economic and social, equality. Whereas the goal of the Left historically is one to further economic and social equality. The CEDAW can be seen in this way as a Left critique of the traditional form of human rights protection for women that's provided in the International Covenant on Civil and Political Rights, the ICCPR. In order to get to this, we need to talk a little bit about collectivism and individualism.

I think it is worth noting in passing that if the CEDAW were to be seen as so quintessentially individualistic as one might imagine from the

55. CEDAW, supra note 9, 1249 U.N.T.S. 13..

subtext of much of the discussion here, one would think that perhaps the United States would be the pioneering force behind the CEDAW. And of course that is not the case. There are 168 States Parties, and the United States is not one of them. And there are reasons for that, which I will get to. When we speak of the CEDAW as collectivist in a certain sense, we need to try to understand what we can make of this notion of individual versus collective paradigm.

I have made a list of ways in which I do not mean the distinction between collective and individual, to give some sense of the full range of things that might be referred to by these notions. Collective might signify, for example, legislative measures or class action litigation as opposed to individual discrimination lawsuits—the acknowledgment of the fact that the liberation of women is not going to occur woman by woman but actually will require some broader strategies and tactics. It might include preferences and quotas for the inclusion of women in historically male-dominated institutions as opposed to efforts to address discriminatory treatment of individual women. It might include funding and autonomy for exclusively female educational and other institutions, as opposed to integration of women into male-dominated institutions. It might refer, at a higher level of abstraction, to a relationship-oriented ethic of care, as opposed to an autonomy-oriented ethic of abstract justice—a debate that occurs between radical and liberal feminisms. It might also, of course, touch upon the premise about collectivism that seems to be at work here today, which is 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 right to determine one’s life plan based on reason and the exercise of free will. So these are different modes of understanding a collective approach, none of which are going to be the subject of my talk today.

When I speak of collectivism, in the sense that I mean for today—with no intent to disparage other meanings—I am speaking specifically about the extent and nature of collective decision making in social life. I want to address this both in quantitative, and above all, in qualitative terms, because I believe that that is where a fundamental distinction lies between the CEDAW and the ICCPR and between a dominant tendency in modern liberal thought and a critical approach coming from the Left.

Now in order to deal with this, we need to deal with the liberal political tradition, which is indeed predicated on some notion of individualism. By the liberal political tradition, I mean a broad conception of the nature of political life—and indeed a normative conception of the nature of political life—that originated in the West and has always had the
highest density of support politically in the West, but that has also been criticized in the West and has also been embraced by many outside the West. It is not Western political thought as such. Rather, it is a very broad family of political ideas that have a set of common premises. The fundamental premise of the liberal tradition of political thought is that human beings are by hypothesis, in some conceptual sense, free and equal—without, therefore, any inherent hierarchy among them. Indeed, any exercise of power among human beings must be justified from the standpoint of every individual subject to it.

Put another way, this liberal political tradition is based on four basic principles, understood in particularly narrow ways: universalism, rationalism, egalitarianism, and individualism. By universalism, I mean simply that the foundational principle—that people should be subject only to such power relationships as can be justified to those who are subject to them—is applicable everywhere and always. It is not simply an artifact of custom. By rationalism, I mean that political authority is ultimately to be derived from the exercise and application of reason to political problems and not from revelation or tradition alone. By egalitarianism, I mean simply that there is no natural moral order of human beings in which some people are properly dominated by others; rather, whatever inequalities are to exist have to be justified independently. Finally, I mean individualism in the sense that we are operating from the premise that the individual is the essential unit of analysis in trying to understand the legitimacy of political order.

There are other meanings of universalism, rationalism, egalitarianism, and individualism to which the liberal political tradition is by no means committed. It is important not to view these things in a stereotyped or exaggerated way. For example, in terms of universalism, to be a liberal in this broad sense is certainly not to believe that there is one particular framework of rules and institutions that can be simply exported and imposed in any context anywhere in the world. Some people might think that, but that doesn’t implicate the liberal political tradition as such. Rationalism need not mean that there is some definitive answer deducible from first principles to every issue that arises that should be seen as a subject of common agreement by all rational people. Egalitarianism could mean any number of things—more or less formal, more or less substantive—and egalitarianism here only means the most elemental version.

Individualism, which is what I really want to focus on, can be understood in many ways that have nothing to do with this fundamental element of liberal political thought. But indeed, individualism to the extent that it is stereotyped as being associated with an ethic of selfishness
or isolation is, in fact, a straw position. I do not know any liberals, frankly, who think that human fulfillment is ultimately to be derived in isolation, all by oneself, or for the sake only of one's own personal aggrandizement and personal self-seeking. In fact, all liberals that I know not only believe in the interconnectedness of human beings fundamentally, but also believe that responsibilities, as well as rights, play an important role in the understanding of a legitimate political and social order.

So I think one needs to be very careful not to present liberalism in a way that makes it a kind of straw target for those who would seek to criticize the imposition of some model of Western selfishness that might be reflected in the culture of media advertisement. That is, unfortunately, America's great bequest to the world, most overtly. The liberal tradition is much more subtle than that. And the liberal tradition is much varied.

There are liberalisms of the Left, the Right, and the Center, in the sense that I mean liberalism. There are conservatives who fall broadly into the liberal tradition, but who are criticized by the rest of us, largely because although their understanding of political order is liberal, their understanding of the way in which the liberal order works is infected, we might think, by particular illiberal notions about the relationships of human beings in spheres other than the political. Which is to say, conservatives frequently can be seen as believing that there is a natural order of economy, civic association, and family as to which the proper role of the State is merely to reaffirm and reinforce these basic tendencies. When the State steps outside of that role and seeks to reform the dynamics of the economy, civic association, and family, it is doing something fundamentally illegitimate. It is imposing itself. It is politicizing properly apolitical realms. That form of conservatism is something that I will not have further need to discuss here, because I want to discuss, rather, the contrast between those who accept the fundamental premises of liberal political traditions and take them in a certain direction that a particular main current of contemporary liberalism does, versus critics coming more or less from the Left—that is to say, from the standpoints of feminism and socialism, by and large.

The critical distinction on this question—the critical problem in analyzing contemporary liberalism—concerns the proper role of collective decision making in social life. This goes directly to the question of whether there can be said to be a substantive common good that is properly brought about through mechanisms involving compulsory collective decision. We frequently speak of common good when we are speaking the language of conservatives and people on the Left have a tendency to recoil at the use of that particular language because of what it has been
associated with. Nonetheless, I believe that analyzed properly, the critique from the Left is indeed an argument about a substantive common good, whereas the main current of contemporary liberal thought (what might be called "deontological" or "neutralist" liberalism) is committed to the notion that the State needs to avoid taking a position on what counts as the good life, on what count as the proper objects of human striving for individuals.

For this particular strain of liberalism, the goal of good politics—it might be referred to in Madison's terms as "the general good," as opposed to the common good—is a matter of making society safe for the diversity of interests. It is based on a particular model of the relationship of the individual to society that is more specific than the broader model of the liberal political tradition that I presented before.

I will get back to this in a bit. It would obviously take a very long time to lay out all of the principles of deontological liberalism. But I want to get into the CEDAW and the ICCPR to demonstrate how some of this plays out there.

The ICCPR, as an instrument in regard to the problem of female equality, is actually, in many respects, a very progressive document. It is not only concerned with formal equality, but concerned with discrimination against women, and not only discrimination in the realm of State actors, but also discrimination in the private sector. Discrimination is something that the State has the affirmative obligation to address through its laws and through the execution of those laws. Beyond that, the notion of equal protection in article 26 of the ICCPR is a notion of equal and effective exercise of rights. Read broadly, it can include not simply practices and norms which discriminate against women on their face, but also a condemnation of norms which are neutral on their face but which have a disparate impact on women, as a result of the ways in which they are differently situated. So my purpose in setting up the ICCPR as a contrast to the CEDAW is not in any sense to dump on the ICCPR—which I think is an improvement over law that exists in much of the world—but the CEDAW adds something fundamental to the approach that is taken by the ICCPR. It also, of course, lacks some of the substantive concerns of the ICCPR, in areas that are away from the subject of women's rights, that may, in some ways, cut against women's rights. Therefore, you can see tensions down the road.

The CEDAW is concerned fundamentally with transforming the basic conditions in which women actually live, rather than understanding the problems of women's equality as a matter of discrete instances of discrimination, whether by State actors or by non-State actors. The CEDAW understands the conditions of inequality faced by women as
being much more deep-seated and requiring much more in the way of affirmative action on the part of the State, in a whole series of realms, to transform these conditions, and potentially in a radical way, in order to make real the promise of genuine substantive equality for women.

The most sweeping of the provisions of the CEDAW, and the one that perhaps will strike some in the liberal tradition as most problematic, is article 5(a). This reads: “State parties shall take all appropriate measures 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 inferiority or superiority of either of the sexes or on stereotyped roles for men and women.”

This is a truly remarkable enabling clause for State action. One thing to immediately notice about that clause is the use of the terms “prejudices” and “stereotypes,” because once one tries to dissect these provisions, once one tries to break down what count as prejudices and stereotypes, one ultimately, I think, has to engage with fundamental questions, not just about some abstract conception of the rights—that is to say, fairness or distributive justice—but questions of the good, the common good, the proper objects of human striving. What are women really like, as opposed to their stereotype? What counts as a prejudice, as opposed to an accurate perception of female difference? This gives rise potentially to all kinds of tensions, not just between article 5(a) and particular provisions of the ICCPR that have to do with specific individual rights understood as important in liberal societies, but also a fundamental clash, potentially, with grander conceptions of the neutrality of the State on questions of the common good.

This is not merely a theoretical or abstract question. The United States Senate, in 1994, briefly took up the question of whether to ratify the CEDAW and there was a golden moment—which passed rather quickly—in which it appeared that CEDAW ratification might well go forward. But had it gone forward, it would have gone forward with an extensive set of reservations, understandings, and declarations. That would not be new to the CEDAW. The CEDAW is full of these reservations on the part of many of the 168 States Parties, and many of those reservations are potentially criticizable as violating the object and purpose of the CEDAW because of how far those reservations tend to cut into the distinctive protections provided by that treaty regime. But here, the Senate Foreign Relations Committee is taking a position, in 1994, that in many ways is as seriously undercutting of the purpose of the CEDAW as many of the more notorious CEDAW ratifications out there.

57. CEDAW, supra note 9, art 5(a), 1249 U.N.T.S. at 17.
The Committee stated: "Individual 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 law of the United States." This pretty well rips the guts out of what makes the CEDAW a distinctive form of protection for women over and above the standards of the ICCPR.

Now it looks like we are again about to have a moment in which the CEDAW could be up for ratification by the United States. I would predict that we are probably going to find ourselves in the same predicament, in terms of reservations, understandings, and declarations of that magnitude. There are others, however, who are not so willing to undermine the object and purpose of the CEDAW, who nonetheless have taken the position that article 5(a) goes too far and that it constitutes a threat to liberal understandings of freedom. Theodor Meron, for example, has worried 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 [article 5(a)] may conflict with 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." Meron does not regard his suggested limitation on the scope of article 5(a) as a curtailment of the overall project. To the contrary, he maintains, "Social and cultural practices of conduct could be regulated by the substantive provisions [of the CEDAW] which govern actual practices in a particular field, for example employment practices, without a loss of substantive rights under the Convention."

This attempt to "square the circle" assumes that the tension between women's substantive equality and other human rights interests is a product of sloppy drafting rather than social reality. The 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

60. Id.
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 necessarily expect to find such tidy solutions. 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 fundamental problems that arise out of this clash over the CEDAW are familiar problems in political philosophy in the twentieth century—and with, indeed, many antecedents in previous centuries. It is a problem, fundamentally, over the question of freedom: whether freedom should be understood primarily, if not exclusively, as the absence of coercion, the absence of direct interference in the areas in which one might otherwise act, as Isaiah Berlin defined what he called “negative liberty”; or whether it should be understood as positive freedom, the actual ability to engage in self-directed conduct, which requires a whole series of social contexts, including resources of an economic nature but also many other aspects of social reality, to make possible the kinds of choices that we are concerned, in our furtherance of liberty, to protect.

So, one approach to human rights understands the issue as non-interference with choices among options that are already in existence and already available to the chooser, whereas the 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, I would say, is more profound, but it also contains notorious dangers that need to be confronted. To the extent that one’s political program is to try to create the basis for people to be true self-determining actors—to provide the context, through a program of compulsory collective decisions (that is to say, State action), in which people can truly make effective choices about fundamental matters in their lives—one has to have, in initiating this program, a pretty good idea about what individuals would do if they were truly free. And there is the rub: that it becomes very difficult to take positions on what kinds of fundamental actions are to be taken by the State without a preconceived notion about what individuals would do if they were able to truly realize their human essence. In the language of the CEDAW, then, we are back to the question, for women, of what counts as a prejudice or a stereotype, as opposed to a true characteristic fundamental to women?

There are many places in which the rubber might meet the road on this question; we are not speaking simply in abstract terms about this. The most interesting to me of the issues that have actually arisen, not specifically with respect to CEDAW application, but with respect to the
problem of women's rights generally, is the matter of pornography as addressed by Catharine MacKinnon. And this being the University of Michigan, it is with great disappointment that I realized that she could not be in attendance today.

There is a fundamentally important and interesting First Amendment opinion issued by the United States Court of Appeals for the Seventh Circuit, in the case of *American Booksellers Association v. Hudnut*,\(^6^1\) which had to do with an ordinance in the city of Indianapolis that Professor MacKinnon helped to draft. And the decision in that case, by Judge Frank Easterbrook—a jurist not, one might say, of a progressive bent, but certainly also one of great intellectual acumen—illuminates the ways in which the CEDAW might qualitatively exceed the reach into social life that might otherwise be mandated in human rights law, on behalf of women. The ordinance in the city of Indianapolis, perhaps inspired by the same notions underlying article 5(a) of the CEDAW, sought to prohibit, or make actionable, 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."\(^6^2\) The point of the ordinance was that pornography normalizes, and indeed eroticizes, the subjugation and objectification of women; that this has a fundamental social impact on the lives of women in the society. It increases the danger, argued MacKinnon, of women being subjected to rape. But beyond that, it increases the danger of women being subject to the kind of treatment by empowered males in the society that could lead to discrimination and harassment. Pornography and the preexisting structure of power therefore work on the whole, as a system, to perpetuate the subjugation of women in the society.

Now, the interesting thing about Judge Easterbrook's response to this argument is how much of it he actually is willing to concede. The point that pornography potentially has this effect—and has it, indeed, in an illegitimate way, not by actually convincing people intellectually of a particular way to regard women, but by inculcating in a subconscious way a mode of behavior that perpetuates the subjugation of women—is something that Judge Easterbrook can fully accept as a possibility. He says that pornography "works by socializing, by establishing the expected and the permissible. . . . Words and images act at the level of the subconscious before they persuade at the level of the conscious. Even the

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61. 771 F.2d 323 (7th Cir. 1985).
62. *Id.* at 324.
truth has little chance, unless the statement fits within the framework of beliefs that may never have been subjected to rational study.  

Having said all of that, Judge Easterbrook holds the ordinance unconstitutional, and indeed condemns it as thought control. His point is that the ordinance will censor expression on the basis of the perspective of the author. In other words, that it imposes a certain kind of public truth, based upon an authoritative conception of the common good. That is exactly the sort of imposition that a liberal order, in his view, should exclude. He says that under the ordinance, speech that subordinates women, presenting them in positions of servility or submission or display, is forbidden regardless of any literary or political value of the work taken as a whole, whereas speech which portrays women in positions of equality is lawful, no matter how sexually explicit. He goes on to recite court opinions that make the point that there is no proper orthodoxy in expression, as a matter of American constitutional law. “There’s no such thing as a false idea,” to quote from a famous constitutional case. This becomes the basis for striking down the ordinance.

Now, who is right in this, MacKinnon or Easterbrook? I do not want, at the moment, to try and sort out that question. What I do want to suggest, though, is that there is a serious issue to be considered in all of this. That the dogma that is expressed by Judge Easterbrook, the notion of State neutrality on questions of the common good, is a dogma that need not be universally embraced. It should come as rather a natural thing that there is a different result on the same types of facts in Canada than there is in the United States. We have here an opening created by the CEDAW in article 5(a), and created by the activism of MacKinnon and others in other circumstances, to a healthy debate about what kind of society we want and how we want to pursue some notion of the common good. And from my standpoint, it is all to the good that we be understanding the question of equality in this substantive way and not try, with Professor Meron, or worse with the Senate Committee on the reservations, to find some way of closing off the discussion about the kind of society we need to have if we are going to liberate women.

Thank you.

A.W. BRIAN SIMPSON: My apologies for not being here for the rest of this conference, but as you can tell, I have some sort of infection and I was lying in bed, preserving my right to life. [Laughter] But here I am, and I hope you can just about follow me, in spite of my funny accent and quirky voice. My interest in human rights law is twofold. One is

63. ld. at 328.
64. ld. at 331 (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974)).
historical, and the other is very practical. I have written on the historical
side of it and I have been involved to some degree in practical work, in
relation to the European Court of Human Rights.

The age of rights in which we now live is very, very modern. It has
only been going for about fifty years. If you went back into 1939, there
was no such thing as a general law of human rights. It simply did not
exist. There was certain protection for minorities under some treaties, but
there was nothing else. And then it developed after the Second World
War. We live in this age of rights, as Louis Henkin has called it, and it is
worth reflecting on the fact that it might not last forever. Things do
change. It is possible that we have seen the high peak of this movement.
I don’t know. That is a speculation. But certain things are very obvious
from the history so far. The first is it is extremely easy to get States to
sign up to human rights and humanitarian conventions and treaties. It is
really easy to do this. Most of them will do it. It is true that some of
them, probably the States who take them a little bit more seriously than
others, often do it with a great raft of reservations and understandings of
this or that kind, as you are familiar. But you can get them to sign up.
But it is extremely difficult to get them to sign up to institutional
mechanisms which do anything about the situation if the provisions of
these treaties are violated. That is very, very difficult indeed. The
immediate aftermath of the Second World War produced the first two
major humanitarian and human rights instruments. The Universal
Declaration of Human Rights (1948),\textsuperscript{65} which wasn’t even a treaty, and
has no mechanisms of enforcement whatever, and was treated with
contempt by the human rights lawyer of the period, Hersch Lauterpecht.
And the Genocide Convention (1948),\textsuperscript{66} which is an extraordinary
ineffective document and as far as I can see, has made very, very little
difference to the practice of genocide in the world since it was adopted
by the United Nations, on the day before the Universal Declaration. It
came into force a short time afterwards, after a certain number of
ratifications and accessions had taken place. The whole of the human
rights movement was a byproduct of the movement which established
the United Nations itself in 1945. And there were disputes before that as
to whether the way to go was to have a global institution, which is what
we have, the United Nations, or whether the right way to go was to have
just regional institutions. But the regional idea did not win at the San
Francisco Conference. The other aspect of the same movement, which
developed during the Second World War was the idea that you should

\textsuperscript{65.} Universal Declaration of Human Rights, \textit{supra} note 22.
\textsuperscript{66.} Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12,
have global statements of human rights and fundamental freedoms, couched in extremely general terms, and that these should be based on the individualist model. That is because the major powers who influenced these negotiations were absolutely against group rights in the form of minority protection. For example, Eleanor Roosevelt, who played a very major part in these early negotiations, publicly announced there were no minorities in the United States at all. Of course it is well known that in France there are no such things as minorities. The British were slightly more honest. They said, well, actually, we have got some minorities, and we do not want them making trouble. And so the whole atmosphere was against any sort of protection of collectivities in this world of global human rights.

In these discussions very little attention was paid to what seemed to me to be pretty practical considerations. There were prolonged arguments in the negotiations of the U.N. Conventions as to whether there should be recognized a right of individual petition, whether individuals should be able to make petitions to some organization, or to the United Nations, about violations of rights. People got very steamed up on this issue, and eventually got put off with optional protocols and so forth. But very little attention was paid to practicalities, as to the workability of a world in which every single human being in that world, ideally, was to be able to take their complaints as to violation of human rights to an international body. If somebody suggested that as a way of distributing passports, or air tickets, people would think they were mad. But over these discussions hung both a great air of idealism, and, I suspect, a considerable air of unreality, and much lack of attention to practicalities. One of the reasons why many of the delegates did not bother about the practicalities was that their countries were not going to sign up for any sort of enforcement mechanism anyway, so it did not much matter. So that is the kind of world where this all began.

Now since then, regional institutions have come into existence, and the one I know most about is the European Convention of Human Rights and its enforcement mechanisms. The American system is modeled on it, and it is too early to say whether the American system is going to be at all effective. It may well be. We hope it will be. But it has not been going long enough for anybody to have a view. And of course, it's marred by the fact that the major American power, the United States, has not joined the club. Which, of course, gives it a sort of peculiar air to start with. But the European system, it is generally agreed, has the most effective mechanism for the protection of individual rights, which is

what it is about, which has yet been evolved in the history of the world. Now I do not mean by that that it does not already have its problems. It may also have some very severe problems coming along. It may become a victim of its own success. For now it applies to forty-three countries, and the complaints from one of them, the Soviet Russian Federation, have hardly begun to come in. It may just be ground down, under the weight of its own success, that is because of the sheer volume of cases brought to it. That is being a victim of its own success. But some points about it do I think have some general significance for human rights protection everywhere.

The first is that it was originally an intensely conservative document. It was not meant to be a revolutionary document. It was meant to protect the rights and fundamental freedoms that existed in Western Europe, or were thought to exist there, at the time when the convention came into effect in 1953. Since then, it has been interpreted in an evolutive way, and so all sorts of things are now held to be violations of the European Convention, which would not have occurred to anybody to suggest were violations of the Convention when it came into force. Now how has that come about? It is because those who pressed for this Convention, though they were not entirely successful to start with, wanted to protect human rights in accordance with the model of civil domestic litigation. They wanted individuals and groups, as well as States, to be able to bring complaints. These should go to a commission and ultimately, in some cases, to a court. The Court should issue binding judgments, and the Committee of Ministers of the Western Powers should decide on how these judgments were to be implemented. The Convention was based on this litigation model, and initially some countries in Western Europe were very reluctant, Britain in particular, to concede sovereignty to an international court. And so the right to go to the Court was also initially optional for States, and the right of individual petition was also initially optional. But over the course of the years, all Western European countries have now accepted the Court, and the right of individual petition. The result of the existence of the court has been the development of a jurisprudence of rights. There is now a huge case law. This case law, which is based on the evolutive model of interpretation—for nobody bothers about intention of the founders, or anything like that anymore—has extended, very, very considerably, the protection of human rights, and the concept of what amounts to a violation of human rights. Yet, at the same time, the Court has been extremely careful not to push things too far, so as to keep people on board. It has developed doctrines which have legitimated a cautious approach to the evolution of more extensive human rights protection. In particular it has developed a doctrine called
the margin of appreciation, which says that individual States have power to protect human rights in a way which seems to them to be best, and they won't all always be second guessed by the European Court.

This jurisprudence has, to some degree, developed protection for the positive rights of women, which were practically unheard of at the time when the Convention came into force, but it has done this in a very sort of cautious way. In fact, its more dramatic developments have been in relation to other areas, I think, things like gay rights, and so forth. There has indeed been a very considerable development of human rights protection. And when you look at this system, and turn to the protection of the rights of women, you wonder whether really the way to go is to adopt this juridical model; this litigation model, incorporated in regional conventions, and backed up by judicial institutions, which can develop a jurisprudence of rights. Well, I am not absolutely sure that that is a viable option today.

Already the European Convention is running into serious difficulties. I just want to mention some of them. One is, until very recently, the States of Western Europe dutifully conformed to judgments of the Court. They might grouse about it, or delay for a bit, but they did not just do nothing about these Court decisions. Unfortunately, life has now changed. Turkey has got a bad record of nonconformity, and already there are serious threats from some of the newly admitted countries in Central and East Europe. I remember teaching human rights in Albania, and one thing you have to sign up to nowadays is abolishing the death penalty. They were still executing people. And we said, "There, you've got to stop it." And they said, "Well we're going to stop it." We said, "No, no, now, today. You've signed it. Today you stop this." They found it very baffling, and indeed confusing. [Laughter] Talking about prisoners' rights in Eastern Europe produces yawns from many people.

One wonders about the extension of this regional system to a very large number of countries, forty-three now, and to some seventy million people, coming from countries with not only different social and economic backgrounds, but different attitudes to the role of law in society, because in Eastern Europe, the notion of judicial review of administrative action is regarded as nothing short of bizarre. Perhaps this is going to drive the Convention and its principal institution into the ground. So I'm not sure that the relative success, to date, of the European Convention, points the way for the protection of women's rights internationally.

What other mechanisms for their protection are there? Now one is, I think, the process which is going on, which is to go on producing these very abstract declarations of rights, which possess virtually no teeth. Even the countries who sign up to them, many of them who are not
Dueling Fates

going to pay them any attention at all, are not prepared to accept them fully, because they enter reservations. Now I do not want to say that these grand declarations may not have some force. It is very obscure what effect the Universal Declaration of Human Rights has had. But it has certainly sort of triggered off a movement. It may well be that it has provided a weapon for groups campaigning, as political groups, for the protection of individual rights. So it may be that these abstract documents may have some sort of political function. They may be something you can point to, and say, "Well, it says here, the country has signed up to this." Then provide arguments in political disputes. I think there may be something in the view expressed in the title of a book, which appeared not long ago: The Mobilization of Shame.\textsuperscript{68} That is to say that by signing up to these documents, governments put themselves in a position in which they can be publicly shamed by the press, and so forth, for failure to conform to the provisions they have signed up to. So it may well be that they have a value. I am, however, somewhat doubtful about their value, and I just wonder what the alternatives are.

Now I think one of the problems with the movement to protect women's rights is that it is essentially a revolutionary movement. Now human rights have always had two sort of strands in them. Human rights, individual rights, have not at all times in history been treated as conservative. They were in the eighteenth century in Britain, and in the American Bill of Rights. The same was true with the European Convention, initially. But sometimes rights can be used as a revolutionary instrument, as in Tom Paine's Rights of Man.\textsuperscript{69} I do not think there is any doubt that the women's rights movement is of a revolutionary character, and the passage which has been read out from CEDAW is an example of that. That's part of a revolutionary program. And I wonder, myself, whether there are not other ways to go, which will in some way reinforce reliance on very abstract, general, ideally global, declarations of rights, which possess no effective mechanism for their enforcement. I think of two things from the history of human rights protection. One is that no institution, perhaps, has done more for the protection of human rights than—and it is not a governmental institution, it is an NGO—Amnesty International. Now the importance of NGOs in the protection of human rights, both domestically and globally, by liaison between groups in different countries, seems to me something which just cannot be overestimated. When Amnesty International began, all its supporters did was to write letters to governments saying, "Won't you let so and so out?"


\textsuperscript{69} THOMAS PAINE, RIGHTS OF MAN (Watts & Co. 1910) (1793).
The person being a political prisoner. Like magic it worked in some cases. And now Amnesty International is an enormously influential body in disseminating information and mobilizing support in countries around the world. So I just thought: That is a profitable way to go. The other general observation is it always seems to me that the protection of rights ideally best begins at home. The establishment of domestic mechanisms is probably of more importance than the establishment of international mechanisms. It is noticeable that many of these international humanitarian instruments do not require States Parties to set up any domestic institutions. A good example is the Genocide Convention. It is deeply obscure what it requires States who ratify it or accede to it to do, so far as their domestic law is concerned. It seems to me that pressure in these negotiations for texts which require the establishment of domestic monitoring institutions might be a useful way to go.

Now finally, what have I got to say about the difference between an individual paradigm and a collective paradigm? The short answer is not very much. But I personally think that the way in which collective protection of human rights is likely to be most effective, is by the organization of individuals into groups within countries which press for changes in the law, and press for respect for whatever the law happens to be. And so forth and so on. The way forward for the protection of women as a collectivity may not be a different form of human rights text, so much as the development of local institutions, particularly NGOs which press for protection. And my enthusiasm for local institutions comes about partly from a historical fact. Before the Second World War, in Western Europe, there was no general protection of human rights, but there were treaties under which minorities were supposed to be protected in new States like Poland. These treaties were very ineffective. But there was one place where they were reasonably effective, though unfortunately it was all overtaken by the rise of Hitler, and that was a place called Upper Silesia. Upper Silesia had partly a German population, and partly a Polish population, and they didn’t get along with each other. It was partitioned and there was imposed a convention, which was to last for fifteen years, which was to make sure during the teething troubles of these two bits of Silesia, that individual rights would be respected. And the convention set up not only an international form of supervision through legal nations, which in fact wasn’t particularly effective, but it set up, in these two territories, local institutions to which individuals could take their complaints.

So it was part of the Silesian convention to set up these institutions and people would go to them, they were local, to make their complaints, and get something done about them. And this worked, really quite
effectively. Since then, it has never been copied because of course, it involves an interference with State sovereignty, something I am afraid, many, many countries would not be prepared to accept. But it provides a model for a relatively effective system of human rights protection. In fact it was in Upper Silesia that a Jew was protected from Hitler by international law, the only occasion this happened. There actually was protection for a Jew, and this was after the persecution of the Jews began, after the rise to power of Hitler. So I think it has a little lesson for us, which is that local institutions are very important in the protection of rights, and that is a model which might be followed. And of course the way to get them going is by the work of NGOs in particular countries, pressing for the establishment of institutions of one sort or another for the protection of women’s rights. Thank you.

[Applause]

ANN ELIZABETH MAYER: I want to thank the panelists for their valuable presentations and because they have been so expeditious, we actually have some time for discussion now. So I’ll open the floor to questions. Yes?

QUESTION: I have a question for Professor Roth, which probably reflects my philosophical ignorance—my confusion. It is about liberalism and the notion that liberalism does not make any substantive judgments about the way one should live one’s life. But it seems to me that if you say that the individual ought to be free to make her own life plans, that this is a substantive judgment because you are saying to the individual rather than the family or collectivity, you are saying that you should have this freedom as opposed to just doing what you are supposed to do, your responsibility. And you are also saying gee, you don’t have to have a plan, which is actually very stressful. You know, if you have ever been eighteen or twenty for example [Laughter]. This is very stressful, as opposed to a society where you just live your life. I think liberals are denying that they or we are imposing some kind of substantive judgment.

BRAD R. ROTH: Right, I think you are right. And I think too, that the notion here is that people should be free to pursue such life plans as they deem fit. If individuals wish to abdicate that in favor of taking for themselves the answers that have been set for them by some local or other community that they identify with, that is not something to which liberals have objection. The point that neutralist liberalism insists on is the notion that individuals should be free to make up and change their minds about these matters, that particularly they should not, once integrated into some particular system of this sort, be stuck there. They should have the opportunity to secede from communities that treat them
badly or revise their plan when they come to take on ends that are at odds with those who are seeking to determine their lives. But I think more generally, you are quite correct, that there is some real substance to what it is that this liberalism seeks to impose.

The point that neutralist liberals will try to make on this is that there is a distinction between the realm of justice and the realm of the good. And that they are, indeed, quite willing to impose the circumstances of justice because that is the only thing that makes possible individuals being able to adopt their own life plans. It is the freedom to choose the content of the life plan that liberals want to see as being sacrosanct—even where liberals might themselves have a view that there is a particular right and wrong way to live life—on the theory that it is only right for you if you have chosen it. Even if it is objectively right, if someone is imposing it upon you, that makes it not right for you. That is what people like Will Kymlicka, for example, say on the subject.

It is contestable in a whole series of ways. My point about it is that the insistence on not taking a position on the common good leads to the inability to produce certain kinds of public goods, to solve certain kinds of collective action problems so as to create the circumstances in which people could exercise other kinds of freedoms not otherwise available. So liberals are, in fact, I think by default, making choices about what kinds of life plans are going to be feasible and what are not, and hiding behind the notion of neutralism to avoid responsibility for that.

QUESTION: A comment for Professor Simpson. I really appreciate the fact that you were the last speaker and your last note was to sort of remind us [inaudible], because I think when we speak of the international, sometimes we spend so much time thinking about it and how can it be used and what can it do and the reality is that very few individual people will be affected by optional protocols in terms of cases that will be settled, except that it does go on and create these norms or ideas that then, of course, people can just disseminate very widely. So I thought that was a very nice place to end. But I guess from a few things I said this morning and the experience of the region that I look at, which is Latin America, I have seen quite a few places where precisely to do what you were advocating at the end, that has opened up national spaces that will be a venue to which women can come—sort of national class action or even bring up a complaint. One of the mechanisms through which one of the justifications in which to set those things up is to tell the State, “You have signed CEDAW.” To use precisely the way you suggested, which as a shame mechanism. And I just wanted to let you know that when I read out the Brazilian version of CEDAW that has been passed in the state of São Paulo, they explicitly said that the way this is to be used
is not to have material sanctions but to bring on shame for the signatories who do not comply with it. And I think that they are really speaking to what you can do with this normative language that you cannot necessarily force people to comply with in a law? Finally, when you bring up the example of Amnesty International and how effective that has been, in terms of international action, to take action for people who have their rights violated in other countries, that makes me think okay, so what are some of these NGOs that have done similar sorts of work for women. Equality Now just springs to mind and I think they choose their cases very deliberately, to not only help an individual person, but to draw attention to a particular violation. But it is also fascinating to me to watch how human rights [inaudible] and Amnesty International in the late Eighties [inaudible] have developed these women’s human rights programs to make sure that the sorts of issues that we are talking about here today are mainstreamed into that type of activity as well. So that women will also be, and the violation of women’s rights that may not always look the same as the violation of men’s human rights have also been put on the agenda. I think that is a very interesting place where that activity has gone on. And again, also bolstered by international law that is changing [inaudible]. What would it mean for Amnesty International to try to defend CEDAW when it looks for prisoners [inaudible]?

A.W. BRIAN SIMPSON: Just one little sort of comment on that. International lawyers use ridiculous expressions—one of the stupidest is “the International Community.” I mean “International Pack of Wolves” would be a more realistic account of these barbarians. [Laughter] But there is an international community, to be sought in NGOs. I mean these really constitute communities: people who are linked by common ideas and a common sense of belonging to an organization. Another famous community is the Red Cross and Red Crescent, which is an extraordinary institution. So when we talk about “the International Community,” I mean you can sort of forget the great powers. But these unofficial institutions do form communities of a very, very important character, in practical terms.

ANN ELIZABETH MAYER: Yes?

QUESTION: Hi. My name is Julia Ernst. I really appreciate your panel. It has been very interesting and educational. I have two hopefully short comments. One is for Professor Simpson. In terms of the international method I would like to—I know you do not feel that they are necessarily that useful, but I think that the two are intricately related in that what—part of what my organization does is that we work with women lawyers who work in other countries to bring international women reproductive rights to the fore in their countries and one of the
methods that was used is reports to a committee like a CEDAW committee that monitors the treaty. And those reports have been used not only in front of that body, but also [inaudible] method. So I think it is very important, following up on your comment, that we do see these methods being used—you mentioned that they are quite revolutionary, but I think they are used in a very evolutionary manner, in that you could not necessarily count on women's human rights to be recognized had there not been a CEDAW treaty that was created and this whole concept of the international community getting together, the ICPD, the Beijing Convention, the Cairo Convention, etc.

So I wanted to say that I see this as very politically linked. You cannot have one without the other. I am interested that you made such a dichotomy between the classic liberal [inaudible] of making [inaudible] diversity [inaudible]. And of also provision by CEDAW that the modification of [inaudible]. You put those [inaudible] dichotomy and [inaudible], but I see them as being also complementary. Not necessarily in contrast with each other because to me, we are thinking like lawyers here when we are saying [inaudible] pornography. In order to [inaudible]. That does not necessarily have to be the case. Governments take opinions and have programs all the time to try to give back social change or modify it culturally without necessarily having a negative law opposed to it. One of the most recent [inaudible] marriage provision that President Bush is trying to effect, that, in my opinion is not necessarily a good thing. That would be again, the government trying to go in and include a precept that it should be [inaudible]. But I am in contrast where you [inaudible] a liberal view [inaudible] tradition and then you also need to add to that [inaudible] individuals, without having those individuals infringe upon the rights of others.

So there is a duty to individuals not to infringe upon that of others. And where you have something like the issue of pornography where, again Judge Easterbrook said there are reasons to believe that this does infringe upon the rights of others. You might want a governmental program to—you were talking about education—to educate people in terms of why pornography might be bad. Without outright banning of it. So I do not know if that makes sense, but anyway I leave that to you.

A.W. BRIAN SIMPSON: There is just one thing I wanted to say about the issue of individualism against collectivism. One view is that the human rights movement has overemphasized rights and not bothered very much about duties. That view actually is expressed in the American Declaration of 1948, which is a declaration of both rights and duties.70

70. American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in Basic
There is, I think, another more fundamental view, which is that what is wrong with individualism is the idea that people will only achieve the best they can achieve not on their own but as members of groups. That view tends to be rejected by liberalism, I think.

I am very sympathetic to the point that was made about the horrors of being asked to have a plan. I was once in the British Army, and I can tell you it was absolutely marvelous. You don't have to decide anything at all. [Laughter] They just tell you what to do and you say yes, no, and so on. It is deeply relaxing, because the military is an organization where submergence of the individual in the group is a part of their ethos. And also I think we all have probably experienced in life occasions on which we have felt absolutely great when we have just become members of a group devoid of individualism. I mean sometimes people get this feeling, they go mountaineering together. Often mountaineers hate each other, and fight all the time, but sometimes they get an enormous high from being together on some ghastly mountain, with death imminent. [Laughter] In hideous conditions. And I confess, though I have not done any classy mountaineering, that I have experienced that feeling. And that sense of only being important as part of a group can be developed into a philosophical view of considerable significance. I mean, for example, monks don't have rights. They just have obligations. And their obligation is to submerge themselves in the group. But that sort of thing is not liberal individualism, I think.

BRAD R. ROTH: You have very well articulated the liberal neutralist response to my position. I disagree with it for some of the reasons that I have given. Pornographers are diverse, too, and so are their customers, and I do not have any particular regard for that, but some people do. The difficulty is how nonjudgmental you can actually be about these things on this theory of not interfering with others. The favorite statement about liberty, quoted by liberals, is John Stewart Mill's statement that "the only freedom which deserves the name 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." And that is fine, except that it turns out, in practice, that for people who are trying to hold the neutralist line, "impede" has to be understood very narrowly to mean direct impositions as opposed to indirect impositions. I am not persuaded that indirect impositions are not just as important. Nor am I persuaded that living the good life can really be separated from living in


the good society. And so this is a matter on which we can agree to disagree, I think.

The other point was about funding educational efforts to try to change things. Actually, if you hold to the rigid neutralist line, there are problems there, too, because can you discriminate as the government against people who are trying to inculcate a view that is contrary to the authorized position? There is actually interesting caselaw on this point. So the problem lingers, notwithstanding the alternative approach.

ANN ELIZABETH MAYER: Yes.

QUESTION: You talk about children. Rights of mothers and not necessarily [Inaudible]

REEM BAHDI: Yeah, absolutely, I think that is why the court went with the conventions on the rights of the child, because children are an easier sell. When you look at who Mavis Baker was, she was an immigrant. Well, a woman who came and stayed illegally. So she does not even have formal immigration status. She was a Black woman from Jamaica. She had to rely on social assistance for a while and she also had a disability, and so there were a whole host of—Adrien Wing’s not here—but intersecting identities that shaped the way that the court approached this particular issue. There is no question. And it really started me thinking about the value of international law in domestic courts because one thing that international law was not able to do in this particular situation is break the kind of analysis that domestic law, itself, brought to it. So what I am getting at is that we already had a sense of the best interest of the child in national law, what we needed in this case was international law to come in and say no, you know what, Mavis Baker is a non-citizen, Mavis Baker is a woman with disabilities. Mavis Baker is somebody living in poverty, who needs some recognition and protection. Thanks for your question.

ANN ELIZABETH MAYER: Any other questions? Well we will just thank our panelists one more time. Thank you so much.

[Applause]
DUELING FATES: SHOULD THE INTERNATIONAL LEGAL REGIME ACCEPT A COLLECTIVE OR INDIVIDUAL PARADIGM TO PROTECT WOMEN’S RIGHTS?

CAMPUS INN DINNER BANQUET
SATURDAY, APRIL 6, 2002

PLENARY ADDRESS II

THANKS AND INTRODUCTION

HAMID M. KHAN: Good evening. If I could have your attention for a moment. While coffee is being passed around we are going to begin tonight’s shorter festivities. First, before we have our second plenary address, I would like to take this time to acknowledge some of our sponsors who have been instrumental in providing funding for this Symposium and have been very generous in their resources, we would like to acknowledge them right now. First and foremost, of course, the University of Michigan Law School, the Office of the Provost and the Executive Vice President for Academic Affairs, the International Institute, the Office of the President of the University of Michigan, the Michigan Student Assembly, the Department of Women’s Studies, the Center for Middle Eastern/North African Studies, the Center for Education of Women, and the Holland & Hart Foundation. In particular, however, we would also like to thank individuals who have also been instrumental in our success, and we would like to acknowledge them here, be they present or not. All of them have contributed in some way, either through their support in logistical matters or simply providing the necessary support we need in conducting affairs such as this. First and foremost, to repeat, Associate Dean Caminker, who has not only proven himself to be a great moderator in a pinch but also been helpful to the Journal in dealing with our schedules. We greatly appreciate Director Michael Vourner, Ann Castle, Provost Paul Korant, Director Michael Kennedy, Dean Jeffrey Lehman, Dean Earl Lewis, Director Pamela Trotman Reed, and President Joseph White. In addition to those who have been mentioned, I would like to extend a special thanks to the students whose hard work and dedication made this possible, and for all of you who, despite the fact that I continue to speak here incessantly, realize that there are others who are very important (far more important than me)! In recognition, we would like to extend a token of our
gratitude. It is merely a token, for the amount of work that they have done. First off, Stephanie Dorn and, I believe, our esteemed Editor in Chief and Managing Editor will be passing out our tokens. Matt Johnson, whom I would like to especially thank because he’s right there! But he’s been great. I just thought I would mention that. Dustin Pickens; Hillary Spike, the incoming Editor in Chief; Jacob Tiedt, who is my favorite person dealing with Web addresses and the Internet; Jeff Totten; Andrew Dyer; and Tina Juntunen, all of whom were very helpful the last few days. But even above them, there are four people who were part of my Symposium Committee who received my incessant e-mails, my pleas for help, and my ranting and crying: Shuaib Atique, Jan Geht, Tariq Hafeez, and Julie Pfluger. Just a personal note, they had to deal with my impatience, and that deserves a special thanks. And of course for those who have come from great distances on such short notice, to our participants and moderators: Reem Bahdi, Karima Bennoune, Christina Brandt-Young, Professor Caminker. To Elisabeth Jay Friedman, Professor Rhoda Howard-Hassmann, Professor Sherman Jackson, Professor Ann Mayer, Professor Brad Roth, Professor Brian Simpson, and Professor Adrien Wing. Let me say as being the collective representative, you all made this paradigm seem very much more interesting than even I imagined it would be, and I know we discussed it, and I know that many of the speakers and I had interesting debates about what the content would be. So thank you for enlightening us and giving us a sense of how diverse the subject really is. Now I think I will be turning it over to the Editor in Chief of the Michigan Journal of International Law, who would like to make some special acknowledgements as well. So without further ado, Stephanie Browning.

STEPHANIE BROWNING: I think there is one very obvious person who has yet to be thanked and that is Hamid Khan. He has done so much since about a year ago this week to help get this Symposium all the success it gained today. It was about a year ago when we started drafting the proposal. We said, “This is something that Hamid certainly would have an interest in,” based on what we knew of him. We said, “Do you want to come help us?” And he did. He took over, thankfully! And championed the proposal to all the great speakers that we had today and just has been absolutely amazing. His devotion and dedication to the subject matter is what really drives this Symposium. We can’t thank you enough, Hamid!

HAMID M. KHAN: I don’t know if this honor is quite deserved, but thank you very much. It has been an interesting odyssey as I pointed out. And to culminate tonight’s events is our second plenary speaker. Professor Karima Bennoune earned her bachelors with honors from
Brown University and then earned joint degrees, her J.D., cum laude from the University of Michigan Law School, and her Masters of Arts in Middle Eastern and North African Studies at the University of Michigan Rackham Graduate School. She also obtained a graduate certificate in Women’s Studies during the same time period. Additionally, she earned a certificate in Human Rights Law from the International Institute of Human Rights in Strasbourg, France. Currently Professor Bennoune is a visiting professor at the University of Michigan Law School. She teaches seminars in international protection of human rights. She is also helping to develop and teach a new required course at the University of Michigan, Transnational Law, which has now gotten quite a bit of national renown. Previously she was legal advisor for Amnesty International’s Legal and International Organizations Program in London. It is with great honor that I present to you tonight’s primary speaker, Professor Karima Bennoune.

KARIMA BENNOUNE: Thank you very much for that warm introduction. I really am honored to be here with you this evening, and I am honored that the staff of the Journal chose to entrust me with keeping you awake after dessert! I will do the best that I can! The Journal of International Law means a lot to me. I was actually on the staff of the Journal when I was a student and I learned a lot about working with other people and about public international law from that time, so it is wonderful to be a part of your efforts and to see that students who have so much else to do and have exams in a few weeks time have taken out so much of their own time to devote our attention to these important issues.

With advancing years beginning to put distance between me and my graduate student days, I realize that I have to come out of the closet and admit that I have become a universalist. Or, as I confessed to Professor Simpson in my office a few days ago, an intolerant universalist! And that is what I am going to talk about tonight.

Perhaps, it is inevitable that I should be an intolerant universalist. After all, I am a professor of international human rights law and before that actually practiced in the field. My universalist views notwithstanding, though, I have to confess that I do share some concerns with the cultural relativists. Namely, I am often greatly frustrated when those who profess universalism do not practice it. Or instead they project what is merely their own vision as the universal. In my view this does great violence to universal notions and universal norms.

To give you an example of what I mean, I turn back to the beginning of my formal training in human rights law. In 1989, I attended the summer study session at the International Institute of Human Rights in Strasbourg, France. I remember very vividly sitting at the opening
ceremonies when we were treated to an utterly un-self-conscious proclamation that France was not only the sole birthplace of human rights, but seemingly a beacon of the same. For many people, perhaps that statement would pass without a second thought. But for me, being the daughter of an Algerian father who had only some thirty years before been brutally tortured by the French army, it was very difficult to accept what was being said at the opening of my course of study. I certainly recognize that French civilization, like many human civilizations, had contributed a great deal to developing important ideas about human freedom. On the other hand, I recognized that French civilization, like many human civilizations, had also carried out brutal repression. Liberté, égalité, fraternité have often been intended only for some. This paradox is vividly captured in my father’s favorite film, the stunningly beautiful Casablanca. I thought I would resort to talking about movies tonight since it is, after all, a Saturday night! Who could forget, who could fail to be moved by that wonderful scene in Casablanca in which Victor Laszlo takes the baton and conducts the orchestra in Rick’s Café in a chorus of the French national anthem, “La Marseillaise,” drowning out “Wacht am Rhein,” an anthem that is being sung by a cohort of Nazis in the background. Every time I watch that scene I want to jump to my feet and join in the singing of “La Marseillaise.” Then I stop and I remember that the setting of the film, Casablanca, was at the time a colonized city in which the French were themselves the oppressors of the native Moroccans. The natives, of course, are absent entirely from the cinematic Casablanca, except (and I wonder if anybody else remembers this) for one crafty merchant who tries to swindle Ingrid Bergman in the marketplace. If you do not remember him, he’s the guy who says, “For a special friend of Rick’s, we have special price!” He is the only native Moroccan that we ever see in the course of the film Casablanca. Furthermore, Sam, the African-American pianist in Rick’s Café is still referred to as “boy,” even by the anti-fascist heroine, Ilsa Lund. Liberté, égalité, fraternité for some “as time goes by.” Though I still love the film for aesthetic reasons, this is perhaps the ultimate example of what I mean by a non-universal universalism.

Such blindness has found its way into official human rights history as well. Some Western writers point out that many human rights norms, including the Universal Declaration of Human Rights, were adopted after the Second World War in revulsion to the horrors of the Holocaust. And so there was and should have been revulsion. Yet, the same writers usually do not point out that many of the abuses related to the Holocaust—systematic discrimination and persecution, murder, rape, torture, in some instances even genocide—continued to be perpetrated by many of the Western
countries in the colonies that they continued to control as they were
drafting the same human rights norms that were meant to be developed
in revulsion to the horrors of the Holocaust. So there is this question of
whether or not we learn from our history and whether or not we actually
are applying these norms universally.

To give you another concrete example, going back to Algeria. One of
the very tragic aspects of the Algerian war of independence from France
was that some of the heroes of the French resistance against Nazi occu-
pation later became torturers in Algeria. All of this, all of these issues
that I am talking about in no way invalidate the universal norms. But
these are facts that I feel we have to be, at the least, self-conscious about,
that we must acknowledge, that we must discuss critically if we want to
be able to build a truly universal set of universal norms and apply those
norms universally.

For an example closer to home, I turn to November of 2001 when the
U.S. government appears to have officially discovered Taliban persecution
of Afghan women. For several weeks we were shown images of Afghan
women whom CNN dubbed the “silent shadowy members of Afghan
society.” We were reminded that they were oppressed, completely cloaked,
sometimes executed in Kabul stadium. We were reminded of how they had
been systematically excluded from education and from employment, and
utterly excised from the public sphere by their totalitarian government.
All of this was true, and the systematic discrimination of Afghan women
under the Taliban was utterly and completely reprehensible and no
possible justification can be offered for it. However, something about the
official media discourse on the subject began to make me distinctly
uncomfortable. My discomfort started as a twinge and it grew to a pang,
and at a certain point it became a throb. I think I traced that to the
moment when I was riding in a taxi in New York City and I heard First
Lady Laura Bush deliver the first ever presidential weekly radio address
given entirely by a U.S. First Lady. This was the 17th of November
2001. She deplored the treatment of Afghanistan’s female population
(and I certainly agreed with her about that). The plight of women and
children in Afghanistan, she said, is “a matter of deliberate human
cruelty carried out by those who seek to intimidate and control” (and I
certainly agreed with that). And I remember thinking that it is very
positive the First Lady is being so outspoken about these issues, but there
is something strange about this. It is November 17th, 2001. The U.S.
military has already knocked the Taliban out of power. It seemed to me
she would have been truly brave if she had given the same speech six
months earlier, when, except for some noisy feminists, virtually no one
really cared about women in Afghanistan. Furthermore, though the
toppling of the Taliban is clearly a good thing in human rights terms, U.S. bombs were not gender-sensitive, and were giving rise to civilian casualties, female as well as male, as the First Lady spoke. I think of a woman named Koko Gol, who was thirty years old. According to The Guardian newspaper, she was killed by a U.S. bombing along with her two children on October 28th while she was at home sewing clothes for her brother-in-law's wedding.

It seemed to me that Mrs. Bush could also have reminded us, perhaps most usefully, of our own complicity in making Afghanistan a haven for theocratic lunacy and repression of women in the first place. How did we do that? Well, we along with a number of other countries decided to support any group, no matter how extreme its ideology, that opposed the illegal Soviet invasion and occupation of the country. As Amnesty International noted in a 1995 report, "Since 1979, the human rights crisis in Afghanistan has been exacerbated by outside powers. The Soviet Union, the USA, and governments and countries neighboring Afghanistan have consistently put their political interests above the human rights of Afghans." Though extremist and misogynist movements are clearly produced by both endogenous and exogenous forces in any context, we must remember when we talk about the treatment of women in the Muslim world, that we might not have ended up with the Ayatollah Khomeini in Iran had we not overthrown Iran's democratically-elected Mossadegh government, and we might not have ended up with the Taliban in Afghanistan, had we and the former Soviet Union not played a Cold War game with the life of another country.

Does this mean we should not have criticized the Taliban's treatment of women on the basis of universal norms? Absolutely not. That treatment deserved the harshest criticism and opposition, as, by the way, does the treatment of women by that U.S. friend, Saudi Arabia. I would love to hear the radio address on that as well. The silence of the U.S. administration was deafening after March 15th when some fourteen school girls in Saudi Arabia are reported to have burned to death. This happened because the religious police prevented them from escaping an inferno in their school since they were not wearing their head scarves and no male relatives were there to receive them. And particularly for me, as somebody who's proud of her Muslim heritage, I find this action in the holy city of Mecca utterly unbelievable and something that should be condemned universally. To be truly universal, though, I think our criticism of and opposition to violations of women's human rights has to be vehement and principled, nonselective and thoughtful.

But back to the First Lady's radio address. In that same week in early November 2001 when she was talking about the Taliban and how
they had threatened to pull out women's fingernails for wearing nail polish, there was a very interesting item in the press. In a bid to raise the spirits of U.S. troops participating in Operation Enduring Freedom, the Dallas Cowboy cheerleaders performed for U.S. troops at Kandahar airport. Kandahar, you may remember, used to be the seat of the Taliban. Now again, maybe it's just me, but there was something incredibly ironic about this, and I try to imagine the scene. I have no idea if the cheerleaders actually performed or what they did when they were there, but I just kept thinking of that awful scene in "Apocalypse Now" when the playboy bunnies come to perform for the U.S. troops and they end up having to be evacuated by helicopter. And I found this wonderful picture from the Internet, because the Miami Dolphins cheerleaders went too, and they actually signed bombs that were going to be dropped on Afghanistan, which to me was this incredibly ironic and sad image. A number of U.S. writers have really been aware of the kind of awkward dynamics of all of this and have written about some of these issues, have talked about ways in which the burka can be compared to the bikini, the total covering of the female form to its total uncovering, even to the point of being denuded of hair. This reminds me of a pet theory of mine that stripping and veiling basically represent different vestiges of the same phenomenon.

Now I know I need to be careful here, and I am not trying to make a sort of easy linear comparison between the Taliban's gendercide (to use a term that was used this afternoon) and some of the de facto subordination that women face in the West. I think that would be silly. But I am concerned with our lack of self-consciousness and I am very concerned about the instrumentalization of women's human rights issues.

Now let me be clear, this is not something of which I am only accusing voices in the West. I know we have problematized all of those terms today, so please see that the quotation marks are on these terms. Fundamentalists and others who try to dominate women in the so-called East deploy the same tactics. In her brilliant essay, "Orientalism, Occidentalism, and the Control of Women," Arab-American anthropologist Laura Nader talks about the ways in which discourses about the oppression of "other" women are used in both the Middle East and the West to control women by making them fear a worse fate even than the one they currently face. She writes that, "Misleading cultural comparisons support contentions of positional superiority which divert attention from the processes which are controlling women in both worlds." 72 I think this is a phenomenon to which we need to pay attention. To go back to my idea about universality, I think this is a

72. Laura Nader, Orientalism, Occidentalism and the Control of Women, 2 CULTURAL DYNAMICS 323 (1989).
phenomenon which serves to undermine universal norms and universal human rights practice. The non-universal universalism that I talked about can even backfire, can kind of boomerang. Back to the Algerian colonial example. When French women, whose husbands were busy subjugating the Algerian populace, tried to organize Algerian women to stop wearing the *haïk*, more women began to wear it as a sign of nationalist protest, weaving a kind of nationalist mythology around the covering of women’s bodies. We certainly need to recognize universal norms and defend them, but we need to be very careful and very thoughtful about the way in which we are doing that.

Because this whole project of universalism is very difficult, and because so often we get it wrong, some have turned to a kind of foggy cultural relativism. For example, I remember speaking in the Netherlands in 1994 about the deteriorating situation of women in Algeria (during the civil war in Algeria between the armed fundamentalist groups and the government). A Dutch man in the audience who had never been to Algeria claimed to me that women’s lives in the country would not change very much if there was a theocratic Islamic State. I realized that he was trying to be a voice against what he saw as the contemporary Islam-bashing in Europe, but to me he was negating the reality of Algerian women’s lives. He was falling for the very stereotype that he sought to question. The words of a young Algerian woman that I had interviewed in Algeria in 1994 resonate for me here. She said,

> I have to believe that you Americans do not understand us or the full importance of our problem. Those whom you supported or still support in Afghanistan and Saudi Arabia are full of scorn for you. They believe that American women are filthy whores, but I do not believe this and neither do my friends. We do not want to be like you, but we want to live in a country where we can be like you if that is what we please, or be like ourselves, or even wear a veil if we want to. But the Islamists, after they have turned Algeria into another Iran, will not give us any choices at all.

And I believe she was claiming her own vision of her universal rights.

There have been other attempts to answer the problems in universality, “universal” approaches, that have not been so universal. One of the things that has been tried is using equivocal language about violations of women’s human rights. To give you a concrete example of this, in response to some of the admittedly sensationalized treatment of the subject of female genital mutilation in the West, some scholars have started using the term “female genital surgeries” instead. I have to say I
found that kind of disturbing, given that no anesthetic is hardly ever used, no surgical instruments are employed, and almost no sanitary precautions taken for the most part when this practice is carried out. This puts the women and girls at great risk of illness and infection. My view is that we should unashamedly defend universality, defend a really universal universalism, defend what is positive, and dare I say humanist about the Western tradition, the Muslim tradition, and about other traditions as well. And at the same time, we must mercilessly challenge what is anti-humanist, anti-human rights, in all of the above traditions, regardless of what justification is offered thereto, be it cultural, religious, social, or one we don’t sometimes think about in this category, free market oriented. We have no reason to be ashamed of our universalist views, I submit, if they become more truly universal.

In many of my human rights classes these days, thoughtful students worry that when asserting human rights principles, they are somehow being inherently Western, meaning something bad. Somehow they are being repressive, and they often apologize for themselves. On the one hand I salute the impulses of cultural sensitivity and respect, but I would argue that we must not let a new disguised relativism disable us. Universalist approaches are not inherently hegemonic, though they can be if overly dogmatic, insensitive, un-self-conscious or triumphalist, and this is a distinction we must not lose sight of.

A related point that I would like to make is about what I call, for lack of a better term, “groupism.” It is something that concerns me terribly, and I feel in this post 9-11 world, with a new Arab-Israeli war practically underway and the absurd possibility of another war with Iraq, we stand on a precipice, and groupism has helped us to get there. If we are not careful it is going to help us right over into the abyss. Groupism seems to me (and I am not a social scientist so forgive me for practicing social science here without a license) to be the idea that the most important collective to which we belong is not humanity, but rather the myriad of distinctive subgroups that demand our loyalty. After all there is something not quite human about those in other subgroups. The criminals who flew planes into the World Trade Center could see none of the precious humanity in those buildings or among their fellow doomed passengers, only that they were generalized “Americans,” (even though we know there were people of many nationalities). Those who went out in the days following the 9-11 atrocities and murdered Sikh-Americans, those who threatened family members of a Lebanese-American businessman who died in the World Trade Center, those who spit on a University of Michigan Law student of South Asian descent here in the streets of Ann Arbor, were also suffering from acute groupism and could
not see beyond a vast, undifferentiated spectrum of brownness and difference.

I think right now of the case of Adam Shapiro, the courageous Jewish-American humanitarian aid worker living in Israeli-reoccupied Ramallah with his Palestinian fiancée. Adam Shapiro was assisting the evacuation of wounded from the Palestinian Authority Compound and became trapped inside during the fighting. He was interviewed on CNN while inside. I was very disturbed to learn in the New York Times that he has now been denounced as a traitor by some few members of the Jewish community in Brooklyn and his family have actually had to flee the Borough for their lives. Those threatening his family clearly have groupism.

Those suffering from groupism may have or may believe that they represent legitimate grievances, but for me that still does not change how I feel about their behavior. It is very often despicable. For example, the Hamas and Islamic Jihad commanders who send suicide bombers, however unjust the Israeli occupation of the West Bank and the Gaza Strip that they oppose may be, also quite clearly suffer from severe groupism when they can see Jewish babies and old people eating Passover dinner as legitimate targets.

The Algerian fundamentalist murderers who kill intellectuals and unveiled women believe (and we have heard this from the interviews with some Algerian fundamentalists who surrendered) the more their victim suffers, the more the doors of paradise open for them. These people may even be beyond groupism. But one thing we must not forget at the same time is that the secularist, whether in Algeria or whether in the United States of America or Israel or anywhere else, who believes that a "fundamentalist" is somehow no longer human and thus deserves neither to be protected from torture nor to have a fair trial, also has groupism. So there are no easy outs here. Ariel Sharon has acute groupism. You watch TV, I will not tell you about that one. Osama Bin Laden, wherever he is, has groupism. Those who discuss attacking Iraq as if Saddam Hussein was the only person who lived there, and with no concern for the already catastrophic humanitarian situation of the Iraqi population have been utterly blinded by their groupism and may really lead us into another tragedy. And finally, George W. If-You-Are-Not-With-Us-You-Are-Against-Us Bush has terminal groupism. I wrote here, "Have I managed to offend everyone yet?!"

What can we do about this? What choice does this leave for us? And this has been my frustration. Do we have to join a group and not see beyond its constraints? Do we have to take part in the clash of civilizations, the crusade that elements within the U.S. government seem to insist upon? Do we have to pick only one of the many collective identities, that
Professor Wing eloquently described this afternoon that we each possess, to champion? I am proud of all the parts of my heritage (Arab, Berber, Muslim, Algerian, Wasp, American, Presbyterian, the list goes on), and all of those things are part of who I am, but they are not who I am. Maybe my view is particularly that of a half-breed, I do not know. And I am not asking, and I want to be very clear about this point, for us to ignore our differences or pretend they do not exist. Nor am I blind to power and the distinctions that it wreaks. I think of this beautiful Bosnian film, “No Man’s Land,” that I saw this week. To me the film is really the amazing analogy of where we find ourselves in the world at the moment. The central metaphor of the film is the situation of three soldiers trapped in a trench. Two are Bosnian Muslims, one is a Bosnian Serb. One of the Bosnian Muslims was presumed dead, and he is actually alive and lying on a mine that will explode if he is moved. Apparently some of the Bosnian Serb soldiers would do this. They would put mines under the bodies of fallen Bosnian Muslims or Bosnian government troops (since they were not all Muslim) and so when their comrades would come to pick up the body, the mine would explode and kill everybody in the immediate area. So yes, it was a Bosnian Serb who had initially put the mine there, but now the two Bosnian Muslims and a Bosnian Serb are trapped (this is a different Bosnian Serb from the one who set the mine) in this trench together. Whether they get out or do not get out and what happens to them depends on all of them.

So I am not blind to power, but I really do believe we kind of find ourselves here in a common mess. Certainly the powerful have to take the lead. They have the resources to do it. But I think we’re all implicated. And I do think that the truly universal universalism that I talked about can help us in this project. I do believe, no matter what, that there is hope for the anti-groupism cause. Why do I think this? Well, it is hard to think this now, isn’t it? But there are some quixotic line crossers who have not given up and they inspire me. They continue to transgress boundaries (physical boundaries, national boundaries, mental boundaries) and I just thought I would give you some examples.

The first that come to mind are the Refusniks in Israel who have gone to jail rather than take part in the murderous assault on the West Bank, and I think they are a constant reminder of our common humanity. Wouldn’t it be great to see such conscientious objection in the future in other parts of the Middle East as well when confronted with a pattern of gross human rights abuses. Hanan Ashrawi, a member of the Palestinian Legislative Council who has criticized suicide bombings from within, even while strongly opposing the Israeli occupation, is another. I worry about her safety in the current assault on Ramallah where she lives. I
find her very inspiring. I think also of the Algerian women's movement. I did not have much chance to talk about them and what they do, but they have kept on militating for their rights despite being in this terrible civil war situation, despite the fact that they are chastised in the most horrible terms. They are called the "women who want to marry four husbands." They are referred to as the "avant-garde of colonial oppression," and they just don't give up challenging unjust laws in Algeria and seeking to end violence against women, both by armed groups, the State, and individuals.

One of the acts of line crossing that really inspired me the most and gives me hope for this anti-groupism cause, was the example of American families who had lost family members on September 11th and who traveled to Afghanistan. This was a trip sponsored by a U.S. organization called Global Exchange. They visited with innocent Afghan civilians who had lost their loved ones in U.S. attacks. And I thought it was amazing that they could recognize the shared horror. In fact, the American families submitted claims for compensation on behalf of the Afghan families to the U.S. authorities. I have not heard whether there has been any action on those petitions, but I hope there will be. I found that a truly moving act and representative of this truly universal universalism that I am talking about that I would like to support.

Finally, I have to say a few words about international human rights law. I love the stuff! Even with all of its problems and shortcomings. I think in human rights law, even with all of the critiques, there is an urgent humanist imperative and it is something that we need to keep aspiring to. Maybe most of all in difficult times. That is one thing I tell my students. Human rights were not written for a sunny day. Human rights law was written for the rainy day that we find ourselves living at the moment. I can't help but quote the Universal Declaration of Human Rights, which reminds us that, "The recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world." Professor Michael Ignatieff recently asked in the New York Times if the era of human rights is ending. All I can say is, if that is so, I fear. We must not let it be so.

Given the dire situation in the world, I cannot resist turning in conclusion to the wisdom of the late, great Dr. Seuss, one of the great human rights theorists of all times. In his story, The Lorax, he showed a mythical environment devastated by greed. Despite the warnings of a

73. Universal Declaration of Human Rights, supra note 22, pmbl.
creature known as the Lorax, all the trees are knocked down and the Bar-ba-loots that play in the shade of the trees are forced to leave. The mythical world teeters on the brink. I feel sometimes when I am watching television news as if we now stand at the end of that story. The Lorax, feeling he can do no more, has just lifted himself up by the seat of his pants, and gone away through a hole in the clouds of smog, leaving us with a ring of stones that merely says by way of a challenge to future generations, “Unless.”

Thank you.

FINAL THANKS

SARAH HEINEMAN: I just want to take this one more opportunity to thank the speakers that are still here with us right now. Professor Bahdi, Professor Roth, Professor Howard-Hassmann, and Professor Mayer, thank you very much for everything you have done today and everything you will do tomorrow. Professor Wing, thank you!

And I have to confess I was writing out Hamid’s list of people to thank earlier and I forgot a couple people that I need to add. Stephanie Browning, our current Editor in Chief, has done wonderful things to help the Symposium come together. Thank you, Stephanie. And also John Nathan, our Executive Articles Editor, helped a lot in the planning stages of this Symposium, thanks John!

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GOOD MORNING everybody. One of the innovative factors that the students thought of for this conference, as Dean Lehman mentioned yesterday, was offering us the opportunity to get together and talk through what we see as the outstanding issues and questions from our discussions yesterday. They gave me this great list of talking points, that they came up with last night. I also have a few ideas that really stood out to me in the presentations yesterday. We might want to talk our way through some of those. I do not know that we will necessarily find agreement or even that that is our project this morning. As I say to my students very often, if we can begin by identifying the questions, that, in and of itself, is a very big project. Before we get started, I wanted to say a few words about international law and women’s human rights, because I am not sure that we paid too much specific attention to that issue yesterday.

One of the things that I think has been great about this conference has been talking across the disciplines. I think those of you who are from the social sciences are perhaps used to this as a methodology, but we in the law do not do enough of that. I have learned a great deal from that aspect of the conference. I also want to make sure, when we are talking about international law in the Symposium, that we do justice to, in fact, what has been happening in international law, in terms of women’s human rights. The last ten years have seen an incredible burgeoning in international legal frameworks and mechanisms to deal with women’s human rights. For example, the creation of the mandate of the U.N.’s Special Rapporteur on violence against women, who is a wonderful person, Radhika Coomara Swamy from Sri Lanka. She has done reports
every year for the Commission on Human Rights on a wide range of
kinds of violence against women, and causes and consequences of that
violence. The U.N. General Assembly also adopted a Declaration on the
Elimination of All Forms of Violence against Women\textsuperscript{76} and we know that
was very important because the CEDAW Convention does not include
the word violence, even once, on the face of its text, being very much a
product of the time in which it was drafted. Of course, we know the
CEDAW Committee has tried to rectify that problem by interpreting
gender-based violence as within the meaning of discrimination.

Other important developments include the creation of an Optional
Protocol to the CEDAW Convention,\textsuperscript{77} something which is very exciting
because it ties in with the issue of implementation that Professor
Simpson very fittingly reminded us of. The crux really at the end of the
day is implementation, and the Optional Protocol allows individual
women, as well as groups of women actually, interestingly for this
conference, to bring complaints to the CEDAW Committee of violations
of their rights under the Convention. Interestingly, in light of our subject,
it also allows for an inquiry by the CEDAW Committee into systematic
violations of women's human rights, things like gender apartheid in
Afghanistan, for example. Of course Afghanistan has not yet ratified the
convention, obviously, nor the Optional Protocol. I am just giving an
example of the kind of violation that could be covered there. I am told that
the Committee on Economic, Social, and Cultural Rights may soon issue a
general comment looking at women and gender dynamics with regard to
economic, social, and cultural rights. The Human Rights Committee is
also trying to develop its jurisprudence in the area of women's human
rights. The very important nongovernmental organizations that Professor
Simpson mentioned yesterday as being key players, are really learning and
trying to play a lot of catch-up in the area of women's human rights under
international law. Of course there are specialized women's NGOs who are
way ahead in this process, but the big NGOs like Amnesty International,
and Human Rights Watch, and the Lawyers Committee for Human Rights,
and many others in the field, are beginning to incorporate more work on
women's human rights in the mainstream of what they do. NGOs were
key players around the Beijing Women's Conference, which drafted the
very important Beijing Declaration and Platform for Action.\textsuperscript{78} This
document reaffirmed that women's rights are human rights. We do, I
think, while being critical of international law, need to really reaffirm the

\textsuperscript{76.} Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104,

\textsuperscript{77.} Optional Protocol to CEDAW, supra note 13.

\textsuperscript{78.} Beijing Declaration and Platform of Action, A/CONF. 177/20 (1995) and A/CONF.
tremendous advances and achievements that it has seen in the area of women's human rights, particularly in the last decade.

Let me just go through the students' talking points and then hand it over to our panel. The first one says that the importance of process-based conceptions of international law in legitimating it at the international level and implementing it at the local level cannot be overestimated. So we have a couple of ideas in there: the idea of process in international law, the idea of legitimacy that Professor Abou El Fadl talked very eloquently about, and the idea of implementation as well as specifically implementing political and legal ideals at the local level. Professor Simpson spoke about this. So that's the first talking point.

The second one is a question, and it says, "If the concept of the rights of women as women has tremendous political force, yet is philosophically limited to abortion, how do we distinguish or reconcile politics and legal ideals in international human rights?" So again, a number of ideas there. Picking up on Professor Howard-Hassmann's discussion of what rights women have as women that are different, perhaps, from human rights appertaining to men, and also distinguishing or reconciling political and legal ideals in international human rights.

The third question lists CEDAW's temporary special measures and obligations to alter stereotypes, Jackson's suspect class of gender, Baker v. Canada's protection of children's rights but not women's rights to motherhood. "If women have international rights, what kind of remedies do they need?"

The next question, "What should be done with patriarchal institutions?" I like this question. Should they be overthrown in revolution or utilized in opportunistic evolution? The next one, number five. Widespread recognition of the inherent limits of liberal freedom may be coextensive with the widespread citizen internalization of human rights norms. This is the value and definition of the collective. So, I think tying in with some of Brad Roth's discussion of liberalism, and I think also exhorting us to be very specific when we use the term liberalism. Think about what that means, what its implications are. I thought one of the very interesting ideas was that perhaps there are costs in this process, and maybe that is okay and we just need to acknowledge that. Christina Brandt-Young mentioned that as well when she was talking about the costs of evolving away from traditional society. Perhaps there are great benefits to that, but we do have to be honest that there are also costs. It is about making those choices and recognizing that those choices are still the right ones, in spite of those costs.
The next talking point here: How can we dismember the concept of the legal collective, when used as a political pretext, and defeat the rise of groupism?

The next one, and last one, is how can we reconcile the ephemerality of human rights with the importance of the persistence of universality?

And I think that sort of throws out a lot of issues for us that we can start talking about. You should feel free to either comment on any of these points or throw all of these points out the window and make some comments about what you saw as outstanding, perhaps unresolved issues from yesterday.

ANN ELIZABETH MAYER: This is Ann Mayer. I still am troubled by the basic uncertainty I have about the overall questions that we were supposed to address. And I am not saying the talking points are not worthy of consideration. It is just that I do have a strong commitment to international law and international human rights law and I remain very troubled by things that we see in the program, such as, "arguably international law has thus far failed to adequately articulate women's rights under either approach." It suggests that out there is a critical standard that we are using to judge international law and we are finding it deficient and it has not succeeded by the mechanism of the collective approach or the individual approach to address issues of women's rights. I certainly do not think that international law has reached a stage where we can say with confidence that we have reached the ultimate development of women's human rights, and I would be happy to see international law evolve further. But, I think we have accomplished a great deal, and you have reminded us of what we have accomplished. I think the amount of progress we have made in the last two decades, in elaborating women's human rights, is astonishing. I am also troubled by things in the material that we have been given that imply—that imply that international law has neglected to take a proactive approach to women's rights. On the contrary, I think many provisions of international law dealing with women's rights are explicitly proactive ones. And so behind all this is a question. What was the critical standard that people had in mind that they were using to judge international law, to judge women's international human rights law as it now stands and find it deficient? There must have been a criterion that was being used, but I assumed yesterday that I was going to find this made explicit, and I was going to have the solution to the mystery. But at this stage, I still do not know what the organizers were referring to when they passed this very negative judgment about women's international human rights. I think we have to consider that very seriously. I think that the basis for this negative assessment should be put forward and that the supporting arguments
should be expressly laid out so that we can discuss them. Particularly at this juncture in U.S. history, where we have the United States still resisting ratifying the Women's Convention. And when we know that the forces opposed to women's human rights are very eager to discredit human rights, our making a statement and putting it out in the public domain will be providing fuel to the opponents of women's international human rights. One may be an opponent of international human rights for women; I am not saying that that is a position one may not take.

Obviously I believe in the First Amendment, but a proposition like this should at least be subject to debate. We should have a statement setting forth why women's international human rights are being judged so deficient, so that we can discuss and learn what is the basis for this perspective. So I remain sitting here with essentially a big question mark in front of me. I am still mystified by what we are doing. In the presentations yesterday, I listened as closely as I could and I could not find the answer to this fundamental question that is still troubling me.

KARIMA BENNOUNE: Would somebody like to specifically address that issue?

HAMID M. KHAN: Well I could attempt to address the question. With regard to the specifics, and we will admit, as part of the Journal, that this was an evolutionary process and not one as seemingly static as the text would indicate. It was not what we intended, as you know. I think yesterday was a vindication that the question really is almost irrelevant. The question itself is actually mired in falsehood, because as we find out, there has been a great deal of progress. I think that when we had the idea in mind, it was more of a question that begged an answer. It begged a bold answer that refuted the notion that there was even a failure. I think that, to be honest, we as the Journal saw the trouble in the question as well. And in addressing it, we thought what would be best, after cumulative months, cumulative discussions with members of this panel and those who advised us that in fact the question, although it could easily be stated, it was the answer that was important. And I thought that yesterday the answer was made explicit that the standard was wrong and latent in our questions was obviously a lot of negativity and really should not have been.

So I take what you mean as the question mark is actually a very good point. I think that there is no way in which one could certainly say that there is a failure of international law and that in fact international law has led the way. But in that question, I think we find something very provocative and that we have seen the progress. I think that in this effort, we should stand up for that progress and assert it as being evident. That we should say, "Look at the progress we have made. Look what we
could do in the future.” So I would say the parameters now have been disseminated by our discussion and disseminated more by history, and disseminated more by evidence of our discussion here. So my effort would be now to move beyond the question and insert it as being more fact. And instead, work towards trying to define those parameters. Rather than getting caught up in questions that you and I, and members of this Journal, had trouble answering ourselves. And as students, unfortunately we were guided by a process that made our lives much more difficult. So I would encourage that the question is irrelevant, because I think that we have already answered that question and that the question really does not need to be asked because I think it is in some ways wrong.

KARIMA BENNOUNE: Would any of the other speakers like to comment specifically on this issue? Professor Friedman?

ELISABETH JAY FRIEDMAN: This is Elisabeth Jay Friedman. It is a little bit tangential, but I was reminded about a conversation that we had had around the issues of how the Symposium was positioned. So in a way, it is a linked concern which is that I do not feel that something that I was looking for got addressed yesterday and I am curious why it was not, if this was also deliberate, or if it was something that was sort of struck down by what we were saying in the morning, perhaps. But that the whole conference was articulated as trying to assess the individual versus collective approach. I did not really hear the collective approach articulated in more than critique, and I am guilty of critiquing. I am wondering if perhaps today, if somebody does have an articulation of the importance of thinking about how women’s rights can be defended as a collective. Whether we are either thinking about how women, as a collective, defend their rights or if there is something in the—okay, I’m not going to go towards groupism, it is not a term that I use but I think it might be more in that realm—that women’s rights could also be defended within larger collectives, which is the way I initially understood the question. But I feel as though either the defense or the definitive nailing the coffin on collectivism would be an interesting thing to hear about this morning as well.

KARIMA BENNOUNE: I wonder if anyone would like to respond on that. I think you are right. If we are going to have some type of a discussion or an interrogation of a collective approach, we do need to be clear about what is meant by that in this context.

RHODA E. HOWARD-HASSMANN: I think there are, or there may have been when this started, a few underlying suppositions. And one is that individualism is tied up with lack of concern for the community, family, and so on. So that there’s a supposition that the whole human rights discourse denies community. Now, somebody other than
me said yesterday, a point I agree with, I think Brad Roth said it, actually liberals do not assume that there is no community. So part of this discussion is individualism. Liberalism, liberalism means free market economics and American social practice, which means selfishness and lack of concern for others. And Brad pointed out that this is not what liberalism means and that is my view on it. I wrote a book called *Human Rights and the Search for Community*, not to have any commercials here, in which I argue that there is a liberal community. It is a community of choice rather than of structured social roles and tradition. But in liberal societies we do have community. So that was one of the things there. Coming out of that there is also the thought then that human rights undermines commitment to the collective. So then it becomes a real problem of what is a collective. I ended up in fact defining a collective as being very close to an ethnic group. I did not realize it until I had written it. I was thinking about the case for collective rights for Aboriginal people, in Canada, and the proposition that there are some rights that cannot be enjoyed unless you are part of the collective. So I can enjoy my right not to be tortured as an individual but it would be very hard for me if I was an aboriginal woman to “récuperer” (what’s the English word for “récuperer”? Recover) recover my capacity to speak Mohawk if schools were not established to teach in Mohawk and so on. One of the things that I noticed in this discussion was different uses of the word social group. I tried to use it sociologically and I tried to argue that there is no such thing as a sociological group, that it is often used just as a statistical aggregate. Somebody else in discussion, perhaps it was Christina, I am not sure, pointed out to me that of course there is a legal term for social group in refugee law and also in human rights law. So we now throw women escaping FGM (female genital mutilation) into a social group and gays and lesbians into a social group and so on. So that is complicated. Then I think Professor Jackson mentioned the ideas of suspect classes and heightened scrutiny, which I thought was American legal terminology and Professor Mayer, I think told me it was. So I am happy to learn that I have learned something about American legal terminology. Then there is a problem of a collectivity as a locus of action, with which I agree, as opposed to collectivity as an object for which you get rights. So I was arguing that, of course, you have collective action but that does not mean that the rights for which you are striving are necessarily collective rights. That is what I got from this.

Now the other subtext, I have noticed in reading the literature, is that there has been an assertion for example, Hilary Charlesworth makes it in Rebecca Cook’s book on human rights that human rights law as

originally written is irrelevant to women or largely irrelevant to women because it privileges civil and political rights and these are mainly male.\textsuperscript{80} And I object very strongly to this. For two reasons. One is that women are not only women. Women have many other identities. Not to put too fine a point on it, two of my aunts were murdered and they were not murdered because they were women. They were murdered because they were Jews. So there are reasons why one needs civil and political rights. If there had been civil and political rights in Nazi Germany, they would not have been murdered. Second as women, women need civil and political rights. Somebody yesterday, speaking about the poor—I think it may have been Professor Wing but I am not sure—said, “well even if they’re just thinking about the right to eat now, they may want the right to vote later on.” But in fact in order to eat, you may need the vote first. Some of the worst cases of famine we know of are State induced famine. They are a consequence of State policies, of commission or omission. So it does not necessarily follow that economic, social, and cultural rights or especially economic rights are prior to civil and political. Even if you are a woman in deep distress and your most important objective is to feed your children. So I find this kind of criticism of the international human rights regime very problematic. Then there is the matter of the ethic of care versus a rule-based ethic. Somebody mentioned, I think it was again Brad, Carol Gilligan’s work, what’s the name? It escapes me now.

\textbf{KARIMA BENNOUNE: In a Different Voice.}

\textbf{RHODA E. HOWARD-HASSMANN: In a Different Voice}, which is drawn upon very heavily. I read Carol Gilligan’s book and she says in her 1993 preface in the reprint that she never meant it to be taken as a—not a seminal, but perhaps an ovarian text.\textsuperscript{81} [Laughter] Okay. Ovarian, I picked up from a philosopher named Mary O’Brien some years ago. She [Gilligan] says she never wanted it taken this way because it was a fairly experimental study and indeed it was. When I read it and I read the stories that her male and female subjects told, it seemed to me that at some points you could have interpreted the stories in different ways. So I was not convinced that this showed our fundamental difference between the ethic of care and the ethic of rules. Even if women are more likely to engage in caregiving activities, which they are at the moment, for reasons to do with gender roles and so on, it does not mean they do not need rules. Rules are very helpful to women. They are a bottom line and they say, “We get this too.” So I mean this may have been what was


\textsuperscript{81.} Carol Gilligan, \textit{Preface} to \textit{In a Different Voice} (2d ed. 1993).
floating through people's minds when they said this. I do not find any of the criticisms of the international human rights regime as being irrelevant to women at all persuasive. Although, of course, like everyone else in the feminist movement and as a feminist scholar, I have found very persuasive the move to point out violations of women's rights in the private sphere. But again those are also sometimes violations of men's rights. So that is what I think may have been going on in the backs of people's minds.

KARIMA BENNOUNE: I just wanted to add a bibliographic reference. There's a great article by Dorothy Thomas called "In Defense of the Civil and Political Rights of Women" that I think addresses some of these same issues in a very interesting way. Would anyone like to pick up on some of these points that Professor Mayer and Professor Hassmann have been making? Reem Bahdi?

REEM BAHDI: Hi, thank you, Karima. I have two points that I would like to make and they are not necessarily connected. So maybe I will start off with the point in response to Professor Hassmann. On the question of social and economic rights, it is true, of course, that women need civil and political rights, and that the two regimes are interdependent. You cannot have one without the other. At the same time, the reality of women's lives is that women tend to be the ones who are living in poverty. And the reality of the international human rights system is that social and economic rights and cultural rights—that is the third part of that treaty—are the poor second cousin to civil and political rights. And it is women who suffer the consequences, not exclusively but relatively, within that regime. So that is why I think that it is important to recognize the differences between civil and political rights and social and economic rights. Not that they are different in value, but they are different in their reality. I mean, we just look at the fact that there is no Optional Protocol to the one treaty whereas there is to the other. That the Covenant on Economic, Social, and Cultural Rights is considered most often within domestic contexts and also at some points at the international level as policy statements rather than rights, as compared to the civil and political regime. So that is the first point.

The other point I wanted to make relates to my understanding and thinking about collective rights. I think that we can probably all agree that all individuals are entitled to the same kinds of dignity, equality, and security of person. In that sense, individual rights are what we are trying to get at. But the question for me is how do we get there? I think of

rights as recognizing harms, getting at the harms and recognizing the lived experiences of women and human beings, in general. Consider a case like Baker. In that case, the Supreme Court reached the right result: They at least sent the case back for reconsideration. But the reasoning was hollow in some respects because the Court did not get at the total harm or what was wrong with what had been done to her. The Court should have considered her status as a mother and the parent-child relationship. This would have required a less individualistic approach to rights. I can give another example. It is very important to be able to say, for example, to Palestinian women that you have the right to be free from violence. But unless we recognize that right within the context of the kinds of harms that are directed against the Palestinian people as a collective, we do not understand why and what the reality is. Why Palestinian women, for example, live in violence, and I am just using that as one example. So I am not fully prepared to give up the notion of collective rights, because I think we really need them sometimes to understand what is wrong with a particular picture.

KARIMA BENNOUNE: I just want to say one of the key points I think you mentioned from a human rights perspective was this concept of interdependence. And I saw the hands of Professor Hassmann, Christina Brandt-Young, and Brad Roth.

RHODA E. HOWARD-HASSMANN: Just on the rights of Palestinian women. Yes, of course, Palestinians as a collectivity, ethnic, national, whatever are suffering violations of their rights, now. But I would have thought that that fell under war crimes, crimes against humanity. Much of that would fall under those kinds of laws and I do not know whether there is any point in discussing whether those are collective or group rights. Those are rights that are supposed to defend any group at war or in peace, at peace in the case of crimes against humanity. Is there any conceptual reason to distinguish between individual and collective rights there?

KARIMA BENNOUNE: Would you like to just respond on that point?

REEM BAHDI: Well, I think yes, they do fall under those regimes. But there is also the question of self-determination which is conceived of as a collective right that is not fully covered by those regimes. The point is that we cannot address violations on an individual basis—the wrong done to the whole is different than that done to the sum of its parts.

KARIMA BENNOUNE: Christina Brandt-Young.

CHRISTINA L. BRANDT-YOUNG: I am glad that you just mentioned self-determination, speaking as someone who is trying to work on the question of multiculturalism and subgroups within States, if we can
agree what groups are. I think we have suggested two levels of collective
rights, or maybe "collective rights" is encompassing too many concepts
here. Because there is the self-determination question, which in the mul-
ticultural context is the question of groups wanting autonomy within
States to administer certain laws because they feel that those inhere in
the group level and they are concerned about a level of group sover-
eignty. Maybe that is what collective rights are. But then there is this
other question of relational rights. It is absolutely true that if there is not
another single Mohawk speaker anywhere, you cannot exercise your
right to speak Mohawk, which also inheres in you. It is void. Maybe
what we are looking at is this issue of group sovereignty versus people's
relational rights, their right to experience humanity commonly in par-
ticular ways with others. Maybe only one gets asserted. Maybe the
relational right is the one that gets asserted politically, when in fact what
certain people within groups want is this sovereignty thing. The differ-
ence between relationships and power could be an interesting way of
thinking about this.

KARIMA BENNOUNE: Brad Roth.

BRAD R. ROTH: I think the self-determination right is an important
collective right. There is a list of rights that have been developed, that have
been framed as collective rights—the third generation of human rights in
the international system. They are controversial conceptually sometimes
because it is unclear, unlike with other kinds of rights, what obligations
actually are entailed by the assertion of the right. The right sometimes
seems more like the framing of an aspiration, such as the right to a healthy
environment or the right to peace. It does not give rise to significant
enough specific statements of the obligations that are on the flip side of
those rights that make them real as rights.

With respect to the right of self-determination and some of the ways it
affects some of the issues that arise here, it is important to note that al-
though in many ways collective rights and individual rights are mutually
reinforcing and part of the same structure, there are times when they are in
tension. And one way that they can be in tension—and Rhoda Hassmann
yesterday alluded to it in an indirect way by pointing out the sort of pre-
texts that are sometimes given in this regard—is that there are times when
outside forces are all too eager to assert the individual rights of people
within a community for the purpose of undermining that community. One
only needs to think about the strong support that employers have every-
where for the rights of their workers not to join unions. [Laughter] And
they will really go to the mat on that one. I can think of very specific cir-
cumstances in which the right of the CIA-funded opposition newspaper to
print without censorship is considered an important human right. One
indeed that becomes almost a cause célèbre. So I think that there is reason to take seriously the notion that there are rights that inhere in the collective that are in tension, potentially, with the rights of individuals.

It is important also to realize that people, even people who are suffering from specific violations of their individual rights, including war crimes and crimes against humanity, are sometimes engaged in a struggle that cannot be understood without an understanding of their own aspiration to fight for the collective right. Individuals frequently do not have as their first complaint the way in which they are being treated individually or tortured; rather, the underlying point is that they put themselves in that position precisely because they are struggling for something that they assign greater significance, as a matter of a collective right, that provides the very basis for ultimately achieving the ends that all rights exist to serve. So I think all of this needs to be taken seriously.

The question, though, is how it applies in the discourse of women’s rights. No one has made an argument yet, that I have found possible to take seriously, that the women’s rights movement is really a way of undermining dependent cultures or weaker societies and opening them up to domination and exploitation by imperialist forces. So I think that the use of the collective as a pretext for failing to implement individual rights is something that has to be taken equally seriously. The reason why the pretext works so well, however, is that it corresponds to a more valid concern that in different context, I think, has real salience.

KARIMA BENNOUNE: I have myself first on the list, then Hamid Khan and Professor Friedman. I’m going to exercise the prerogative here of the moderator. I just wanted to say a few things, I think picking up very much on Brad Roth’s last set of comments. I completely share Professor Mayer’s concern about the ways in which international law, qua international law, is under assault in this country at the moment. Yet at the same time, I completely recognize the reality of the internal contradictions that Brad Roth talks about. And I think if we are to move seriously into a full phase of implementation in international human rights law, the international human rights community has got to work through and resolve some of these internal contradictions because we are not going to be able to maximize the potential of this body of law as a working body of law without addressing these problems. At the same time, we need to be sensitive to the context of which Professor Mayer reminds us, in which international law’s legitimacy itself is somewhat questioned.

And I just wanted to throw out there again the way in which women’s international human rights law picks up on some of these
things that we have been talking about: the potential to bring individual cases and group cases; the ways in which women’s human rights are protected as individual rights in some of the covenants, as group rights in other covenants, as members of a range of collectivities. The next person on the list is Hamid Khan.

HAMID M. KHAN: I kind of wanted to speak to that question of how we implement it. It is a question, I think of what has been repeatedly called legitimacy. It is something that I alluded to and I think was more eloquently stated by Professor Abou El Fadl and Professor Jackson and I think it was also in the thrust of Professor Friedman’s comments. One of the things I think that we speak of when we speak of failure in terms of the international regime is perhaps an impatience on our part as looking at the world as if it should have been preeminent. As if the logic of human rights should have been evident and in some respect is evident. We also have to realize that we are in an infancy in many respects. That we are still questioning whether rights is the right answer, as Professor Simpson pointed out that there are duties. But I wanted to also go to questions of legitimacy more beyond time. A question of legitimacy in terms of what seemed to be underlying a lot of our concerns which was, how do we legitimate? How do we bring salience to these kinds of questions of women’s rights? How do we go to the people in Salamar or even Madrid or other places in the world? And I think that we have to go to the question of legitimacy. We can sit here and talk about it but how do we make it salient? And I say this anecdotally but it is interesting in thinking about this. My mother was basically orphaned when she was five and she remembers being very young in the midst of war. She was eating United Nations rations and she remembers they were United Nations rations because they were particularly terrible. [Laughter] She said the oil was bad, the rice was horrible, and we could not stand it but at least we knew the United Nations was there trying to help us because it was a constant sight. I had an opportunity a few weeks ago that my wife’s family had sent one of these dehydration packs that was sent by the United Nations and for her it was a particularly salient moment in her life where she realized that it was not merely the country of Pakistan which she was living in, it was also something more, something larger. And I think that what we struggle with oftentimes is the question of legitimacy is somehow bringing home the idea that there is something out there. That we ourselves talk about this as if it were evident. But sometimes it is not as evident and I think that Professor Friedman does an excellent job in her exposition of bringing it home, where the rubber meets the ground. And I guess those questions of legitimacy may not just be legal orientations but
may be things like Amnesty International. But even at a basic level, how
do we reach people to say you do have rights, you do have a way in which
to do it? Because we can hear and articulate all these propositions, but we
need advocates there.

We need someone to say these sorts of things in a political institution
or courts of law. I guess that’s more of a question than it is a comment. I
just wondered, being a student, you all obviously being scholars. How do
we do that? How do we disseminate the knowledge?

**KARIMA BENNOUNE:** Elisabeth Friedman?

**ELISABETH JAY FRIEDMAN:** Oh, goody. I love when a ques-
tion is put out there and I happen to be next on the line. [Laughter] I am
going to answer that question, at least give you some sense of how it is
already being done. But I do want to mention one thing before I talk
about implementation, which is to follow up on this discussion about the
fundamental tension that I think was there and probably was the reason
that the whole conference was framed as: Is it better to have an interna-
tional legal regime that is focused on individual rights versus collective
rights, when we are thinking about women’s rights? Because those ten-
sions are real, because it is rare that we have the nice complimentarity of
the indigenous girl who gets education and gets education in her own
language. Usually what we have instead is the fight over what are we
going to do about divorce law? What are we going to do about female
genital mutilation or female genital surgery? What are we going to do
about the fact that women do not get sent to school? What are we going
to do about the fact that girls do not get enough to eat? If and when these
things are justified as, “In our collectivity, this is the way that gender
relations work and if you come in and tell us to change it, you are violat-
ing our sovereignty, or group rights, to decide how we should set up the
basic building block of society which is the family.” I don’t think that
that can be stressed enough. I think that Brad can sit here and we can
agree with you fully that you are not convinced. You do not take it seri-
ously when people hold up that definition of collective rights. You are
not going to take that argument seriously, but it is seriously out there. I
cannot tell you how seriously it is out there. The study I alluded to—
which I would be happy to give you a footnote for—in my talk about this
study that we did looking at pretty much all of the major U.N. confer-
ences of the 1990s and we were trying to find what the basic—what we
called sovereignty referents were.\(^3\) When was it when the rubber met the

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road, on the part of State actors? When did they say "my sovereignty will not be violated and I will not sign onto this document or I will not agree with taking brackets off this particular sentence"? And the overall referent that grew over the course of the 1990s directly in response to how powerful the organization of international women's human rights and other rights NGOs were around the structure of the family, was around gender relations, was around women's sexuality. It was about abortion, it was about birth control, everything that has to do with the structure of gender relations in society. And I wanted to stress that because I found it quite troubling, also fascinating. It was fascinating to me because the other researchers I was working with kept saying "this one's yours Elisabeth." This is about women, again. And trying to figure out, okay, if we do not buy that, if we do not take it seriously intellectually or at a theoretical level, why is it articulated with such strength? Right? Several spoke to this yesterday. I do think it very much has to do with the explanations that we got in terms of why women’s rights, right now, seem to be a threat. Particularly when it is around their rights to control their bodies and their rights to exercise their personhood freely in terms of their most intimate relations. I do think it does have to do with processes of urbanization, processes of globalization, processes of cultural change and shifting. That people want to grab onto what they think is most fundamental about their lives and hold onto it as tight as they can.

It is also used extremely instrumentally by what we think of as fundamentalist movements. The rubber hits the road and it runs over women. We see that very, very strongly, of course, in cases like Afghanistan, but we do not want to fetishize Afghanistan and we do not want to fetishize the non-West, either. We see that in this country. We see it with the Defense of Marriage Act.\footnote{Defense of Marriage Act, Sept. 21, 1996, P.L. 104-199, 110 Stat. 2419.} Right? Where it is a challenge to gender relations, and as you pointed out, it's revolutionary. Because revolutionizing gender relations is about as revolutionary as you can get. It is just as revolutionary as trying to revolutionize class relations and we know how fraught that has been. So I think that we want to take it seriously because it is a serious challenge and we want to continue to articulate it in that way so we do not think, "Oh well, you know it's just about women. And well, you know feminists can't get it together to solve these problems for us." Well, it is not just up to the feminists. This is a global problem and I think it's a lot of what the idea of articulating women's rights as human's rights gets at. It does not blow human rights out of the water but it does

force a real articulation of the interdependence of human rights that is a huge challenge. I have gotten to watch it for ten years and even the way that a group like Amnesty International has been struggling with that. When first off they were saying “We can’t go there. We won’t have our mandate.” And then, you know, a lot of pressure from the outside and a lot of opening their eyes to the reality of people’s lives got them to say, “Well, we have to go there because you can’t pull [interdependent human rights] apart.”

Which leads me to another point about this idea of women’s rights: that we have gotten it down. It is only abortion now. What are we going to do about this politically when we still want to claim that there’s a reason to have women’s rights struggles? The articulation of women’s rights as human rights was this sort of articulation of “ultimately what we want are truly universal universals” to quote our brilliant keynote speech of yesterday. To say if we think about violence against women in the home that will also allow us to think about violence against children, violence against men, violence against anybody by a private actor. To say not only that women’s rights are human rights but to go back to our funny exchange earlier that women’s rights are men’s rights. In other words, we have to go and look at all of the rights claims and say, “How does including everyone within that rights claim not ask for a new right?” That is why I think abortion keeps coming out there. It is so basic. It is so tied to biology that as I joked about, in twenty years, maybe we will not be talking about it anymore. But that does not mean that that reinterpretation isn’t still fundamentally a challenge, when we go in to see how it might work.

I do want to speak to this question that Hamid put on the table and was also in several of the speaking points here. How do we legitimate these rights in particular cultural contexts? I think there has been a lot of reification of the idea of the regime and our responsibility to implement the regime, our responsibility as international lawyers, as students of international law, as professors, as researchers. I guess I am here to tell you that one thing I have found in my research is that that regime is not something that’s only set up at the international level by people with leisure. That is what was articulated yesterday. I mean, certainly there are incredibly important jurists and whole legal developments that are really happening in the upper atmosphere of international negotiations. But these regimes are articulated, reinterpreted, rearticulated through their use on the ground. That when we think of the regime more broadly, this is a regime that includes very small human rights NGOs, in rural areas in India, in rural areas in Cambodia, and in rural areas of Brazil. It includes the landless movement in Brazil which is not a little NGO. But I think
we need to recognize that it is not under our control; that people are articulating things that we might look at as researchers and scholars and students and as lawyers and say “what you are doing is part of the broader regime.” But also lots of them know it is out there and they knew it before the Web, but certainly the Web and the Web’s retranslation through community radio and flyers and articulate local speakers, through NGO-driven campaigns like the petition campaigns that the women’s human rights movement has done around [the U.N. World Conferences in] Vienna and Beijing where they go out from the national level within particular countries and have these petitions circulated in local languages that articulate the concepts of women’s human rights as human rights and get people to put their thumbprints on it and then send it to Vienna. And there are 300,000 of these signatures that are brought in showing that women all over the world have a recognition of the importance of their rights. In that process I think that is where we can really think about or see this process of legitimation. That was not quite articulate enough, but I had a couple of examples yesterday. I pointed out to somebody that if you read in the CEDAW that was developed for the state of São Paulo and signed onto municipalities in that State, they didn’t just translate CEDAW from English to Portuguese. They retranslated it within the framework of the Brazilian women’s movement and the issues that they had articulated were most important. I believe that was childcare, violence, health, work, and education. But they kept the idea of what it was that CEDAW is out there to do, but said this has to do with what we’re concerned with on the local level. But it is important that they still called it CEDAW, because they are still saying this has international legitimation but it will also work for where we are. So I will leave it at that example.

KARIMA BENNOUNE: Thanks. I have three people now on the list: Ann Mayer, Professor Hassmann, Professor Roth.

ANN ELIZABETH MAYER: I wonder if you remember this better than I do. I have certainly gotten into the practice of reading treaty reservations. I just think they are so fascinating. [Laughter] This morning, it may be the early hour sleepiness, but I cannot recall any government ever expressly using the term “collective rights” in a reservation.

ELISABETH JAY FRIEDMAN: Can I speak to that?

ANN ELIZABETH MAYER: Yeah.

ELISABETH JAY FRIEDMAN: What is fascinating to me is that in terms of the ones I was just speaking of, they did not say collective. They said this is anti-Islamic. They said Christians would not sign onto this. They said our constitution protects life from the moment of conception, and so it was a matter of reconstructing. We were speaking
about this yesterday, that essentially, for example, half of the Latin American countries that had reservations to Beijing were essentially articulating a collective Christian right—not to make a pun there—to defend certain of their Christian beliefs and that was the basis upon which they were taking reservations. But it is fascinating they do not say it is a collective [right].

**ANN ELIZABETH MAYER:** Right. Yeah, I thought that was interesting. And I think we could get into a long argument and Brad would probably help us here by going into that because these rights are being rejected on terms that are very similar to the ones that the United States uses when it invokes the U.S. Constitution. When the United States invokes its Constitution, for example, not to accept restrictions on hate speech. Is it invoking a collective right when Muslim countries say we cannot accept this principle of women's rights because it violates Islamic law? Is that speaking in terms of a *collectivity* or a *collective* approach to rights? Or is it merely a case of a government asserting that the national law—which happens to embody sacred principles—like the U.S. Constitution or Islamic law, necessarily has to override this convention?

Another issue that has come up is the intensity with which people have recently come to speak out to denounce women's international human rights. I am sorry that Susan Waltz is not here for the conference. I was hoping she would be here. She has just written an article that I hope will be published shortly. It goes in great detail over the debates at the outset of the international human rights system at the time that the various countries in the United Nations system were considering the various provisions of the Universal Declaration. She points out that in general, in that period, Muslim countries were very relaxed about accepting the principles in the Universal Declaration of Human Rights. There were occasional objections, the most famous of which is the Saudi Arabian objection to the principle that a person would be allowed to change religion. But by and large, Muslim countries in that period were often more comfortable with international human rights than a country like the United States or Britain and France. So we need to think about what is going into this mounting resistance we are seeing, this new tendency—and it is a relatively recent one—to say our culture or our religions will stand in the way of our accepting international human rights. Karen Engle has a very interesting article about this, suggesting that it is part of a package of excuses for noncompliance like sovereignty, development, culture, and they are pretty much interchangeable.\(^8\) Maybe this is all a result of globalization pressures, which then increase the need to erect

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plausible barriers. You try to select a barrier, ideally, that comes within the system. We know the international human rights system does call for respect for culture and religion. We do have principles of development as a right. We do have, within the United Nations system, sovereignty, as a right. And so we have people perhaps looking around within the system with increasing desperation, precisely, because they are seeing that globalization is meaning that the rights could be accepted rather glibly. When we think that the United States did not reject the Universal Declaration at the time when it had de facto and de jure racial segregation, we know that a lot of this acceptance was given on the basis that people assumed they would never really have to come to terms with these principles. Now at the moment they are having to contend with the fact that these rights are having mounting force. I think that is partly because of their legitimacy, as you have discussed. The countries that really want to stand up to the international rights regime now have to look for these plausible pretexts.

KARIMA BENNOUNE: Professor Hassmann.

RHODA E. HOWARD-HASSMANN: I think Dr. Mayer and I are turning into Bobsey twins. I am a little concerned. I do not know whether Professor Friedman and I are in disagreement. I wanted to reiterate that although I argue that every right that I can think of that women need is also a man's right, except for abortion, that does not mean I am not concerned with women's rights. Patriarchy makes me very angry. I really have to keep myself under control when I discuss women's rights.

ELISABETH JAY FRIEDMAN: I think we are still in total agreement. [Laughter]

RHODA E. HOWARD-HASSMANN: We are in total agreement. Glad to hear it. Just to throw in something that has not been discussed in this seminar. Homophobia also kind of annoys me. Professor Friedman talked about the reification of regimes and another problem is the reification of the term “culture.” As if culture is a static thing and holistic so that if one aspect of a culture changes, the entire culture disappears. I think it is still a problem in the literature that culture is seen this way. In the first place, cultures can change, and even when they change, they can be recognizable. Now I say this with some hesitation, because I am going to speak about Canada, and of course differentiating Canada from the United States is difficult, although Dr. Mayer says Canadians are funnier. [Laughter]

ANN ELIZABETH MAYER: That is definitely true.

RHODA E. HOWARD-HASSMANN: Canada in 1950 was racist, sexist, homophobic, anti-Semitic, the whole shebang. There were not any Arabs around or Palestinians. If there had been they would also have been
included, of course. Canada has changed. The culture is still recognizably something Canadian, North American. There are some Canadians, yes, who go around—perhaps who were adults in 1950—who worry about the changes. But most of us manage quite effectively, to function. In fact, we eat a lot better because we have a lot more immigrants from a lot more places in the world. Culture is also a matter of interest. Who is defining what the culture is? And therefore, also a matter of power. Who is in power? Who can make those decisions? In the international debate, Professor Mayer is right as she said collectiveness, culture, development, and all this stuff in fact, merges. When governments claim cultural relativity, they do not, for example, say “Well, we have the right to torture.” In fact, torture is a cultural custom. In many societies, until very recently, it was common. In all societies, they focus on four things. Certain aspects of freedom of speech, like pornography and scatological speech, but also that lets them censor purely political speech. They focus on freedom of religion, which is seen as symbolic of the community, but also means that they get to maintain cultural norms that oppress women and prevent women from removing themselves from the religion. They get very exercised about women’s rights in general, again because women are symbols of culture. Finally, nowadays, they get extremely exercised, some countries, about gay and lesbian rights, which are seen as a form of, at least rhetorically, Western cultural imperialism and attack on norms about proper behavior. Why do they do this? Well again, one reason they do it is so that governments can deflect attention from what they are really doing to their own citizens. So governments have an interest in saying, “Your international human rights norms are imperialist Western,” despite the fact that there are huge numbers of NGOs, for example, about women’s rights in all parts of the world now.

The other reason is that men, as well as governments, have a material interest in continuing their exploitation of women. They have a material interest in controlling women’s income and women’s wealth or their inheritances. They have a material interest in benefiting from women’s unpaid labor. Finally, there is a high symbolic value to being male and at least having power in the home. Again, I think that the less power a man has in the public realm, the more frustrated and incapable of having any sense of dignity in the public realm, then the more likely a man is to at least want to maintain that sense of dignity or being somebody special in the home. I am sorry to have to say that, and I do not think all men behave that way. But I think that as a social phenomenon, that is true. So since the issue of cultural relativism came up, I mean these are fairly basic things. I think it is a shame that the international
discourse by now still does not acknowledge that culture is a social creation, is malleable, changeable, and so on.

KARIMA BENNOUNE: The next person on the list is Brad Roth.

BRAD R. ROTH: First just to clarify, in response to Professor Friedman’s statement about what is and is not to be taken seriously, my point about that had to do with not taking seriously the notion that women’s rights are a divide-and-conquer strategy to undermine communities. I certainly take seriously the existence of tremendous resistance to women’s rights norms and the fact that that resistance is often framed in terms of a fundamental right to the family, which we see in international human rights instruments. How one understands the right to the family, of course, is a function of all of the other values that are in play here. My concern with respect to communities that are asserting a particular way of understanding the family is: Who gets to participate in those decisions about what the family ends up looking like? I am not sure that I want to give more respect to assertions about the right to have the last word about what the family looks like than I do to assertions, in the name of sovereignty, about the last word about what the economy ought to look like or whether there ought to be freedom of the press or anything else.

In terms of the way in which reservations are framed and so on, and the relationship between that and sovereignty, what sovereignty amounts to in international law is first and foremost the presumption that States are not subject to obligations, except those to which they can be said to have consented, whether that consent be express, implied in fact, or implied in law. And of course, the asserting of reservations is a way of withholding, expressly, consent to particular obligations. The United States, of course, does this quite a lot. It does it, perhaps, for the laudable reason that it takes seriously the international obligations that it undertakes and therefore is unwilling to undertake obligations that it won’t implement. Many States, of course, are perfectly willing to formally accept obligations that they have no intention of implementing. But the United States has a tendency to frame these things in sometimes the most obnoxious possible ways, such as in the Helms Proviso to the ICCPR, asserting that we will not accept any obligation in violation of the Constitution of the United States as interpreted by the United States.\footnote{138 CONG. REC. S 4781 (daily ed. Apr. 2, 1992).}

That Proviso actually is not appended to the instrument of ratification. It is an internal statement which has to do with another aspect of sovereignty, which is the implementation of such obligations that concededly exist. It is not simply that States are free to the extent that they are not subject to international obligations through some operation of
consent. It is also that the implementation is a matter of internal discretion in important ways. The existence of the interstate obligation does not automatically result in directly effective law within the territory. It does so only to the extent—again, presumptively—that that is provided for, within the constitution and the laws of the individual State.

Finally, of course, the centerpiece of sovereignty is that, irrespective of these international obligations, there is no inherent right of the international community as a whole, or of States individually, to implement some conception of States’ international law obligations through coercive interference in internal affairs, whether that be by armed intrusion or by economic coercion, or by other means that have been condemned as coercive interference.

So these limitations are framed in terms of sovereignty and consent in the international system in ways that do not really require States to make the additional assertion about a particular collective human right. If it corresponds to that, it corresponds to the right of self-determination upon which sovereignty is predicated in the contemporary system.

KARIMA BENNOUNE: I have three people on the speaker’s list: Hamid Khan, myself, and Christina.

CHRISTINA L. BRANDT-YOUNG: I was just thinking that States don’t have to articulate any collective reasons for why they want to do things, based on the concept of sovereignty. Ngaire Naffine’s work, Ngaire Naffine, The Body Bag, in SEXING THE SUBJECT OF LAW 79 (Ngaire Naffine & Rosemary Owens eds., 1997) I think, has shown beautifully how some of the aspects of State sovereignty gender the State male. We should have another conference about that.

HAMID M. KHAN: In response to Professor Mayer’s point about reservations. I find it very interesting that when we were talking about the Universal Declaration of Human Rights, of course, there was no implementive force to do so. I think as an empirical question: Have reservations increased? Have we invoked cultural relativism even more in the modern era? The reason why I ask is because I think there is a reason why, that this animating feature, that international law is having an effect. One which not only the United States will have to take seriously, which other countries are taking seriously, as a collective international community. If that really is true or if there is an international community. They are having an interesting effect.

The reason I was just noting this is because I recently did a bit of empiricism on the Cairo Declaration of Human Rights in Islam and I noticed that there have been other resolutions in Rome. Last year, a resolution in Rome articulated a statement of principles which was...
interesting because it didn't endorse the original declaration of the organization, the Islamic Conference. In fact, it made no mention of it. I am not sure what that means. I was looking at the report and it made no real reference to the Declaration. It seemed almost that this statement of principles was a backing away of their more assertive stances, which I think received a little bit of negative comment from the general international community. One of which, is Professor Mayer herself, who wrote a very distinguished article about her criticisms and her analysis. I am just wondering, will we see cultural relativism being increased more and is the reason why we are seeing it because international law is having more salience rather than less?

KARIMA BENNOUNE: Professor Mayer, would you like to respond?

ANN ELIZABETH MAYER: On the question of cultural relativism coming up, yes, I think it is really something that we are seeing in the 1990s. And the reason that I have characterized it as opportunistic includes a number of the factors that others have mentioned. The culture is not static. The government does not speak for culture. The government, particularly when we were talking about women in culture, is likely to be unrepresentative of women's voices. But it is also, to my mind, pretty mind boggling to have communist China now speaking up in terms of Asian values, promoting Confucianism. [Laughter] They found religion at last. And to see this parallel exactly the use of Islamic rubrics suggests to me that it is a global phenomenon and people focus far too much, in my opinion, on Islamic exceptionalism. In Muslim societies, we see many of the same political dynamics that we see in other societies. Culture is a very good rubric to use. Religion is a very good rubric under which to place your objections to international human rights in an era when the great global hegemonic power is the United States, which exults its primary values: freedom of religion and freedom of speech. If you are being attacked by the United States and you say what we are doing here is following our religion and you're interfering with our religious freedom, it does force the United States to at least rethink the way it is dealing with the human rights problems in the country.

KARIMA BENNOUNE: I wanted to pick up on one point that Brad Roth made. I would really like to hear what you think about this. We hear time and again from U.S. diplomatic representatives in human rights negotiations that the reason that they behave in the way they do in

treaty making is that the United States takes its international legal obligation seriously. There is an extent to which I am willing to give the United States the benefit of the doubt on that. I have to say this as a law professor. We do have a very sophisticated legal system in this country. It does have problems but it does function very well in many ways.

On the other hand, I want to kind of question this idea that has become accepted wisdom that the United States takes its international obligations seriously. Look at, for example, the Convention against Torture, which the United States has ratified. My understanding is that the only implementation of that convention was the Torture Victim Protection Act which gives both non-citizens and citizens of the United States a right to proceed on a case of torture against a foreign torturer, which is very important. But it does not deal with the very important issue of torture and cruel, inhuman, or degrading treatment or punishment in the prisons and detention facilities of the United States. So as we look at this issue of ratification of CEDAW, do we not have to be extremely insistent that while the symbolic step of the United States ratifying is incredibly important, we want more than that? We want ratification of the Optional Protocol. We want actual implementation. It might be scary to put all of those things on the table because then the fear may be that we never get the ratification at all. But I am just wondering if we need to question this idea of the United States taking its obligations so seriously, picking up on some of the comments that Professor Mayer just made.

The final point I wanted to throw out there is going back to implementation and going back to Hamid’s question that I take very seriously, and I get this from my international law students all the time. “Professor this is very interesting, but could you please explain to me how we are going to translate that into reality?” And I think we do face these very important challenges in the women’s human rights area of a reified culture, religion, tradition, sovereignty. But I think perhaps at the moment the two biggest threats to the whole human rights framework and women’s human rights, on the implementation front, are, number one, globalization, which has already been mentioned, and number two: the war on terrorism. I wanted to throw all of those things out there. Professor Hassmann?

RHODA E. HOWARD-HASSMANN: Professor Mayer has written an entire book on U.S. violations of women’s rights, in the United States, so I think she should speak before me about implementation. Please.

ANN ELIZABETH MAYER: Oh, gee. Well let me just say that if I remember right, it was this state which prevented the United Nations observer from going into the women's prison to investigate claims that women prisoners in the state of Michigan were being abused by the male jailers. And when you think of the United States of America, in a situation where there was widespread credible evidence that female prisoners were being sexually abused, telling the United Nations—this is my recollection, you Michiganders may correct me—but I believe they said that it was a question of sovereignty, and that outsiders could not come in and inspect U.S. prisons. In my experience, in Middle Eastern countries, very often, they feel—and certainly not all of them—but very often they feel obliged to give U.N. inspectors pretty wide access to facilities, to investigate complaints.

To think that the United States of America, in these circumstances would not even allow an outside observer to come in, I think that tells you a lot about the United States' willingness to comply. Of course, I recognize that in the United States we do take rights seriously—this is a legalistic, rights-oriented culture. The problem lies in the area of the United States adjusting to the notion that any outsiders have any business investigating what is going on internally in this society. We remember the extraordinary U.S. defensiveness about race relations in the past. It was at the Bandung Conference, one of the major Third World conferences, that proposals were mooted to look into the situation of Black Americans. Adam Clayton Powell became a hero in the United States by rejecting the idea that outsiders should have any say in solving our race problems and telling the conference that Black Americans would deal with their own problems by themselves. We have this history of isolationism. I do not need to lecture you people about it, of course you know it, and it makes it extremely hard for the United States to adjust to the notion that it is subject to the same controls that it always expects other societies to be subjected to.

KARIMA BENNOUNE: Professor Hassmann.

RHODA E. HOWARD-HASSMANN: Okay, now I have my own comment. I thought when you were telling us the story about the Syrian comedian, that when his wife said, "Why did you hit me?" he was going to say "globalization." [Laughter] My view on globalization is somewhat different from those who think that globalization is a process that will inevitably result in the deterioration of women's rights and all other human rights. I think, in fact, that in the long run globalization will improve matters. I think that the discussion fails to distinguish between short, medium, and long term. I don't yet have statistics on everything, but even in the short term, Anthony Giddens, the British sociologist,
points out in his book *The Third Way*, the tremendous number of jobs that globalization has created. As a sociologist, thinking about globalization as an aspect of social change, I think that it will improve matters in, say, the fifty year medium term. It will improve matters because there is increasing pressure toward the rule of law.

Now I read Marx many years ago and Marx pointed out that the rule of law was originated in corporate law for the bourgeois. And that is what is happening now. There are pressures on places like China and Russia to protect private property and protect corporate contracts. This, then, will generate probably increasing pressures for rule of law in other domains, including the domain of rights. Globalization is also likely, in the long term, to provide, as I said, job opportunities and to increase pressures for more education. We have the regional exception of Sub-Saharan Africa, which for a variety of circumstances is not making progress, but other parts of the world are. In terms of women’s rights, globalization, you could argue—especially if you are me and you are trying to make a living publishing articles in this area—part of globalization is global standards of justice and rights. So we have global norms, which say you are really not allowed to do things—certain things now that could be done in Britain 150–200 years ago, in the period of industrialization. We have an enormous global feminist movement. Mr. Khan has left the room right now. But he is too young to know what the situation was like in 1970 or even 1980 when I worked on women’s rights in 1980, in sub-Saharan Africa. When I went to academic conferences, there were only men from Africa there. There were no sub-Saharan African women. There were no sub-Saharan African women international lawyers in 1980. There—

**ANN ELIZABETH MAYER:** Conferences on women?

**RHODA E. HOWARD-HASSMANN:** Well, we would be talking about women at an African studies conference. Men would say things to me like, “our women don’t need rights. We don’t beat women in our society.” So then I would meet some African woman. I remember asking a Zambian woman student this once. Is it true that Zambian men never beat Zambian women? And she said my brother-in-law beat my sister to death and then took the kid that she was carrying. So, so much for that. So there has been enormous progress in the global feminist movement, which is part of globalization. Finally as we know, global communications and travel as Professor Friedman has already said. The Internet, e-mail and just the capacity to get on a plane. So I do not think that globalization is a big, evil thing. I do not think that the free market is a big, evil thing. I think an unregulated free market . . . I think the establishment of export

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processing zones where people don’t have the right to unionize . . . I think having nondemocratic governments which allow foreign investors to lock up their workers, beat them, and so on . . . In China right now, foreign investors are allowed to treat their workers so badly that there are thousands and thousands of people who die or who lose their limbs in factories. All these things are terrible and we know that in world history, the existence of a free market is a very short period of time. Then you have labor movements which said we are going to go on strike if you do not give us some rights and some protections. So I think market economies work. Economies that try to suppress the market don’t work. We have seventy years of socialism to show us that. But unless we also have democracy and the rule of law, then globalization, of course, will include all these adverse effects. In the very long term, if we are optimistic, globalization may be a good thing. On the other hand, we may have social reactions such as post nine-eleven anti-Arab, Muslim, etc. prejudices. People may batten down the hatches and retreat into their own communities. Then perhaps we will have a Third World War, she said cheerfully. [Laughter]

KARIMA BENNOUNE: Reem Bahdi?

REEM BAHDI: I have two comments. The first is that I am not quite sure that I understood this statement, so perhaps I can be corrected if I misunderstood it. I think I heard that the suggestion was that male abuses in the private realm are an extension of the lack of power in the public realm. Yes, but let us not forget that powerful men abuse, too. That is my first observation. I just wanted that on the record.

The other point that I wanted to make goes to what you were talking about, Ann, which I find so interesting, regarding claims to sovereignty. I see that also in attempts to inject international law in national courts. So the question was, “Where does the United States stand?” and I can only say this as an outsider. There is great hostility to international law in America’s highest court. It is very interesting to look at the reaction that international law gets in the courts of places like India, to a certain extent Botswana, Nigeria, New Zealand, Australia, and perhaps to a lesser extent in Canada. I mean certainly there is hostility elsewhere, and to me this goes in part back to the question of legitimacy that has been raised. That if you want to use international law to beat others on the head, you cannot use it as a shield in your own domain.

KARIMA BENNOUNE: The next person on the list is Elisabeth Friedman.

ELISABETH JAY FRIEDMAN: I think Hamid has a follow-up to that.
KARIMA BENNOUNE: Hamid was your point specifically on that?

HAMID M. KHAN: I was just going to make a brief comment. Professor Roth I know was also in attendance at the ASIL Conference, and I found it profound and interesting that Justice O'Connor who gave the Conference's keynote address, urged us to listen to the music of the law, specifically that of international law, admitting that she was one of the obstinate barriers in the idea of accepting international law in the United States. So I think there is kind of a schizophrenia of sorts. Whether or not we are really sure we should accept international law and perhaps there may be some cognition as to the idea of actually doing it here. But it looks pretty slow.

KARIMA BENNOUNE: Anybody else have a specific sort of reply or comment? Elisabeth?

ELISABETH JAY FRIEDMAN: Okay, I'll go back to something that Rhoda said and then maybe go somewhere else in the talking points. This does speak directly to the threats of the post-September 11 phenom and also of globalization. And I think, again reification rears its ugly head as it wants to do when we say globalization and as you can tell, globalization means free flows of capital. It means EPZs. It means Export Processing Zones.

RHODA E. HOWARD HASSMANN: Zees, Zs, no, you are supposed to say Zed. If you had said EPZed. I would know what you meant. [Laughter]

ELISABETH JAY FRIEDMAN: Oh, well then you know I am not from Canada, as if that is not already blatantly obvious. Globalization means the Internet. Globalization means taking planes. Globalization means maybe starting a new wave of labor movements. Globalization means massive amounts of growing inequality in Latin America. It does mean all of these things. So I think it is helpful to try to disaggregate what we mean by globalization, in part, because if we just say globalization, we are helpless in front of it. It is the juggernaut. It is a U.S. tank with a banker on top of it. I am sure we could come up with lots of horrific images like that. [Laughter] Or it is U.S.-made tanks in Israel, running over Palestinian cars. I won't go there. But I do want to point that out because while I agree that there are very positive things that are coming with globalization, just thinking in terms of more employment opportunities for women in the developing world, there are these tensions and contradictions about what does it mean when you have a new supply of jobs in a patriarchal culture. Jobs that are being opened only to young women. It isn't cost free and it is not the solution, right? Give them jobs and then they have equality in the family. No, give
them jobs and then their families will start relying on them to bring home the income and they will have ways of getting the income out of them. What does it mean when you have a formally organized labor force in a place like Mexico, in which the people who know how to organize are no longer getting the jobs? What will they organize for? What will they do if they cannot organize?

Sometimes I do not know how productive conversations about globalization can be if we do not really focus in on what it means. Again, to use this overused metaphor, when the rubber hits the road, who gets to go online? Who gets to get on the plane? I totally agree from looking at the Latin American region, that commercial law is going to drive the call for the implementation of the rule of law, but you know they could set up commercial courts and leave those family courts alone. Now, of course, then domestic actors can say, “Hey, we need implementation over here also.” But I do think that the most powerful aspects of globalization, the places where it is going to get sort of worked out the fastest are in the economy. Having economic changes go forward, new labor markets, new forms of work, in themselves are not going to bring about the rest of the positive changes we want to see in society.

I guess one more point on that is that it is nice to go back and look into history and think, “Well, first we had vicious capitalism and sweat shops and then we got labor movements.” But again, and this is reflecting from the region I know the best, they also got labor movements there. They looked very different than labor movements looked in Western Europe. They privileged a certain class of laborers. They did not get universal rights for the great majority of workers and a lot of the impact of whatever capitalism looks like right now in Latin America has been to generate an enormous informal working force. And you have to think about organization in a very new way in the informal economy. I think women are leading the way in places like India on that. But it is a very difficult group to generate organizations in, and a place where I think there is a lot of concern. Can I move onto another topic?

KARIMA BENNOUNE: Does anybody want to come back on any of those sets of points?

ELISABETH JAY FRIEDMAN: I want to speak about number four. What should be done with patriarchal institutions? [Laughter] Should they be overthrown in revolution or utilized in opportunistic evolution? And I think it is important, not just because I work on institutions and so, I like to talk about them. But also because, in a way, it is yet another one of our wonderful subtexts that is running through the discussion here, because international law, of course, has been faulted as being a patriarchal institution and the whole articulation, again going
back to women’s rights or human rights and critiquing were those rights really everybody’s rights? No, they were based on the rights of male political prisoners or you know, whatever your historical explanation is. So when we are talking about the major subject of this conference, we are talking about a patriarchal institution. When you bring up provocative comments about the State and how the State is a gendered institution, or you could say made up of a constellation of gender institutions. I would say political parties are gendered institutions. I would say labor movements are gendered institutions. And if you want to read a great book about gendered institutions, I will give you a good cite. I happen to have written it, so there is my commercial for myself.  

[Laughter]

So I have studied gendered institutions in some depth, in a very local context or a national context, which is Venezuela, but also Latin America more generally. Should they be overthrown in revolution or utilized in opportunistic evolution? I have to say overthrown in revolution as a political scientist makes me a little nervous because I know what it refers to. No, they should not be overthrown in revolutions. Revolutionary movements are really sexy and they are great to support, and they generate fabulous music. [Laughter] But generally, as we just alluded to earlier, revolutions often are not universal, right? They are revolutions for a certain class. It is very hard to say we are going to sweep the slate clean because we cannot clean slates, right? We can say, “Okay, we are going to destroy the Congress, and we are going to destroy the presidency, and we are going to destroy the basis of our economic development.” But what do you then put into place? You put a whole new utopian vision, which happens to be completely informed by the people who happen to be in charge of the revolution and of course, so they set up new patriarchal institutions, which I think the Soviet Union was a great example of. You can also see it in Cuba and Nicaragua. But then we are left with opportunistic evolution, which makes us very opportunistic. I think to think about evolutions and institutions is very important, and there can be more or less revolutionary evolution. So it is not that I am not for serious and fundamental institutional change, but I think when we are thinking about change—and I would be happy to share some examples of what I call regendering institutions—we think about the patriarchal nature of them. But, for example, the family is an institution and we can see what challenging familial relationships brings onto us. People are very invested, in ways they do not even know, in institutions. And part of that is not because they are blind or they need to be educated or what have you. But you grow up in institutions and they

93. **FRIEDMAN, supra note 7.**
form part of who you are: your assumptions, your wedding rings, your projections about what your life is going to look like, your understandings about where your parents came from.

So I think that that is why, for example, in the gay and lesbian movement there is a big debate about whether they want to get married or not. Do we want to be married? A lot of lesbians will say that marriage is a patriarchal institution. So why should two women engage in it? Others will say marriage is the way that at least this society has recognized a serious lifelong commitment between two people. And we want to use that framework because you could say it is opportunistic. You could say this is the way we have also understood commitment. So to deny us that ability is to essentially say, “You get to be the caretakers of your parents when you get old and we will not take your [chosen] family seriously.” I think that there are good reasons for one side to say that to overthrow this institution is to deny some basic part of the way that your identity has been constructed. But just to end on something that is perhaps a little less personal, one thing that I saw—and this is what is so great about getting to do field research that I looked at the trajectory of the Venezuelan women’s movement from the mid-Thirties—and yes, there were feminist organizations in Venezuela in the mid-Thirties—there’s also huge debate about feminism and how imperialist it was. Into the 1990s, one of the strategies that they developed after years of not getting to be accepted within patriarchal institutions . . . That is, they would join the political parties but they couldn’t move up to the leadership ranks. Or they would be taken on as civil servants, but they would never get to the head of the ministries. Or they would try to make action through existing civil society organizations and what do you know, the labor organizations were not interested in taking on—I hate to call them women’s issues now after all the debate we have had about women’s rights—but I will just use that and you will know what I mean, right? Child care for example. So what they did in response, and this was a learning process on their part, is they began to do something that I call regendering institutions. Often what it meant, and maybe this speaks a little bit to your idea of revolution, is they set up new ones. Or they set up new parts of existing institutions and the organizations that I mentioned yesterday, which were the Women’s Ministries that you find in pretty much every country around the world, that often were set up to enforce CEDAW. In Venezuela, they developed it in a way that reflected slightly different values about what they wanted the space that was going to essentially promote women’s interests to look like and how it would have to look different than a traditional ministry. For one thing, it would have to avoid a potential for cooptation that often comes about with
highly politicized States as you find in the Third World. But they also set up alternative civil society organizations that were nonhierarchical and decentralized, and, of course, that brought their own set of problems. But they were thinking about what did the patriarchal institutions look like, where are the parallel institutions we can set up so we get what we need taken care of? How do we do it differently so we also don’t fall into the same sort of traps that we are critical of in these institutions.

KARIMA BENNOUNE: There is nobody else on the speaker’s list. So if I may, I want to pick up on these points and suggest a direction I would like us to pursue in some of the twenty-five minutes that we have left. This is to take these questions that Professor Friedman has just opened up for us about regendering institutions and talk about how we do that specifically with international women’s human rights, with international human rights law in general, how we do that with the United Nations. I can tell anecdotes of what it is like to be a young woman representing an NGO in a United Nations meeting. There is a lot of work that needs to be done there. What do we actually do with this system that we now have, and how do we get to implementation? What is the balance that we should be looking for between pushing at the international level and pushing at the national level with the support of international norms? Do we need new norms to fill in the gaps that we have? Should we solely be focusing on implementing the ones that we have? Should we be looking at traditional mechanisms like United Nations treaty bodies or the treaty bodies of regional human rights institutions? Or should we be looking at new, innovative developments in the enforcement area like the International Criminal Court, the use of United Nations field presence, the use of aid conditionality, which is a very controversial subject. So I’m wondering if we can pick up on those questions about regendering, about institutions, and spend some time focusing specifically on the international human rights system and women. Professor Hassmann?

RHODA E. HOWARD-HASSMANN: I know you do not want to tell anecdotal stories and I do not in fact have any, but I have heard them and in fact I do think we should put on the table that the United Nations and some of the international institutions of human rights still have the problem that there’s still blatant sexism by some individuals. There is still certainly a problem of, I understand from anecdotes, younger women tell me, of older men not taking younger women seriously, as scholars or as legal scholars, colleagues. This kind of thing goes around. Women in the business gossip about it. But nothing much seems to be done about it and I do not know what can when there are still men in the international system who do not take women seriously. I think it was
Barbara Rogers who wrote a book a long time ago about women in the U.N., about thirty years ago. And one would have hoped that these kinds of things had ended. It is not clear to me that they have. But as I say, I'm not going to spread gossip in this forum. I will say one thing. I had a conversation with two very intelligent younger women a couple of years ago, one of whom I thought was—I only knew the work of one but I think they both were doing very important work—and the stories they told me suggested to me that not much had changed in the last thirty years.

**KARIMA BENNOUNE:** Reem Bahdi?

**REEM BAHDI:** Yes, and to follow up on that point, I think we need to also consider the kinds of institutions that we want to look at to promote women’s rights. For me, one of the biggest issues is the Security Council. And we often do not talk about that institution, I think, in the context of international women’s human rights law. But, we need to start thinking more about what security means within the context of the Security Council. In part that means who do you bring to the table? Is it just men or is it men and women? But it is also a definitional question or an analytical question of how do you define the mandate of that institution in a way that reflects a broader understanding of security?

**KARIMA BENNOUNE:** Anybody else? I do not have anybody currently on the list. Would anybody like to come in on these issues?

**ELISABETH JAY FRIEDMAN:** I think one thing that would be really interesting for, say, a student to do a project on or write a paper on is take a look at these institutions and make some sort of an argument about where are they regendering and where are they new? Because that fits so nicely into the debate over what is the right strategy: the mainstreaming strategy versus the external pressure. Do we work through CEDAW or do we reinterpret the human rights treaties? We have to recognize where a lot of this good work is going on. I mentioned—now, we’ve been together long enough I have forgotten which conversation this was, perhaps it was the one at lunch—that Julie Mertus wrote a book called *War’s Offensive Against Women*, in which she used three case studies. She used three case studies: Kosovo, Bosnia, and Afghanistan. She used the case studies to talk about both the efforts that are already being put in place to deal with the fact that men and women suffer displacement and the experience of being refugees differently and that women have different needs from men and then to look at the efforts that are already going on to deal with women’s refugees issues, but also to talk about the different levels at which this situation can be addressed. Looking at reinterpreting refugee law. Looking at reinterpreting what

does it mean to provide humanitarian aid. What does the aid include? And of course, here the anecdote is always sanitary napkins and tampons are just as important as other supplies to women. If you are living in those conditions, what do you do if there's nothing, right. You don't have any food, but then—well I will leave it to the women's imaginations to just see how serious that is. And by the way, the big joke about socialist revolutions is they never made enough tampons, they never made enough sanitary napkins. [Laughter]

RHODA E. HOWARD-HASSMANN: Right, yes, exactly. But it is a nice anecdote because it gets to this thing about what is different for women. Unfortunately it does go back to the biological, and there are lots of social things. [Julie] Mertus pointed out for example that women are expected to take on the caretaking roles for the elderly relatives, and often it is because there are no men in the refugee situations, for all sorts of horrendous reasons.95 But that sort of book you could look at and sort of go through and I think for the most part, she is not saying there are wholly new things we need to set up. It is that there are laws on the books about refugees and there are understandings about the importance of providing humanitarian aid, but if we are thinking about the fact that it is not just men running, it is also women and women with children, you have to think differently about what their needs are. I think that paradigm is one that can move to any situation in which we are talking about the importance of defending rights.

KARIMA BENNOUNE: The next person I have on the list is Hamid.

HAMID M. KHAN: Some of those things I can comment about, and some of those obviously I could not, [Laughter] being in a male situation. One of the things that I thought was intriguing is the need for which institutions are going to enforce this and who do we go to? Who do we seek out? And it seems to me that we must go to all levels. That it cannot depend upon one or the other and that we really do need to seek out those institutions countrywide, religious-wide, and we need to seek out every type of an institution that is out there. I think it is incredibly important that even while regional institutions may take up the slack, may take up the grass roots efforts, greater international institutions have to be there, have to be vigilant in their efforts. But of course this deals with a problem and that is the question of do we have cacophony and voices. If there is a reinterpretation, or a view in which we, for example looked at your example of CEDAW at a microcosmic level in São Paulo, do we yield to cacophony? But I think that the value in that is that we need to get every voice in there and we need to get them screaming, per-

95. Id.
sonally. My review of Islamic law has concluded that there is a wholesale absence of women jurists who are in an incredible position to really change the law and the fabric of the law. I think that they are important because their voices are probably going to be the most important voices to overcome the fundamentalist, or what I term the Revivalist, concern that we are just tearing apart the legal legacy. I believe that—and I think there is evidence to it—that you will find there are linked concerns, there are more prominent concerns. They are there. But we need voices out there and I think the only way we can do that is to remove the representativeness that sometimes we feel, as legal institutions. Go to the regional institutions and seek a way out. I do not think that we can look at one way and say that is the answer. Often when we look at the United Nations, we often almost reactively think that is the issue of choice, and I think that is simply not going to work. I think the underground efforts are very much more appropriate.

KARIMA BENNOUNE: The next person on the list is Rhoda Hassmann, please.

RHODA E. HOWARD-HASSMANN: Well when you said are there any institutions needed, I wondered whether there is any progress in establishing a United Nations police force. Because in the refugee camps, I understand that one of the problems is the assumption that refugees can police themselves. But also the general problem that it is going to be males who run these police forces. Aside from that, I think the real problem is not institutions so much as it is pressure, or perhaps if not revolution, at least revolutionary pressure.

I did research on refugee camps in Africa over twenty years ago. A lot of the problems of women that people are talking about now were known over twenty years ago. That women were vulnerable to rape. Women without protection could not get food and so on and so forth. Again, with regard to the Taliban, one of our speakers said yesterday: Why are people paying attention to women under Taliban but not Palestinian women? I think it was the wrong question. Palestinian women come under the rubric of laws of war, self-determination, and so on and so forth. Nobody is saying that the Israelis are in Palestine because they do not like women. The Taliban was a genuinely oppressive system. It was equivalent to, if not worse than apartheid. If any other group had been treated the way women were, under the Taliban, this would have been a known thing. In Canada, a lot more fuss appeared to be made when they threatened to have Hindus wear yellow garments than seemed to have been made about women. Now part of that was because of actually the color yellow and memories of Nazi treatment of Jews and so on. Of course I disagreed that Hindus should have to distinguish themselves that way,
but I was concerned that this gender apartheid appeared to have very little resonance until after September 11. So again, I think this sounds much more glib than it should, because Dr. Friedman does on-the-ground research. Unless you have a very strong social movement, the institutions are less likely to act. Maybe we could have an international women’s court. That would be nice. But since we do not even have an international criminal court, I do not think we will get very far in the immediate future on that.

KARIMA BENNOUNE: I have Brad and Elisabeth on the list, but I wanted to throw in my optimistic two cents here. We do have to recognize that there has been tremendous progress with regard to international institutions and women’s human rights and I did want to point that out as well. We have the CEDAW Optional Protocol. There was a meeting here, organized by Professor MacKinnon, last fall, to talk about the strategy for using the Optional Protocol. She brought together women lawyers from around the world to talk about these issues. In the Statute of the International Criminal Court, we do have some very helpful language about violations from which women particularly suffer. The U.N. field presences that I mentioned, many of them now have gender advisors. The international financial institutions, whatever we may think of them, also have started to do more work on gender. There is some real progress that is happening in those institutions. Brad first and Elisabeth next.

BRAD R. ROTH: Just a quick word about the Taliban, which has come up a number of times in the conference. I do not want to overstate the point because clearly not enough was done to address the issues of the oppression of women under the Taliban. But I do not want people to come away with the impression that there was simply inattention to this matter. And in fact, when you think about the fact that the Taliban effectively held control of about 90 percent of Afghanistan for five years and was never recognized by any country in the world, other than Pakistan, Saudi Arabia, and the United Arab Emirates, that the U.N. General Assembly Credentials Committee refused every year to take action on the Taliban’s submission of governmental representatives for the General Assembly, and thereby left in place the old government. This is about as significant a form of ostracism as a government can face in the international community and I think it had real consequences. The reasons for this were varied, but some of the articulated reasons for it

96. Optional Protocol to CEDAW, supra note 13.
had to do precisely with the Taliban’s treatment of women. In fact, the United States expressly made the point that the Taliban would not be recognized until such time that it changed behavior regarding women. Now, that may have been cynical and there may have been other things going on. Certainly the United States government was also playing footsie with the Taliban on other matters. But still, in all, derecognition is a significant aspect. Other rebel movements that have seized control of that much of a national territory for that long have almost uniformly been recognized, but the Taliban were not.

Similarly, the use of force against the Taliban in the post-September 11 period is a somewhat ambiguous thing from the standpoint of international law. There would be a strong argument to be made that self-defense does not justify going beyond attacking the Al Qaeda camps to actually taking out the Taliban government. And although it is very difficult to draw legal conclusions from the ways in which States have reacted to the situation, it is clear that if that Taliban regime were not seen as a good riddance—and largely for human rights reasons—there would be a very different reaction, I think, to the extent of force used by the United States to transform the circumstances inside of Afghanistan.

ELISABETH JAY FRIEDMAN: I am always prowling around Lexis and I just got this article from the National Review, published April 8, 2002. It is a very hostile discussion of women’s rights at the United Nations by the U.S. government’s new team that goes to the U.N. Commission on the Status of Women. A very, very negative assessment, of course of the United Nations’ women’s human rights. Here is the little comment. “From the outset, our delegation made it clear that the resolution could not dictate that Afghanistan ratify the Convention on the Elimination of All Forms of Discrimination Against Women, which it, like the United States, has signed but not ratified. Longstanding U.S. policy holds that it is inappropriate for the U.N. to pressure sovereign countries to join international conventions.” So this ties in with the discussion of the Bush administration’s position on women of Afghanistan, supposedly concerned about their welfare but sending a U.S. delegation that is hostile to the idea of pressing the new Afghan government to ratify CEDAW.

KARIMA BENNOUNE: Julia Ernst from the Center for Reproductive Law and Policy was here yesterday, and her organization is working with many others on this issue of CEDAW ratification. She and I were discussing the subject last night after the dinner, that it would be great to

start a campaign to pressure the United States and Afghanistan to ratify CEDAW together. [Laughter]

CHRISTINA L. BRANDT-YOUNG: That sounds great and that leads right into my point here, which is to pick up on what Rhoda had mentioned before about the importance of social pressure. I think it is absolutely clear that you can do a lot within an institution, but you cannot really make it effective unless there is a permanent group of people who are going to be asking, so, are you fulfilling CEDAW and your new gender mandates in the field? Is there inspection going on, are there reports going back? It does not have to be one of those in-the-street social movements either. To pick up on the case of Afghanistan, I continue to be amazed when people mention approvingly that Laura Bush spoke about the violations. I thought I knew before the Taliban took power what their attitudes toward women were and what they threatening to do. Why? Because I have e-mail and I’m part of a huge international women’s human rights social movement, a very amorphous one. That shows the importance of watchdog movements outside of whatever institution exists, in order to keep the pressure on. And then just one final thing, which is to pick up on what Hamid was saying about how he does not see any prominent female jurists in the discussions about the interpretation of Islamic law. It is too bad, because it is clear that they certainly are out there. One thing to remember is that, particularly for those of us who do not always focus on gender, to constantly be bringing it up in whatever forum you are in. Nothing has nothing to do with gender. We realize that it is completely integrated with discussions of sovereignty, with discussions of religion and law, with discussions of globalization. I think as scholars, as students, as practitioners, we can take it upon ourselves to make sure that we do not ever leave it off the table. That will keep us from regendering the institutions.

KARIMA BENNOUNE: Ann Mayer, please.

ANN ELIZABETH MAYER: Two quick comments. I know it is very important to have more women jurists in the Muslim world. I do not deny that for a minute. But we find that Muslim women have discovered that they can really illuminate aspects of discussion from other perspectives. For example, speaking in terms of sociology, speaking in terms of anthropology. They do not necessarily find that there is only one legalistic way to attack women’s rights in Islam. And also, sadly, sometimes we forget that there are women just like the women representing the United States now in the U.N. Commission of Women. Ziba Mir Hosseini has written a lot about development of Islamic jurisprudence in Iran, where one of the most innovative thinkers is proposing that women should enjoy full equality under any sound interpretation of Islamic law, has been
a man. Whereas a number of the women who are going to the new special training facility for women jurists at home have turned out to be hardliners with the mentality of people like Phyllis Schlafly and who, because they bought into this particular system, are its staunchest defenders. So we always have to remember that men can be wonderful feminists and there are women who, for a variety of reasons, will be the most determined foes of women’s rights in any system.

KARIMA BENNOUNE: I have been told to wrap up. I wanted to add one quick thing and that is that we need to look at the underrepresentation of women jurists at the international level. There has only ever been one woman judge on the International Court of Justice: the wonderful Rosalyn Higgins from the United Kingdom. There has never been a woman member of the U.N. International Law Commission, as far as I know. That is a reality that we have to change. So we need to look for representation of women there as well. I would like to, if I may, on behalf of the faculty of the University of Michigan Law School, thank you all profoundly for coming and participating in this seminar. Also I would like to thank the students who put so much time and effort into bringing us together to talk about these issues and who were open even to us questioning their terms and their paradigms, which I think is always the most important place to start. So thank you all very much and have a safe trip home.

[Applause]

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