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# A Comparative Analysis of Women's Issues: Toward a Contextualized Methodology

Antoinette Sedillo López\*

[T]he very notion that there exists a prototypical woman who can be described in ways that reflect and have meaning for the lives of the many different women living in very different geographical, economic, political and social settings needs to be challenged.

- Ruth Hubbard

*Women's Nature: Rationalizations of Inequality* (1983)<sup>1</sup>

## I. INTRODUCTION

Despite a global feminist movement,<sup>2</sup> feminists have not developed a clearly articulated methodology of comparative analysis.<sup>3</sup> Comparative

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\* Professor of Law, University of New Mexico School of Law. I would like to thank Professor Patricia Begne, University of Guanajuato, Guanajuato, Mexico, for the conversations about Mexican law. I appreciate Dean Robert Desiderio's summer research grant support of this Article. I also appreciate the work of the Hastings Women's Law Journal Staff and especially the work of Kavitha Sreeharsha, lead editor.

1. Ruth Hubbard, *Social Effects of Some Contemporary Myths about Women*, in WOMAN'S NATURE: RATIONALIZATIONS OF INEQUALITY (Marian Lowe & Ruth Hubbard eds., 1983).

2. American University hosted a conference for Latin American female lawyers, judges and academics in November, 1997, titled *Panamerican Conference, Transforming Women's Legal Status*, American University Washington College of the Law. I appreciate the conversations I had with the participants. Their insights inform this work.

3. See The U.N. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Dec. 18, 1979, G.A. Res. 34/180 (entry into force Sept. 3, 1981). CEDAW has been identified as a source of support for combating discrimination and pushing a women's rights agenda. See, e.g., Sherry Teachnor, *The U.N. Convention on the Elimination of All Forms of Discrimination Against Women: An Effective Tool to Combat Discrimination in the 20th Century*, 9 WHITTIER L. REV. 419 (1987). The U.N. CEDAW is a very important document in the area of women's rights. However, the declaration does not articulate a methodology for drawing comparisons between different international approaches to women's rights. It provides definitions of equality, a description of discriminatory practices and a mechanism for international supervision of the obligations the document imposes on nations that have ratified it. The United States has not yet ratified the Convention. See also Catherine Harries, *Daughters of Our Peoples: International*

analysis shows how problems faced in one jurisdiction are addressed in another. Comparing women's rights can provide important cultural insights into how women's issues have been addressed. However, a difficult issue comparativists face is a tendency to be ethnocentric when studying another nation's legal system.<sup>4</sup>

This Article proposes a methodology for comparative analysis of women's rights using insights from critical race theory and feminism. Comparative analysis by a Western scholar must reconcile a perspective developed in the United States with respect for another culture. In discussing women's rights, lawyers, judges, students and sociologists have justified certain women's situations as an inherent aspect of culture. For example, traditional "female genital surgery" has been defended as a "mere bodily mutilation" that is the "sine qua non of the whole teaching of tribal law, religion, and morality."<sup>5</sup> In Mexico, "machismo" has been justified as an immutable characteristic of Mexican culture that should be respected.<sup>6</sup> Cultural relativists maintain that criticizing cultural norms is akin to advocating cultural genocide.<sup>7</sup> Thus, comparative analysis faces the challenge of respecting cultural differences.

Feminists in the United States also confront the issue of respect for diversity and respect for other cultures.<sup>8</sup> Although white middle-class feminists have dominated the feminist movement in the United States, feminists of color have criticized white feminist domination for ignoring their needs and perspectives.<sup>9</sup> Similarly, the international feminist

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*Feminism Meets Ugandan Law and Custom*, 25 COLUM. HUM. RTS. L. REV. 493 (1994); Nancy Kim, *Toward a Feminist Theory of Human Rights: Straddling the Fence Between Western Imperialism and Uncritical Absolutism*, 25 COLUM. HUM. RTS. L. REV. 49 (1993).

4. See generally E. WIGHT BAKKE, *REVOLUTIONARY DEMOCRACY: CHALLENGE AND TESTING IN JAPAN* (1968); JOHN D. MONTGOMERY, *FORCED TO BE FREE: THE ARTIFICIAL REVOLUTION IN GERMANY AND JAPAN* (1957); Robert B. Seidman, *Law and Development: A General Model*, 6 L. & SOC'Y REV. 311, 312 (1972) ("After all, whatever American scholars may believe about the superiority of the legal system of Ruritania, one may doubt that the decision makers in Kenya will give a hoot.").

5. Hope Lewis, *Between Irua and "Female Genital Mutilation": Feminist Human Rights Discourse and the Cultural Divide*, 8 HARV. HUM. RTS. J. 1, 31 (1995) (quoting JOMO KENYATTA, *FACING MT. KENYA* 129 (1965)).

6. See OCTAVIO PAZ, *THE LABYRINTH OF SOLITUDE: LIFE AND THOUGHT IN MEXICO* 81-88 (1961).

7. See ELISABETH BUMILLER, *MAY YOU BE THE MOTHER OF A HUNDRED SONS: A JOURNEY AMONG THE WOMEN OF INDIA* 72 (1990). See generally HUMAN RIGHTS: CULTURAL AND IDEOLOGICAL PERSPECTIVES 4 (Admanatia Pollis & Peter Schwab eds., 1979); Katherine M. Culliton, *Legal Remedies for Domestic Violence in Chile and the United States: Cultural Relativism, Myth, and Realities*, 26 CASE W. RES. J. INT'L L. 183 (1994).

8. See Isabelle R. Gunning, *Arrogant Perception, World-traveling and Multi-cultural Feminism: The Case of Female Genital Surgeries*, 23 COLUM. HUM. RTS. L. REV. 189 (1991-92). As a Latina, I am particularly sensitive to the dangers of forced acculturation by a dominant group. See generally *LATINOS IN THE UNITED STATES* (Antoinette Sedillo López, ed., 1995).

9. See, e.g., Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A*

movement has been dominated by feminists from the United States and other western feminists, but challenged by third world feminists for excluding or essentializing the perspectives and needs of women of color and third world women.<sup>10</sup> The United Nations Fourth World Conference on Women held in Beijing illustrated the difficulty of communicating across cultural differences to articulate a common statement on women's rights.<sup>11</sup> Western feminists now attempt to include women of color and women from other countries and cultures as part of their intellectual and activist movement.<sup>12</sup> Such inclusiveness can help white feminists see their own ethnocentricity and understand their privileged position compared to that of third world women and women of color.<sup>13</sup>

Just as inclusivity works to overcome narrow perspectives, using a range of theoretical perspectives helps to broaden comparative analysis. Liberal feminism teaches about the value of autonomy and independent moral agency.<sup>14</sup> Radical feminism articulates the limits of liberalism and autonomy, especially for those women not in a position to exercise autonomous choice.<sup>15</sup> Cultural feminism instructs us about the possibilities of alternative women's values.<sup>16</sup> Post modern feminists and feminists of color teach us about the falsity of over-generalizing women's experiences,

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*Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139; Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365; Bonnie Thornton Dil, *Race, Class, and Gender: Prospects for an All-Inclusive Sisterhood*, 9 FEMINIST STUD. 131 (1983). See also, 2 LATINOS IN THE UNITED STATES: LATINA ISSUES (Antoinette Sedillo López ed., 1995)[hereinafter LATINA ISSUES].

10. See, e.g., Valerie Amos & Pratibha Parmar, *Challenging Imperial Feminism*, 17 FEMINIST REV. 3 (1984); CHANDRA TALPADE MOHANTY ET. AL., *THIRD WORLD WOMEN AND THE POLITICS OF FEMINISM* (1991).

11. See, e.g., Patrick E. Tyler, *Forum on Women Agrees on Goals*, N.Y. TIMES, Sept. 15, 1995, at A1. See also Nancy Kim, *Toward a Feminist Theory of Human Rights: Straddling the Fence Between Western Imperialism and Uncritical Absolutism*, 25 COLUM. HUM. RTS. L. REV. 49 (1993).

12. See, e.g., ROBIN MORGAN, *SISTERHOOD IS GLOBAL: THE INTERNATIONAL WOMEN'S MOVEMENT ANTHOLOGY* (1984); ELLEN CAROL DUBOIS & VICKI L. RUIZ, *UNEQUAL SISTERS: A MULTI CULTURAL READER IN U.S. WOMEN'S HISTORY* (1990); Martha I. Morgan & Monica Maria Alzate Buitrago, *Constitution-Making In a Time of Cholera: Women and the 1991 Columbian Constitution*, 4 YALE J.L. & FEMINISM 353 (1992).

13. See generally Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (or otherisms)*, 1991 DUKE L.J. 397; Antoinette Sedillo López, *On Privilege*, 2 AM. U. J. GENDER & L. 217 (1994).

14. See generally Deborah L. Rhode, *Perspectives on Professional Women*, 40 STAN. L. REV. 1163 (1988).

15. See generally Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279 (1987).

16. See, e.g., Martha Fineman, *Dominant Discourse, Professional Language and Legal Change in Child Custody Decision-making*, 101 HARV. L. REV. 727 (1988); CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY & WOMEN'S DEVELOPMENT (1982).

values and needs.<sup>17</sup> No single feminist approach appropriately draws cultural comparisons between women's legal status in different legal systems.

It is important to evaluate the effect of laws on the quality of women's lives. Does the law open opportunities for women? Does it treat women fairly? What do women pursue? What are their needs and their dreams? In what ways does the law circumscribe women's lives? Does one's culture and legal system value autonomy? If so, are women in a position to exercise autonomous choice? If not, how do women feel about their position in society? How do feminists who belong to the culture prioritize and conceptualize their own agenda for social change?

This Article will construct a feminist method of comparing women's legal status using insights from feminism and critical race theory.<sup>18</sup> It begins with a framework for evaluating the progress in improving women's lives and legal status in another country while being sensitive to that country's cultural values. The proposed comparative methodology involves three steps. First, the comparativist must look for and perceive cultural context. Cultural context can be discovered in a variety of ways, including traveling, reading, interviewing, listening, observing, and using ethnography and demographic interpretation (to name a few methods). Second, the comparativist must develop a framework for identifying the legal context e.g., identifying the status of the legal system as Civil, Common Law, Socialist, Islamic, etc. Third, the comparativist should use feminist and critical race theories to consider the implications of legal issues for women. The comparativist should seek women representing a particular culture and listen to their stories.<sup>19</sup> By using the proposed methodology, the comparativist will be able to draw meaningful comparisons and contrasts in legal status while recognizing cultural context. The proposed analysis helps comparativists broaden their perspective and minimize ethnocentricity and recognizes the importance of understanding how women view their own legal status and situation. Finally, this Article will discuss abortion law in Mexico and the United States to illustrate the comparative method proposed.<sup>20</sup>

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17. See PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991); Carrie Menkel-Meadow, *The Power of Narrative In Empathetic Learning: Post-Modernism and the Stories of Law*, 2 *UCLA WOMEN'S L.J.* 287, 295-297 (1992).

18. See Adrien Katherine Wing, *Critical Race Feminism and International Human Rights of Women in Bosnia, Palestine, and South Africa: Issues for LatCrit Theory*, 28 *U. MIAMI INTER-AM. L. REV.* 337 (1997).

19. I think it is important that women of the culture be involved in defining for themselves what would constitute an improvement in their lives; thus, in my work about Mexican women, I have relied on interviews with Mexican women and on Mexican feminist writings whenever possible.

20. See, e.g., Antoinette Sedillo López, *Two Legal Constructs of Motherhood: "Protective" Legislation in Mexico and the United States*, 1 *S. CAL. REV. L. & WOMEN'S STUD.* 239 (1992) (comparing protective legislation in Mexico and the United States).

## II. THE PERILS OF COMPARING: DECONSTRUCTING DIFFERENCES AND CONSTRUCTING FALSE DICHOTOMIES

A growing body of literature compares laws affecting women.<sup>21</sup> However, the authors fail to understand differences in cultural values. Thus, the comparisons made are incomplete.<sup>22</sup> A feminist comparativist must be open to the possibility that women in a culture might share the cultural values and be empowered by distinct cultural approaches to gender.<sup>23</sup> Although feminists are concerned with deconstructing patriarchal legal systems and social structures that disadvantage women, feminists must also be wary of imposing their own values on others. Ironically, such imposition of values is one of the very things feminists have resisted about patriarchy. It is important that a feminist who chooses to engage in comparative analysis learns to suspend judgment in analyzing differences. Differences should be viewed in their context and from a cultural perspective. This is not to say that feminists should not examine the ways in which women are disadvantaged in cultural systems; a universal truth is

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21. Notable comparative works on women's legal issues include: Paula C. Johnson, *Danger in the Diaspora: Law, Culture and Violence Against Women of African Descent in the United States and South Africa*, 1 J. GENDER RACE & JUST. 471 (1998); Marsha A. Freeman, *Measuring Equality: A Comparative Perspective on Women's Legal Capacity and Constitutional Rights in Five Commonwealth Countries*, 5 BERKELEY WOMEN'S L.J. 110 (1990); Paolo Wright-Carozza, *Organic Goods: Legal Understandings of Work, Parenthood and Gender Equality in Comparative Perspective*, 81 CAL. L. REV. 531 (1993); Carol Rasnic, *Germany's Legal Protection for Women Workers Vis a Vis Illegal Employment Discrimination in the United States: A Comparative Perspective in Light of Johnson Controls*, 13 MICH. J. INT'L L. 415 (1992); Nicolle R. Lipper, *Sexual Harassment in the Workplace: A Comparative Study of Great Britain and the United States*, 13 COMP. LAB. L. J. 293 (1992); MARGARET E. LEAHY, DEVELOPMENT STRATEGIES AND THE STATUS OF WOMEN: A COMPARATIVE STUDY OF UNITED STATES MEXICO SOVIET UNION CUBA [sic] (1986); MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW (1987); GIBERT H. FLANZ, COMPARATIVE WOMEN'S RIGHTS AND POLITICAL PARTICIPATION IN EUROPE (1983).

22. See Brenda Cossman, *Turning the Gaze Back on Itself: Comparative Law, Feminist Legal Studies, and the Post Colonial Project*, 1997 UTAH L. REV. 525 (criticizing the ethnocentric "gaze" of comparative law and discussing collaborative work as a way of avoiding ethnocentrism).

23. See, e.g., Gloria Valencia-Weber & Christine Zuni, *Domestic Violence and Tribal Protection of Indigenous Women in the United States*, 69 ST. JOHN'S L. REV. 69 (1995) (discussing the importance of respecting culture as opposed to western feminism in crafting legal solutions). Traditional Navajo culture is a matrilineal society. The Navajo creation story articulates major differences between men and women justifying different roles. In the story, Changing Woman explains the differences between men and women when she makes her demands on the sun:

Remember that I willingly let you send your rays into my body. Remember that I gave birth to your son, enduring pain to bring him into the world. Remember that I gave that child growth and protected him from harm . . . Remember, as different as we are, you and I, we are of one spirit. As dissimilar as we are, you and I, we are of equal worth. As unlike as you and I are, there must always be solidarity between the two of us . . .

PAUL G. ZOLBROD, DINÈ BAHANÉ: THE NAVAJO CREATION STORY 274-75 (1984). See also GARY WITHERSPOON, NAVAJO KINSHIP AND MARRIAGE (1975).

that women in most cultures are disadvantaged socially, politically, legally and educationally.<sup>24</sup> However, the disadvantage will not be the same as that experienced by white, liberal, middle-class feminists in the United States. Rather, women's oppression may be linked to broader social, political and cultural issues. For example, American middle-class feminists may support policies aimed to keep wages low for women of color and those of the Third World.<sup>25</sup>

Thus, it is important that a comparativist be aware of social and cultural context. A major comparative work on family law and abortion is Mary Ann Glendon's *Abortion and Divorce in Western Law*.<sup>26</sup> In the book, Ms. Glendon surveys legal principles in European and North American countries. Unfortunately, the work fails to perceive the cultural context and women's role within that cultural context. After conceding that the legal 'story' is not the whole 'story',<sup>27</sup> she proceeds to summarize and categorize the types of abortion laws and family laws in the nation states of Europe and North America.<sup>28</sup> She alludes to a cultural context,<sup>29</sup> but fails to include a description of the role of women in society and in creating social and cultural advances in women's rights.<sup>30</sup> For example, she glosses over the feminist litigation responsible for much of the transformation of the abortion law and family law in the United States and Europe.<sup>31</sup> She places the judge-made and legislature-created legal "stories" in philosophical and theoretical constructs created by de Toqueville, Hobbes and John Stuart Mill in the United States, and by Rousseau and Kant in Europe.<sup>32</sup> These philosophers had an important impact on liberal intellectual discourse. In particular, Mill and Rousseau created important intellectual foundation for feminist theory. However, it was the more textured changes wrought by feminist activists and their political will that resulted in the profound societal and legal transformation of women's legal status throughout both Europe and the United States.<sup>33</sup> Glendon professes to be interested in the

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24. See, e.g., ROBIN MORGAN, *SISTERHOOD IS GLOBAL: THE INTERNATIONAL WOMEN'S MOVEMENT ANTHOLOGY* (1984); Susan Faludi, *Swedish Sojourn*, MS., Mar./April 1996, at 64 (chronicling problems of Swedish women politicians).

25. See Evelyn Nakno Glenn, *Cleaning Up/Kept Down: A Historical Perspective on Racial Equality*, 43 STAN. L. REV. 1333, 1335-36 (1991) (detailing a historical analysis of work experiences for women of color).

26. GLENDON, *supra* note 21.

27. *Id.* at 9.

28. See *id.* at 145-154.

29. See *id.* at 33-39.

30. Glendon's book was also criticized for failing to recognize fundamental social and legal differences between West Germany and the United States. See Florian Miedel, *Is West Germany's 1975 Abortion Decision a Solution to the American Abortion Debate? A Critique of Mary Ann Glendon and Donald Kommers*, 20 N.Y.U. REV. L. & SOC. CHANGE 471 (1993-94).

31. GLENDON, *supra* note 21.

32. *Id.* at 112-34.

33. See, e.g., CAROLINE DALEY & MELANIE NOLAN, *SUFFRAGE & BEYOND:*



educational function of the enactment of legal norms.<sup>34</sup> Ironically, she ignores both the educational role of feminist consciousness raising, which resulted in an awareness of law as a source of women's oppression, and the cultural impact of that awareness. Her conclusion that a mediated approach like that of the European nations might satisfy the needs of both abortion advocates and opponents<sup>35</sup> misses the points raised by women on both sides of the question and tells an incomplete story.<sup>36</sup> A feminist comparative analysis should avoid such omissions.

### III. PROPOSED ANALYSIS

The proposed analysis requires comparativists to first, perceive cultural context; second, identify context in legal norms; and third, use feminist theories and critical race theories to consider implications of legal regimes for women. The proposed analysis requires consideration of the not so obvious facts of women's lives.

#### A. PERCEIVING CULTURAL CONTEXT

As illustrated by Glendon's book, a major difficulty in comparative analysis is the perception of cultural context. Culture has been almost exclusively studied by white first world anthropologists who attempt to describe societies and social ways of doing things.<sup>37</sup> The nature of culture can vary from subgroup to subgroup and even from individual to individual.<sup>38</sup> Culture is also affected by political development and stability as well as economic status. Unfortunately, the anthropologists' descriptions of culture may suffer from the distorted lenses that even the most trained anthropologist brings to the study of people who are different.<sup>39</sup> On the other hand, people have difficulty describing their own cultural norms—except as being different from other cultures. In other

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INTERNATIONAL FEMINIST PERSPECTIVES (1994); JANET K. BOLES, *THE POLITICS OF THE EQUAL RIGHTS AMENDMENT: CONFLICT AND THE DECISION PROCESS* (1979); ELEANOR FLEXNER, *CENTURY OF STRUGGLE* (1959); WILLIAM HENRY CHAFE, *THE AMERICAN WOMAN* (1972).

34. GLENDON, *supra* note 21, at 9.

35. *See id.* at 58-62.

36. *See* Heleen F. P. Ietswaart, *Incomplete Stories* 69 B.U. L. REV. 257 (1989) (review of Glendon's *Abortion and Divorce in Western Law* and criticizing it for failing to perceive the social ramifications of abortion and divorce law).

37. *See* RUTH BENEDICT, *PATTERNS OF CULTURE 2* (1934) Anthropologist Ruth Benedict states:

No man ever looks at the world with pristine eyes. He sees it edited by a definite set of customs and institutions and ways of thinking. Even in his philosophical probes he cannot go behind these stereotypes; his very concepts of the true and the false will still have references to his particular traditional customs.

*Id.*

38. *See id.* at 1-20.

39. *See id.* at 3-4.

words, culture is invisible to those who are within the culture. The interactions of people from different cultural backgrounds reveal the differences. Such interactions make people notice different values, beliefs and customs. Cross-cultural interaction makes the previously invisible visible. That is one of the reasons international travel is so valuable. Other sources of cultural context are critical readings of popular culture, history, literature, ethnography, interviews and personal experiences. In addition, a review of demographics and social and educational data enhances understanding. Comparative analysis that ignores social and cultural context risks painting an incomplete picture.

#### B. IDENTIFYING CONTEXT IN LEGAL NORMS

Of course, a comparativist must also perceive legal context. The development of legal systems is as varied as the number of systems that exist. Some systems evolved from cultural and political self-development; other legal systems were transplanted; some systems were borrowed, others were imposed.<sup>40</sup> All legal regimes are fluid, changing in response to social, political, or cultural pressure. Further, the application and interpretation of legal norms varies with social contexts, political systems and cultural norms.<sup>41</sup> It is possible that laws that look startlingly different on their face may be very similar in application. Other laws may look similar on the books but be applied quite differently. The context of the legal system as part of the civil law tradition or as part of the common law tradition will mean that the methods of enforcement and interpretation will be quite different. A cursory comparison might deconstruct differences that are not really there or create false dichotomies. For example, while Mexico's constitution looks like that of the United States, it is quite different in history, purpose and application.<sup>42</sup> Thus, it is important to gain an understanding of the law's history, intended purpose and application in order to have a complete picture of the law.

#### C. USING FEMINIST THEORIES TO CONSIDER IMPLICATIONS FOR WOMEN

A feminist comparative analysis of laws affecting women should use critical race and feminist insights to help draw comparisons in women's legal status and to understand the implications for women. These insights will help identify subtle issues confronting women in the cultures studied.

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40. See RICHARD A. DANNER & MARIE-LOUISE H. BERNAL, INTRODUCTION TO FOREIGN LEGAL SYSTEMS, 48-51 (1994); RENÉ DAVID & JOHN E.C. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY 75-93 (1985).

41. See generally HERBERT J. LIEBESNY, FOREIGN LEGAL SYSTEMS: A COMPARATIVE ANALYSIS (4th ed. 1981).

42. See Rubens Medina, *The Mexican Legal System*, in INTRODUCTION TO FOREIGN LEGAL SYSTEMS 83-87 (Richard A. Danner & Marie-Louise H. Bernal eds., 1994).

## 1) Feminist Theories

Feminists have developed a variety of theoretical frameworks for addressing women's rights. Most of the litigation and scholarly analysis in the United States has sought to remove sex-based stereotypes from the law. This has occurred under the rhetoric of equality as espoused by liberal feminists.<sup>43</sup> These feminists argue against stereotypes about women and against prohibitions on their employment.<sup>44</sup> In sum, they advocate that women be treated equally to men.<sup>45</sup> They deny the possibility of differences between men and women that might justify different treatment or classification.<sup>46</sup> As Deborah Rhode described, "arguments emphasizing sexual difference, even those designed to advance feminist causes, risked contributing to the stereotypes on which antifeminism [sic] rested."<sup>47</sup> In essence, middle-class feminists perceived the employment, political, and social privileges accorded men and sought those privileges. They wanted equal treatment.

However, other feminists use a more relational approach. They believe that there are some instances in which women are different. For example, during pregnancy women are obviously different from men. These feminists argue that under those circumstances women should be treated differently in order to achieve substantive equality.<sup>48</sup> Since many feminists have fought hard to erase generalizations based on perceived differences between men and women, early feminists did not accept this 'new' approach wholeheartedly.<sup>49</sup>

Professor Patricia Cain has classified the various writers of contemporary U.S. legal feminist thought into four main categories: liberal feminism, radical feminism, cultural feminism and postmodern feminism.<sup>50</sup> Liberal feminists believe that the legal system should treat women as autonomous, independent rights-bearing individuals (just like men).<sup>51</sup> The quest for equal treatment has been criticized because in some situations

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43. See generally CARL N. DEGLER, *AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT* (1980).

44. See *id.* at 362-417.

45. See *id.*

46. See *id.*

47. Deborah L. Rhode, *Perspectives on Professional Women*, 40 *STAN. L. REV.* 1163, 1168 (1998) quoted in Herma Hill Kay, *Perspectives on Sociobiology, Feminism, and the Law*, in *THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE* 75 (Deborah L. Rhode ed., 1990).

48. I have argued in a different context that this is the difference between equality in treatment and equality in achieving results. See Antoinette Sedillo López, *Educating our Children "On Equal Terms": The Failure of The De Jure/De Facto Analysis in Desegregation Cases*, 7 *CHICANO L. REV.* 1, 18-24 (1984).

49. See, e.g., Deborah L. Rhode, *Definitions of Difference*, in *THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE* 209-12 (Deborah L. Rhode ed., 1990).

50. See Patricia A. Cain, *Feminism and the Limits of Equality*, 24 *GA. L. REV.* 803, 829-41 (1990).

51. See *id.* at 829.

men and women are not equal. According to liberal feminism, treating men and women as equals results in women losing ground in rights and privileges previously afforded to women.<sup>52</sup>

Radical feminists stress women's subordination as a class, not as individuals.<sup>53</sup> Catharine MacKinnon,<sup>54</sup> Andrea Dworkin<sup>55</sup> and Christine Littleton<sup>56</sup> have all written that the law should recognize gender differences. They cite pregnancy, nursing, abortion, rape, domestic violence and pornography as instances where women are not the 'same' as men. They maintain that the law should take women's differences into account to achieve fairness and to help them achieve equality.

Cultural feminists, like radical feminists, focus on women's differences from men, but they believe that the law should value women's special nurturing orientation.<sup>57</sup> Divorce and custody law are examples in which women's differences should be recognized positively.<sup>58</sup> Cultural feminists have relied on works such as Gilligan's theory of women's different 'voice' to support their theories.<sup>59</sup>

Postmodern feminists and women of color do not believe in an 'essential' quality of woman; they seek to discover the diverse realities of women's experiences.<sup>60</sup> For example, women of color, poor women and lesbian women, have experiences that are different from the 'essential characteristics' of the abstract woman described in previous schools of feminism. Minority and poor women have always faced the challenge of working to survive and caring for their children. Their experiences in the workplace and the political realm are different from those of middle-class white women.<sup>61</sup>

All of these theories are useful in considering the implications of laws affecting women. We learn about the positive aspects of autonomy, but also its limitations. These theories teach us about the value and uniqueness of women's experiences and how to respect and appreciate the diversity of women's experiences. My own view is that feminist insights reveal male/female complexities. However, they do not present a coherent theory

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52. See Littleton, *supra* note 15, at 1304-14.

53. See Cain, *supra* note 50, at 832.

54. See CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987).

55. See ANDREA DWORKIN, *RIGHT WING WOMEN* (1978).

56. See Littleton, *supra* note 15.

57. See Cain, *supra* note 50, at 835-38.

58. See Martha Finemen, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decision-making*, 101 HARV. L. REV. 727, 768-70 (1988); Leslie Bender, *From Gender Difference to Feminist Solidarity: Using Carol Gilligan and an Ethic of Care in Law*, 15 VT. L. REV. 1, 46-47 (1990).

59. See Cain, *supra* note 50, at 836.

60. See, e.g., Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990). See also Cain, *supra* note 50, at 838-41.

61. See, e.g., WILLIAMS, *supra* note 17.

for addressing those complexities. This failure stems from the fact that feminist thought is in its infancy. While we, as feminists, have learned to deconstruct and criticize patriarchy, we have not convincingly created an alternative view. Comparative analysis can help us learn about other cultures and become more sophisticated in developing a coherent alternative philosophy.

## 2) Finding "Herstories" in Cultural History

Since many texts about nation states do not include an analysis of the contributions and experiences of women, it is very important to make sure that any comparative analysis of women's rights seeks out women's role in cultural history. Robin Morgan's anthology, *Sisterhood is Global*,<sup>62</sup> is a collection of material about women in seventy countries and the United Nations. The "Herstory" section of each nation's material outlines women's history. That is, it describes women's work in developing a social and political agenda concerning women's issues.<sup>63</sup> A feminist comparative analysis should seek to uncover women's history in the cultures studied. Only by uncovering these stories does a comparativist begin to understand the relationships between women's history, culture and law. The history of women in each country reveals a great deal about women's power and role in the country. It is vital to an understanding of legal context.

## 3) Listening to Women Across Culture: Gathering the Accounts

Any analysis of rights affecting a particular group needs to consider the perspectives of the members of that group. The members are in the best position to evaluate how the law affects them. Thus, it is important to understand how women perceive their own legal status. Interviewing women of a culture and reviewing their writing is important to identify the unconscious imposition of ethnocentric values. It also serves to gather the accounts of the actual experiences of women. This investigation will help the comparativist understand the relevance and significance of the laws studied. It will help the comparativist gain insights that may not have been obvious.

# IV. APPLYING THE PROPOSED ANALYSIS: ABORTION IN MEXICO AND THE UNITED STATES

## A. PERCEIVING CONTEXT: SOCIAL AND DEMOGRAPHIC CONTEXT

The United States and Mexico have vastly uneven economic resources.

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62. *SISTERHOOD IS GLOBAL: THE INTERNATIONAL WOMEN'S MOVEMENT ANTHOLOGY* (Robin Morgan ed., 1984).

63. *See id.* *See also* Pamela Bridgewater, *Connectedness and Closeted Questions: The Use of History in Developing Feminist Legal Theory*, 11 *WIS. WOMEN'S L.J.* 351 (1997) (stressing the importance of historical analysis in feminist legal theory).

However, since 1940 Mexico has steadily grown (albeit unevenly) economically. Post-war development has been pronounced in the manufacturing sector.<sup>64</sup> Agricultural development under the "green revolution" has been channeled in the capital intensive production of export crops such as cotton and coffee at the expense of subsistence crops that have traditionally supported farm workers. The population has grown from 19.7 million in 1940,<sup>65</sup> to an estimated 73 million in 1982, to about 97.6 million in 1997.<sup>66</sup> The population of Mexico is projected to be more than 100 million by the year 2000.<sup>67</sup> Demographic movement depicts a pattern of migration from rural areas to the cities.<sup>68</sup> Massive urban growth has put a burden on the poor. Housing is grossly inadequate to meet the needs of the poor. This social and demographic context explains potential priorities for a women's agenda in Mexico. It is predictable that women in Mexico will be concerned with social and economic justice for the poor rather than more middle-class concerns. Conditions in Mexico are in sharp contrast to those in the United States, the most wealthy and powerful country in the world.

#### B. CULTURAL DIFFERENCES IN VALUES

One source for perceiving cultural context is through popular culture. The popular Mexican film, *Like Water for Chocolate*,<sup>69</sup> has been subtitled in English and screened in an edited version in art theaters throughout the United States. It is based on the best selling novel by Laura Esquibel.<sup>70</sup> She tells the story of a family living near the United States/Mexican border in turn-of-the-century Mexico. In the family, there was a tradition<sup>71</sup> that dictated that the youngest daughter could not marry, but rather had to remain at home to care for her mother. Tita, the youngest daughter in the family, fell in love with a handsome young man named Pedro. Her mother did not permit her to marry him, but instead arranged for Tita's older sister, Rosaura, to marry Pedro. He agreed to marry the older sister in order to be near Tita. He moved in with the family, thus setting up the sexual tension, repression and rage that bubble within the household.

At one point, Tita suffered a breakdown; an American doctor nurses her back to the vibrant and vivacious woman she had been before the

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64. See MERILEE S. GRINDLE, PROGRAM IN UNITED STATES-MEXICAN STUDIES, OFFICIAL INTERPRETATIONS OF RURAL UNDERDEVELOPMENT: MEXICO IN THE 1970'S, at 1 (1981).

65. HOWARD F. CLINE, MEXICO: REVOLUTION TO EVOLUTION, 1940-1960, at 83 (1963).

66. THE UNITED STATES-MEXICO CHAMBER OF COMMERCE, DEMOGRAPHICS (visited March 17, 1999) <<http://www.usmcoc.org/eco5.html>>.

67. See MEXICO: A COUNTRY GUIDE XIX, at x-xi (Tom Barry ed., 1992).

68. See WORLD BANK, WORLD DEVELOPMENT REPORT: INVESTING IN HEALTH, WORLD DEVELOPMENT INDICATORS 299 (1993).

69. LIKE WATER FOR CHOCOLATE (Miramax 1991).

70. LAURA ESQUIBEL, LIKE WATER FOR CHOCOLATE (Carol Christensen & Thomas Christensen trans., 1992).

71. The tradition was a family tradition, not a Mexican cultural tradition.

breakdown. The American physician fell in love with Tita and asked her to marry him. At first she agreed, but ultimately decided not to marry him in order to engage in an illicit affair with her first love, her brother-in-law.

The movie also involves the magical nature of Tita's cooking. The wedding cake Tita baked for her sister's wedding caused the guests to become affected by great waves of melancholy; they remembered lost loves, and became ill with pain and nausea. Her quail in rose petal sauce produced sexual desire and longing in everyone who partook of it. The mix of magic, passion and beauty is compelling.

I had the unique opportunity of seeing the film in Mexico at the height of its popular run, and then about a year later seeing the shortened version<sup>72</sup> that ran in the United States. I saw it with Mexican feminists in Mexico and American feminists and men in the United States. Mexicans loved the stunning photography, the fine acting and the actors' sensuality. Mexican feminists were interested in the portrayal of passion from a woman's perspective. They discussed the triangular conflict between mother, daughter and sister. They were intrigued by the symbolism in the use of cooking and the kitchen. They discussed the sexual repression and the family rage. In the United States, Americans with whom I discussed the film also enjoyed its beauty and other aspects. But, while they accepted the film's magical moments as characteristic of Latin American literature,<sup>73</sup> some found the plot wholly unbelievable. Several of my friends could not understand how Tita could acquiesce to her mother's wishes. In other words, some of my American friends could not understand how Tita could put her family ahead of her own wishes. Others did not understand how an intelligent woman could reject the security of a marriage with the American doctor. They could not see how an intelligent, beautiful and vibrant woman could make the 'irrational' choice of rejecting a solid, well-to-do physician in order to pursue a doomed love affair with her sister's ineffectual husband. The different reactions I was exposed to illustrate some differences in perspectives between Mexican culture and Anglo – American culture.

Devotion to family has traditionally been a very important cultural value in Mexican society. Individuals often sacrifice their needs for the needs of their family.<sup>74</sup> While it is not exactly a Mexican cultural trait to put passion before security in matters of marriage, the American view that marriage to the doctor would have been the more 'rational' choice,

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72. The shortened version omitted the story of Chenchá, the family maid.

73. *See, e.g.*, GABRIEL GARCIA MARQUEZ, *ONE HUNDRED YEARS OF SOLITUDE* (Gregory Rabassa, trans., 1970); ISABEL ALLENDE, *THE HOUSE OF THE SPIRITS* (Magda Bogin trans., 1986).

74. *See generally* OSCAR LEWIS, *THE CHILDREN OF SANCHEZ* (1961); OSCAR LEWIS, *FIVE FAMILIES: MEXICAN CASE STUDIES IN THE CULTURE OF POVERTY* (1959); ALAN RIDING, *DISTANT NEIGHBORS: A PORTRAIT OF THE MEXICANS* (1984); PATRICK OSTER, *THE MEXICANS: A PERSONAL PORTRAIT OF A PEOPLE* (1989).

illustrates a value of American culture. While both countries have experienced profound societal changes wrought by economics, technology and education, the cultural values of the citizens of each country have remained different from one another: the United States has developed a strong value in individualism and autonomy; Mexico has retained a strong tradition and value of the family.<sup>75</sup> It is important to keep these differences in mind when comparing and contrasting these two countries as values underlie legal systems.

Another important difference between Mexico and the United States surfaced one evening as I was working on this project. My son asked me for help with his homework. His 'culturally sensitive' task was to pretend to be either a pilgrim or an Indian and to write about early American life from that perspective. He asked me why he had to pick one or the other. I realized that in Mexico a child would probably not be asked to pick one perspective. Mexican people today view themselves as the descendants of both the Spanish colonizers and the native peoples. Their heritage embraces both perspectives. In the United States, the legacy is not mixed despite the increasing incidence of interracial union.<sup>76</sup> There is an Indian perspective, and there is a Euro-American perspective.<sup>77</sup>

Paradoxically, because the Mexican mestizo<sup>78</sup> heritage and its Catholic heritage is so pervasive,<sup>79</sup> there is much more of a consensus on cultural norms – especially about the family unit.<sup>80</sup> It is easier to establish a shared vision of society in Mexico. Mexican law can reflect these norms. Because the United States consists of such a variety of cultural, ethnic and racial groups, it is more difficult to establish cultural norms and expectations. Lawmakers are faced with the dilemma of setting up legal norms that respect and permit differences. The differences are mediated by permitting a large degree of individualism and autonomy.

### C. PERCEIVING LEGAL CONTEXT

On the surface, Mexico's legal system seems much like that of the

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75. See Sedillo López, *supra* note 20, at 253.

76. See Adrienne Poke, *One Chicago Couple's Experience*, 41 *Interrace* (1999); Glenda Valentine, *Introduction* to GIGI KAESAR (PHOTOS) & PEGGY GILLESPIE (INTERVIEWS), *OF MANY COLORS: PORTRAITS OF MULTIRACIAL FAMILIES* xi, xi-xiv (1997).

77. These two groups were at war with each other and ultimately the Europeans prevailed to dominate the government, the economic and the social landscape of this country. See ROBERT M. UTLEY, *THE LANCE AND THE SHIELD: THE LIFE AND TIMES OF SITTING BULL* (1993).

78. See ENRIQUE KRAUSE, *MEXICO: BIOGRAPHY OF POWER* 55-59 (1997).

79. See *id.* at 68-85. See generally AGUSTÍN BASAVE BENÍTEZ, *MÉXICO MESTIZO: ANÁLISIS DEL NACIONALISMO MEXICANO EN TORNO A LA MESTIZOFILIA DE ANDRES MOLINA ENRÍQUEZ* ).[MEXICO MESTIZO: ANALYSIS OF MEXICAN NATIONALISM DURING THE MESTIZOFILIA OF ANDRES MOLINA ENRIQUEZ] (1992).

80. See Sedillo López, *supra* note 20, at 253. See generally JORGE SANCHEZ AZCONA, *FAMILIA Y SOCIEDAD [FAMILY AND SOCIETY]* (1980).



United States. Mexico's constitution, especially the provisions of the 1917 constitution that survive from the 1824 and 1857 constitutions, was modeled, in many respects, on that of the United States. Mexico has a Senate and a House of Representatives, a Supreme Court, circuit courts, district courts, the appearance of checks and balances, a federal system and a state system of jurisdiction.<sup>81</sup> Although much was modeled on North American legal forms, Mexico did not adopt the English common law, but instead continued with the Roman and European civil law tradition.<sup>82</sup>

The civil law tradition largely operates without juries. Judges rely on the written code to render decisions.<sup>83</sup> They do not engage in a search for judicial interpretation of a statute to resolve ambiguities. For example, a Mexican district court is not bound by a previous Supreme Court interpretation of a statute unless the Supreme Court has created binding precedent by ruling the same way in five consecutive cases. Although this is changing, Mexican lawyers do not often cite cases in their legal briefs. If they cite anything other than the code, they tend to cite a treatise or other writing by a legal scholar.<sup>84</sup> The power of the judiciary in Mexico is limited as compared to the power of the judiciary in the United States. Judges do not have the power to declare statutes unconstitutional and thus void. If a litigant has a claim based on the deprivation of a right guaranteed by the constitution, the litigant may use the *amparo* process.<sup>85</sup> However, this proceeding is binding only on the litigants before the court. A statute, even if found by the judge to be inconsistent with the constitution, stays on the books and is enforced until the legislature changes it. Rulings such as the *Roe v. Wade* decision<sup>86</sup> are not possible under the Mexican system. In practical effect, the judiciary has been accused of acting as a rubber stamp for the policies and legislation of the powerful executive branch.<sup>87</sup>

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81. See MEX. CONST. art. II §1; art. II §2; art. III §1; art. III §2[1-3]; art. III §3; art. III §4; art. V.

82. See generally HAROLD EUGENE DAVIS, GOVERNMENT AND POLITICS IN LATIN AMERICA 345-47 (1958).

83. See JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION 34-47 (1985).

84. See Woodfin L. Battle, *Stare Decisis, Doctrine, and Jurisprudence in Mexico and Elsewhere*, in THE ROLE OF JUDICIAL DECISIONS AND DOCTRINE IN CIVIL LAW AND IN MIXED JURISDICTIONS 311, 325 (Joseph Dainow ed., 1974).

85. See RICHARD D. BAKER, JUDICIAL REVIEW IN MEXICO: A STUDY OF THE AMPARO SUIT (1971).

86. 410 U.S. 113 (1973).

87. Interviews with Mexican lawyers who prefer to remain anonymous (1994) (Case notes on file with author). Mexican law is western in the sense that it derives from many of the same European origins as those of the United States. It shares much in common with the United States; as stated earlier, some of its legal frameworks were patterned after U.S. laws. However, in studying Mexican law there is a danger of focusing on false cognates or similar structures and importing the same meaning to each. For example, the terms "jurisprudence" and "jurisprudencia" are false cognates. In the United States jurisprudence means legal philosophy, legal reasoning, legal thought. In Mexico jurisprudencia refers to the situation where the Mexican Supreme Court has decided a case the same way more than five times. "Jurisprudencia" thus does not have the same meaning as "jurisprudence" and should not be

Meaningful comparisons between laws of the two countries, and especially those laws affecting women, also require an understanding of the distinctions between legal and social phenomena. In Mexico, it is often said that there is a huge gap between "*el derecho y el hecho*" the law and the deed. That is, laws may envision a set of consequences flowing from a law, but the citizens may experience those consequences quite differently. Law Professor Alicia Elena Perez, of the Universidad Nacional Autonoma de Mexico (UNAM), believes that since the Spanish colonization of Mexico began in the 1500s, it has been inherent in Mexico's culture to have a deep distrust of government and the judicial process.<sup>88</sup> She believes that feminists in Mexico share this distrust.<sup>89</sup> Thus, women have not used the judicial process of *amparo* to challenge obviously discriminatory laws that are inconsistent with the constitutional equal rights amendment. In contrast, resorting to the courts has been a powerful method for feminists challenging gender discriminatory laws in the United States.<sup>90</sup>

#### D. MODERN MEXICAN FEMINISM

In Mexico, there seem to be many more feminist activists than feminist academics. The academics write about women in literature—some focus on reproductive rights, others on feminist and social theory.<sup>91</sup> Maria Antonieta Rascon, a Mexican feminist, has pointed out that women's traditional roles are important to replicate a class-based society, in that they reproduce and work in the labor force at little or no cost—such unpaid labor (both reproductive and economic) allows Mexican society to maintain the status quo.<sup>92</sup> *FEM*, the leading feminist magazine, is filled with powerfully written critiques of government, political articles, poetry and prose. In 1989, UNAM published a collection of essays written by a leading feminist, Lourdes Arizpe. These essays document an emerging feminist voice challenging Mexican legal, cultural and societal treatment of women.<sup>93</sup>

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used in a translation of the term. A student of Mexican law must avoid interpreting Mexican law using Anglo American understanding and values. It is important to understand definitional and legal subtleties because they may have profound implications upon how the law actually affects people's lives. See Antoinette Sedillo López, *Translating Legal Terms in Context*, 17 LEGAL REFERENCE SERVICES Q. (forthcoming 1999) (manuscript at 2, on file with author).

88. See Interview with Alicia Elena Perez Duarte y Noria (Summer 1994) (on file with author).

89. See *id.*

90. See Jane E. Larson, *Introduction: Third Wave—Can Feminists Use the Law to Effect Social Change in the 1990s?*, 87 NW. U. L. REV. 1252, 1253 n.2 (1993).

91. See, e.g., MARIA ANGELES REBOLLAR DE LOYOLA, *MEXICANAS AL GRITO DE GUERRA [MEXICAN WOMEN AT THE BRINK OF WAR]* (1975).

92. See Maria Antonieta Rascon, *La Mujer y la Lucha Social [Woman and the Social Cause]*, in *IMAGEN Y REALIDAD DE LA MUJER* 139, 141-43 (Elena Urrutia ed., 1987).

93. See LOURDES ARIZPE, *LA MUJER EN EL DESARROLLO DE MEXICO Y DE AMERICANA LATINA [WOMEN IN THE DEVELOPMENT OF MEXICO AND LATIN AMERICA]* (1989).

In comparison, the Mexican activists work in rape crisis centers and actively organize demonstrations. Urban poor women have fought to improve their lives and the lives of their children. Community based female activists have pursued change. Some have used interesting strategies.<sup>94</sup> Learning about their mutual concerns of inadequate services, inflation, alcoholism and family violence, women band together to petition the government and stage state demonstrations. However, in their public and political work, women often present their demands as a struggle to fulfill their traditional family role as the mother. For example, in Guadalajara, women have protested chronic water shortages by bathing their children in the ornamental fountain in front of city hall. In doing so, they chastised state officials for choosing to allocate water for a public fountain over providing water for basic human needs.<sup>95</sup> These women did not challenge the culturally traditional gender roles. Rather, they viewed themselves as being forced to take public and political action in order to fulfill their traditional roles. Another example of women taking public communitarian action was their involvement in rebuilding Mexico City and in providing food and shelter to those stranded after the Mexico City earthquake of September 1985.<sup>96</sup> These political and community activities are, in a sense, transforming the role of mother to include activism in order to further their maternal impulses. Their objective of improving their daily lives and the quality of lives of their children does not rely on asking to be treated 'equally.' They seek to change the values of government and to place their needs on the governmental agenda.<sup>97</sup>

This approach is consistent with Mexican cultural support for the family, and thus is more likely to be accepted by society. It also values a feminine perspective on achieving structural change that can transform society. Mexican feminists seek improvement for their communities rather than enhancement of individual rights. They thus look for opportunities to create new societal norms that value community and human needs.<sup>98</sup>

Although some Latin American feminists have drawn parallels between authoritarian governments and families,<sup>99</sup> in Mexico there does not seem to be a unified feminist movement seeking to change the traditional family roles. This is true despite the fact that women's work outside the home

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94. See KATHLEEN LOGAN, *HACIENDO PUEBLO: THE DEVELOPMENT OF A GUADALAJARAN SUBURB* 78-82 (1984).

95. See *id.* at 79-80.

96. See PARTICIPACIÓN SOCIAL, RECONSTRUCCIÓN Y MUJER. *EL SISMO DE 1985 [SOCIAL PARTICIPATION, RECONSTRUCTION AND WOMEN. THE QUAKE OF 1985]* (Alejandra Massolo & Martha Shteingart eds., 1987).

97. See MARTHA ROBLES ET. AL., *CECILIA SOTO: EL PODER DE LA NUEVA FUERZA POLÍTICA [CECILIA SOTO: POWER AND THE NEW POLITICAL FORCE]* (1994).

98. See *id.*

99. See Sandra McGee Deutsch, *Feminist Studies, in LATINAS OF THE AMERICAS: A SOURCEBOOK*, 129, 136-39 (K. Lynn Stoner ed., 1988).

serves to change traditional gender role allocation.<sup>100</sup> In meeting the challenge of economic survival, many Mexican women do not seek 'individual rights' for women, but instead seek basic improvement in the quality of life for all.<sup>101</sup>

#### E. COMPARING ABORTION LAW IN MEXICO AND THE UNITED STATES

The laws on abortion in the United States and Mexico are completely different. Generally, Mexico prohibits abortion while the United States permits it.<sup>102</sup> The Mexican conceptual approach focuses on morality, the sanctity of the family and new life.<sup>103</sup> The conceptual approach in the United States focuses on an individual's right to autonomy in decision-making. Mexico's constitution provides that all families have the right to control the number and spacing of their children.<sup>104</sup> North Americans who are accustomed to thinking about individual rights and autonomy tend to think of this as a guaranteed constitutional right to family planning. However, in Mexico, abortion is not considered a method of family planning because from the moment a child is conceived, the child comes under the protection of the law, having the same protection as one who is born.<sup>105</sup> Mexican states generally permit abortion and make it available to women only in cases of rape<sup>106</sup> or to protect women's health.<sup>107</sup> The vast majority of Mexican citizens are Catholic—retaining the religion brought by the Spanish colonizers.<sup>108</sup> Their belief in the teaching of the church affects their positions on abortion.<sup>109</sup>

In 1990, there was an attempt to liberalize the abortion laws in the state

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100. See Eloíse Norman, *La Organización de la Vida Familiar*. [sic] *Un Estudio de Cso: La Candelaria, Coyoacán* [*The Organization of Daily Life. A Study of CSO: La Candelaria, Coyoacán*], in *NUEVOS TEXTOS Y RENOVADOS PRETEXTOS* (1994).

101. See generally CLARA EUGENIA ARANDA ET. AL., *LA MUJER: EXPLOTACIÓN, LUCHA, LIBERACIÓN* [WOMAN: EXPLOITATION, STRUGGLE, LIBERATION] (1976).

102. See Christine Tierney, *PAN Candidate's Agenda Worries Mexican Feminists*, Reuters North American Wire, August 12, 1994, available in LEXIS-NEXIS Library, Reuters File (reporting that abortion is illegal, however also available). *But see Roe v. Wade*, 410 U.S. 113 (1973).

103. See *supra* note 74; EUGENIO TRUEBA OLIVARES, *EL HOMBRE, LA MORAL Y EL DERECHO* [MAN, MORALITY AND LAW] 275-81 (1986).

104. MEX. CONST. art. IV. For a bibliography on family planning, see MONSERATT LINES, *LIBRE ELECCIÓN O FECUNDIDAD CONTROLADA* [FREEDOM OF CHOICE AND CONTROLLED REPRODUCTION] (1989).

105. See Código Civil para el Distrito Federal [C.C.D.F.] art. 167.

106. The theory for allowing an abortion in the case of rape is that the raped woman did not consent to the creation of a family. See Interview with Pedro Vasquez Nieto, Attorney (Spring 1992) (on file with author). Of course, this theory is inconsistent with Catholic teachings about abortion. See Pope John Paul II, *Instruction on Respect for Human Life in Its Origin and on the Dignity of Procreation: Replies to Certain Questions of the Day*, N.Y. TIMES, March 11, 1987, at A14.

107. See Código Civil para el Distrito Federal [C.C.D.F.] art. 22.

108. See GEORGE W. GRAYSON, *THE CHURCH IN CONTEMPORARY MEXICO* 1-2 (The Center for Strategic and International Studies, Significant Issues Series, 1992).

109. See *id.*

of Chiapas.<sup>110</sup> The Chiapas story illustrates the power of the federal executive and the problems feminists have in Mexico. According to Alicia Perez, the federal family planning authorities approached the executive about considering abortion as a method of family planning. This would probably have had a dramatic effect on population control; if abortions were considered as a method of family planning, they could be performed free or at very low cost in well run and plentiful government clinics.<sup>111</sup> Officials wanted to see if the people of Mexico would accept this drastic change from previous policy before announcing it as federal policy. They then persuaded the Chiapas legislators to amend the criminal law in Chiapas and decriminalize abortion. The Chiapas legislature responded with the usual accommodation of requests from the federal executive and made the desired changes. Upon publicizing the changes, the government discovered extreme opposition and intense national debate on the issue. Liberalization of abortion law was widely criticized as immoral and destructive of the family.<sup>112</sup>

Mexican feminists, while clearly not the impetus for the change, felt obligated to support it since reproductive rights had been on their agenda for some time.<sup>113</sup> However, many feminists had private reservations about the change, because they feared that if abortions became legal, overly—aggressive government clinics might engage in forced abortions in the same manner in which they had performed unconsented sterilizations.<sup>114</sup> The national debate became so intense that the Chiapas legislature revoked their legalization of abortion.<sup>115</sup> New regulations of family planning do not include abortion as a method of family planning.<sup>116</sup>

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110. See State of Chiapas Backs Down From Attempt To Decriminalize Abortion, SourceMex, Jan. 16, 1991 (on file with author).

111. See *New Injectable Contraceptive to be Introduced in Mexico*, Reuters North American Wire, June 6, 1991, available in LEXIS-NEXIS Library, Reuters File (plans to introduce cyclophem in free clinics in Mexico).

112. See Perez, *supra* note 88. Dilation involves stretching or enlarging an organ or body part and curettage is a surgical scraping. See also *Interview: Mexican Women and Reproductive Rights*, SOURCEMEX, May 6, 1992 (interviewing Latina feminist Selina Espinoza) (on file with author) [hereinafter *Interview*].

113. See Perez, *supra* note 88.

114. See, e.g., Sara Lovera, *Sterilization Pushed Without Women's Consent*, InterPress Service, March 16, 1989, available in LEXIS-NEXIS, Academic Universe, InterPress Service File (citing a study by the College of Mexico which denounced the abusive way in which women were sterilized in public hospitals and clinics: describes the plight of Dulce Maria Gonzalez who was sterilized without her consent in a government hospital at the age of 22; and women's groups mounting 1984 protests against the sterilization of women against their will or without their informed consent.); *Mexico "Forcibly Sterilizing" Poor Women Group*, Reuters North American Wire, Oct. 11, 1996, available in LEXIS-NEXIS Library, Reuters File.

115. See *Interview*, *supra* note 112.

116. See JORGE MARTÍNEZ MANAUTOU, SUCEDIÓ EN MEXICO: DEL NACIMIENTO DE LA "PILDORA" A LA REDUCCIÓN DE LA TASA DE CRECIMIENTO POBLACIONAL [IT HAPPENED IN MEXICO: FROM THE BIRTH OF THE "PILL" TO THE REDUCTION OF THE RATE OF POPULATION

On a side note, it is reported that some of the most vigorous opponents of legalization are gynecologists who are rumored to perform clean, skilled, but illegal abortions, disguised as dilation and curettage, for hefty fees.<sup>117</sup>

Finally, abortion laws in Mexico are not vigorously enforced.<sup>118</sup> Many illegal abortions are performed throughout Mexico.<sup>119</sup> Numerous women suffer complications from botched illegal abortions. A report from a public hospital in Durango indicated that in 1990, twelve hundred women received medical care after suffering complications from botched abortions.<sup>120</sup> This was a 153 percent increase over 1989.<sup>121</sup> In practice, abortion is available to women with the funds to pay for it. Most of these women travel to a different state and pay a gynecologist to perform their dilation and curettage for a large fee.<sup>122</sup>

In contrast, the United States slowly moved to legalize abortion in various states until the famous case of *Roe v. Wade*<sup>123</sup> legalized abortion, for any reason, during the first trimester of pregnancy. In the context of reproductive rights, individual rights have been perceived as a sphere of autonomy in which the individual has the right to exercise choices about familial relationships.<sup>124</sup> Building on earlier cases giving individuals the right to use contraception without state interference,<sup>125</sup> *Roe v. Wade* focused on an individual woman's autonomy and her right to choose whether or not to terminate her pregnancy.<sup>126</sup> The Court limited states' ability to legislate in this area. A woman has the right to make this decision without the consent of her husband.<sup>127</sup> However, subsequent cases about this right have ensured that it is not available to poor women,<sup>128</sup> and there is often a waiting period, and minors often need parental consent.<sup>129</sup> Although the government generally will not pay for or counsel about abortions,<sup>130</sup> abortions are available to middle-class women without "undue

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GROWTH] (1994).

117. See Perez, *supra* note 88.

118. See EL PROBLEMA DEL ABORTO EN MEXICO [THE ABORTION PROBLEM IN MEXICO] 107 (Luisa Maria Leal ed., 1980) (describing statistics in Mexico regarding abortions performed); ROSARIO CARDICH, VISIONES DEL ABORTO [VISIONS OF ABORTION] (1993) (interviews of 50 Mexican women who have had abortions).

119. See ARANDA, *supra* note 102, at 165.

120. *Complications from Botched Abortions in Durango: One Hundred Fifty-Three Percent Increase Over 1989*. SOURCEMEX, January 16, 1991 (on file with author).

121. See *id.*

122. Interview with Mexican female professional who prefers anonymity (June 1994) (on file with author).

123. 410 U.S. 113 (1973).

124. See *Planned Parenthood of Southern Pa. v. Casey*, 505 U.S. 833, 847-48 (1992).

125. See *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972).

126. *Roe*, 410 U.S. at 113.

127. See *Planned Parenthood of Central Mo. v. U. Danforth*, 428 U.S. 52, 67-70 (1976).

128. See *Harris v. McCrae*, 448 U.S. 297, 325 (1980).

129. See *Bellotti v. Baird*, 443 U.S. 622, 643-44 (1979).

130. See *Rust v. Sullivan*, 500 U.S. 173, 184-87 (1991).

burdens" by the state.<sup>131</sup> Reproductive rights are seen as an aspect of individual autonomy. The issue of abortion has proven to be extremely controversial.<sup>132</sup> United States family planning policy is complicated by abortion politics. Feminists in the United States have found that the autonomy, rights-based approach to abortion has limitations.<sup>133</sup> Laurie Schrage has pointed out that the abortion debate in the United States has polarized women on both sides of the debate. She states that women on both sides of the abortion debate in the United States have a different view of motherhood.<sup>134</sup> Pro-choice women see the demands of motherhood as unreasonable, unfair and sometimes unmanageable if a woman is not ready for motherhood.<sup>135</sup> For pro-life women, motherhood is an essential aspect of a woman's existence.<sup>136</sup> When a woman marries or has sex she implicitly agrees to take on this role.<sup>137</sup> The demands of motherhood are seen as reasonable and fair if she has the proper attitude.<sup>138</sup> The rhetoric about 'women's right to choose' or 'pro-life' obscures these perspectives. Religious convictions play an important role in values concerning the morality of abortion. In addition to the theoretical and religious differences between pro-choice and pro-life advocates, the abortion issues have become part of the political discourse.<sup>139</sup> In my view, this reflects deeply held views about women's self-perception as mothers and potential mothers.

Despite the difference in abortion theory and politics, abortions are available to middle-class women with money to pay for the procedure in both the United States and Mexico. Poor women in both countries do not have access to the procedure.<sup>140</sup> Given the different economic situations of both countries, more women in the United States have access to the procedure. Also, because of the religious aspects, Mexican women are more reluctant to choose an abortion. The implications of the above comparative analysis are complex. Mexican and Mexican American

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131. See *Webster v. Reproductive Health Services*, 492 U.S. 490, 530 (1989).

132. See generally KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* (Brian Barry & Samuel Popkin eds., 1984); *UNDERSTANDING THE NEW POLITICS OF ABORTION* (Malcolm L. Goggin ed., 1993).

133. See Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 262 (1991-92). See, e.g. Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 PENN. L. REV. 955, 968-98 (1984). See also *New Mexico Right to Choose/NARAL v. Johnson*, No. 23, 239, 1998 WL 959993 (N.M. Nov. 25, 1998) (women used New Mexico Equal Rights Amendment to challenge state regulations limiting funding for abortions).

134. See LAURIE SHRAGE, *MORAL DILEMMAS OF FEMINISM: PROSTITUTION, ADULTERY, AND ABORTION* 60 (1994).

135. See *id.* at 62.

136. See *id.* at 63.

137. See *id.*

138. See *id.*

139. See Siegel, *supra* note 134.

140. See *id.*

women in the United States find themselves caught in a clash of cultural and legal norms.<sup>141</sup> Allowing absolute individual autonomy (as in the United States) can help women in a position to exercise choices to make those choices. However, autonomy theory does not help women (e.g., women of color and those who are poor) who are *not* in a position to exercise choices. There are also real questions about how much 'choice' women really have in a patriarchal society where expectations about women's proper roles limit women's opportunities. Feminist successes in the United States seek to further individual choice. However, individual choice evades the morality questions, or at least leaves them up to the individual. In contrast, laws in Mexico support traditional cultural gender roles and religious moral values.<sup>142</sup> The different approaches to abortion reveal a great deal about autonomy as a value held in the United States, and those family and religious values held in Mexico.<sup>143</sup>

## V. CONCLUSION

Thus, a contextualized comparative analysis of women's rights reveals that the abortion issue is conceptualized differently in Mexico and the United States. Context helps comparativists studying women's rights draw meaningful comparisons and contrasts in legal status while recognizing culture. The proposed methodology helps broaden perspective and minimize ethnocentricity. The methodology draws on feminist insights to evaluate implications of the law for women. Finally, it recognizes the importance of understanding how women perceive their own legal status in their own cultural context. There is much comparative work to be done; the proposed methodology promotes consideration about this work's implications and the complexities of gender dynamics.

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141. See generally ALFREDO MIRANDÉ, EVANGELINA ENRÍQUEZ, *LA CHICANA: THE MEXICAN AMERICAN WOMAN* 202-43 (1979); Margaret E. Montoya, *Mascaras, Trensas y Grenas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse*, 15 *CHICANO-LATINO L. REV.* 1 (1994); *LATINA ISSUES*, supra note 9; Berta Esperanza Hernandez Truyol, *Building Bridges—Latinos and Latinos at the Crossroads: Realities, Rhetoric and Replacement*, 25 *COL. HUM. RTS. L. REV.* 369 (1994); LAWRENCE J. MOSQUEDA, *CHICANOS, CATHOLICISM AND POLITICAL IDEOLOGY* (1986). I have deeply ambivalent views about abortion. While I believe a woman should not be forced to bear a child against her will, the psychological and moral issues trouble me. Further, abortion can be used as a form of genocide. As a society we should not be cavalier about the implications of these painful choices. Nonetheless, despite my concerns, I do not believe that this is an appropriate area for the government to intrude on personal decision-making. See Antoinette Sedillo López, *Privacy and the Regulation of the New Reproductive Technologies*, 22 *FAM. L.Q.* 173 (1998).

142. See, e.g., Antoinette Sedillo López, *Two Legal Constructs of Motherhood: "Protective" Legislation in Mexico and the United States*, 1 *S. CAL. REV. L. & WOMEN'S STUD.* 239 (1992).

143. See Alexia Vargas, *Why Mrs. Torres Broke Away*, *WALL ST. J.*, Nov. 18, 1998, at A1.