

# Michigan Journal of International Law

---

Volume 13 | Issue 3

---

1992

## International Human Rights and Feminism: When Discourses Meet

Karen Engle  
*Harvard Law School*

Follow this and additional works at: <https://repository.law.umich.edu/mjil>



Part of the [Human Rights Law Commons](#), and the [Law and Gender Commons](#)

---

### Recommended Citation

Karen Engle, *International Human Rights and Feminism: When Discourses Meet*, 13 MICH. J. INT'L L. 517 (1992).

Available at: <https://repository.law.umich.edu/mjil/vol13/iss3/1>

This Article is brought to you for free and open access by the Michigan Journal of International Law at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Journal of International Law by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mLaw.repository@umich.edu](mailto:mLaw.repository@umich.edu).

# INTERNATIONAL HUMAN RIGHTS AND FEMINISM: WHEN DISCOURSES MEET

*Karen Engle\**

## TABLE OF CONTENTS

Introduction .....	518
I. Women's Rights and Human Rights: Contradiction?....	524
A. <i>Conflicting Rights</i> .....	526
B. <i>Conflicting Instruments</i> .....	528
C. <i>Grappling with the Conflicts: A Preview</i> .....	529
II. Doctrinally Deriving Rights .....	531
A. <i>Focusing on the Existence of Rights in International         Legal Instruments</i> .....	535
1. Deducing the Rights from the Instruments .....	535
2. Reinforcing the Authority of the Law .....	540
B. <i>Strategies and Remedies: Making the Law Work</i> ....	543
III. Relying on and Critiquing Institutions .....	555
A. <i>Raising Issues of Enforceability</i> .....	557
B. <i>Working with Institutions to Respond to Enforcement         Issues</i> .....	560
1. Focusing on Mainstream Institutions .....	562
2. Turning to Specialized Institutions .....	565
a. The Commission on the Status of Women ...	565
b. The Committee on the Elimination of Discrimination Against Women .....	570

---

\* Ford Fellow in Public International Law, Harvard Law School; Baylor University, B.A., Harvard Law School, J.D.

I am grateful to Marie-Claire Belleau, Marj Benson, Nathaniel Berman, Pat Cain, Abe Chayes, Rebecca Cook, Chris Desan Husson, Nitya Duclos, David Kennedy, Jean Love, Martha Minow, Fran Olsen, Ileana Porras, Lucinda Sikes, and Henry Steiner. I am especially grateful to Duncan Kennedy for his enthusiasm and encouragement, particularly for the countless hours he devoted to the early discussion and writing phases of this project. I also benefited from feedback on presentations of parts of this work by the interdisciplinary gender group at the University of Texas Institute of Latin American Studies; the Boston Area Femcrits; and faculty and students at the University of British Columbia and the Massachusetts Institute of Technology.

I dedicate this article to the memory of Mary Joe Frug, who contributed to its production through her sharp insights and thoughtful questions. In addition, her own work and views on life, law, postmodernism, and feminism have greatly influenced my thinking about the issues discussed here.

IV. Externally Critiquing Human Rights Discourse: Making It Accommodate Women's Rights .....	575
A. <i>Reclaiming Human Rights Discourse to Integrate Women's Rights</i> .....	578
B. <i>Reconceptualizing Human Rights Discourse</i> .....	584
C. <i>Critiquing the Language of Human Rights Discourse</i> .....	592
Conclusion .....	599

## INTRODUCTION

In recent years, legal scholars have been embroiled in an intense debate about rights that has touched almost every area of domestic law. Controversy about the role and utility of rights discourse has been especially fierce in areas generally identified with popular struggles, such as civil rights for minorities and women.<sup>1</sup>

Surprisingly, international law has not been a target of rights critics. Even international human rights law, with its near total reliance on rights discourse and its intimate relationship with nongovernmental organizations and popular struggles, has remained largely untouched by the rights debate.

In this article, I bring some of the issues identified and discussed in domestic law into public international law, through an analysis of that area of human rights law pertaining to women. Although I am inspired by the domestic debate, my purpose here is not specifically to critique or defend rights. Rather, I explore the various ways that advocates of international women's rights have deployed, and at the same time critiqued, existing rights frameworks in order to achieve change for women. In doing so, I analyze the multiple roles that rights discourse plays in the advocacy of women's rights internationally.

The literature on women's human rights<sup>2</sup> is a particularly rich site for an analysis of rights discourse deployment, because in this litera-

---

1. See, e.g., Peter Gabel, *The Phenomenology of Rights — Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563 (1984); Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387 (1984); Elizabeth Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movements*, 61 N.Y.U. L. REV. 589 (1986); Patricia J. Williams, *Alchemical Notes: Reconstructed Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987).

2. I generally use the term "women's human rights" throughout this article. I do so consciously, both out of convenience and to conflate two other widely used terms, "women's rights" and "human rights of women." A tension exists in this literature about which language to use, representing a larger issue about whether and how women's rights can be assimilated to the international human rights régime. See, e.g., *infra* notes 61-62 and accompanying text; text accompanying note 159.

ture two different, and sometimes competing, models of rights converge. Although it might seem that international human rights law would naturally incorporate women's rights, since women are human, women's rights advocates have suggested that such incorporation cannot be assumed. While some maintain that women's rights are already included in international human rights law, others argue that the international human rights régime will have to change before it can take women into account. In either case, women's rights discourse is generally positioned at the periphery of human rights discourse, both challenging and defending the dominant human rights model as it attempts to fit its causes into that model. In this arena, filled with rights enumeration and rights talk, possibilities for conflicts between competing rights ensue. Examining how different women's rights advocates deal with those potential conflicts sheds light both on international rights discourse and on feminist approaches to law.

Although a critique of rights has not been launched at human rights law, it has not escaped challenge. Two attacks are generally aimed at the law. First, it is often seen as a Western-conceived and -dominated project that fails to address adequately the concerns of the East and the Third World. While some critics raise the possibility that a Western system of rights cannot accommodate non-Western needs,<sup>3</sup> most believe that the system can rearrange its priorities to address those needs. Second, and more often, human rights law is attacked for not being expansive enough. It is encouraged, for example, to take more seriously economic or social rights, or the rights of women or cultural and ethnic minorities.<sup>4</sup> These two critiques, of course, are not unrelated. For both sets of critics, whatever deficiencies the law might have can be addressed through expansion, either through new sets of rights or through a reordering of the rights that exist.<sup>5</sup> None of the critics believes that taking into account her or his concerns will radically disrupt the system.

The international law of human rights has been built largely by its

---

3. See generally Raimundol Pannikar, *Is the Notion of Human Rights a Western Concept?*, *DIOGENES*, Winter 1982, at 75.

4. See *infra* note 46 (citing various articles that have argued for human rights law to take up a new or overlooked issue).

5. Those who argue that the system ought to better accommodate economic and social rights, for example, often make much of the fact that those rights exist in positive law. The problem, they claim, is that an unfortunate and wrongheaded hierarchy of rights leads to the subordination of economic and social rights to civil and political rights. See, e.g., Philip Alston & Gerard Quinn, *The Nature and Scope of States Parties' Obligations Under the International Covenant on Economic, Social and Cultural Rights*, 9 *HUM. RTS. Q.* 156 (1987). For a general discussion of the hierarchy within human rights, see Theodor Meron, *On a Hierarchy of International Human Rights*, 80 *AM. J. INT'L L.* 1 (1986).

own criticism. Since its inception, different groups and causes have situated themselves at its margins and challenged it to respond better to more and different types of oppression. In many ways, they have been successful. As different groups have suggested new rights and reinterpretations of old rights, they have contributed to a proliferation of international human rights documents and conventions.<sup>6</sup>

Feminists form one of the groups that has attempted to expand human rights, urging it to better encompass women's rights. Through their work, they have not only identified those international legal instruments that include provisions prohibiting sex discrimination, but they have also helped establish international legal instruments that pertain specifically to women's rights. Using the number of such instruments as a measure of progress, it would appear feminists' work has paid off: in 1986, Natalie Hevener identified twenty-two international documents relating to the status of women.<sup>7</sup> Much of the work of women's rights advocates was realized during the United Nations Decade for Women, with the creation of the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (Women's Convention).<sup>8</sup> Although that Convention has only been open for signature since 1980, it already has been ratified by as many States as have ratified the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights.<sup>9</sup>

As the number of legal instruments has increased, so has the scholarly literature on women's human rights. Before the Women's Convention, only a few works had been written about women's rights,<sup>10</sup> but since then the number of works has skyrocketed.<sup>11</sup> Some of those

---

6. For an extensive list of these documents and conventions, see LOUIS HENKIN ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 991-93 (2d ed. 1987).

7. See Natalie K. Hevener, *An Analysis of Gender Based Treaty Law: Contemporary Developments in Historical Perspective*, 8 *HUM. RTS. Q.* 70, 87-88 (1986).

8. Convention for the Elimination of All Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 14 (entered into force Sept. 3, 1981) [hereinafter Women's Convention].

9. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976). For statistics on ratification, see Andrew C. Byrnes, *The "Other" Human Rights Treaty Body: The Work of the Committee on the Elimination of Discrimination Against Women*, 14 *YALE J. INT'L L.* 1, 3 (1989).

10. See, e.g., Malvina H. Guggenheim, *The Implementation of Human Rights by the U.N. Commission on the Status of Women*, 12 *TEX. INT'L L.J.* 239 (1977); Patricia Ireland, *International Advancement and Protection of Human Rights of Women*, 10 *LAW. AM.* 87 (1978); Rita F. Taubenfeld & Howard J. Taubenfeld, *Achieving the Human Rights of Women: The Base Line. The Challenge. The Search for a Strategy*, 4 *HUM. RTS.* 125 (1975).

11. For a comprehensive bibliography of works dealing with international law regarding the

written since the Women's Convention focus specifically on that Convention, while others deal generally with women's human rights. The Women's Convention, then, has both generated and reflected a renewed interest in women's human rights, as much as it has been the actual subject of discourse.

This article examines in detail much of the literature that has emerged on women's human rights since 1979,<sup>12</sup> identifying three broad approaches taken by women's human rights advocates. I have labeled these approaches doctrinalist, institutionalist, and external critique. Each represents a particular feminist approach to law as well as a specific approach to human rights discourse.

Regardless of the approaches they take, women's human rights advocates confront a difficult task in attempting to secure women's place in the international human rights framework. Explicitly or implicitly, they challenge traditional notions of human rights for failing to take women into account adequately. At the same time, though, they rely on international legal instruments and human rights law and language as vehicles for achieving women's equality. Thus, a tension emerges, an ambivalence about whether and how women's rights can become a part of human rights. This tension manifests itself through the approaches the advocates take.

Two approaches, doctrinal and institutional, work within the field of international human rights and use language internal to that discourse.<sup>13</sup> Their proponents are, for the most part, liberal feminists who generally believe in the effectiveness of human rights legal doctrine and institutions. Advocates who take a third approach pose what I consider external critiques.<sup>14</sup> They approach human rights discourse as feminists, generally radical or cultural feminists, who are troubled by the existence of a system that claims to protect the rights of all human beings while systematically excluding one-half of the human race.

---

status of women, see Rebecca J. Cook, *Women's International Human Rights: A Bibliography*, 24 N.Y.U. J. INT'L L. & POL'Y (forthcoming 1992); Rebecca J. Cook, *Bibliography: The International Right to Nondiscrimination on the Basis of Sex*, 14 YALE J. INT'L L. 161, 163-81 (1989).

12. The articles and books I examine comprise much of the English language literature in this area that does more than merely describe the provisions of international legal instruments that apply to women. The authors represent a variety of disciplines and several different countries. As I have explored this area I have been surprised by the lack of communication between people writing in this discipline. Few of the authors react to others who have written about similar problems before them.

13. Advocates examined under the first approach are Boulware-Miller, Slack, An-Na'im, Cook and Maine, and Khushalani. See *infra* Part II. Those discussed under the second approach are Galey, Reanda, Burrows, and Meron. See *infra* Part III.

14. Those works explored under the third approach are by Eisler, Hosken, Burrows, Gaer, Holmes, and Peterson. See *infra* Part IV.

Those taking the first two approaches advocate women's rights by interpreting and sometimes criticizing the existing doctrinal and institutional framework. Doctrinalists generally describe a specific problem facing women in some or all parts of the world and then show doctrinally how the problem constitutes an international human rights violation. Institutionalists critically examine international legal institutions that are created to enforce human rights. They study both mainstream human rights institutions and specialized women's institutions to determine whether and how they protect women's human rights.

I consider both of these approaches positivist since they generally rely on international legal doctrine and institutions to make their arguments.<sup>15</sup> Doctrinalists and institutionalists do not see themselves as approaching human rights law with any preconceptions about what rights should be derived from the instruments or enforced by the institutions. Doctrinalists, for example, extract particular rights from documents as if, were it not for the documents, the rights might not exist at all. The positive nature of the work of both groups evinces a general approach to human rights that sees women's rights as a normal part of human rights law and discourse, readily assimilable to the human rights model.

Those who take the third approach, rather than working within human rights discourse in its present form, critique the human rights framework either for being male-defined or -deployed, or for being based on inherently male concepts. These external critics aim to have what they see as women's human rights achieved, regardless of whether those rights exist in positive law. In doing so, they raise difficult questions about whether women's needs and rights can fit into the existing definition and conception of human rights. Thus, they are less likely than doctrinalists and institutionalists to see women's rights as assimilable to the human rights model. The views of external critics

---

15. I do not use positivism here in the way it is often used in public international law discourse. That is, by calling the approaches positivist, I do not mean to suggest that the advocates see doctrine and institutions as mere products of sovereign consent. To the extent, however, that they believe that international law is authoritative and that States are bound by it, particularly those States that have signed or ratified specific documents, their views are more traditionally positivist.

I primarily use the term positivism to highlight these advocates' use of positive law as the starting point from which they derive rights. I also use positivism to contrast the suggestion that rights only exist by virtue of their embodiment in particular documents with a theory of rights that relies on natural law for its basis. *But see* MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* 106-17 (1987) (discussing various meanings of positivism and displaying how in 19th century public international legal discourse — the "golden age of positivism" — those considered positivists commonly relied on naturalist notions and vice versa).

range from those who think human rights theory will only be fully consistent after it incorporates women's rights to those who think human rights theory must change and be reconceptualized in order to address successfully women's concerns.

The primary distinction between the first two approaches and the third approach, then, is that the first two assume and act upon the belief that women's rights have and can be assimilated to the human rights structure. The third approach, on the other hand, questions whether assimilation to the structure as it exists is possible. Advocates who take this latter approach tend to believe that the structure itself will have to change in order to accommodate women's rights.<sup>16</sup>

Whether their approach be assimilation or accommodation, all advocates encounter difficulties with making women's rights a part of human rights. Some of the difficulties are with human rights generally, while others are specific to women's rights. The recognition of these difficulties, however, does not lead any of the advocates to abandon human rights law or rhetoric. None of the advocates suggests that including women's rights would fundamentally disrupt the human rights régime. And none openly explores the possibility that women's rights and human rights might be incommensurable.

While most advocates do not consciously acknowledge or directly confront the possibility of conflicts among rights, they all bump up against it. As they attempt to make human rights law and discourse work for their particular causes, they grapple with potential obstacles to achieving women's human rights. The obstacles encountered depend on the approach taken. Hence, doctrinalists deal with issues of cultural difference, institutionalists raise questions about the role of different institutions in protecting women's rights, and external critics grapple with the (at least purported) distinction between the public and private spheres. The different ways these advocates confront these issues (and fail to confront others) reflect a variety of feminist positions.

This article brings to light these issues that arise from attempts to bring women's rights into the human rights arena. My experience in the women's human rights movement, as well as in other types of human rights advocacy, indicates that advocates make many assumptions about the meaning(s) of rights, universality, and enforcement of

---

16. For a related discussion of the difference between assimilation and accommodation, see Duncan Kennedy, *A Semiotics of Legal Argument*, 42 SYRACUSE L. REV. 75, 109-10 (1991) (explaining how Piaget has been used to "understand how judges decide cases by 'assimilating' or recasting the facts to fit the legal materials that exist at a given moment, while 'accommodating' or recasting the materials to fit the irreducible particularity of the facts").



international law. Too often, however, the assumptions are not articulated, and as a result, those in the movement assume that they are all "in it together." By highlighting these different assumptions, I hope to create the possibility for forthright discussions about the difficult task of applying human rights law to women's issues. Then, through using the strengths and weaknesses of existing approaches to critique and bolster each other, I hope to begin to rethink both international human rights and feminist approaches to law.

In Part I of this essay, I explore one manifestation of the uncertain relationship between women's rights and human rights, through an examination of a mainstream conception of the potential conflict between women's rights and human rights. Parts II and III focus on the doctrinalist and institutionalist internal approaches, while Part IV analyzes the external critiques. In the Conclusion, I situate my thesis in my own experience as a women's human rights advocate. Then, through a comparison of the approaches analyzed in the previous sections, I draw out the strengths and weaknesses of each approach.

## I. WOMEN'S RIGHTS AND HUMAN RIGHTS: CONTRADICTION?

Of all who work in women's human rights, Theodor Meron most overtly identifies the potential for a clash of women's rights with other human rights. Meron devotes a chapter of his book, *Human Rights Law-Making in the United Nations*, to the Women's Convention.<sup>17</sup> In this chapter, Meron expresses concern about what he terms the Convention's "overbreadth in the scope of the obligations created, which extend to political, economic, social, cultural, legal, familial, and personal fields of activity."<sup>18</sup> This overbreadth, he believes, leads to potential violations of other human rights, some of which are guaranteed by other international legal instruments.

Meron begins his discussion of the Women's Convention by calling it "the first universal instrument which focuses on the general prohibition of discrimination against women."<sup>19</sup> He indicates that there was a need for the Convention because sex discrimination had not received

---

17. THEODOR MERON, *HUMAN RIGHTS LAW-MAKING IN THE UNITED NATIONS* 53-80 (1986); see also *id.* at 153-60 (discussing potential conflicts between religious rights and women's rights). In many ways Meron is a women's rights advocate. Although here he complains that some women's rights might compromise or negate other human rights, elsewhere he suggests improving the enforceability of those women's rights he believes are properly within the scope of human rights. There, he offers concrete proposals for making women's rights institutions more effective. See, e.g., *id.* at 53-82, discussed *infra* Part III; Theodor Meron, *Editorial Comments: Enhancing the Effectiveness of the Prohibition of Discrimination Against Women*, 84 AM. J. INT'L L. 213 (1990).

18. MERON, *supra* note 17, at 58.

19. *Id.* at 53.

much attention, in spite of its prohibition in international documents, including the United Nations Charter.<sup>20</sup> Meron is aware of discriminatory practices "against women in public and private life in most, if not in all countries" and therefore sees the Women's Convention as "a response to an urgent need and . . . potentially of great importance."<sup>21</sup>

In spite of his belief that women around the world are victims of discrimination and that the Women's Convention is a potentially important document, Meron argues that the Convention has gone too far by guaranteeing rights that conflict with other, presumably more important, rights. Most of his chapter on the Women's Convention analyzes specific articles of that document. One section concentrates on "overbreadth and other problems" of the Convention,<sup>22</sup> while another section examines potential conflicts between women's rights and religious rights.<sup>23</sup> Meron's analysis of the Women's Convention suggests that he believes that the international legal system of rights should be coherent. While he acknowledges that in some cases rights conflict, and that therefore certain rights must take precedence over other rights, he is troubled that conflicts occur. He seems particularly disturbed by his perception that the Women's Convention has been drafted in a way that might require women's rights to trump other rights that human beings (men?) have.

Meron's principal concern about the Women's Convention is that it establishes rights in the "private" sphere, a factor many women's rights advocates see as one of the Convention's strengths.<sup>24</sup> For Meron, the entrance of international scrutiny into the private sphere makes possible the violation of other rights, such as privacy, cultural, and associational rights. Meron does not derive those rights from positive law but generally treats them as natural rights, assuming their existence and import.

Meron also complains that religious rights might be compromised by the Women's Convention. Here, though, he focuses on a possible clash of positive law, between some provisions of the Women's Con-

---

20. *Id.* at 54 ("[U]nlike racial discrimination[, sex discrimination] has not become the focus for concerted international action and it is not listed as reflecting customary law in the draft of the new Restatement of the Foreign Relations Law of the United States.") (citing RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (Revised) § 702 (Tentative Draft No. 6, 1985)).

21. *Id.* at 56.

22. *Id.* at 57-73.

23. *Id.* at 77-79 (section entitled "Women's Equality and Religious Freedom").

24. *See. e.g.,* *infra* text accompanying note 254 (discussing Hosken); *infra* note 258 and accompanying text (discussing Eisler). *But see* *infra* text accompanying notes 289-92 (discussing Burrows's view that the Convention does not sufficiently guarantee rights in the traditional private sphere).

vention and parts of the Declaration on Religion.<sup>25</sup>

### A. *Conflicting Rights*

Meron begins his exploration of the "overbreadth" of the Women's Convention's by comparing article 1 of that Convention,<sup>26</sup> which he argues "clearly extends the prohibition of discrimination to private life,"<sup>27</sup> with nondiscrimination provisions of other instruments. He distinguishes, for example, the International Convention on the Elimination of All Forms of Racial Discrimination, which he maintains is ambiguous about whether it prohibits private discrimination.<sup>28</sup> He also compares the definition in the Women's Convention with definitions in the International Covenant on Civil and Political Rights, and the American and European Conventions on Human Rights, which he argues clearly prohibit discrimination only in the public sphere.<sup>29</sup>

Meron recognizes that the private sphere is the locus of much of women's oppression.<sup>30</sup> Nevertheless, he opposes legal regulation of that sphere because

[t]here is danger . . . that state regulation of interpersonal conduct may violate the privacy and associational rights of the individual and conflict with the principles of freedom of opinion, expression, and belief. Such regulation might require invasive state action to determine compliance, including inquiry into political and religious beliefs.<sup>31</sup>

Meron does not believe that these conflicts are inevitable. Rather, he insists that they could have been avoided through careful drafting of the Convention.<sup>32</sup> He presses this alternative, even with the knowl-

25. Meron is especially concerned with articles 4 and 7 of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, which he believes give the Declaration its normative character. MERON, *supra* note 17, at 153, citing G.A. Res. 36/55, U.N. GAOR, 36th Sess., Supp. No. 51, at 171, U.N. Doc. A/36/51 (1982).

26. Article 1 of the Women's Convention defines discrimination against women as: any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. Women's Convention, *supra* note 8, art. 1, 1249 U.N.T.S. at 16.

27. MERON, *supra* note 17, at 60.

28. *See id.* at 59-60 ("[T]he operative provisions extend the reach of certain obligations beyond the action of public officials: racially discriminatory action which occurs in 'public life' is prohibited even when it is taken by 'any persons, group or organization' . . . without clearly delimiting the parameters of 'public life.'"). For Meron, this ambiguity is "integral" to the Convention.

29. *Id.* at 61.

30. *Id.* at 62 ("It is certainly true that discrimination against women in personal and family life is rampant and may obviate equal opportunities which may be available in public life.").

31. *Id.* at 62.

32. *Id.* ("A more restricted approach might have been preferable, limiting the definition of discrimination against women to distinctions on the basis of gender in the fields of activity listed in Art. 1 and 'in any other field of public life.'").

edge that such a drafting would have made the document less effective.

Throughout his discussion of the Women's Convention, Meron continues to reinforce a distinction between the public and private spheres. This dichotomy guides him through his article-by-article analysis of the Convention. In his examination of article 2, for example, which outlines policy measures designed to "eliminat[e] discrimination against women," Meron complains that four of its paragraphs "reach interpersonal 'private' acts of discrimination and are therefore characterized by the overbreadth discussed with regard to Art. 1."<sup>33</sup> In discussing article 5,<sup>34</sup> which requires States Parties "[t]o modify the social and cultural patterns of conduct of men and women," he complains that "[t]his provision mandates regulation of social and cultural patterns of conduct regardless of whether the conduct is public or private."<sup>35</sup> About article 13, requiring States Parties to eliminate sex discrimination in economic and social life by ensuring equal rights to family benefits, financial credits, and participation in recreational activities and cultural life, Meron again complains that the public/private distinction has not been respected.<sup>36</sup>

Only when Meron discusses article 7 of the Women's Convention, which guarantees women's rights in "political and public life," does he express some uncertainty about the rigid public/private distinction he has maintained. Noting that article 7 provides women the right to participate in nongovernmental organizations concerned with public and political life, he justifies the right by stating that "such intrusion may be necessary in order to achieve political equality for women. Moreover, intrusion which might occur would not impinge upon interpersonal, 'private' relationships, but upon groups that have assumed a public role."<sup>37</sup> In this case, then, Meron allows a compromise of associational rights in the interest of women's "political equality." Still, he draws the line at "interpersonal 'private' relationships," even though he puts the word "private" in quotation marks, possibly indicating some uneasiness with the distinction he perpetuates.

By determining that women's rights ought to trump associational rights in this situation, rather than suggesting rewriting the Women's

---

33. *Id.* at 64 (referring to paras. (b), (c), (e), and (f)). For a detailed discussion of the "overbreadth," see *id.* at 64-65.

34. For many women's rights advocates, article 5 is one of the most significant provisions of the Convention, since it attempts to remove obstacles to equality that result from cultural differences. See, e.g., *infra* note 75 (discussing An-Na'im); *infra* note 266 and accompanying text (discussing Eisler).

35. MERON, *supra* note 17, at 66.

36. *Id.* at 71.

37. *Id.* at 67.

Convention, Meron is forced to confront the conflict. He ultimately justifies the violation of associational rights, however, by returning to the public/private distinction. For Meron, it is the public nature of the work of nongovernmental organizations and associations that justifies the apparent intrusion into the private sphere.<sup>38</sup> By deeming the problem one that exists in the public realm, Meron essentially erases the conflict. Through this justification he maintains the public/private distinction and, simultaneously, his argument that women's rights should not be forced into the private sphere.

Associational rights are the only rights that Meron allows women's rights to trump. As for the rest of women's oppression in the private sphere, he suggests solutions outside law.

The need to modify cultural and social patterns of conduct with a view to eliminating prejudices and stereotyped notions of sex roles, emphasized in Art. 5 of the Convention, can best be advanced by education and appropriate governmental incentives, rather than by excessive encroachment by the State into interpersonal relations.<sup>39</sup>

Meron does not mount opposition to the end — the equality of women in the private sphere — but only to the means.

As long as the Women's Convention is to be enacted and enforced in its current form, then, Meron warns of some absolute contradictions between women's rights and human rights. He softens the blow, however, in three ways. First, he suggests that the Women's Convention could have been drafted to avoid much of the conflict. Second, in one case he reinterprets the private sphere to make it public. Third, he recommends the use of extralegal means such as education and incentives rather than absolute legal enforcement. Throughout his discussion, though, he assumes that there is something inherently disturbing about guaranteeing private sphere rights (for women). As a consequence, he toes the public/private line, even while recognizing that to do so might preclude women's equality.

### B. *Conflicting Instruments*

Meron is also disturbed that the Women's Convention guarantees rights that conflict with the rights of ethnic and religious groups. This concern emerges in Meron's further discussion of article 5:

Moreover, since social and cultural behaviour may be patterned according to factors such as ethnicity or religion, State action authorized by para. (a) which is directed towards modifying the way in which a partic-

---

38. Meron suggests that international law deal with the conflict the same way the United States Supreme Court dealt with it in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), which he believes "represents a reasonable balancing of the relevant values." *Id.* at 62.

39. *Id.* at 62-63.

ular ethnic or religious group treats women may conflict with the principles forbidding discrimination on the basis of race or religion.<sup>40</sup>

Here Meron is concerned that two specialized instruments, the Women's Convention and the Declaration on Religion, seem to exist in direct conflict. This conflict between two sets of doctrinally guaranteed rights presents different problems from those discussed earlier.

Before acknowledging the inevitability of the conflict between religious rights and women's human rights, Meron attempts to find a doctrinal solution. He looks to the Women's Convention's resolution of conflicts provision,<sup>41</sup> the "saving clause" of the Declaration on Religion,<sup>42</sup> and certain provisions of the Vienna Convention on the Law of Treaties.<sup>43</sup> Ultimately, however, he concludes that none of these provisions easily solves the problem because both the Women's Convention and the Declaration on Religion lack adequate conflict resolution measures.

For Meron then, the conflict has not been satisfactorily resolved. As a result, he believes both women's equality and religious freedom will likely suffer.<sup>44</sup>

### C. *Grappling with the Conflicts: A Preview*

If Meron correctly identifies this absolute conflict of rights, where either women's equality suffers in the face of other rights or other rights are diminished in the face of women's rights, women cannot simply assimilate to the human rights system. And if Meron is correct in not allowing women to have legal rights in the private sphere, the human rights model cannot take the leap of abolishing the public/private distinction to accommodate women's rights. The only way

---

40. *Id.* at 66.

41. *See id.* at 77 for the text of the provision; *see also id.* at 154 (discussing ways that the provision might not apply to a declaration since by its language, it addresses only conflicts between the Women's Convention and other conventions, treaties, or agreements).

42. *Id.* at 154.

43. *Id.* at 77.

44. *See id.* at 155. Meron explains that

[g]iven the force of religion in many societies, it is entirely possible that, in the future, States Parties to the Discrimination Against Women Convention will invoke the principles embodied in the Declaration as grounds for evading obligations under the Convention which are incompatible with specific religious practices. Reconciliation of conflicts between these two sets of principles may prove difficult. Regardless of whether certain discriminatory religious practices are intended to discriminate against women or not, the continuation of those practices may bar or impair the achievement of the equality of sexes. The attainment of the goal of equality of women may therefore require encroachment upon religious freedom.

*Id.* For an excellent discussion of reservations that many States have made to the Women's Convention, often explicitly or implicitly on the basis of religion, see Rebecca J. Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 30 VA. J. INT'L L. 643 (1990).

women's rights can fit snugly into the human rights system, then, according to Meron, is through much less expansive women's rights law. Changing the law as Meron would suggest, however, would eliminate measures that even he acknowledges are required for "true" equality.

Meron's analysis indicates that some conflicts might be irreconcilable. It might lead those who already challenge human rights discourse to conclude that human rights, having been designed to protect men's rights, can never accommodate women's rights. Although this possibility of irreconcilability is suggested by some women's rights advocates, particularly external critics, only Meron explicitly recognizes it.<sup>45</sup> The failure of women's rights advocates to openly acknowledge such tensions between women's rights and human rights does not mean they do not confront them. To the contrary, they all encounter the possibility that human rights might be incapable of assimilating or accommodating women's rights. That very possibility of irreconcilability, I contend, guides women's human rights advocacy.

Meron encounters the possibility by naming absolute conflicts and, thus, his reaction is an overt manifestation of the uneasy relationship between women's rights and human rights. Other advocates display it differently. As their positions range from liberal feminist internal to radical feminist external approaches to law, advocates highlight and struggle with the relationships between the following pairs: mainstream international instruments and institutions and their specialized counterparts; universal law and cultural relativism; positive law and the institutions created to enforce it; and the traditional public and private spheres. The tensions among and between these pairs emerge as advocates become aware of various difficulties with bringing women's rights into the human rights domain. Their disparate reactions to the difficulties shed light on liberal and radical feminisms and their ability to confront these issues.

Although this article focuses on women's human rights, the tensions I sense in that movement are not unique to women's rights. They seem to appear whenever an individual or group tries to shape and mold a new right or set of rights to fit into the human rights régime.<sup>46</sup> Sometimes these new concerns cannot be made to fit at all.

---

45. Even Meron, once he turns to an analysis of institutions, seems to disregard the conflict he has named. See *infra* Part III.

46. Similar struggles occur, for example, in debates about whether and to what extent economic and social rights should be recognized as international human rights. See, e.g., HENRY SHUE, *BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY* (1980); Alston & Quinn, *supra* note 5; Jack Donnelly, *In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development*, 15 CAL. W. INT'L L.J. 473 (1985); Craig Scott, *The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights*, 27 OSGOODE HALL L.J. 769 (1989). As human rights law expands,

Other times the fit is uneasy. And often, when and if a fit seems to have occurred, the paradigm itself has been reshaped and remolded as much as have the new concerns.<sup>47</sup>

I explore women's human rights advocacy for the light it sheds on feminism and human rights, as well as on their intersection. This literature, situated at various places on the margins of human rights discourse, reveals a lot about both the margins and the center; the contradictions that surface at the periphery are often reflective of the difficulties that lie at the core. Women's human rights advocacy has challenged the human rights core, but only to a point. As it attempts either to move its causes into the core or to expand the core itself, women's human rights advocacy defines itself by its outsider status as well as its attempt to become part of the inside.

In this article, I explore how and when that dual personality emerges, in the literature as a whole and in each of the approaches. Through this method, I hope to understand better the strategies, the ideas, and the complications behind the women's human rights movement. By exploring the uneasy fit between women's rights and human rights, even whether there is any fit at all, I want to think about the ways the periphery and the core simultaneously challenge one another and keep each other alive. I wonder whether the periphery could ever become a part of the core without both the periphery and the core losing their appearances of coherency.

## II. DOCTRINALLY DERIVING RIGHTS

Advocates who take a doctrinal approach to assimilating women's rights to the international human rights framework view international positive law as important, authoritative, and inclusive of women's rights. They argue that women have had certain rights ever since the

---

almost every conceivable issue is being constructed as a human rights issue. See, e.g., *Aging: A New Human Rights Concern*, 1987 AM. SOC'Y. INT'L L. PROC. 156; Colleen E. Dawes, *The Right to Peace*, 60 AUSTL. L.J. 156 (1986); Farooq Hassan, *The Right to be Different: An Exploratory Proposal for the Creation of a New Human Right*, 5 LOY. L.A. INT'L & COMP. L.J. 67 (1982); Eugene V. Rostow, *Peace as a Human Right*, 4 N.Y.L. SCH. J. INT'L & COMP. L. 215 (1983); Henry Steiner, *Political Participation as a Human Right*, 1 HARV. HUM. RTS. J. 77 (1988). The environment has recently become a potential subject of human rights law. See, e.g., Melissa Thorne, *Establishing Environment as a Human Right*, 19 DENV. J. INT'L L. & POL'Y 301 (1991); William A. Shutkin, *Note, International Human Rights Law and the Earth: The Protection of Indigenous Peoples and the Environment*, 31 VA. J. INT'L L. 479 (1991).

47. This phenomenon is what Thomas Kuhn has called a "paradigm shift." See generally THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962). For applications of this idea to law, see generally David Kennedy, *Primitive Legal Scholarship*, 27 HARV. INT'L L.J. 1 (1986); Frances Olsen, *The Sex of Law*, in *THE POLITICS OF LAW* 453 (David Kairys ed., 1990); Duncan Kennedy, *The Rise and Fall of Classical Legal Thought* (1975) (unpublished manuscript).



inception of human rights law, and sometimes even before that time. Their task is to persuade those who deploy human rights discourse — States, intergovernmental organizations, and sometimes nongovernmental organizations and activists — to take women's rights seriously and to work toward their implementation.

Doctrinalists identify a practice or set of practices that they believe violates international human rights law, and then list and describe the positive law that guarantees the rights being violated. While those rights are sometimes explicitly named and guaranteed in human rights instruments, they often must be derived through the interpretation of broadly defined rights. Doctrinalists focus, for example, on rights that would require banning the practice of female circumcision,<sup>48</sup> prevent women from being raped in times of war,<sup>49</sup> and allow women to make their own decisions about reproduction and family planning.<sup>50</sup> One doctrinalist explores generally the rights of Muslim women, suggesting a reinterpretation of Islamic law that would prevent it from conflicting with international law.<sup>51</sup>

Through their arguments that women's rights are guaranteed by a variety of international legal instruments, doctrinalists indicate a number of uncertainties about the relationship between women's rights and human rights. First, even within their doctrinal mode, the advocates implicitly take different positions on the importance and usefulness of certain human rights instruments. For the most part, their analyses all touch upon and oscillate between mainstream (presumably universal) human rights instruments and specialized women's instruments. They turn first to mainstream international law and argue that the general language in the documents guarantees the rights they advocate, both by protecting the rights of all human beings and by specifically prohibiting discrimination on the basis of sex. Several

---

48. See Kay Boulware-Miller, *Female Circumcision: Challenges to the Practice as a Human Rights Violation*, 8 HARV. WOMEN'S L.J. 155 (1985); Alison T. Slack, *Female Circumcision: A Critical Appraisal*, 10 HUM. RTS. Q. 437 (1988). "Female circumcision" is a broad term that can incorporate many different procedures. The term is not uniformly embraced by women's rights advocates. Some advocates prefer to use technical terms to explain the specific procedure being performed, such as clitoridectomy or infibulation. Others, including some I will discuss in Part IV, use the term "genital mutilation," which has been attacked for its insensitivity to those women who have undergone the operation. See, e.g., Marie-Angelique Savanne, *Why We Are Against the National Campaign*, 40 INT'L CHILD WELFARE REV. 37 (1979). In this article I use the terms that the writers themselves use.

49. See YOUNGINDRA KHUSHALANI, *DIGNITY AND HONOUR OF WOMEN AS BASIC AND FUNDAMENTAL HUMAN RIGHTS* (1982).

50. See Rebecca J. Cook & Deborah Maine, *Spousal Veto Over Family Planning Services*, 77 AM. J. PUB. HEALTH 339 (1987).

51. See Abdullahi An-Na'im, *The Rights of Women and International Law in the Muslim Context*, 9 WHITTIER L. REV. 491 (1987).

then turn to the Women's Convention or other specialized documents or language that they believe guarantee the rights. The advocates generally do not explain, though, why they have chosen to use the various instruments.

Second, even though doctrinalists believe that the rights they advocate are protected in positive law, they are well aware that women's rights are continually violated. That is, they identify a gap between the rights they claim are guaranteed in international instruments and the real situation of women in the world. In some cases, they attribute that gap to enforcement difficulties with international law generally. But more often they express some belief that women's rights are more difficult to enforce than other human rights. One of the ways they respond to enforcement difficulties is by arguing that international law is, in and of itself, authoritative.

Third, and perhaps most significant, the uncertainty of the ability of human rights to assimilate women's rights surfaces toward the end of most of these advocates' works. At that point, their arguments seem less doctrinal, as they turn to a discussion of strategies for implementing positive law. Doctrinalists make this shift, it seems, in part to respond to concerns about enforcement; even as they maintain that international law is authoritative, they generally recognize the practical need to fill the enforcement gap. They also turn to strategy out of a concern for cultural differences. Although human rights law is meant to be universal, several doctrinalists confront the reality that particular rights are not universally agreed on, by presumed violators or victims, especially in those countries where the "violations" are most rampant. In this sense, doctrinalists are unique among women's rights advocates; they acknowledge cultural differences as potential obstacles to achieving women's rights.<sup>52</sup>

In their shift to strategies for implementation, doctrinalists concentrate on noninstitutional strategies.<sup>53</sup> Some take an approach I call strategic positivism because it attempts to determine which right guaranteed by positive international law will best convince women and States to change municipal law. Others turn to strategies that involve

---

52. I have discussed in more detail elsewhere how doctrinalists, as well as other women's human rights advocates, address (or fail to address) issues of cultural difference. See Karen Engle, *Female Subjects of Public International Law: Human Rights and the Exotic Other Female*, 26 NEW ENG. L. REV. (forthcoming 1992).

53. Noninstitutional strategies include teaching women about their rights and encouraging States to recognize and implement women's rights. Other women's human rights advocates, expressing similar enforcement concerns, turn to international institutions for their answers. See *infra* Part III.

education of individual women and men, as well as governments and lawmakers.

As doctrinalists shift from a sole focus on the existence of rights in positive law to strategies for seeing them implemented, they appear to address a new audience. When they make arguments based on positive law, they seem to be attempting to convince those who define and deploy international human rights discourse that the rights exist. When they shift to strategies for implementation, they seem to be speaking to fellow women's rights advocates and activists. For the latter audience, the legal arguments are likely not as important, although they might provide some useful authoritative language.

For the most part, I consider these advocates to be liberal feminists. Believing that women should have the same possibilities and rights protections as men, they aim to assimilate women's rights to the dominant human rights structures.<sup>54</sup> Since they see positive human rights law as already including women, they do not believe that such assimilation will disrupt or significantly change the structures.

The doctrinalists' liberal feminist attitudes affect their approaches to issues of cultural difference. Despite their belief that the universal norms they advocate have their basis in positive law, they do not assume that all men, women, and States will agree that those norms are properly derived from international law or should be enforced at a local level. The advocates therefore see their task as one of convincing States and their citizens, male and female, that women have those rights. They proceed with this task, not merely by reiterating doctrine, but also by choosing which doctrinal argument to stress. In addition they suggest extralegal means of persuasion.<sup>55</sup>

In this section, I examine works that are representative of this doctrinal approach. I discuss articles on female circumcision by Kay Boulware-Miller and Alison Slack,<sup>56</sup> Abdullahi An-Na'im's article on Muslim women's rights,<sup>57</sup> Rebecca Cook and Deborah Maine's article

---

54. Their approach is similar to what Mary Joe Frug labeled, in the U.S. context, "Equality Doctrine." See Mary Joe Frug, *Sexual Equality and Sexual Difference in American Law*, 26 *NEW ENG. L. REV.* (forthcoming 1992) ("Equality Doctrinalists analyzed how the position of women could be improved by extending civil rights statutes or the Constitution in their behalf.").

55. On one hand, it is not surprising that liberal feminists would acknowledge cultural differences, since liberalism generally promotes choice. On the other hand the approach of liberal feminists in the international context is distinguishable from traditional liberal feminism in North America, which is primarily concerned with liberty and a certain type of equality that tends to focus on issues that primarily affect white middle and upper-middle class women. For a detailed description and critique of U.S. liberal feminist politics, see ALISON M. JAGGAR, *FEMINIST POLITICS AND HUMAN NATURE* 173-203 (1983). For another critique, see BELL HOOKS, *FEMINIST THEORY FROM MARGINS TO CENTER* (1984).

56. Boulware-Miller, *supra* note 48; Slack, *supra* note 48.

57. An-Na'im, *supra* note 51.

on spousal veto of family planning services,<sup>58</sup> and Yougindra Khushalani's book on the protection of women's "dignity and honour" during times of war.<sup>59</sup>

### A. *Focusing on the Existence of Rights in International Legal Instruments*

#### 1. Deducing the Rights from the Instruments

Doctrinalists focus most of their efforts on interpreting international legal provisions so as to guarantee the particular rights they advocate. In attempting to prove the guarantee of certain rights in positive law, many of these advocates follow a method of overkill: the more documents from which they can derive a right, the more likely its existence seems. Although this method is quite common in public international law,<sup>60</sup> its manifestation in women's human rights advocacy reflects a question about whether to pursue the "human rights of women," through an appeal to universal human rights law, or to pursue "women's rights," through a more specific appeal to law that seems particular to women's situation. Whether advocates are attempting to achieve the "human rights of women" or "women's rights" is a recurring theme throughout women's human rights advocacy.<sup>61</sup>

For feminists, this concern is not unique to human rights law. Feminists in the United States, for example, have debated about how best to secure a legal right to abortion. While some argue that a general constitutional right to privacy protects women's right to choose an abortion, others suggest that the Equal Protection clause might better assimilate such a right by allowing for a more specific focus on the

58. Cook & Maine, *supra* note 50. Spousal veto is the practice whereby a "spouse, usually the husband, can veto a partner's use of family planning services." *Id.* at 339.

59. KHUSHALANI, *supra* note 49.

60. Part of the reason for this overkill method in much of public international law is, I believe, customary law. Since the more present a principle is in positive international law, the more likely it is to become a part of customary law, a State might be considered bound by customary law that is equivalent to provisions of a treaty or convention to which it chose not to bind itself. For an analysis of the roles and indications of sovereign consent in the creation of customary law, see David Kennedy, *The Sources of International Law*, 2 AM. U. J. INT'L L. & POL'Y 1, 36-39 (1987). For a discussion of the interplay between human rights and customary law, see Martti Koskenniemi, *The Pull of the Mainstream*, 88 MICH. L. REV. 1946 (1990) (reviewing THEODOR MERON, *HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW* (1989)).

61. See *supra* note 2. Institutionalists, for example, as they focus either on mainstream institutions or on specialized institutions (and occasionally both), struggle with a similar issue. One institutionalist, Laura Reanda, specifically names a tension between the global and the particular. See Reanda *infra* note 136, at 12 (discussed *infra* at text accompanying note 159). Among external critics, there is also disagreement about whether human rights theory, in its present form, is capable of accommodating women's rights or whether it must be reconceptualized to incorporate those rights that women themselves define. See *infra* Part IV(A) and IV(B).

gender issues implicated by abortion.<sup>62</sup> Still others might contend that each of these general provisions is too indeterminate to secure the right; they might argue that the Constitution must be amended with specific language guaranteeing a women's right to choose an abortion.

In the women's human rights context, doctrinalists argue on one hand that the general language of mainstream instruments recognizes women's rights. On the other hand, they maintain that women's rights are more definitively recognized through specialized women's instruments, such as the Women's Convention, and the specialized language of mainstream instruments. Regardless of how many instruments the advocates cite, though, each advocate tends to focus either on mainstream or specialized instruments.

While different advocates emphasize different documents, they do not usually specify why they choose to concentrate on certain instruments. They do not explain why, if a right exists in one document, they need to find it in others. If women's rights have existed since the beginning of human rights law, then why is there a need for specialized instruments? Or if the Women's Convention is as comprehensive as many claim, why look to any other documents?<sup>63</sup> Some advocates seem to hone in on those documents they believe are more authoritative, while others appear to concentrate on those that better articulate the rights they advocate.

Whether they are mostly concerned with mainstream or specialized documents, the doctrinalists all begin their analyses with the most mainstream of international instruments: the United Nations Charter and the Universal Declaration of Human Rights.<sup>64</sup> Perhaps they do so out of a sense that those documents are most authoritative,<sup>65</sup> or to show that women's rights are a part of all human rights. Even those

---

62. See generally Frances Olsen, *The Supreme Court, 1988 Term-Comment: Unraveling Compromise*, 103 HARV. L. REV. 105 (1989) (discussing and critiquing these approaches to abortion). A similar issue has been the center of much disagreement among feminists in the last two decades in the United States, in the form of the "equal treatment/special treatment" debate. For an excellent and concise discussion of this debate, see Martha Minow, *Adjudicating Differences: Conflicts Among Feminist Lawyers*, in CONFLICTS IN FEMINISM 149, 149-56 (Marianne Hirsch & Evelyn Fox Keller eds., 1990).

63. But see *supra* note 60 and accompanying text for a discussion of the use of overkill to make claims of customary international law.

64. Both Slack and Boulware-Miller begin their arguments that female circumcision is a human rights violation by turning to the Universal Declaration. See Slack, *supra* note 48, at 464; Boulware-Miller, *supra* note 48, at 162. An-Na'im also begins his exploration of international law with the Declaration. See An-Na'im, *supra* note 51, at 502-03. Khushalani and Cook and Maine start with the Charter. See KHUSHALANI, *supra* note 49, at 77-87 (where she first discusses the Charter and then the Universal Declaration); Cook & Maine, *supra* note 50, at 340.

65. While at its inception the Declaration was considered formally non-binding, many argue that much of it has come to be seen as customary law. See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); An-Na'im, *supra* note 51, at 503.

authors who primarily discuss specialized instruments do not critique mainstream instruments for failing to guarantee the rights they advocate. Rather, they turn from an initial deference to the mainstream documents to a more careful and thorough analysis of the specialized ones.<sup>66</sup>

At some point, each doctrinalist turns to specialized instruments, or to specialized language of mainstream instruments. The different ways advocates discuss specialized instruments reflect some ambivalence surrounding the instruments' importance and distinctiveness. Slack, for example, accords the Women's Convention no special status, treating it as just one of many of the international legal documents on which she relies for support.<sup>67</sup> Cook and Maine take the opposite approach, as they focus nearly all of their attention on the Women's Convention. Indeed, the part of their article that discusses instruments other than the Women's Convention comprises only one sentence and a few footnotes.<sup>68</sup> Still, they do not let go of mainstream and other documents that might also recognize (perhaps more authoritatively) the rights they advocate.

An-Na'im's approach to the Women's Convention falls somewhere in between those taken by Slack and Cook and Maine, as he openly confronts the issue whether to pursue general human rights or specific women's rights to improve women's situation. In his exploration of the positive international law that guarantees women's rights, An-Na'im notes that "the most significant developments in the rights of women have been achieved through treaties and conventions. This was accomplished by both the general human rights instruments and those specialized in the rights of women."<sup>69</sup>

Before turning to those treaties and conventions, An-Na'im ana-

---

66. Cf. my discussion of institutions, *infra* Part III (noting that although authors who move to more specialized institutions critique those who control mainstream institutions for not assimilating women's rights, they never critique the legal structure of the mainstream institutions themselves or of the instruments that create them).

67. In fact, she gives it less significance than other documents, as she refers to it merely for support for her proposition that female circumcision "can be considered a violation of the rights afforded women and children." Slack, *supra* note 48, at 465. Slack focuses most of her analysis of international instruments on discussions of the African Charter on Human and People's Rights, the Draft Charter on Human and People's Rights in the Arab World, and the Declaration of the Rights of the Child. *Id.* at 464-67.

68. See Cook & Maine, *supra* note 50, at 341 (citing a number of mainstream documents, for example, to support the one sentence claim that spousal veto practices impair or nullify women's "rights to life, health care, rights to privacy and autonomy, and the right to found a family according to one's wishes") (citations omitted).

69. An-Na'im, *supra* note 51, at 502. He turns to treaties and conventions after dismissing the possibility that customary law might afford women, or any individuals, human rights protection. *Id.* ("Since individuals were traditionally regarded as objects rather than direct subjects of international law, custom did not address their rights as such.") (citation omitted).

lyzes the Universal Declaration of Human Rights as "a non-treaty document of special significance."<sup>70</sup> He then turns to a "brief survey of human rights instruments, [focusing] on rights and principles which are of special interest to women."<sup>71</sup> But he avoids making women's rights too particular, insisting that this special focus

should not be taken as implying that women are not concerned with the full ranges of human rights. It simply means that besides being equally affected by and concerned with all the social, economic, cultural, civil and political human rights, women have traditionally been victims of certain types of oppression and discrimination which make certain rights specifically applicable to them.<sup>72</sup>

In determining which instruments are of special interest to women, An-Na'im does not distinguish between mainstream and specialized instruments. Instead, he turns to any instruments that "embody the fundamental principle of non-discrimination on grounds such as sex."<sup>73</sup>

Eventually, An-Na'im turns to a discussion of the Women's Convention, which he considers "[t]he most comprehensive and important specialized instrument."<sup>74</sup> Even then he devotes only two paragraphs and a couple of extensive footnotes to its interpretation, treating it merely as the last in a sequence of important documents that recognize women's rights. While he has the sense that the Women's Convention is "comprehensive and important," he never clearly distinguishes it from the other instruments with which he deals. He does not list any rights, for example, that can be derived from the Women's Convention that cannot be derived from other documents.<sup>75</sup>

Structurally, then, An-Na'im does not significantly privilege any document or group of documents that he believes guarantees women's

---

70. *Id.* For his discussion and analysis of the Declaration, see *id.* at 502-03.

71. *Id.* at 503.

72. *Id.*

73. *Id.* at 504; see generally *id.* at 503-08 (discussing a number of international conventions and specialized instruments, including the International Covenant on Social, Economic and Cultural Rights, the International Covenant on Civil and Political Rights, and instruments of the International Labor Organization).

74. *Id.* at 508.

75. An-Na'im does, however, hint at one possible distinction. Referring to articles 3 through 16 and emphasizing article 5 of the Women's Convention, he points out that the Convention "follows up with more specific and precise provisions in the fields of political and public life, education, employment, health care, and other areas." *Id.* For him, article 5's mandate for States to modify social and cultural patterns is of particular significance "because no legal or other official and formal measures can possibly achieve the objectives of equality and human dignity for women without the necessary education and elimination of attitudes and social norms and practices which are antithetical to the rights of women." *Id.* at 508 n.76. Paradoxically, then, the distinction between the Women's Convention and other international documents seems to be that the Women's Convention actually creates a positive law mandate to go outside of positive law to ensure the actualization of women's rights.

rights. Though he begins to articulate his approach to the documents, seeing himself as focusing on those instruments that contain special provisions regarding women's rights or discrimination against women, at the end of the article he resorts to a general, rather than specific, approach to human rights:

In conclusion, the wholeness of women as human beings must be emphasized. Efforts to promote the full range of human rights . . . are as conducive to maintaining respect for the rights of women, as efforts to promote rights especially significant to women. . . . In the final analysis, the rights of women are an integral part of the individual and collective human rights of their men and children.<sup>76</sup>

By concluding that women's rights are merely a part of all human rights, An-Na'im eases the tension between the two.

This uncertainty about which legal instruments to rely on when advocating women's rights also surfaces in Khushalani's book, if somewhat differently. She structures her book around analyses of different legal instruments, only a few of which are human rights documents, in an attempt to demonstrate that women have a positive right not to be raped (a right to have their "dignity and honour" respected) during times of war. As she makes clear with the opening lines of the book, her aim is to prove that the right has existed since "time immemorial":

In this book an attempt is made to focus attention on an aspect of a human right which has always remained eclipsed due to the attitude of the civilized nations of the world towards such a right. The present work is not meant to exhort people to act more humanely but it tries to bring into light the hidden rules that they have been enjoined to follow and have in fact been unconsciously following from time immemorial. These rules have been and are a part of international law, not merely moral percepts [sic] or suggested modes of conduct.<sup>77</sup>

Sometimes she derives this right from general rights language embodied in positive law, while other times she derives it from fairly specific language. Khushalani oscillates between referring to general and specific language in much the same way that other authors oscillate between referring to mainstream and specialized instruments. The methodology of Khushalani's book involves analyzing a legal instrument, quoting from it, italicizing any language from which the right might be derived, and then discussing whether the language either specifically names or permits the derivation of the right.

Khushalani's discussion of the Geneva Convention of 1949 Relative to the Protection of Civilian Persons in Time of War provides one

---

76. *Id.* at 516.

77. KHUSHALANI, *supra* note 49, at 1.



example of how she deals both with those provisions that do and those that do not specifically enumerate the right.<sup>78</sup> In discussing the provisions of article 3 of the Convention, she acknowledges that it does not specifically mention rape of women. She nevertheless derives a right of women not to be raped in wartime from general language prohibiting “outrages upon personal dignity.”<sup>79</sup> Article 27 of the Convention, on the other hand, includes language particular to the protection of women. Khushalani, therefore, refers immediately to the language of the text, emphasizing with italics this specific language: “*Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.*”<sup>80</sup> Khushalani follows this method throughout the book, so that by the end, she has conveyed a clear sense that an endless number of international legal documents, through both general and particular language, protect women from rape in wartime.

All the doctrinalists cite document after document to support the particular rights they advocate. While they rely on mainstream documents to a certain extent, they all at some point turn to specialized language or instruments. The different emphases they place on certain types of language or instruments reflect different views on the same question: whether women’s rights are a part of human rights or are unique to women.

## 2. Reinforcing the Authority of the Law

Doctrinalists become aware at some point in their analyses that the rights they advocate, even though they might exist in positive law, are not always actualized. At this point, then, they identify a gap between the existence of positive law and the reality of women’s lives. Most of the advocates respond to this gap by first showing that the law they cite is authoritative — that it is legally or morally binding — and then working out strategies for implementing the law. While An-Na’im, Cook and Maine, Slack, and Boulware-Miller turn to issues of implementation, Khushalani does not, although she is nevertheless aware of the gap.

Unlike most doctrinalists, Khushalani spends little time discussing the magnitude of the human rights violations about which she is con-

---

78. *See id.* at 39-46.

79. *Id.* at 41 (“Article 3(c) in unequivocal language prohibits ‘outrages upon personal dignity’ in particular humiliating and degrading treatment. Rape of women though not specifically mentioned is clearly prohibited under Article 3(c) as an outrage upon personal dignity and humiliating and degrading treatment.”).

80. *Id.* at 42.

cerned. At least twice, though, she acknowledges that the existence in authoritative law of the right of women not to be raped in wartime has not ended violations.<sup>81</sup> Instead of breaking the routinized structure of her book to discuss issues such as implementation, she merely moves from that acknowledgment of an enforcement gap regarding particular instruments to the analysis of other (perhaps more authoritative) instruments.

Khushalani seems to avoid discussion of implementation by downplaying the enforcement gap, and by reinforcing the authority, both legal and moral, of public international law. She does not, however, assume that authority; instead, she continually shows why incorporation of "[t]he rule of the law of nations strictly prohibiting attack on the honour of women and protecting against rape in almost every treaty, convention and agreement dealing with the inherent dignity and inalienable rights of the members of the human family"<sup>82</sup> is important. That is, each time she deduces the right from a legal instrument, she claims the instrument's absoluteness.<sup>83</sup> In addition, she often goes to great lengths to express that particular provisions of each instrument on which she relies are authoritative.<sup>84</sup>

Even after claiming that the laws are absolute, Khushalani searches for yet more authority, suggesting that the right she advocates is more than a positive right guaranteed in various authoritative documents. She argues that the right is "a developing norm having a character of *jus cogens*,"<sup>85</sup> and should be recognized as a peremptory norm of international law from which no derogation would be

---

81. *Id.* at 11 ("In spite of these explicit regulations of established customs [set forth in the Hague Conventions of 1899 and 1907], and of the clear dictates of public conscience, outrages upon the honour of women have been accepted through the years as almost a natural phenomenon of war."); *id.* at 83 ("It is rather sad that very often these mandatory provisions [of the U.N. Charter] are disregarded and mankind's shared aspirations to respect the dignity and worth of the human person has become a dream rather than reality.")

82. *Id.* at 1.

83. For example, after discussing the Universal Declaration of Human Rights, she asserts: The articles use the word "shall", thereby mandatorily prohibiting inhumane or degrading treatment and attacks upon the honor. Nothing more is required to prove that the right of women to protection of their dignity and honor is further confirmed under the Declaration. And mass rape of women is denial of such a right, being violative of the mandatory prohibitions of the Declaration.

The rights guaranteed under the Declaration are absolute.

.....  
The effect of these two articles mentioned above is to make some of the human rights guaranteed by these documents absolutely inviolable.  
*Id.* at 86-87.

84. Khushalani's discussion of the Geneva Convention of 1949 again provides a good example. See, e.g., *id.* at 40 (discussing article 3 as "[t]he most fundamental principle underlying the Civilian Convention"); *id.* at 42 (discussing the significance of article 27).

85. *Id.* at 152.

permitted.<sup>86</sup>

Perhaps because Khushalani centers her argument around the existence of rights in legal documents, she is particularly concerned to show that such existence makes a difference. She is not alone in this concern. In fact, all of the doctrinalists generally assume that the instruments they cite have some authority. Sometimes their belief in the authority is implicit; the very project of going through document after document to prove the existence of a right evinces a belief that the documents have some force. Other times it is more explicit. An-Na'im and Cook and Maine all briefly express their belief in the authority of the law, even though they do not place nearly the same emphasis on it as does Khushalani.<sup>87</sup>

In addition to reinforcing the legal authority of international documents, An-Na'im and Khushalani also assert that the instruments to which they refer have some moral authority. Appeals to morality emerge, for example, in Khushalani's discussion of *jus cogens*,<sup>88</sup> and in An-Na'im's statement that the Universal Declaration has both political and moral force.<sup>89</sup> Khushalani's appeal to morality is greatest of all the doctrinalists, and is often intertwined with her appeals to legal authority. The following are but a few examples:

Rape of women is a crime against humanity as well as a grave breach of the Geneva Conventions and Protocol I.<sup>90</sup>

[I]t is quite clear that under the provisions of the Charter, the obligation on states to protect the dignity and honor of women is binding upon

---

86. *Id.* at 150-51 (*Jus cogens* is "a norm of absolutely peremptory character, very well confirmed by the rules of the internal law of states. The source of this rule lay in the custom from which no derogation was permitted.").

87. An-Na'im only brings up the issue of authority when analyzing the Universal Declaration and the two Covenants. See An-Na'im, *supra* note 51, at 502-03 ("Some would even argue that . . . the UDHR [Universal Declaration on Human Rights] has achieved the status of binding custom. . . . In any case, the provisions of the UDHR enjoy special moral and political weight and can be used anywhere in the world to support claims to at least the underlying principles of its main provisions."); *id.* at 503-04 (the two Covenants "give more precise treaty formulation for the principles of the UDHR, thereby making them legally binding on the States Parties").

Cook and Maine also refer to the legal status of the rights they have shown to exist, but not by insisting on the authority of any particular instruments. Rather, for them the authority is more implicit. See, e.g., Cook & Maine, *supra* note 50, at 342 (beginning their section on remedies with: "Where governments have established rights to sexual non-discrimination in their national constitutions or by ratification of international human rights conventions, they have legal duties to implement those rights.").

88. See Khushalani, *supra* note 49, at 150-52.

89. See An-Na'im, *supra* note 51, at 502-03. Cook and Maine also appeal to morality, but not a morality arising from the law; instead, they appeal to the "professional ethic of health providers." See, e.g., Cook & Maine, *supra* note 50, at 342 ("Family planning associations should recognize that maintaining their requirements for husband's authorizations violates women's rights to sexual non-discrimination and are contrary to the professional ethic of health care providers."); *id.* at 343.

90. KHUSHALANI, *supra* note 49, at 1.

them in the sphere of law as well as in that of conscience.<sup>91</sup>

Assuming, though not admitting, that the resolutions declaring the principle of protection of civilian population in armed conflicts are not binding, it is, an alternative submitted that they possess moral force and do, as such, exert great influence.<sup>92</sup>

For Khushalani, it appears, morality is almost an authoritative measure of last resort. She seems to be suggesting that if States do not believe they are legally bound, they should at least recognize that

[i]f these resolutions do not create direct legal obligations on the part of states, their provisions at least impose upon them the necessity of being guided in their conduct by those provisions. States have an obligation to act in good faith in accordance with the principles expressed in the resolutions.<sup>93</sup>

For Khushalani, then, moral obligation is real.

In summary, doctrinalists seem intent on showing, implicitly or explicitly, that international law is legally or morally binding (or both). An assumption that the existence of positive law makes a difference is essential to their doctrinal approaches. In the end, though, the advocates do not believe that the mere existence of rights in positive law leads to the actualization of those rights. Consequently, all except Khushalani turn to strategies for implementation of the rights they advocate.

### B. *Strategies and Remedies: Making the Law Work*

After doctrinalists discuss the existence and authority of legal instruments and the rights they embody, questions often arise about implementation and enforceability. The surfacing of these questions is usually tied to a concern about cultural differences and disagreements, and their impact on the law's effectiveness. Thus, the works often drift into a more strategic mode either when the advocates cannot claim absolute legal or moral authority, or when they acknowledge that authority alone will not make women's rights a reality. At the moment the correlation between the existence of rights in international law and the implementation of those rights in the real world seems uncertain, advocates step back a bit from the discourse about the existence of

---

91. *Id.* at 83.

92. *Id.* at 129.

93. *Id.* at 129-30. Although Khushalani here embraces moral obligations as important, at other times she seems to denigrate them. The start of her book, for example, argues that rules about not raping women are "a part of international law, not merely moral percepts [sic]." *Id.* at 1. At another point, however, she suggests that international law entails nothing but moral obligations: "International law, after all, is merely persuasive — a moral but not a legally binding obligation. Therein lies one of its great weaknesses in regard to the conduct of global warfare." *Id.* at 36.

positive rights and the authority of the law providing those rights. They begin to look for means for seeing the rights actualized.

In this shift to strategy, women's rights advocates seem to be addressing a new audience. This new audience, largely composed of women's rights activists, wants to know about more than the inclusion of rights in positive law; it wants to know how to implement law in the real world in order to achieve women's rights.

I do not mean to suggest here that advocates of other human rights do not also think about the best strategies by which to actualize those rights. Rather, the move to strategy in the case of women's human rights is yet another manifestation of the uncertain relationship between women's rights and human rights. The turn to strategy by women's rights advocates represents, I believe, an ambivalence about relying on the many documents to which they have just appealed. Part of the ambivalence stems from the controversial nature of many of the rights advocated. Often the presumed beneficiaries of some of the rights must be convinced, largely because of cultural differences, that they are and should be guaranteed such rights. Even the Women's Convention responds to cultural differences with its doctrinal embodiment of the turn to strategy, manifested in its unusual requirement that States "modify the social and cultural patterns of conduct of men and women."<sup>94</sup>

The strategic approaches, then, seem to emerge out of a basic lack of faith in the ability of positive law, on its own, to achieve change. This lack of faith initially manifests itself in questions about the enforceability of international law. While doctrinalists do not generally assume bad faith on the part of those entities that monitor and enforce human rights law,<sup>95</sup> they nevertheless recognize difficulties with enforcing "universal" human rights.

While some doctrinalists, at least initially, perceive the difficulties as no different from those involved with enforcing other human rights,<sup>96</sup> others see them as specific to women's human rights. For Cook and Maine and Boulware-Miller, for example, women's rights

---

94. Women's Convention, *supra* note 8, art. 5(a), 1249 U.N.T.S. at 17; *see supra* note 75 (discussing An-Na'im's approach to article 5).

95. *But see infra* Parts III & IV (discussing the fact that bad faith on the part of those who deploy human rights discourse is often assumed).

96. Slack, for example, notes that "[o]ne of the problems in dealing with a universal declaration designed to be followed as international law is enforcement. Violations of international law are ubiquitous; to achieve universal compliance will be most difficult." Slack, *supra* note 48, at 476. An-Na'im shares this concern: "Unfortunately, like other aspects of human rights, international law on the rights of women suffers from the inadequacy of enforcement or compliance mechanisms even in relation to the States Parties to the conventions." An-Na'im, *supra* note 51, at 509.

create a unique obstacle, largely due to cultural differences and disagreements about the role of women and the priority of women's rights issues. Cook and Maine see the problem as one of making individuals in particular cultures comply with international and domestic law:

Spousal authorization requirements for the sale and distribution of contraceptives, and the provision of voluntary sterilization and abortion services, are found in laws, regulations, and clinic guidelines. Often these requirements violate principles of sexual nondiscrimination found in national constitutions or international human rights conventions. They persist, in part, because of misperceptions about what the law allows and what cultures can require. Many cultures subscribe formally or informally to beliefs that men have rights to their wives' fertility, and that whoever impairs or exploits that fertility commits wrongs against them.<sup>97</sup>

Boulware-Miller believes that cultural differences restrict international institutional enforcement bodies from implementing the rights:

Although female circumcision appears to be a human rights violation prohibited by the covenants of international organizations, these organizations alone cannot effectively combat the practice.

. . . .

Because of internal disagreement and resistance from certain African countries . . . international organizations are inherently restricted in what they can do to attack female circumcision.<sup>98</sup>

This concern about cultural differences plays a significant role in doctrinalists' discussions about strategy. Indeed, it is largely due to this concern that advocates move beyond merely discussing positive law to formulating attempts at putting law into practice.

When dealing with strategies for enforcing rights, most doctrinalists are concerned that not all people — indeed not all women — agree with their formulations of rights violations. As advocates claim universal human rights in the face of a world that does not universally agree, they are plagued by the counter-claim of cultural relativism. So strong is this counter-claim that Slack frames the purpose of her article as one of determining “at what point the ‘tradition’ female circumcision becomes a human rights violation justifying pressure from

---

97. Cook & Maine, *supra* note 50, at 340.

98. Boulware-Miller, *supra* note 48, at 162-63 (citations omitted); *see also id.* at 164 (“The efforts of the United Nations (UN), the World Health Organization (WHO), and the United Nations Children's Fund (UNICEF), demonstrate how difficult it is for international organizations to develop a single coherent policy regarding female circumcision.”).

Those advocates who primarily focus on institutions generally do not see cultural differences as a potential obstacle to achieving women's rights. Instead, they argue that the institutions authorized to enforce the rights either do not make women's rights a priority or do not have the power to enforce them. *See generally infra* Part III.

foreign cultures to end this 'tradition.'"<sup>99</sup>

While not all women's rights advocates overtly confront this counter-claim of cultural relativism, doctrinalists often do. Their reliance on universal positive law leads them to reject a cultural relativist perspective. Nevertheless, they are acutely aware that disagreements exist. Rather than suppressing the disagreements, most of the advocates accept them and attempt to work around them. They do not see such disagreements as causing or reflecting any conflicts within human rights or between women's rights and human rights.

This acceptance of cultural differences, particularly among women, distinguishes these feminists from the radical feminists I discuss in Part IV, who, by focusing on a male/female dichotomy as the obstacle to achieving women's human rights, are less likely to acknowledge these differences. The doctrinalists' acknowledgment of differences in the present context is, in my mind, an asset of their liberal feminist approaches.

Although doctrinalists accept the existence of cultural differences, they each react to them differently. Slack carefully considers the cultural relativism claim, spending a great deal of her article setting forth and responding to the conflict she sees between human rights and "cultural self-determination".<sup>100</sup> "The heart of the controversy lies in finding a balance between a society's cultural self-determination, and the protection of individuals from the violation of their human rights."<sup>101</sup> Slack never sees the conflict as one between different rights, only between rights and culture. She does not address the possible argument that rights exist to protect people's cultures.<sup>102</sup>

After her analysis of the universality/relativity (rights/culture) debate, Slack comes down on the side of universality and rights (and believes much of the world comes down on that side as well):

There is a good deal of agreement that in order to live in a progressively shrinking and ever more interactive world, there must be some method by which each society and culture can live more harmoniously with others. Perhaps, if the most fundamental of the proposed human rights,

99. Slack, *supra* note 48, at 439. She asks:

At what point should a practice be deemed dangerous enough to be a violation of human rights, and hence, worthy of external interference? How is this determined, and by whom? Does female circumcision fit into this category? The controversy may be restated as one of cultural self-determination versus human rights.

*Id.* at 464.

100. Slack, *supra* note 48, at 462-66, 473-76.

101. *Id.* at 439; see also *id.* at 462 ("The controversy boils down to one of tradition versus health — the right to carry on a tradition versus the right to protect girls and women from unnecessary pain, health complications, permanent bodily damage, and even death.").

102. See, e.g., International Covenant on Civil and Political Rights, *supra* note 9, arts. 1, 27.

such as those to life and health, and those protecting against slavery and torture, were universally adopted, there would be less conflict of culture, and violations of such rights would be more conspicuous and easily identified.<sup>103</sup>

Far from recognizing potential rights conflicts, Slack sees universal human rights as a way to avoid conflicts. She derives her argument that States are obliged to acknowledge and act upon women's rights from her notion of universality:

If human rights are not simply a Western ideology, but are inalienable — entitled to all human beings, and cannot be denied by a "state" or government — then developing countries cannot deny these rights to their people. Governments have an obligation to humanity, therefore, to acknowledge these rights and adopt policies to implement and enforce them.<sup>104</sup>

Even while Slack confronts the universality/relativity debate and comes down firmly on the side of universality, she still acknowledges that the rights are not universally recognized. Rather than relying on the mere existence of the rights (which are "inalienable" and now seem more like natural rights than positive rights), she thinks about strategies for actualizing them and for seeing them acknowledged universally.

Although other doctrinalists do not squarely confront the cultural relativism/universality debate, the recognition of cultural differences affects their strategies. For them, such differences must be taken into account when attempting to convince governments to recognize women's rights and when encouraging women, the supposed beneficiaries of the rights, to accept them.

In their appeals to governments, doctrinalists make positive international law the focus of their strategies. Their appeals to women are generally wrapped in rights language, often involving suggestions for teaching women their positive rights. Sometimes doctrinalists suggest extra-legal means, such as education about issues other than the law, to convince women to accept particular rights.

While Cook and Maine cover the spectrum of possibilities for implementation, or remedies,<sup>105</sup> many of their approaches respond to the fact that municipal law and regulations often permit or even require spousal veto practices. Such law, Cook and Maine claim, exists in direct conflict with international law and municipal constitutions

---

103. Slack, *supra* note 48, at 476.

104. *Id.* at 475.

105. Under their section entitled "Remedies," they list the following subsections: "Removal of Spousal Authorization Requirements," "Education of Service Providers," "Programs to Involve Men in Family Planning," "Consultation," "Ministerial Regulations," "Legal Reform," and "CEDAW Reports." Cook & Maine, *supra* note 50, at 342-43.



prohibiting sex discrimination. Since these requirements “persist, in part, because of misperceptions about what the law allows and what cultures can require,”<sup>106</sup> Cook and Maine set out to correct those misperceptions. Much of their strategy, therefore, involves educating women, governments, and service providers about the rights that exist in international law and about the meaning for spousal veto practices of prohibitions on sex discrimination. Cook and Maine assume that international law and some municipal law have assimilated women’s rights and that, if women correctly make the legal arguments, the rights can be attained.<sup>107</sup>

Even though Cook and Maine place a great deal of faith in international law, they are aware that, due to municipal law, it might not be sufficient to end spousal veto practices. Until municipal law does conform with international law, they seek other ways to stop the practices. They suggest, for example, that service providers might be taught to evade municipal law. If municipal law neither requires nor prohibits spousal authorization, Cook and Maine encourage service providers “to understand that seeking spousal authorization would be a breach of duty and that liability might result from that breach.”<sup>108</sup> But if the law codifies the requirement, “service providers need to know how the requirement is limited in law.”<sup>109</sup> Cook and Maine then suggest ways that service providers might get around what appears to be the law by exploiting any ambiguous language.<sup>110</sup> They even argue for a potential legal claim — based on common, not international, law — against those providers who do not circumvent municipal law.<sup>111</sup>

Slack and Boulware-Miller use international law directly to convince governments and women that female circumcision should be

---

106. *Id.* at 340.

107. Cook and Maine suggest a variety of ways that international law might be used to change spousal veto practices: complainants might argue that the practices violate various positive international human rights; governmental bodies could promulgate “corrective regulations” to bring municipal laws into compliance with international law prohibiting the practices; the Committee on the Elimination of Discrimination Against Women, created to enforce the Women’s Convention, could examine the issue through country reports. *See id.* at 343.

108. *Id.* at 342.

109. *Id.*

110. *Id.* (“Service providers can presume that husbands intend to observe rather than to violate their legal responsibilities to protect the lives and health of their partners. . . . The husband need not be notified of provision of a service unless the law so mandates by unambiguous express language.”).

111. *Id.* (“Indeed, in the absence of such legal mandate [indicated by “unambiguous express language”], disclosure to a husband may constitute legal breach of both contract and the commitment of confidentiality . . . while refusal to continue services to a client may constitute legally actionable negligence or abandonment.”).

prohibited. In doing so, they take what I call a strategic positivist approach. After listing all of the rights they believe are being violated by the practice of female circumcision, they decide strategically which rights to pursue, by determining which rights rubric governments and women are most likely to accept.

Boulware-Miller, for example, after having set forth three possible legal arguments — based on “the rights of the child,”<sup>112</sup> “the right to sexual and corporal integrity,”<sup>113</sup> and “the right to health”<sup>114</sup> — decides to pursue an end to the practice based on the right to health because “[w]omen and governments in Africa accept this approach.”<sup>115</sup> African governments will likely accept the right to health argument because they

are more concerned with basic health and economic problems than with the arguably more elitist rights they associate with Western countries, such as political rights and fundamental freedoms. By presenting female circumcision as a dangerous health hazard, proponents of this approach may be able to convince governments that its eradication is consistent with established governmental priorities.<sup>116</sup>

Boulware-Miller’s position, then, is not that other rights do not prohibit the practice, but that, as a strategic matter, they should not be emphasized. Slack reaches the same conclusion: “As for the government[s] of these countries, they will be more easily convinced of the importance of dealing with the issue of circumcision if it is linked with the right of their people to have decent health.”<sup>117</sup>

In addition to determining the best way to convince governments to abolish female circumcision, Boulware-Miller and Slack aim to convince women within those cultures where female circumcision is practiced that it should be ended. Through personal stories and reflections, they both express ambivalence about forcing international legal norms on women who perform circumcisions and on girls and women who may want to be circumcised. Slack tells one such personal story in the very first footnote of her article, the footnote that follows her name:

112. Boulware-Miller, *supra* note 48, at 165-69.

113. *Id.* at 169-72.

114. *Id.* at 172-76.

115. *Id.* at 172.

116. *Id.* at 173 (citations omitted). *But see id.* at 173-74 (discussing possible obstacles to this approach).

117. Slack, *supra* note 48, at 486. The approach taken by both Boulware-Miller and Slack stands in interesting contrast to the more general impression that civil and political human rights are taken more seriously than economic and social rights by the United Nations, if not by individual countries. *See, e.g., supra* note 5. The audience for their articles seems to have shifted away from the traditional Western international legal audience.

The issue of female circumcision is of special interest to me. As a Peace Corps volunteer in Mauritania, where roughly 80 to 90 percent of females are circumcised, I was witness to the problems associated with this practice. After having lived in my village for five months, one of my friends gave birth to a baby girl, and the family wanted to name her after me. I felt honored, but was afraid that this baby girl, with whom I now had special affinity, was destined to be circumcised. In Mauritania the practice is most often done within the first two weeks after birth, and this contributes to the already high level of infant mortality (approximately 20 percent). I discussed my concerns with the parents in my limited Arabic vocabulary, and was pleased to hear that they had reservations about the practice. During the next two weeks, with my encouragement, they decided not to have their daughter circumcised. Now, six years later, I have learned from a volunteer who was recently in my village that my namesake still has not been circumcised.

It is possible, however, that pressure from the villagers will force the parents to have the procedure done at a later date. . . . Also, it is possible that if the daughter remains uncircumcised, it will be difficult for her to marry. On the other hand, the family is well respected in the village, and their reservations may serve as an example to other families and thereby help to discourage the practice. I can only hope that this will be the outcome; this would be an example of how the influence of an outsider can be successful. This success would not come from the imposition of values, the passing of laws, or the coercion of people to change their ways, but rather through reinforcement of concerns already harbored — reinforcement by means of education and interpersonal communication.<sup>118</sup>

Boulware-Miller expresses personal *angst* about issues involving female circumcision in her conclusion. First, she explains the difficulty of campaigning against the practice:

Given the intimate nature of female circumcision and the complex factors involved in attempts to eradicate it, the success of any campaign is problematic. Female circumcision personally concerns those who have experienced it, and inevitably draws personal responses from those who have not. The personal aspect of female circumcision has contributed to the intensity attending its discussion, and it is the personal aspect which can lead to its successful eradication.<sup>119</sup>

In her penultimate footnote, accompanying the above text, Boulware-Miller openly discusses her own uncertainty:

My initial responses to this issue were ambivalent and confused. As a woman, I felt rage that the practice helped solidify and preserve society by the violation of female bodies; as a Black, I felt a perverse pride that an African tradition had managed to hold its own amid invasive values of beauty, morality, and self-worth; and as mother of a little girl at the age of most who are circumcised, I felt threatened by a vividly-imagined,

---

118. *Id.* at 437.

119. Boulware-Miller, *supra* note 48, at 176 (citation omitted).

but never-to-be-known loss.<sup>120</sup>

Even as both Slack and Boulware-Miller recognize and are open to significant cultural disagreements about the practice of female circumcision, even among women, they both argue against it. Their awareness of these disagreements, as well as their own ambivalence about the practice, affects their strategic use of international law. While Slack reinstates a universalist position,<sup>121</sup> Boulware-Miller confronts the disagreements among women through strategic positivism, determining that the right to health approach would best appeal to women.

Before settling on the right to health approach, Boulware-Miller spends a significant amount of time rejecting other possible rights that might be deployed to abolish the practice. She believes African women would not accept approaches based on those rights. She rejects the rights of the child approach, for example, despite its potential utility, because "[p]ractical problems associated with this approach . . . may prevent it from being effective."<sup>122</sup> She identifies four problems with this approach, all related to a concern that African girls or African women would not accept it.<sup>123</sup> She reaches a similar conclusion regarding an approach based on a right to sexual and corporal integrity:

While this approach has loyal adherents, its success is problematic due to the controversy it arouses. One response to the sexual and corporal integrity argument is that the term "mutilation" is disrespectful of African women who have been circumcised. . . . [I]n so describing an important part of African women's cultural identity, they offend all

120. *Id.* at 176 n.121.

121. See *supra* text accompanying notes 103-04.

122. Boulware-Miller, *supra* note 48, at 166.

123. The four problems noted by Boulware-Miller are as follows:

First, to challenge female circumcision as a violation of the rights of the child suggests that women who permit the operation are incompetent and abusive mothers who, in some ways, do not love their children. The success of this approach therefore depends in part on how it is implemented; if African women are offended by the implication that they are poor mothers they will likely reject the children's rights argument altogether.

The second problem with the rights of the child approach is that it conflicts with parents' desires to rear children independently and their notions of what is in their children's best interests. . . . Besides, if mothers value the economic, social, and cultural benefits of the operation, they are unlikely to be persuaded that it should not be performed on their daughters. . . .

The third problem with this approach is that it almost exclusively focuses on the physical harm done to a child when she is circumcised and does not address the positive feelings she may have as a circumcised woman. . . . As the girls grow into women they may forget the pain and argue that the practice need not be banned. Furthermore, it is difficult to attack a practice as harmful to children when it later gives them both social and economic benefits.

A final problem with approaching this issue from the rights of the child perspective is that many young girls believe that they want to be circumcised. . . . To argue that the girls themselves are opposed to the operation is therefore difficult; indeed, recent studies indicate that adolescent girls "voluntarily" undergo the operation.

*Id.* at 166-67 (citations omitted).

Africans.<sup>124</sup>

After discussing controversies between African and non-African women, she concludes that “[t]ensions among Africans and non-Africans . . . illustrate the difficulties of advocating a right to sexual and corporal integrity. Given the great amount of opposition to this approach, its ultimate effectiveness is far from guaranteed.”<sup>125</sup>

When Boulware-Miller finally accepts the right to health argument, she does so even in spite of certain difficulties because “African women accept the right to health argument”:<sup>126</sup>

Although the right to health argument may not bring immediate results, it is likely to have the most success because it considers the practice from the perspective of Africans. While many African women who would like to stop the practice of female circumcision agree that women have the right to sexual and corporal integrity and that children have the right to develop “in a healthy way,” given Africa’s socio-economic make-up, they find these exclusive approaches politically less acceptable. The right to health argument integrates the issues of physical, mental, and sexual health as well as child development.<sup>127</sup>

Boulware-Miller, then, mediates cultural disagreements about female circumcision by invoking positive international law, but in a way that she believes will be most acceptable to African women. By choosing the right to health rubric, however, she does not squarely confront the practice of female circumcision. What would happen, for example, if the practice were to be performed under more hygienic conditions?<sup>128</sup>

All the doctrinalist advocates, except Khushalani, occasionally leave the realm of legal discourse in attempts to actualize women’s rights. At those moments when they most accept cultural differences, they seem willing to pursue extralegal means to achieve change.

124. *Id.* at 170. For a further discussion of this issue, see Savanne, *supra* note 48.

125. Boulware-Miller, *supra* note 48, at 172. For a more complete discussion of the specific controversy to which she refers, see *id.* at 171-72. See also her observation that

African women may perceive the right to sexual and corporal integrity to be an imposing and judgmental approach because its Western feminist advocates often ignore the cultural influences that perpetuate the practice. Western feminists are considered culturally insensitive by African women, who would prefer to view female circumcision within a socio-economical and political context rather than as a violation of their sexuality or physiology.

*Id.* at 170-71 (citation omitted).

126. *Id.* at 173.

127. *Id.* at 176-77 (citation omitted).

128. This possibility is not as remote as it might seem. See David Gordon, *Female Circumcision and Genital Operations in Egypt and the Sudan: A Dilemma for Medical Anthropology*, 5 MED. ANTHROPOLOGY Q. 3, 12 (1991) (reporting that in urban parts of the Sudan, there is already an official policy of using the health care system to perform the procedures in order to reduce complications and health risks and that trained medical personnel with drugs and equipment have been disseminated and used to perform clitoridectomies and other genital operations) (citing ASMA EL DAREER, *WOMAN, WHY DO YOU WEEP?* (1982); FRAN P. HOSKEN, *THE HOSKEN REPORT: GENITAL AND SEXUAL MUTILATION OF FEMALES* 47, 287 (3d ed. 1982)).

Sometimes they even question whether legal discourse and positive rights offer the answers to the problems they describe.

An-Na'im, for example, ultimately raises questions about whether international law really can be of any use to women. As with other advocates, a concern for cultural differences guides his questions. At one point he concentrates on enlisting the cooperation of Muslim women and men in enforcing the law, which he believes would require them to see that the law is normal, not alien, to Muslim culture:

International standards are meaningless to Muslim women unless they are reflected in the concrete realities of the Muslim environment. . . . To obtain their cooperation in implementing international standards on the rights of women, we need to show the Muslims in general that these standards are not alien at all. They are, in fact, quite compatible with the fundamental values of Islam. In other words, we need to provide Islamic legitimacy for the international standards on the rights of women.<sup>129</sup>

Just one page later, he becomes more strategic about implementation. This time, whether women are aware of the guarantee of their rights in positive law seems unimportant:

Our commitment should not be to the rights of women in the abstract, or as contained in high-sounding international instruments signed by official delegations. It should be a commitment to the rights of women in practice. . . . It is irresponsible and inhumane to encourage these women to move too fast, too soon and to repudiate many of the established norms of their culture or religious law, without due regard to the full implications of such action.<sup>130</sup>

Other doctrinalists make a similar move in calling for extralegal strategies. Education is the most common theme. Even Slack, with her basic universalist response to cultural disagreements, does not rely on the universality of the law to end female circumcision. She suggests education (not surprisingly, health education) as a means of avoiding conflicts about culture:

Health education is recommended as the most probable to succeed, because it avoids the tradition and religion arguments. Individuals tend to accept health education from people outside their culture more easily than criticism; information about the clinical complications of circumcision is less threatening than the accusation that their traditions are immoral or unnatural.<sup>131</sup>

Cook and Maine, even with their nearly exclusive focus on positive law, also suggest nonlegal education as a way of dealing with cultural differences:

---

129. An-Na'im, *supra* note 51, at 515.

130. *Id.* at 516.

131. Slack, *supra* note 48, at 440.

It is said that in some countries service providers fear that removal of spousal authorization will offend cultural values, such as Islamic law which recognizes spousal consultation, and might result in actions or public criticism against them. One way to prevent such results may be to develop programs that involve men in sharing contraceptive responsibility, educating them as to the increased risk of pregnancy-related deaths . . . .<sup>132</sup>

Doctrinalists, then, in addition to using law strategically, often move outside law in response to cultural differences.

Although doctrinalists turn to strategy, none would abandon positive law; by far, the largest parts of all of their works concentrate on international legal instruments. Even when they turn to strategy and remedies, they generally treat these as means of ending practices that they firmly believe violate international human rights law.

In summary, the doctrinalist approach to women's human rights displays many of the difficulties that surround attempts to make women's rights assimilate to human rights discourse. As doctrinalists advocate women's rights, they grapple with general issues surrounding doctrinal human rights advocacy: which documents should be used to pursue a claim, how human rights might be made enforceable, and how arguments of cultural relativism should be addressed. In the context of women's rights, new issues arise: whether women's rights advocates should use mainstream or specialized instruments to pursue their claims, whether women's rights pose special enforcement difficulties, and how cultural disagreements among women should be addressed. Exploring the intersection of doctrinal and feminist approaches to law illuminates these issues. Doctrinalists, consciously or not, continually bump up against these issues as they attempt to assimilate women's rights to the present human rights structures.

Even though doctrinalists are confronted with a variety of difficulties, they do not give up on human rights discourse or openly suggest that it might be unable to assimilate liberal feminist demands. To the contrary, they work within the human rights paradigm, striving to make the discourse work for women. In their attempts to make it work, doctrinalists push and pull on the language of the law to ensure that women's rights are guaranteed, at least in positive law. They realize, however, that rights without remedies will not improve women's status. Hence, they pursue a variety of strategies, generally using legal discourse, to see the rights implemented.

In many ways, doctrinalists take the most assimilationist approach to human rights discourse of any discussed in this article. They are

---

132. Cook & Maine, *supra* note 50, at 343 (citations omitted).

the least likely to overtly critique either human rights discourse or those who control and deploy it. They insist that women's rights are very much a part of human rights, and they proceed on that assumption. By doing so, doctrinalists are least likely to accept what others might consider limitations of human rights discourse. Perhaps out of their determination to make it work, they end up reshaping the discourse the most.

### III. RELYING ON AND CRITIQUING INSTITUTIONS

A second approach to women's human rights concentrates on international institutions that have been created to enforce human rights. Those who take this approach are not overly concerned about doctrine. They do not advocate particular women's rights, and they are not preoccupied with determining which international instruments guarantee women's rights. Instead, institutionalists analyze the effectiveness of institutions in enforcing women's human rights, and suggest measures that might improve enforcement.

Institutionalists, nevertheless, have some connection to positive law and doctrine. The institutions they study, especially those created to enforce particular conventions, spring from positive law. Moreover, institutionalists seem to believe that if the positive law or doctrine is to mean anything, institutions must transform that law or doctrine into action, through pragmatic enforcement mechanisms.<sup>133</sup>

Even with their diminished concentration on doctrine, institutionalists do not altogether avoid the struggles of doctrinalists. Indeed, they too display uncertainties about the ability of the human rights régime to assimilate women's rights, in ways both similar to and different from the doctrinalists.

Institutionalists all begin by addressing the same gap between existing law and the reality of women's lives that the doctrinalists eventually confront. Thus, their works start at the same point at which doctrinalists turn to strategies for implementation. Rather than turning to noninstitutional strategies, though, institutionalists concentrate on the institutions that have been empowered by international law to enforce the law.

As these advocates confront the gap they see between law and reality, they turn to both mainstream institutions and specialized institu-

---

133. For a discussion of the ways that the discipline of international institutions has distinguished itself from traditional public international law, see David Kennedy, *The Move to Institutions*, 8 *CARDOZO L. REV.* 841, 843-44 (1987) (suggesting that international institutional theory and academic practice is "the transformation of deed into word," as institutional scholars begin their study with the life and practice of international organizations).



tions to determine how those institutions might fill the gap. Their exploration of the institutional human rights framework mirrors many aspects of the doctrinalists' works. Institutionalists are uncertain, for example, about whether they should focus on mainstream institutions or on specialized institutions, and about which mainstream and specialized ones they should pursue.

Institutionalists are more openly critical than doctrinalists of the mainstream human rights model. Although they generally believe that human rights can assimilate women's rights, they often focus on the deficiencies of institutional actors who deploy human rights discourse. Indeed, each advocate who spends any amount of time analyzing institutions is critical of or at least skeptical about the ability of the institutions to enforce the law. As advocates move to more concrete critiques of the institutions, however, they manifest the belief that the institutions can do their job, if only a few obstacles are removed. Their critiques, then, imply suggestions for change.

As different advocates urge the use and improvement of different institutions, a two-tiered critique emerges. The institutionalists assert, first, that mainstream institutions are unwilling to assimilate women's rights and, second, that specialized women's institutions have not been granted the same power to protect human rights as have the mainstream institutions.<sup>134</sup> Both parts of the critique imply that an institutional structure is in place to assimilate women's rights; the rights just need to be taken seriously. Therefore, advocates level their critiques against those who deploy and control institutions, not against the institutional structures themselves. Indeed, they cannot really critique the institutional structures unless they are willing to give up on institutions altogether, which none of them seems willing to do.

Institutionalists, then, both critique the institutional arrangements and fight to uphold them. While most advocates concentrate on specialized institutions, they all view those institutions through a comparative lens, one that analyzes their procedures in light of procedures available to mainstream institutions. As a result, the literature is caught in a paradox. It can argue that mainstream institutions are flawed, but not inherently so; rather, they can only be flawed to the extent that they do not assimilate women's rights or take into account women's special status or issues. The specialized institutions are flawed, not because they do not aim to assimilate women's rights, but because they do not have the same enforcement power as the main-

---

134. Since specialized institutions often rely on mainstream structures for their power, this predicament is not surprising.

stream institutions. The paradox emerges through the moves the advocates make as they both attack and sustain the mainstream institutional framework in a call for change in the specialized institutions.

Because of their reliance on existing structures to assimilate women's rights, I also consider institutionalists liberal feminists. Their liberal feminist approaches differ from those of doctrinalists, however, to the extent that institutionalists more openly recognize difficulties with the deployment of the system. The difficulties they point to are more directly attributed to a male-dominated structure than those identified by doctrinalists. Advocates who write about institutions provide useful insights into the power plays within the institutional structure that keep men in control and women's rights at the periphery. To this extent, their approaches are more radical than are those of the doctrinalists.

This Part looks at works written by Margaret Galey,<sup>135</sup> Laura Reanda,<sup>136</sup> Noreen Burrows,<sup>137</sup> and Theodor Meron.<sup>138</sup> They are representative of the variety of approaches taken by institutionalists.<sup>139</sup>

### A. *Raising Issues of Enforceability*

These works all set the stage for a discussion about institutions by raising doubts about the enforceability of international law. As is the case with doctrinalists, some institutionalists are concerned about the enforceability of international law in general, while others concentrate on the lack of enforceability of law and provisions that deal specifically with women.

In Burrows's discussion of enforcement, she grapples with many of the same issues regarding the authority of international law as do Khushalani and An-Na'im. She sees enforcement as a fundamental

---

135. Margaret E. Galey, *International Enforcement of Women's Rights*, 6 HUM. RTS. Q. 463 (1984).

136. Laura Reanda, *Human Rights and Women's Rights: The United Nations Approach*, HUM. RTS. Q., Spring 1981, at 11.

137. Noreen Burrows, *International Law and Human Rights: the Case of Women's Rights*, in HUMAN RIGHTS: FROM RHETORIC TO REALITY 80, 89-96 (Tom Campbell et al. eds., 1986). See *infra* Part IV for a discussion of the first part of Burrows's article.

138. MERON, *supra* note 17, at 53-82. The section of Meron's book that I examine here is separate from his overbreadth critique that I discuss in Part I. Although the two sections are in the same part of the book, most of Meron's discussion of institutions is contained in the final section of the chapter and is entitled "The Adequacy of Measures for Insuring Implementation." *Id.* at 80. He does not relate it to the remainder of the chapter.

139. More recent works take very similar approaches to some of those I describe here. See, e.g., Byrnes, *supra* note 9; Sandra Colliver, *United Nations Machineries on Women's Rights: How Might They Better Help Women Whose Rights are Being Violated?*, in NEW DIRECTIONS IN HUMAN RIGHTS 25 (Ellen L. Lutz et al. eds., 1989); Meron, *supra* note 17.

problem for international law in general, not just for that law that involves women's rights. But when the law is not enforceable, she does not abandon it; instead, she appeals, as do Khushalani and An-Na'im, to its moral authority. For Burrows, international law enforcement becomes particularly problematic when dealing with uncooperative States<sup>140</sup> or States that are not parties to particular international treaties. In fact, she believes the system is flawed to the extent that international instruments only pertain to those States that have signed them.<sup>141</sup>

Burrows's work on institutions is in large part a response to this difficulty, to which she describes two potential reactions. Some, she says, might argue that "the existence of a body of international legal rules which create obligations for a number of States is in itself a powerful moral force,"<sup>142</sup> while others might disagree, "argu[ing] that without a translation of the rhetoric of human rights into enforceable legal rules the individual is in a very weak position in respect of a very powerful state."<sup>143</sup>

Burrows's discussion of institutions mediates the conflict between these two positions. While she first argues that the Women's Convention might create possibilities for "positive enforcement action,"<sup>144</sup> she concludes with the idea that "[t]he international enforcement machinery provided for in the Convention is . . . very weak."<sup>145</sup> But then, to compensate for the weakness, she returns to the moral influence of the law:

This view, of course, ignores the moral value of international law and the persuasive influence which that law can have on states which have not assumed legal obligations under international treaties. The very existence of such treaties . . . may preclude the possibility that in the future sex may again become a permissible ground for discrimination. [The Women's Convention] has set out the ethic of the cosmopolitan community . . . .<sup>146</sup>

---

140. See Burrows, *supra* note 137, at 90 ("International enforcement mechanisms are, however, very weak when confronted with an intransigent state and one of the main problems for international human rights law is the inability to enforce compliance.").

141. See *id.* ("International treaties create legal obligations for the states which are parties to them and for those states only. The status of an international treaty for a state which is not a party to it is at best a moral one.").

142. *Id.*

143. *Id.* at 91.

144. *Id.* at 91-92 ("[Article 2] extends [States'] commitment beyond mere ratification and requires positive enforcement action at the national, and therefore accountable, level. It could, if acted upon, minimize the difficulty outlined above as to the nature of international agreements.").

145. *Id.* at 96.

146. *Id.*

While much of Burrows's work discusses possibilities for an enforceable system, she is fairly open about her doubts. Her discussion of potential improvements in the machinery is one way of dealing with the doubts; reliance on the moral force of the law is another.

Other institutionalists frame their discussion around a concern for enforcement, although they primarily concentrate on the particular difficulties of enforcing women's human rights. While Galey notes, for example, that "the lack of enforcement of international human rights standards has been a major obstacle to the wider enjoyment of human rights,"<sup>147</sup> she seems most concerned that "international enforcement of women's rights has been especially dismal."<sup>148</sup> Consequently, "[t]here is a pressing need for international enforcement bodies and procedures to provide recourse to individual women whose rights have been violated."<sup>149</sup> Galey's article focuses on "two recent developments that may contribute to promoting international enforcement of women's rights."<sup>150</sup>

Meron and Reanda also see enforcement problems with women's human rights, which they both identify by the gap between international law that proscribes discrimination and actual practice in the world. They place responsibility for this gap on the international community. Indeed, Meron, after explaining that the principle of nondiscrimination has existed since the United Nations Charter, points out that sex discrimination "has not become the focus for concerted international action and it is not listed as reflecting customary international law by the recent draft of the new Restatement of the Foreign Relations Law of the United States."<sup>151</sup> Moreover, he notes, the Women's Convention itself acknowledges that "despite the promulgation of various international instruments, 'extensive discrimination against women continues to exist.'"<sup>152</sup>

Reanda sees the enforcement gap similarly, so that even though "the entire range of human rights codified in the International Bill of Human Rights is applicable to women in the most fundamental sense,

---

147. Galey, *supra* note 135, at 463.

148. *Id.*

149. *Id.* at 464.

150. *Id.* "The first development is the new procedure for handling communications (that is, complaints) on alleged violations of internationally recognized women's rights in the Commission on the Status of Women. The second is the potential enforcement capability of the Committee on the Elimination of Discrimination Against Women." *Id.* For discussion of the first development, see *infra* notes 185-90, 195-201 and accompanying text. For discussion of the second development, see *infra* text accompanying notes 202-04.

151. MERON, *supra* note 17, at 54.

152. *Id.*

. . . forms of discrimination against women continue to prevail in many countries which have subscribed to the principles of the Universal Declaration of Human Rights."<sup>153</sup> After identifying the gap, Reanda names three ways that the "problem of the applicability of the International Bill of Human Rights to the protection of the human rights of women poses itself,"<sup>154</sup> the third of which is "adequate international supervision."<sup>155</sup> Reanda devotes the remainder of her article to the question of international supervision, primarily through an analysis of those institutions created under the International Bill of Human Rights, including the Commission on the Status of Women.

Institutionalists, then, turn to institutions in much the same way that doctrinalists turn first to the legal and moral authority of the law and later to strategies for implementation. That is, they focus on institutions when they discover a gap between law and reality or are concerned about the potential for a gap. Only Burrows suggests that institutions might not be able to fill that gap, and she therefore leaves open the possibility that morality can fill it.<sup>156</sup> As these advocates explore the possibilities for filling the gap with institutions, they are concerned either that international law in general is not enforceable, and see the unenforceability of women's rights as a normal part of that flaw, or they are particularly concerned that the status of women is not improving, in spite of international law.<sup>157</sup> Although the turn to institutions reflects a decision not to rely solely on positive law, the institutionalists' approaches are still positivist to the extent that they rely on the institutions created by law. Their critiques rarely lead to a place outside or beyond institutions.

### B. *Working with Institutions to Respond to Enforcement Issues*

Together these advocates survey a number of international institu-

---

153. Reanda, *supra* note 136, at 13.

154. *Id.* at 13-14.

155. *Id.* at 14. The other two ways are through "interpretation of its provisions in a sense that will ensure that women are fully guaranteed their human rights and fundamental freedoms" and "the application of these provisions in national law and practice." *Id.*

156. In Part IV, I discuss Burrows as an external critic, as one who sees a need for the system to change if it is to accommodate women's rights. Since, among the institutionalists, she puts the least faith in the ability of human rights institutions to assimilate women's rights, it is not surprising that she would — at least sometimes — approach human rights from an external position.

157. In identifying the gap between law and practice, Meron and Reanda both point to mainstream documents instead of specialized women's documents. Meron does so in part to set up the need for the Women's Convention, while Reanda is writing prior to the establishment of the Committee on the Elimination of Discrimination Against Women, the enforcement body created by the Women's Convention. While other specialized instruments were in effect at the time, neither author discusses them at this point.

tions: the Commission on Human Rights (CHR), the Human Rights Committee (the Committee), the Commission on the Status of Women (CSOW), and the Committee on the Elimination of Discrimination Against Women (CEDAW).<sup>158</sup> Some critique mainstream institutions, CHR and the Committee, for not taking women's rights sufficiently seriously, while others critique the entire institutional structure for granting specialized women's institutions, CSOW and CEDAW, less power and less effective enforcement mechanisms than are granted mainstream institutions. The institutionalist position, then, alternates between suggesting that all institutions more fully assimilate women's rights and focusing on specialized institutions.

As in the case of doctrinalists, this oscillation between mainstream and specialized reflects a tension about whether to pursue the general human rights of women or women's rights in particular. Here, it manifests itself in the institutionalists' attempts to determine the best ways to effectuate change for women. Only Reanda openly expresses a sense of this tension and its impact on her approach:

This article prefers to use the term *human rights of women* to emphasize the globality and indivisibility of all human rights, and their full applicability to women as human beings. However, it would seem that the creation of specialized machinery and procedures is necessary in order to ensure that the human rights codified in international instruments are interpreted and applied in such a way that women are guaranteed their full enjoyment. The tension between the global and the particular is not always resolved satisfactorily, however, and the United Nations experience has been ambiguous in this respect.<sup>159</sup>

Probably because of this focus on the "human rights of women," Reanda discusses mainstream as well as specialized institutions. Other institutionalists focus only on specialized institutions, apparently avoiding the global/particular dilemma. Yet, because they view specialized institutions in light of their more powerful counterparts — mainstream institutions — the institutionalists do not get away completely from either mainstream institutions or the tension. As they discuss a variety of specialized institutions, these advocates do not ex-

---

158. The Commission on Human Rights and the Commission on the Status of Women are functional commissions under the United Nations Economic and Social Council. See generally UNITED NATIONS ACTION IN THE FIELD OF HUMAN RIGHTS 14-20, U.N. Doc. ST/HR/2/Rev. 3 (1988). Structurally, the Commissions are on an equal plane in the United Nations, although the Commission on the Status of Women was initially created as a sub-commission of the Commission on Human Rights, but received commission status, in response to the sense that women's issues should have their own forum. See *infra* text accompanying notes 173-75. The Human Rights Committee (the Committee) is the institution established to enforce the Covenant on Civil and Political Rights, while the Committee on the Elimination of Discrimination Against Women is the institution created by the Women's Convention to enforce that Convention. See UNITED NATIONS ACTION IN THE FIELD OF HUMAN RIGHTS *supra*, at 25.

159. Reanda, *supra* note 136, at 12.

plain why they focus on any one institution over another. They also fail to discuss why they are concerned about specialized institutions or even why women need to have their own institutions.

### 1. Focusing on Mainstream Institutions

Reanda is the only advocate I discuss who specifically critiques mainstream institutions. She examines both the Commission on Human Rights and the Human Rights Committee, concluding that neither is properly assimilating women's rights.<sup>160</sup> While, for the most part, Reanda indicates that human rights institutional structures can assimilate women's rights, her critique of the Committee suggests that it might have to change to accommodate women's rights completely. To the extent that she suggests a need for accommodation, Reanda's approach is similar to the approaches of the external critics discussed in Part IV.

Reanda begins her article with a section entitled "Women's Rights or the Human Rights of Women," where she sets out the mainstream documents and their institutions.<sup>161</sup> She then begins her critique:

It is therefore puzzling to many that the main international organs established for the promotion and protection of human rights . . . do not appear to deal specifically with violations of the human rights of women, except in a marginal way or within the framework of other human rights issues.

In effect, debates on the rights of women in the United Nations take place largely outside of the frame of reference of existing human rights organs.<sup>162</sup>

Reanda carries this critique through the remainder of her discussion of mainstream institutions. The critique has two parts.

First, Reanda attacks CHR, not for ineffective implementation machinery, but for its general inattentiveness to women's rights:

A review of the work of that Commission shows that questions relating to the human rights of women are not normally included in its agenda, although some of the items discussed may affect women in particular

. . . .

The Commission does not, however, appear to focus on the specific condition of women as a particularly vulnerable social group in the course of its examination of global human rights issues. A scanning of recent reports . . . shows little attention being paid to the particular ways

---

160. Sandra Colliver also discusses these mainstream institutions along with those committees established to enforce the Economic and Social Covenant and the Convention on the Elimination of All Forms of Racial Discrimination and compares and contrasts them with CSOW and CEDAW. See Colliver, *supra* note 139.

161. Reanda, *supra* note 136, at 11.

162. *Id.* at 11-12.

in which [general human rights] problems affect women, even though their position is often considerably worse than that of men in situations in which human rights are being violated.<sup>163</sup>

The implication of this critique is that the Commission could assimilate women's rights, if those who control the machinery would pay closer attention to women. Reanda believes it is important for CHR, even as a mainstream institution, to take up the cause of women's rights because it "still has full responsibility, at least in theory, for the promotion and protection of the human rights of women as a social group which is discriminated against and oppressed."<sup>164</sup>

Next, Reanda begins an examination of the "global human rights instruments and their applicability to women,"<sup>165</sup> in which she analyzes the Human Rights Committee. Rather than critiquing the Committee for a general inattentiveness to women's issues, she argues that its processes generally preclude a sufficient focus on issues of importance to women. This preclusion occurs for two reasons: "first, the emphasis is usually on the legal rather than the de facto situation, so that discrimination against women . . . not specifically defined in the Covenant tends to be neglected,"<sup>166</sup> and second,

the examination of the legal status of women is usually restricted to certain areas which are considered to be "women's rights" (such as family rights and the right to vote) rather than on the totality of the human rights protected under the Covenant and the extent to which women are guaranteed their full enjoyment.<sup>167</sup>

Reanda further complains that "not one state party has yet nominated a woman to serve on the Committee,"<sup>168</sup> which she believes also prevents the Committee from better taking into account women's concerns.<sup>169</sup> Reanda concludes her examination of the Committee, as well as the implementation procedures for the Covenant on Economic,

---

163. *Id.* at 26 (citation omitted).

164. *Id.* at 23.

165. *Id.* at 13. In her section entitled "Global Human Rights Instruments and Their Applicability to Women," Reanda discusses specifically the implementation machinery and procedures created by the Covenant on Civil and Political Rights, *id.* at 14-16, the Covenant on Economic, Social and Cultural Rights, *id.* at 16-17, and periodic reports on human rights, *id.* at 17-18. Because the implementation procedures under the Covenant on Civil and Political Rights are the most detailed, she concentrates more in this section on the activities of the Human Rights Committee than on those of the other implementation bodies.

166. *Id.* at 15.

167. *Id.*

168. *Id.*

169. For example, when Reanda names another weakness of the Committee, its exclusion of nongovernmental organizations, she argues that the harm of such an exclusion might be mitigated if Committee members were to share their knowledge about the situations being discussed. "It is here, however, that the drawbacks of an all-male membership with no specialized knowledge of the condition of women or links to active national women's groups are felt most." *Id.* at 16.



Social and Cultural Rights and the Universal Declaration, by determining “that the effectiveness of these instruments for protection of the human rights of women has remained extremely limited despite the fact that these instruments have established the principle of the equality of sexes and that states have pledged to bring about its realization.”<sup>170</sup>

Through her critiques, therefore, Reanda implicitly suggests ways that “global” institutions might begin to address women’s rights. Her attack on CHR sees women’s rights as normal objects for assimilation, merely requiring the Commission members to reform their attitudes in order to pay more specific attention to women. Her critique of the Committee, though, is a bit more complicated. She aims some of her criticism at the attitudes of those who control the institution, for example, by attacking its completely male membership. But she also suggests that the Human Rights Committee will have to make certain concrete changes — encourage female membership, include nongovernmental organizations, attend more to *de facto* situations, deal with more aspects of discrimination against women — before it can adequately assimilate women’s rights.

Although it seems that it might be easier to get the Human Rights Committee to make concrete changes than to alter the attitudes of CHR members, the two are not unconnected. In the end, Reanda acknowledges that, even to implement her own concrete proposals, the Committee would first have to change its attitude toward women’s rights. As she looks at the probability that the Committee will do so, her prognosis is as bleak as it is for CHR, precisely because the Human Rights Committee, in its present composition, will not change its focus.<sup>171</sup>

Probably because she ultimately suspects that the attitudes of those who control mainstream institutions are unlikely to change, Reanda turns to specialized institutions. In doing so, though, she questions only the will, not the ability, of mainstream institutions to enforce women’s human rights. This belief in the power of mainstream institutions is central to her analysis of specialized institutions since the latter, she argues, have proper attitudes but insufficient power.

---

170. *Id.* at 18.

171. Reanda explains:

To bring these practices under the purview of the Covenant, however, would require a concerted effort in terms of fact-gathering and interpretation, and there is no evidence that this is among the goals of the Committee. In fact, none of these practices has been mentioned in state reports or in the debates of the Committee. It would appear that the interpretation given to the Covenant so far is that the Covenant does not apply to these obvious violations of the human rights of women.

*Id.* at 17 (citation omitted).

## 2. Turning to Specialized Institutions

Most institutionalists do not explicitly express disappointment in or even discuss mainstream institutions; instead, they begin their analyses of institutions with specialized women's institutions. As they analyze those organs that are expressly charged with enforcing women's human rights, however, they do so in light of the powers granted to mainstream institutions. Hence, they all explore and analyze specialized institutions with an eye toward mainstream ones.

These advocates do not attack specialized institutions per se; rather, they critique those who control the deployment of human rights law for not giving specialized institutions the power necessary to do their jobs properly. They believe, therefore, that women's rights can be assimilated to human rights law, but perhaps only via specialized women's institutions, once those institutions are granted power equivalent to that of mainstream institutions.

Both Galey and Reanda discuss in detail the Commission on the Status of Women which, even though created in 1946 "to deal with what were perceived to be 'women's rights,'"<sup>172</sup> has never enjoyed the same kind of power as CHR. While Reanda focuses on the limited power of CSOW, Galey focuses on a new procedure available to CSOW, adopted under Draft Resolution X, which she thinks offers hope for the implementation of women's rights. Along with Meron and Burrows, they both also look to the Committee on the Elimination of Discrimination Against Women as a new and exceptional organ for the proper assimilation of women's rights.

Even though institutionalists raise a number of difficulties with whichever institutions they analyze, they all express some belief in the ability of (some) specialized institutions to assimilate women's rights. They each tend to appeal to a particular specialized institution, discussing its potential for assimilating women's concerns, and then list difficulties with the institution, discussing reasons why it cannot at present fully implement women's rights. Whenever a difficulty is uncovered, though, either the one who uncovered it or someone else responds to the problem, generally by suggesting a better implementation procedure.

### a. The Commission on the Status of Women

Both Reanda and Galey draw comparisons between CHR and CSOW, showing how, in spite of their apparently equal status in the United Nations, CSOW has much less power than CHR. The history

---

172. *Id.* at 12.

of CSOW bespeaks some of the difficulties of assimilating women's rights, even through the creation of specialized institutions. Reanda explains that CSOW began as the Sub-Commission on the Status of Women of CHR, with the responsibility of giving "special advice on problems relating to the status of women."<sup>173</sup> The Sub-Commission, however, immediately asked for the status of a full commission because its members felt that otherwise "the debate on women would become submerged in general human rights questions."<sup>174</sup> The very desire to highlight women's issues apart from general human rights issues, then, gave birth to CSOW as a separate but presumably equal entity. Both Reanda and Galey recognize, however, that "[a]lthough the two commissions were thus placed on the same footing, an examination of their work will reveal striking disparities in their present powers and terms of reference."<sup>175</sup> Indeed, this recognition forms the premise for each author's discussion.

Reanda and Galey name a number of disparities between the two institutions. First, CHR meets more frequently and for a longer period of time than CSOW.<sup>176</sup> Second, CSOW

has not been given powers similar to those of [CHR] which would enable it to play a role in the protection of the human rights of women. In fact, [CSOW] has not been empowered either to set up subordinate organs to investigate alleged violations or to take any action on complaints of such violations.<sup>177</sup>

Third, CSOW has not been delegated the same power as CHR to receive communications (complaints).<sup>178</sup> Much of both authors' critiques centers on this third disparity. In discussing it, though, Reanda and Galey are uncritical of the institutional structures of CHR. They seem to believe that CHR is capable of protecting women's rights but, since it is unlikely to use its powers to benefit women, Galey at least would like to see CSOW get the same power.

For Galey and Reanda, disparity in power to receive communications is most evident in the procedures granted to CHR. Under U.N.

---

173. *Id.* at 23.

174. *Id.*

175. *Id.* at 24.

176. At the time of these articles, CHR met every year for six weeks, while CSOW met only once every two years for between one and one-half to three weeks. *Id.*; see also Galey, *supra* note 135, at 466. Since 1988, after nearly twenty years of biennial sessions, CSOW has begun to meet annually, but still for only one to two weeks. Colliver, *supra* note 139, at 29; see also *infra* note 193 (discussing that CSOW chose not to attempt to increase the length of its meetings).

177. Reanda, *supra* note 136, at 24-25.

178. For brief historical discussions of the power CSOW has had in accepting communications, see *id.* at 27-29; Galey, *supra* note 135, at 464-75; see also Colliver, *supra* note 139, at 31-34.

Economic and Social Council Resolutions 1235<sup>179</sup> and 1503,<sup>180</sup> CHR may investigate allegations of a "consistent pattern of gross and reliably attested violations of human rights."<sup>181</sup> While the procedure under Resolution 1235 allows for public debate on such allegations, that under Resolution 1503 is confidential and permits CHR to receive communications from individuals or groups with direct information pertaining to the allegations.<sup>182</sup> Noting the potential power of the Resolution 1503 procedure,<sup>183</sup> Galey complains that these procedures were never considered a part of CSOW's mandate. Reanda, rather than focusing on CSOW's lack of capacity in this area, emphasizes that CHR has not used its powers to benefit women.<sup>184</sup> Both Galey and Reanda, then, generally believe that the reporting procedures granted to CHR are important and powerful, but that their full potential is not being realized. They would like to see these procedures incorporate the protection of women's rights, either through CHR or through a granting of the same or similar procedures to CSOW.

For the most part, Galey and Reanda assume, as do all the institutionalists, that the priorities and interests of the specialized institutions are proper. That is, given their focus on ensuring women's equality, it seems that specialized women's institutions would escape the attitudinal obstacles that prevent mainstream institutions from properly ensuring women's rights. At one point in Galey's article, though, she discusses a debate that has been going on for some time, among both members of the Economic and Social Council and members of CSOW, about whether CSOW was, after Resolution 1503, entitled to receive communications.

In 1974, CSOW voted to discontinue receiving communications

179. E.S.C. Res. 1235, U.N. ESCOR, 42d Sess., Supp. No. 1, at 17, U.N. Doc. E/4429 (1967); see also Reanda, *supra* note 136, at 24, 28-29.

180. E.S.C. Res. 1503, U.N. ESCOR, 48th Sess., Supp. No. 1A, at 8, U.N. Doc. E/4832/Add.1/Corr.1 (1970); see also Galey, *supra* note 135, at 466-67; Reanda, *supra* note 136, at 24, 28.

181. E.S.C. Res. 1503, *supra* note 180; see also E.S.C. Res. 1235, *supra* note 179; Colliver, *supra* note 139, at 30.

182. Colliver, *supra* note 139, at 31.

183. See Galey, *supra* note 135, at 466 ("Close observers of the Human Rights Commission believe that this procedure has had a notable impact on the behavior of governments that have engaged in gross and persistent violations.").

184. She asserts:

Because of the confidentiality of the procedure [under Resolution 1503], it is impossible to say to what extent it has been used to bring before the Commission on Human Rights cases of violations of the human rights of women, and what the disposition of such cases has been. Informal conversations with delegates and relevant nongovernmental organizations would appear to indicate, however, that the procedure has not been used to protect women. Reanda, *supra* note 136, at 28. *But see* Colliver, *supra* note 139, at 31 (noting that CHR has used the Resolution 1235 procedure to address women's rights on a few occasions).

under the theory that Resolution 1503 created a single, preemptive system for receiving complaints.<sup>185</sup> Only after the Economic and Social Council invited CSOW to reconsider its position did CSOW affirm its own authority to receive communications, and then only to receive those that it could attend to formerly.<sup>186</sup> In 1978, debate again ensued about the issue, which resulted in the creation of an ad hoc working group to consider a list of confidential and nonconfidential communications at the 1980 CSOW session.<sup>187</sup> In 1982, CSOW members engaged in debate over two proposals, one that would transfer communications regarding the status of women to CHR and another that would grant greater power to CSOW to receive complaints.<sup>188</sup> Galey describes a portion of the debate among the drafters of the second proposal, which reflects more ambivalence among the members of CSOW:

The group considered the desirability of focusing on categories of alleged violations rather than on individual cases. While some members felt that the Commission should deal with individual cases, they also recognized that this would involve investigation of allegations, a politically sensitive matter, and a considerable expense, which the Commission's membership was unlikely to support. Though some thought the Commission should deal with "gross and reliably attested violations of women's rights" thus incorporating the standard in ECOSOC Resolution 1503, others considered it preferable to emphasize alleged violations relating to discrimination against women, thereby keeping with the Convention's emphasis on discrimination.<sup>189</sup>

Although, in the end, CSOW rejected the first proposal and adopted the second one, as Draft Resolution X, it did not do so by consensus.<sup>190</sup> This controversy, along with earlier disagreements about communications, makes it clear that CSOW itself is not necessarily willing to use the limited power it has to gain more power.<sup>191</sup>

Galey's reference to and discussion of this debate is important, not only for the light it sheds on the ambivalent feelings of CSOW members, but also for that which it sheds on Galey's and Reanda's critiques. The suggestion that there might be disagreement among

---

185. Galey, *supra* note 135, at 466.

186. *Id.* at 466-67. The Economic and Social Council invited CSOW to reconsider, under pressure from nongovernmental organizations and three Member States. *Id.*

187. *Id.* at 467.

188. *Id.* at 469.

189. *Id.*

190. *Id.*

191. As recently as 1991, the members of CSOW were unable to agree on a resolution that would increase their ability to hear confidential reports. Indeed, the resolution did not even make it to the floor. Communications Concerning the Status of Women, U.N. Doc. E/CN.6/1991/L.14 (1991) (limited distribution).

members of the specialized institutions about the amount of power they desire complicates matters. The solution to the problem now entails more than just increasing their power. Hence, even though Draft Resolution X might be one of the "two recent developments that may contribute to promoting international enforcement of women's rights,"<sup>192</sup> the disagreements should not be ignored.<sup>193</sup>

In 1981, Reanda had all but given up on CSOW, concluding that "[b]ecause of their restricted scope and the lack of provision for international review, the separate instruments on women's rights have therefore remained extremely limited in their ability to affect the condition of women."<sup>194</sup> She then placed her hope largely in the new enforcement procedures that were to be established under the Women's Convention. In 1984, though, Galey found hope in Draft Resolution X, not only because CSOW had passed it in 1982, but because in 1983 CHR endorsed the resolution, calling it a "'useful complement to the procedures established in the Commission on Human Rights for consideration of communication.'"<sup>195</sup> According to Galey, this resolution signaled that the CHR "was ready to cooperate with the Commission on the Status of Women on coordinating communications procedure."<sup>196</sup> That a mainstream institution had endorsed the procedure chosen by a specialized institution somehow legitimized the procedure. Moreover, it seemed to represent a shift toward a day when mainstream institutions and specialized institutions would no longer have separate goals.

The passing and endorsement of Draft Resolution X combined with another action of CSOW, the passing by consensus of a resolution entitled "Physical Violence Specific to Their Sex Against Detained Women,"<sup>197</sup> to provide Galey with even more hope for the enforcement of women's rights through CSOW. For her, the effects were dramatic: "The new procedure and the 1984 resolution may seem a small step forward for women, but actually they represent major steps for-

---

192. Galey, *supra* note 135, at 464.

193. Communications are not the only area where CSOW has chosen not to attempt to increase its own power. In 1988, for example, it chose not to request to increase the length of its meetings, even though the General Assembly encouraged it to do so. Colliver, *supra* note 139, at 29.

194. Reanda, *supra* note 136, at 21.

195. Galey, *supra* note 135, at 470 (quoting from E.S.C. Res. 1983/39, U.N. ESCOR, 39th Sess., Supp. No. 3, at 171-73, U.N. Doc. E/CN.4/1983/60 (1983)).

196. *Id.*

197. The resolution "recalled previous [Economic and Social Council] resolutions authorizing the Commission to deal with communications and to draw attention to emerging trends and patterns," and noted women's particular vulnerability to sexual violence while in detention. *Id.* at 471-72.

ward for womankind.”<sup>198</sup>

Even though Galey is at times critical of these new procedures, she sees them as very important. CSOW, the institution that Reanda had all but given up on, has become the center of Galey's attention, due to a new procedure and a resolution. Galey sets forth five “implications for the enforcement of women's rights” of the procedure and resolution, in which she seems to have extreme confidence.<sup>199</sup> At one point, though, she does recognize limitations of the procedure: “It does not provide for the investigation of alleged violations nor for sanctions against governments that commit alleged violations. Nor does it permit the publication of confidential lists or of communications.”<sup>200</sup> These limitations, her critique implies, could be addressed, if the procedure provided for investigation, sanctions, and publication. Rather than encouraging these changes, though, Galey returns to a defense of the resolution and procedure, largely relying on their symbolic importance:

Nonetheless, in approving the procedure, governments have acknowledged that women have internationally recognized human rights, that they may be violated, and that international recourse for women who allege violations of their rights is now available. In endorsing the 1984 resolution, governments have also acknowledged a specific trend in which women's rights have been violated and have set in motion a process to gather information as a basis on which to formulate measures to help solve the problem. In all these respects, then, the new procedure represents an important turning point in the international enforcement of women's rights.<sup>201</sup>

Hence, according to Galey, the new procedure and resolution seem to have solved, or at least greatly reduced, the limitations of CSOW identified by Reanda.

#### b. The Committee on the Elimination of Discrimination Against Women

For Galey, the second recent development contributing to the international enforcement of women's human rights is the “potential enforcement capability” of the Committee established under the Women's Convention.<sup>202</sup> Although she describes CEDAW's work fairly critically, Galey concludes that “it remains an important inter-

---

198. *Id.* at 472.

199. *See id.* at 472-74 (including the implication that “there is now a bona fide international procedure with a few teeth in it that offers recourse to individual women or groups of women that allege violations of their internationally recognized rights”).

200. *Id.* at 474-75.

201. *Id.* at 475.

202. *Id.* at 464.

national enforcement mechanism for women's rights."<sup>203</sup> Any problems CEDAW has can likely be addressed if governments can be made to respond to its mandate: "If the Committee can find the means to encourage regular reporting by states parties, and act to promote their compliance, it will contribute to rather than detract from the apparent political will of a third of the U.N. member states to promote the goals of the Convention."<sup>204</sup>

Reanda seems even more hopeful about CEDAW's potential. She examines the Women's Convention and CEDAW after concluding that other specialized instruments, "due to their restricted scope and the lack of provision for international review represent little more than a statement of good intentions on the part of states parties and of the international community."<sup>205</sup> Contrasting the Women's Convention with some of the other instruments, she explains that the Women's Convention represented the first time "that separate concepts of 'women's rights' were recast in a global human rights perspective, and supervisory machinery with terms of reference similar to those of existing human rights organs was provided for."<sup>206</sup> For Reanda, then, the Women's Convention seems to mediate the tension she earlier described between the global and the particular.

Although at the time Reanda writes, it is uncertain when the Women's Convention will come into force, she has nothing but praise for it. She believes it "marks a definite turning point in the history of international protection of the human rights of women."<sup>207</sup> Its "most important aspect . . . is its provision for the establishment of implementation machinery to review progress in the elimination of discrimination against women,"<sup>208</sup> which will empower it "to consider reports submitted by states parties on the administrative, judicial, legislative, and other measures which they have adopted to give effect to the provisions of the Convention, including factors and difficulties affecting the degree of fulfillment of obligations under the Convention."<sup>209</sup> Reanda concludes her article with the proclamation that "[h]ope for the

---

203. *Id.* at 488.

204. *Id.* The "third of the U.N. member states" to which she is referring are those fifty-six States that had ratified CEDAW at the time of her article.

205. Reanda, *supra* note 136, at 21.

206. *Id.* at 12.

207. *Id.*

208. *Id.* at 22; see also Catherine Tinker, *Human Rights for Women: The U.N. Convention on the Elimination of All Forms of Discrimination Against Women*, HUM. RTS. Q., Spring 1981, at 32, 42 ("The Convention contains a strong mechanism for the implementation of the instrument, the Committee on the Elimination of Discrimination against Women, with the authority to require reports from states parties on efforts to comply with the Covenant.").

209. Reanda, *supra* note 136, at 22.



future is to be placed in the coming into force of the recently adopted [Women's Convention], and in the work of the supervisory organ to be established under this Convention."<sup>210</sup> For her, the existence of CEDAW should make women's rights readily assimilable.

Burrows and Meron, writing some time after CEDAW's inception, place less hope in it than does Reanda. The portions of their works that discuss CEDAW are critical of the little power it has been given, a difficulty to which Galey and Reanda are also not oblivious. Combined, the concerns of the advocates range from the types of reporting procedures employed by CEDAW to its composition and ability to maintain independence.

Much of the concern focuses on article 21(1) of the Women's Convention, which sets forth CEDAW's procedure for dealing with States' reports:

The Committee shall, through the Economic and Social Council, report annually to the General Assembly of the United Nations on its activities and may make suggestions and general recommendations based on the examination of reports and information received from the States Parties. Such suggestions and general recommendations shall be included in the report of the Committee together with comments, if any, from States Parties.<sup>211</sup>

According to Burrows, this procedure is "[t]he most common, and the least effective, method devised by international law to try to enforce human rights standards."<sup>212</sup> After discussing other possible enforcement provisions, ones that she claims are much more effective than the procedure described above,<sup>213</sup> Burrows concludes: "It is unfortunate, therefore, that, when the Women's Convention was being prepared, only one enforcement mechanism was included, and even more unfortunate that this mechanism is the weak system of the reports procedures established in Article 21."<sup>214</sup> For Burrows, this weak enforcement mechanism is indeed unfortunate, since stakes are high for good enforcement procedures: "There is an obvious danger that human rights instruments may be used as a smokescreen for domestic inactivity, rather than as a basis for positive action. One way to avoid this is to provide an international mechanism whereby the activity (or inactivity) of a state may be assessed."<sup>215</sup> Consequently, if the proce-

---

210. *Id.* at 31.

211. Women's Convention, *supra* note 8, art. 21(1), 1249 U.N.T.S. at 22.

212. Burrows, *supra* note 137, at 94.

213. *See id.* at 93-95.

214. *Id.* at 95.

215. *Id.* at 93.

dures do not allow for this assessment, the instruments may do more harm than good.

Meron and Reanda share similar concerns about the effectiveness of article 21 and about CEDAW's general lack of power to pronounce judgments. First, they are concerned that "the narrow powers do not authorize the Committee to determine that violations of the Convention by a particular State Party have taken place. It is even doubtful whether the Committee may comment on violations of the Convention by a particular State Party."<sup>216</sup> Second, "the Convention does not provide for the examination of individual complaints or communications from victims of discrimination, or of complaints submitted by one State Party against another for failure to fulfill its obligations under the Convention."<sup>217</sup> Both Reanda and Meron suggest that CEDAW should have been provided the same authority as other institutions to receive individual complaints.<sup>218</sup> Third, Meron notes that under article 21, CEDAW cannot consider complaints "submitted by one State against another for failure to fulfill obligations under the Convention."<sup>219</sup> Finally, Meron suggests that CEDAW might not be permitted under article 20, "which states that '[t]he Committee shall normally meet for a period of not more than two weeks annually,'"<sup>220</sup> to meet often enough to perform even the limited tasks it is required to perform under article 21.<sup>221</sup> While Meron suggests a way around article 20 by pointing to some ambiguity in the mandate's language,<sup>222</sup> he concludes that "it is doubtful that a drastic and permanent extension of the annual sessions of the Committee would accord with the Convention."<sup>223</sup>

Galey and Burrows note other problems with CEDAW, including

---

216. MERON, *supra* note 17, at 81; *see also* Reanda, *supra* note 136, at 22.

217. MERON, *supra* note 17, at 56.

218. Both authors note the procedure implemented under the Optional Protocol to the International Covenant on Civil and Political Rights. *See id.* at 81-82; Reanda, *supra* note 136, at 22-23. Additionally, Meron notes that the procedure is allowed under article 14 of the Convention on the Elimination of All Forms of Racial Discrimination. MERON, *supra* note 17, at 82.

219. MERON, *supra* note 17, at 81. Meron contrasts article 21 with articles in the Convention on the Elimination of All Forms of Racial Discrimination that provide for the consideration of such complaints as well as, "in certain circumstances, 'a report embodying its findings on all questions of fact relevant to the issue between the parties and containing such recommendations as it may think proper.'" *Id.*

220. *Id.* at 81.

221. *See id.*

222. *Id.* ("[T]he language of Art. 20 is not categorical, since the word 'normally' leaves a certain latitude to the Committee to meet more frequently or for longer periods.")

223. *Id.* Nevertheless, he made the same suggestion four years later. Meron, *supra* note 17, at 214.

its composition, which seems to be too overtly political. Burrows, relying on Galey's earlier analysis, explains:

The Convention provides that the Committee be composed of a group of independent experts. From the biographies of at least some of the members it is clear that they have been drawn straight from government service. Thus the integrity of the Committee as an independent body must be called into question.<sup>224</sup>

Moreover, she notes that there is a "failure of the ratifying state to report on time," a "lack of time devoted to each report," and a "backlog of reports."<sup>225</sup>

In spite of the many problems institutionalists find with CEDAW, they all allude to ways of solving the difficulties. Indeed, such solutions are embedded in the very identification of the difficulties, and are, for the most part, derived from procedures set up under mainstream institutions. Only Burrows suggests that the international human rights institutional framework might be inherently flawed, but then she seems mainly concerned, even in her discussion of CEDAW, about a general inability of international law to deal with uncooperative States and States that have not signed relevant treaties.<sup>226</sup> For those States, Burrows appeals to the "moral value of international law and the persuasive influence which that law can have on states that have not assumed legal obligations under international treaties."<sup>227</sup> According to Burrows, then, even if the institutions fail, the law's morality prevails.

Somewhat surprisingly, institutions — mainstream and specialized — are where most of the hope for enforcement of women's human rights seems to lie, and yet where the criticism is perhaps most harsh. The concreteness of the institutionalists' critiques, however, poses real possibilities for solutions to the problems they name. The way the procedure adopted by Draft Resolution X fills the gap identified by Reanda, at least in Galey's view, is illustrative of the way in which

---

224. Burrows, *supra* note 137, at 95; see also Galey, *supra* note 135, at 477-78.

225. Burrows, *supra* note 137, at 95-96. The last two problems stem partly from the fact that, as Meron also notes, the Committee meets for only two weeks out of the year. *Id.* at 96.

226. Burrows states:

The international enforcement machinery provided for in the Women's Convention . . . does not inspire a great deal of optimism as to its ability to encourage compliance by recalcitrant states. Bearing in mind that the machinery operates only for parties to the Convention, who might be supposed to have a commitment to the elimination of discrimination, and does not cover two-thirds of the international community, hopes that international law, as a legal system, may make a significant contribution to the elimination of discrimination against women may be ill-founded.

*Id.* at 96. For a discussion of Burrows's concerns about these same issues regarding enforcement of international law generally, see *supra* notes 140-41 and accompanying text.

227. *Id.*

possible solutions might arise from the critiques. Nevertheless, new gaps are always identified, even with the Draft Resolution X procedure, just to be filled by more and more procedures that produce yet more gaps to be filled by yet more procedures. While the process appears endless, most of the institutionalists have faith. They keep identifying the gaps and proposing new fillings, as they move to specialized institutions, while never completely letting go of the mainstream ones.

Although institutionalists tend to be more critical of the human rights model than are doctrinalists, in some ways they have fewer difficulties with it. They accept the basic institutional framework as capable of protecting human rights. Rather than trying to force mainstream institutions to assimilate women's rights, they just attempt to get the system to give power to the specialized institutions. They tend to think that, with power and their own agenda, specialized institutions can see women's rights actualized.

In the process of working on their specialized agenda, institutionalists ignore two things. First, they continually bump up against problem after problem within the system — international law enforcement is difficult, States do not report, "experts" are appointed by governments — but they rarely blame these problems on the system as a whole. With the exception of Burrows, no one suggests that any of these difficulties might lie in the international legal framework or be symptomatic of larger problems. Second, in their turn to specialized institutions, they tend to underestimate the extent to which the power of specialized and mainstream institutions are interrelated. On one hand, much of the power for specialized institutions must come from the mainstream framework. Yet, institutionalists do not address why, if it is not a priority to include women's rights on the human rights agenda, it would be a priority to give women's rights institutions greater status and power. On the other hand, advocates tend to assume that if it were up to specialized institutions, they would give themselves, or at least request, greater power. That (even most female) members of the institutions have in the past rejected possible increases in power is something the advocates do not squarely confront.

#### IV. EXTERNALLY CRITIQUING HUMAN RIGHTS DISCOURSE: MAKING IT ACCOMMODATE WOMEN'S RIGHTS

A number of women's rights advocates approach international human rights law by, at least initially, situating themselves outside the human rights system looking in at its discourse. Overt in their concern for women's interests, they critically question whether such inter-

ests are assimilable to human rights discourse, particularly since the issues/concerns/rights of women often seem different from those matters with which the discourse generally concerns itself. In contrast to other advocates, external critics are concerned less with showing that some right exists in positive law or that some institution has the responsibility to protect women's rights, and more with challenging the entire human rights system — lawmakers, law enforcers, and advocates — to “wake up” to and accommodate the reality of women's lives. External critics differ among themselves in the degree to which they believe the system can accommodate women.

External critics, then, do not take an assimilationist approach to human rights; they are accommodationists, believing that the discourse will have to change in order to fully encompass women's issues/concerns/rights. Different critics take different approaches, reflecting various levels of reliance on human rights law and rhetoric. In addition, their approaches suggest a spectrum of feminist attitudes and beliefs.

One approach is integrationist, arguing for a conception of human rights that is truly human, that represents the rights of women as well as those of men. For those who take this position, women's rights are an integral part of any human rights theory. Indeed, one critic suggests that women's status in the world is the measure of the protection of all human rights in the world. Integrationists suggest reclaiming human rights discourse, but in a way that will make it effective for women. For the discourse to be effective, they argue, it will have to change its (presently male) focus.

A second critique expresses less faith than the integrationist position in the ability of human rights theory to accommodate women's rights. For its proponents, the theory is flawed because it centers on a fundamentally male definition of human rights. Hence human rights must be reconceptualized and redefined, primarily by women, in order for women to be accommodated. Reconceptualists argue, in particular, that women's rights must enter the traditional private sphere.

A third critique argues that human rights rhetoric is problematic because rights discourse and the language of international human rights instruments is “male.” Those who pose this critique question whether rights rhetoric is worth using. Although these critics express a great amount of skepticism about the ability of human rights discourse to accommodate women's concerns, some of their arguments imply that accommodation could occur if human rights language were changed.

While each of the external critics is plagued by an uneasiness as to

whether human rights discourse can or will accommodate women's rights, they all approach and leave the discourse with some hope that it can accommodate their concerns. That is, no one suggests abandoning human rights law, institutions, or rhetoric. Much like institutionalists, each critic depends on certain parts of the system — in its present form — to make her challenge.

I consider the external critics radical feminists, in that they critique the human rights system for the ways it perpetuates women's subordination.<sup>228</sup> Just as doctrinalists confront the existence of cultural differences and institutionalists deal with the roles of mainstream and specialized institutions in affecting change for women, external critics grapple with the perceived distinction between the public and private spheres. For most of these critics, the way human rights discourse can begin to accommodate women's rights is by entering what is traditionally considered the private sphere. Here their approach is in opposition to that of Meron. While Meron believes that the entry of human rights into the private sphere leads to an erosion of human rights, these advocates consider such entry essential to women's rights and therefore essential to a system that claims to protect all human rights.

I also consider some of these critics cultural feminists, to the extent that they approach women's human rights as if all women were essentially the same. Although several are faced with the possibility of differences among women, they do not confront those differences as do the doctrinalists. Were they to face such differences, they would likely assign false consciousness to those with whom they disagree. External critics seem to avoid this issue by focusing almost exclusively on the "male" attitudes of individual States and of those who define human rights discourse.<sup>229</sup>

In this Part, I discuss articles by Fran Hosken,<sup>230</sup> Riane Eisler,<sup>231</sup> Noreen Burrows,<sup>232</sup> and Helen Bequaert Holmes,<sup>233</sup> and an article by

---

228. See generally JAGGAR, *supra* note 55, at 83-85.

229. I have suggested elsewhere that the near exclusive focus on a male/female dichotomy as an obstacle to achieving women's human rights might prevent the external critics from confronting differences among women. See Engle, *supra* note 52.

230. Fran P. Hosken, *Toward a Definition of Women's Human Rights*, HUM. RTS. Q., Spring 1981, at 7.

231. Riane Eisler, *Human Rights: Toward an Integrated Theory of Action*, 9 HUM. RTS. Q. 287 (1987).

232. Burrows, *supra* note 137.

233. Helen B. Holmes, *A Feminist Analysis of the Universal Declaration of Human Rights*, in *BEYOND DOMINATION: NEW PERSPECTIVES ON WOMEN AND PHILOSOPHY* 250 (Carol C. Gould ed., 1983).

Holmes and Susan Rae Peterson.<sup>234</sup> I also look at part of a speech given by Felice Gaer.<sup>235</sup>

### A. *Reclaiming Human Rights Discourse to Integrate Women's Rights*

One line of criticism challenges mainstream human rights advocates to accept a coherent, or true, theory of human rights — one that represents the rights of women and men — and to conform their attitudes and actions to allow for the realization of all human rights. Its proponents are integrationists, promoting a view of “human rights which are genuinely human,”<sup>236</sup> and they see the acceptance of that view as essential to creating a theoretically sound and just framework of human rights. Hosken and Eisler represent this view.

Of all the external critics, Eisler and Hosken are the most specific about what they see as rampant violations of women's human rights.<sup>237</sup> At the same time, though, they also seem to have the greatest amount of faith in the ability of human rights discourse to accommodate their concerns about those violations. This apparent tension, between their belief in the discourse of human rights and their awareness and outrage that women's rights are still violated,<sup>238</sup> guides much of Eisler and Hosken's work. Integrating women into the human rights fold is their response.

To the extent that the integrationist position assumes that human rights belong to women, as human beings, it mirrors the approach of the doctrinalists. But while doctrinalists tend to assume that women are already included in the “human” of human rights, even if sometimes through specialized women's instruments,<sup>239</sup> integrationists fo-

---

234. Helen B. Holmes & Susan R. Peterson, *Rights Over One's Own Body: A Woman-Afirming Health Care Policy*, HUM. RTS. Q., Spring 1981, at 71.

235. Felice Gaer, *Women's Rights and Human Rights: Possibilities and Contradictions*, Address at the 1988 Harvard Human Rights Symposium (April 16, 1988) (videotape available from Harvard Human Rights Program).

236. Hosken, *supra* note 230, at 10.

237. *See, e.g., id.* at 2 (discussing ways in which women are deprived of their rights to food and shelter); *id.* at 4 (discussing deprivations of “woman's right to health and to control of her own body and fertility”); *id.* at 4-5 (discussing deprivations of women's “economic rights”); Eisler, *supra* note 231, at 293-95 (discussing women's lack of property rights, women's lack of reproductive freedom, and “genital mutilations of women which still kill, maim, and blight the physical and psychological health of millions of women and little children every year”); *id.* at 301-02 (discussing violations of women's “rights to life, liberty and property” and “discrimination in food and health care allocations”).

238. This tension resembles the enforcement gap between law and reality that doctrinalists and institutionalists often face.

239. Of course, they do not always readily assume it. Indeed, their oscillation between mainstream and specialized instruments suggests an uncertainty about whether they are advocating the human rights of women or women's rights. *See supra* notes 61-62 and accompanying text.

cus on the failure of human rights practice to comport with its theory.<sup>240</sup>

Hosken and Eisler respond to violations of women's rights that occur despite of the international human rights régime by reclaiming the term "human rights," and then suggesting that current theory and enactment of the term is incorrect. They reclaim the language by promoting what they see as the term's essential meaning, arguing that human rights are not really human rights unless they protect women. So concerned is Eisler to reclaim the language of human rights that she rarely — if ever — uses the term "women's rights" without placing it in quotation marks. Instead, as Reanda does, she uses phrases such as the "human rights of one-half of humanity."<sup>241</sup>

For Eisler, women's rights are not only an important part of human rights, they are essential to human rights. The title of her article, *Human Rights: Toward an Integrated Theory for Action*, bespeaks the "three basic premises" from which she proceeds:

that the aim of the international human rights movement is to secure protection for individual rights; that this includes the rights of all human beings; and that, without a theory that integrates the human rights of half of humanity, the goal of the human rights movement, equal justice for all, cannot be attained.<sup>242</sup>

Eisler continually repeats this concern. For example, she begins her discussion of her "systems view of human rights" by explaining why the struggle for human rights is still incomplete:

A first major step in the modern human rights movement aimed at the top portion of the patriarchal pyramid, was the successful challenge to the "divine right" of kings to rule. The second major step is the successful challenge of the "divine right" of men to rule. Largely because this second challenge has not yet been successful, the modern struggle for human rights remains incomplete.<sup>243</sup>

Then, after discussing some of "the disastrous consequences of the double standard of human rights for women and men for the attainment of the just social order,"<sup>244</sup> she claims that "the major obstacle

240. See, e.g., Hosken, *supra* note 230, at 1. She elaborates:

The very term *human rights* is inclusive with no discriminatory meaning implied. However, practice does not always comply with principle . . . . In our day, experience shows that it is an error to assume that terms such as *humanity*, *human rights*, or *mankind* are inclusive . . . .

Although human rights are discussed throughout the world, women's rights in international human rights initiatives are almost invisible.

*Id.*

241. For earlier discussions of the issue of whether to use the term "women's rights" or "human rights of women," see *supra* note 2 and text accompanying note 159.

242. Eisler, *supra* note 231, at 287.

243. *Id.* at 300 (citation omitted).

244. *Id.* at 302.



that at every turn has blocked or reversed the movement for human rights is that the rights of one half of humanity have not been effectively addressed."<sup>245</sup>

Hosken agrees that women's rights are essential to human rights because "[m]en can never hope to achieve their own freedom or human rights unless women, on whom they depend for the creation of life, are free. As long as some of us are not free, none of us are free."<sup>246</sup> But Hosken takes Eisler's analysis a step further, seeing "[a] human relationship based on equality between women and men [as] the *foundation* of human rights and justice in each family and community within each nation, and finally among all nations."<sup>247</sup>

By reclaiming human rights rhetoric, while at the same time making human rights theory incomplete without women, Hosken and Eisler have begun to mediate the tension with which they began. Now, without respect for women's rights, human rights and a just world will not exist.

A potential obstacle to the actualization of a fully integrated human rights approach arises, though, because human rights theory, at least ostensibly, has not taken up issues of women's rights for a reason: It "continue[s] to deal primarily with the so-called public or political sphere. Since women traditionally have been excluded from this sphere, this has in effect served to also exclude the rights of women from the category of rights protected from institutionalized oppression and discrimination."<sup>248</sup> This theoretical distinction flows over into practice, where "international agencies working for the advancement of human rights continue to focus primarily on the relations between men and men."<sup>249</sup>

Eisler maintains that this difficulty is neither insurmountable nor endemic to human rights theory, arguing that the integrated theory of human rights she proposes would avoid it. She examines the right to privacy, for example, which insulates both men's and women's private lives from public scrutiny. Rather than seeing the right to privacy, as Meron does, as necessarily conflicting with women's rights, she attempts to change its dominant conception: "The critical rearticulation

---

245. *Id.* at 302-03. Much of Eisler's article focuses on the movements, as opposed to the law, of women's rights and human rights, which "have remained generally segregated with severely deleterious consequences for the human rights of *both* women and men." *Id.* at 301. She sees women's integration into human rights law, however, as important to "establish[ing] the foundation for a just and humane world order." *Id.* at 300.

246. Hosken, *supra* note 230, at 9.

247. *Id.* at 2 (emphasis added).

248. Eisler, *supra* note 231, at 289.

249. *Id.*

for legal theory is that the right to privacy is not synonymous with the right to noninterference with actions within the family. Nor is it synonymous with the right by the head of the household to governmental noninterference with his actions within the family."<sup>250</sup>

Eisler makes this "rearticulation" work in two ways. First, she argues that the very notion of human rights evinces a rejection of the public/private dichotomy. "[T]he idea that what governments do within the confines of their nations is a strictly internal affair has today explicitly been rejected by human rights advocates. Indeed, the rejection of this idea is the theoretical basis for the international human rights movement."<sup>251</sup>

Second, she argues that the idea that family is private and can therefore not be interfered with is only selectively applied:

Indeed, the principle of noninterference with "family autonomy" is in actuality nowhere fully accepted. On the contrary, a universally established principle is that family relations are subject to both legal regulation and outside scrutiny . . . .

In other words, the principle of noninterference with "family autonomy" is not consistently applied. It has in fact been applied in a very selective manner designed to maintain a particular type of familial (and social) organization: a male headed, procreation-oriented patriarchal family in which women have few if any individual rights.<sup>252</sup>

Because the public/private distinction is applied inconsistently, the question is no longer one of theory but of priorities, where "the issue is what *types* of private acts are and are not protected by the right to privacy and/or the principle of family autonomy."<sup>253</sup>

Since the difficulty lies in the application of human rights theory, rather than in the theory itself, Eisler can now reclaim the theory. By showing that the public/private dichotomy does not really exist, her "integrated theory" does not have to deal with difficulties that might otherwise be imposed by the distinction.

After reclaiming human rights theory, Eisler and Hosken turn to positive human rights law, placing a great deal of hope in the Women's Convention. For Hosken, "[t]here is no doubt that in the inter-

---

250. *Id.* at 293.

251. *Id.* at 289-90. This idea is so ingrained in human rights theory that most public international scholars point to it as the distinguishing feature between human rights law and the rest of public international law. Of course, as Eisler fails to point out, it is also this distinction that often keeps international human rights law at the periphery of public international law.

252. *Id.* at 293. This idea has been developed in the United States domestic law context in Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REF. 835 (1985); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

253. Eisler, *supra* note 231, at 297.

national context, this Convention is the single most important document speaking for the human rights of women that has ever been devised . . . . 'Its comprehensiveness touches every aspect of women's lives, in the political, economic, and legal and health/family spheres.'"<sup>254</sup> Because it "expressly address[es] violations of the human rights of women," Eisler sees the Convention as "a potentially pivotal turning point in the human rights movement."<sup>255</sup> Not inconsistently with her initial perspective, Eisler finds hope in the Convention largely because it recognizes that so many violations of women's rights still occur, in spite of their prohibition in international law.<sup>256</sup>

Eisler also believes that "the Convention addressed some of the major theoretical barriers to a unified, and operationally effective, theory of human rights."<sup>257</sup> She illustrates how two of the Convention's articles break down the public/private distinction,<sup>258</sup> which is of course what Meron saw as the Convention's weakness and "overbreadth." For Eisler, the Convention "constitutes the hitherto missing link for the construction of an internally consistent theory of human rights that expressly rejects the traditional exclusion of 'women's rights' from the purview of international human rights activities. This is a critical step toward the completion of the modern struggle for human rights."<sup>259</sup> In her move to positive law, Eisler puts faith in more than human rights theory; she believes that the Women's Convention, with its integrated theory, will affect positive change for women.

I noted in Part II that the liberal feminist doctrinalists are able to accept cultural differences among women in a way that the radical and cultural feminist external critics are not. Eisler is the only one of the external critics who expressly addresses the issue of cultural relativism.<sup>260</sup> She never, however, sees the issue as one of differences between women. Indeed, when that possibility arises, she refuses to consider its merit.

Eisler first touches upon this issue in a discussion of "genital mutilation." After condemning international human rights organizations

254. Hosken, *supra* note 230, at 6 (in part quoting Tinker, *supra* note 208, at 42).

255. Eisler, *supra* note 231, at 304.

256. *Id.* ("[The Women's Convention] was the first U.N. document to recognize expressly that, despite other international conventions against discrimination, violations of the human rights of half of humanity still remain generally ignored.").

257. *Id.*

258. *See id.* (discussing articles 1 and 16 of the Women's Convention).

259. *Id.* at 305.

260. This issue also arises briefly, although not overtly, in Burrow's work. *See infra* text accompanying note 295.

for failing to take "a firm position on this important issue and [doing] little to encourage the passage and enforcement of [national] laws [to prohibit the practice],"<sup>261</sup> she addresses possible reasons for their inaction. She first refutes their "ostensible basis . . . that these are private rather than public practices and thus outside the purview of international human rights conventions."<sup>262</sup> Then she turns to the argument that pressing "for the enactment and enforcement of laws prohibiting genital mutilation would be improper interference with ethnic traditions, constituting merely one more form of 'Western cultural imperialism.'"<sup>263</sup> She abruptly dismisses this contention:

The fact is that non-Western women are today in the forefront of the movement to eradicate these practices. Moreover, in the last analysis, the idea that one can justify genital mutilation in the name of respect for cultural traditions is not only horrifying, but ludicrous. All institutionalized behavior, including cannibalism and slavery, are cultural traditions. And surely no human rights advocate, or for that matter anyone else, would today dare to justify cannibalism or slavery — which were once also hallowed ethnic traditions in certain cultures — on cultural or traditional grounds.<sup>264</sup>

Eisler sees the cultural relativism or cultural imperialism argument as disingenuous, particularly to the extent that it is made by those involved in the human rights movement. Her critique implies that the problem lies not in international human rights law or theory, or in disagreements among women, but in the attitudes of those with the power to determine the priorities of the movement.<sup>265</sup>

Eisler believes that human rights discourse can and should be used to change attitudes and customs that serve as vessels of much of women's oppression. Although she does not focus much of her effort on positive law, she believes that the Women's Convention might ultimately provide a vehicle for altering those customs and attitudes. For her, the importance of article 5, requiring States to modify their social and cultural patterns, "cannot be overestimated."<sup>266</sup>

---

261. *Id.* at 295.

262. Eisler, *supra* note 231, at 295. For her specific refutation of the argument, see *id.* at 295-96.

263. *Id.* at 296.

264. *Id.* Eisler supports her claim that non-Western women are in the forefront of the movement with the following footnote:

For example, at the 1985 UN End of the Decade for Women Conference in Nairobi, Kenya, attended by the author, some of the clearest voices against genital mutilation were those of Muslim women. Even among the still rigidly male dominated Masai tribes of Kenya, women are now beginning to reject these "traditional practices."

*Id.* at 296 n.22.

265. See *id.* at 297 ("The real issue is therefore one of priorities.").

266. See Eisler, *supra* note 231, at 305 (quoting article 5(a)).

Integrationists, then, do not give up on human rights discourse, despite the persistence of women's human rights violations. Instead, they embrace it, reclaim it, and put hope for the future in it. While they never suggest that attitudes and priorities are changing within the human rights movement, Eisler and Hosken both indicate that relations among women and men might be improving generally, possibly leading to a decrease in women's human rights violations. While Eisler suggests that the law might change attitudes, Hosken hints toward the end of her article that attitudes are already changing, in compliance with a universal goal:

For the first time in history, we are beginning to see a different, cooperative, more caring and peaceful way of life ahead. We are beginning to perceive a new freedom and a new dignity in our personal relationships that are no longer dominated by fear between women and men, but by respect and by mutual understanding of each other's needs. The route to this goal is political, of course. The goal, which is shared by all people, is freedom for women everywhere in the world.<sup>267</sup>

This conclusion is quite optimistic for Hosken, who has emphasized the many violations against women.<sup>268</sup> Believing that attitudes are changing, though, allows her to continue to rely on human rights discourse.

### B. *Reconceptualizing Human Rights Discourse*

A second critique is less eager than the integrationist position to embrace human rights theory, at least initially. It sees the theory as fundamentally flawed for its basis in a "male" definition of human rights, which precludes sufficient attention to women's concerns. Proponents of this position argue that human rights theory must be reconceptualized and redefined, largely by women, for women's rights to be accommodated. A portion of Noreen Burrows's work is most representative of this reconceptualist approach.<sup>269</sup> The distinction between the reconceptualist and integrationist approaches is sometimes subtle and is perhaps best exemplified by the distinction between Burrows and Eisler.

One difference in their approaches lies in their attitudes toward the differences between women and men, and resembles earlier questions about whether to pursue universal human rights for women or wo-

---

267. Hosken, *supra* note 230, at 9.

268. See *supra* note 237.

269. In describing this approach, I also refer to Gaer, *supra* note 235. While Burrows focuses on the need for women to define their rights, Gaer suggests that international human rights groups enter a period of reconceptualization and redefinition. See *infra* notes 279-81 and accompanying text.

men's particular rights. Eisler tends to normalize or universalize women's rights and make them an essential part of human rights, thereby deemphasizing the possibility that women might be different from men or need special rights.<sup>270</sup> Burrows, on the other hand, embraces women's difference from men and calls upon women to define their own rights. In fact, Burrows criticizes human rights discourse for only dealing with those rights of women that are considered universal in that they apply to women only by virtue of their humanity. Since she sees the Women's Convention as embodying such universal norms, by only prohibiting discrimination rather than guaranteeing rights specific to women, she is more critical of it than are either Eisler or Hosken. This reconceptualist focus on women's special concerns mirrors the institutionalist focus on specialized institutions.

The difference between the integrationist and reconceptualist approaches also emerges in Burrows's and Eisler's attitudes toward the public/private distinction. While Eisler argues that the public/private distinction is arbitrary and irrational, Burrows generally accepts the distinction as logical but wrong, and therefore argues that the discourse has to change in order to encompass what has been defined as the private sphere. Hence, although in many ways Burrows's critique makes greater demands on human rights discourse to expand to include women, she turns out to be more accepting of its limitations than are Eisler and Hosken. Felice Gaer joins Burrows in accepting the dichotomy of public and private spheres as a real limit to expanding women's rights. Indeed, Gaer sees the distinction as one that has precluded the women's rights and human rights movements from working together. Eisler would likely implore Burrows and Gaer not to accept the distinction as a limitation on the protection of women's rights, but instead to explode its appearance of rationality and consistency.<sup>271</sup>

Burrows, unlike Eisler and Hosken, does not discuss specific violations of women's rights. The tone of her article does not convey the same sense of outrage displayed by Hosken and Eisler, perhaps because, rather than seeing human rights discourse as embodying a double standard for women and men, Burrows sees it as merely limited in its present state. By arguing that the human rights system can accommodate women through expanding its scope to include the pri-

---

270. *But see* Eisler, *supra* note 231, at 297 ("The life experiences that are for either biological or traditional reasons typical for women are both similar to and different from those of males.")

271. At one point, Burrows does acknowledge that the distinction is "political," not "inherent." *See* Burrows, *supra* note 137, at 82. Still, the thrust of the article is that human rights discourse must accommodate women's "private" lives.

vate sphere, Burrows does not have to confront the inconsistencies identified by Eisler. She is also able to place much of the onus on women to define their own rights.

Burrows does not feel the same tension as Eisler about talking in terms of women's rights; indeed, her article encourages women to take more decisive steps in defining their rights. For Burrows, women should become more vocal about their differences instead of being subsumed by a discourse about universal human rights that, at best, only deals with discrimination issues.

Burrows suggests that women define their rights because public international law has not yet defined or enumerated them.<sup>272</sup> For her, human rights history displays how men, having generally been in control of defining human rights, have created a system that does not include women's rights:

Human rights discourse has traditionally been male dominated in the sense that, in what is essentially a man's world, men have struggled to assert their dignity and common humanity against an overbearing state apparatus. Attempts to define a body of civil and political rights were made from the eighteenth century onwards in societies that were organized by men and, predominantly, for men.<sup>273</sup>

Burrows does not believe, however, that civil and political rights are historically or inherently male,

rather that the rights typically claimed were designed to regulate the relations between men and the state. In some cases the law did specifically exclude women from the exercise of human rights, but more generally they were excluded from holding rights due to the fact that society undervalued their importance and to some extent ignored their existence. Declarations of the rights of man reflected exactly that perspective.<sup>274</sup>

Since, in Burrows's description of the history, human rights do not naturally exclude women, women can define their own rights. Burrows therefore is able to critique human rights discourse as it currently exists, while still holding out hope for its accommodation of women's rights.

The guarantee of women's rights in positive law is an important part of human rights history for Burrows. She believes that because men have dominated the human rights legal field, women have only been accorded those rights that they have accrued by virtue of being human (not female). Hence, rights have only been gradually extended

---

272. See Burrows, *supra* note 137, at 80 ("In the context of public international law it is perhaps misleading to speak of women's rights.")

273. *Id.* at 81.

274. *Id.*

to include women as they have begun to enter into public life.<sup>275</sup>

Therefore, in the international context, what has been developed is a set of legislative reforms which seek to place women in the same situation as men. In this context women's rights are not therefore rights which are specific to women, but are rather universally recognized rights held by all people by virtue of their common humanity and regardless of their sex.<sup>276</sup>

For Burrows, this focus on universally recognized rights is not sufficient to accommodate women's difference from men.

Continuing in this vein, Burrows devotes most of the remainder of her article to differences between women and men, an issue that is not unrelated to the public/private distinction. The differences, she claims, "are two-fold; those largely defined by the structure of society, and those based on the biological distinction between sexes."<sup>277</sup> Both of those differences mean that women spend a lot of time outside of what is generally considered the public realm, and that human rights discourse largely ignores their concerns.<sup>278</sup>

Burrows indicates that women bear significant responsibility for the failure of the human rights régime to take into account women's special situation. Women's rights have not been accommodated, she contends, for two reasons. First, women have failed "to specify the rights to which they may justifiably lay claim," and second,

women have not grasped the fact that the distinction drawn by states between public and private areas of life, which roughly corresponds to the world of men and that of women, allowing for the existence of rights in the former but not in the latter, is a distinction drawn for political reasons. It is not one which is inherent in the nature of society, neither is it natural or necessary.<sup>279</sup>

Although Burrows here agrees with Eisler that the public/private distinction is not natural, she accepts that the line has been drawn. Burrows's solution to overcoming the distinction is to urge human rights to step into the private sphere.

Felice Gaer also has identified the public/private distinction as an

275. *Id.*

276. *Id.* at 82.

277. *Id.* at 82. She further explains that "[t]he former relate to the fact that typically certain functions are performed by women, such as child-care, housework, subsistence, farming. The latter relates to the exclusive performance by women of bearing and suckling children." *Id.*

278. Burrows elaborates:

These areas, which have been defined by states as being areas of private life, are often thought not to be areas where the discourse of human rights is relevant, yet they are areas in which the majority of the world's women live out their days. A definition of rights which omits to take on board the needs and aspirations of half the human race cannot thereby lay claim to universality nor can it be seen to have an overriding moral authority.

*Id.*

279. *Id.*



obstacle to the prospect of bringing together women's rights and human rights, particularly their separate movements. As a participant in a panel entitled "Putting Women's Rights on the Human Rights Agenda: Can We? Should We?" during a 1988 Harvard Human Rights Symposium, Gaer posited that the line that has been drawn between the public and private spheres creates a fundamental problem for bringing the two movements together:

I think there's been a very fundamental problem in [bringing the movements and organizations together] and it's a conceptual problem. The women's agenda really touches on three distinct areas. One is the development agenda of the international community and the United Nations in particular. The second is the traditional human rights questions — civil, political, economic and social. The third [is] a set of issues that have (sic) been categorized as women's issues within the context of the United Nations. And the fact is that most of the human rights organizations focus on the issue of political and civil rights and they focus particularly on those of the physical integrity of the individual versus the state. It is the state that is the object of attention because it is the state that is viewed as the perpetrator of the abuses against the individual and so you have a focus on issues when it came to women — voting, torture, due process, things of that sort.<sup>280</sup>

Gaer believes that the human rights movement can accommodate women's rights, but only by overcoming this conceptual problem. After discussing reasons why "[m]ost of the human rights organizations in fact don't see the issue as human rights and they often concomitantly don't see the issues as important,"<sup>281</sup> Gaer, while reemphasizing the problem as a conceptual one, also begins to suggest a solution:

What I'm trying to get at is that there really is a conceptual problem here and there's a very big conceptual problem and that what is needed, in order to put the woman's agenda into the agenda of the international human rights groups is a redefinition and a period of reconceptualization.<sup>282</sup>

Gaer agrees with Burrows that the public/private line limits human rights discourse in its ability to guarantee women's human rights. Gaer, though, rather than calling on women to define their rights, suggests that it is up to international human rights groups to reconceptualize their mandates.

Burrows is more specific than Gaer about what a reconceptualization of human rights would look like. Much of Burrows's article

---

280. Gaer, *supra* note 235.

281. *Id.* She lists three reasons for their failure to deal with the issues: (1) the leaders of most human rights organizations are lawyers; (2) there is a "hierarchy of rights" which privileges civil and political rights; (3) the organizations do not see the problems as public ones for which governments are responsible but rather see them as "cultural problems." *Id.*

282. *Id.*

seems to be aimed at women's rights activists, whose job she believes is to define women's rights so that States can then draft appropriate international and national legislation to accommodate those rights. Although Burrows discusses how States fail to recognize women's rights, she seems to see their behavior as both reflecting and impacting on international law, since the law results from joint State action.<sup>283</sup> For Burrows, the Women's Convention is therefore an example of how States have failed to accommodate women's rights.<sup>284</sup>

Burrows contends that, due largely to the hasty manner in which it was drafted,<sup>285</sup> the Women's Convention does not reflect "a sincere attempt to define the rights of women."<sup>286</sup> In drafting the Convention, "emphasis came to be placed not on defining women's rights as such, but on the elimination of discrimination against them within the conservative context of already accepted male norms."<sup>287</sup> For Burrows, it seems, the Women's Convention at best "provide[s] some indicators as to what might constitute a body of rights for women."<sup>288</sup>

Burrows disagrees sharply with Eisler, and Meron, as to how much the Convention breaks down the public/private dichotomy. Although the Convention purports to deal with the distinction, Burrows claims it has not successfully done so:

The preamble to the Convention recalls the contribution of women to the welfare of the family, the social significance of maternity, and the contribution of both parents to the care of children. It affirms that change is required 'in the traditional role of men as well as the role of women in society and in the family'. However, in the text of the Convention there is no attempt to translate the private relations in the family into a system which is governed by a set of rights.<sup>289</sup>

Burrows does not maintain that this particular flaw is a result of the hurried way the text was put together. Rather, she makes it clear that women's rights in the family were discussed, because a move to include a statement similar to one that had existed in the Declaration on the Elimination of All Forms of Discrimination Against Women — that women's equality is "[w]ithout prejudice to the safeguarding of

---

283. Also for Burrows, without State commitment, positive international law "remains a dead-letter, for the international legal system is incapable of forcing states' hands where they are unwilling to act." Burrows, *supra* note 137, at 97.

284. *Cf.* Burrows's discussion of CEDAW, *supra* text accompanying notes 211-15.

285. *See* Burrows, *supra* note 137, at 88 (suggesting that the motivation for the Convention "was to provide a focus for the conference [for the review of the Decade for the Advancement of Women]" and that the preparation for it was therefore minimal).

286. *Id.*

287. *Id.* at 87, *see also id.* at 85 ("The main thrust of the Convention is the elimination of discrimination and it is not intended to provide a list of rights for women.").

288. *Id.* at 84.

289. *Id.* at 83 (citation omitted).

the unity and harmony of the family which remains the basic unit of society"<sup>290</sup> — was "quashed."<sup>291</sup> While Burrows does not believe that the Convention is totally without merit, she cautions her readers that "the adoption of the Convention is not a solution to the problem of denying fundamental rights to women but can only be a step in the direction of valuing women's potential and actual contribution."<sup>292</sup>

For Burrows, then, women's rights will only be recognized if women can push States beyond the normal definition of human rights. To do this, women must define their rights to include more than rights to nondiscrimination in the public sphere, because "[e]ven were women to have unlimited access to what is at present the male environment, they would still occupy their own particular sphere. There would still be a need to develop a body of women's rights."<sup>293</sup> Burrows suggests that there are two types of rights that women must claim: "Certain of these rights would be exclusive to women, whilst others would be those typically claimed by women."<sup>294</sup>

Most of Burrows's discussion assumes that women will agree about which rights to claim. Nevertheless, when she suggests some of those rights, she is careful not to claim their absoluteness. Her rhetoric is not as forceful as that of Hosken and Eisler, and she expresses some concern that cultural differences might complicate the definition of women's rights:

An international definition of the rights of women would of course not be easy to achieve. Opponents of 'radical universalism' argue that universalist definitions of rights imply 'a priority to the demands of cosmopolitan community' and fail to take into account 'cross cultural variations in human rights'. Given the diversity in the forms of interpersonal relations and cultural variations which exist, say in the structure of the family, it may prove difficult to specify with sufficient precision those rights which the international community would recognize as being the rights of women.<sup>295</sup>

Hence, when it comes to a concrete discussion of what right or set of

---

290. *Id.* (quoting *Declaration on the Elimination of All Forms of Discrimination Against Women*, G.A. Res. 2263, UN GAOR, 22nd Sess., Supp. No. 16, at 36, UN Doc. A/6880 (1967)).

291. *Id.*

292. *Id.* at 89.

293. *Id.* at 86.

294. *Id.* at 85. Rights in the first category are "those centered on child-birth and would be accorded to women before, during and after the confinement," and "those which enable [a woman] to protect her person, such as the right to abortion, and to choose the time and spacing of her children." *Id.* Rights in the second category might include "the right to a minimum wage for child-care or for work performed in the home or in subsistence farming" and the "right to literacy." *Id.*

295. *Id.* (quoting Jack Donnelly, *Cultural Relativism and Universal Human Rights*, 6 HUM. RTS. Q. 400 (1984)).

rights women should claim, Burrows acknowledges that differences among cultures might make it difficult to conceive of a body of rights that the international community would recognize. While she accepts the existence of cultural differences and the effects it might have on "universal" human rights formation, she does not really entertain the possibility suggested by doctrinalists that women might define their rights differently in different cultures. Instead, her concern is whether individual States or the international community would accept rights that might seem antithetical to certain cultures.

Even with this complication, Burrows insists that women try to define their rights since "[i]t is unlikely that states as such will set out to recognize rights for women when women themselves have not presented a coherent argument for rights particular to them."<sup>296</sup> Her goal seems to be for women to define rights so that States will "recogniz[e] that women should have rights in areas which have been designated as the private domain . . . . If this is approved, then women will be free to assert their dignity and worth as human beings."<sup>297</sup>

Although Burrows seems to believe that the international human rights régime might eventually accommodate women, she does not suggest ways for women to come together to do the defining. At the same time, she is careful not to propose her own definitive list of rights. Even as Burrows urges an expansion of human rights to include women, however that expansion might occur, she acknowledges in her concluding sentence that States have done little to comply with those rights already guaranteed in positive law: "At the moment there is little evidence to suggest that states are actively pursuing policies of non-discrimination, and no evidence whatsoever to suggest that they are making efforts to extend the discourse of human rights to include the particular needs of women."<sup>298</sup> In the end, then, Burrows indicates uncertainty over whether human rights discourse would expand to recognize those rights, even after women have defined them.

### C. *Critiquing the Language of Human Rights Discourse*

For some external critics, the discourse of human rights is not just male-dominated and -deployed; it is male. These critics struggle directly with the question whether feminists should attempt to use rights discourse to meet women's concerns. Although they pose a number of important critiques of rights, they do not totally give up on the dis-

---

296. Burrows, *supra* note 137, at 89.

297. *Id.* at 85-86.

298. *Id.* at 97.

course. They all use rights rhetoric, for example; they just use it more self-consciously than other advocates. Helen Bequaert Holmes and Susan Rae Peterson are most representative of this approach.

In 1981, Holmes and Peterson wrote an article entitled *Rights Over One's Own Body: A Woman-Affirming Health Care Policy*, arguing that women should have the right to self-determination over their own bodies.<sup>299</sup> There, they contend that rights are male concepts on which they prefer not to rely, although to a certain extent they believe doing so is necessary. Two years later, Holmes published an article on the Universal Declaration of Human Rights,<sup>300</sup> in which she attacks that document's language, although not its use of rights per se, for being male. She also criticizes it for failing to contain certain rights and for guaranteeing only limited rights in some areas. Although her critique is quite harsh, it suggests that she has decided to use rights rhetoric. It also evinces a belief that the Declaration is authoritative and makes a difference in the world.

While both articles critique the language of human rights discourse, they do so in different ways. The first article comes nearer to a general feminist critique of rights than any other work on international human rights I have seen. The second one presents a thorough textual analysis of a document, looking specifically for male bias. Both articles, however, ultimately rely on human rights discourse, suggesting that it can eventually accommodate women's rights.

Peterson and Holmes are overt about their external approaches to human rights. They make no pretense of neutrality. Holmes gives an idea of her perspective early in her analysis of the Universal Declaration: "I approach the UDHR as a biologist and as a feminist."<sup>301</sup> Although they are not as assertive about their perspective in their article on women's health care, Holmes and Peterson do not try to hide their views. On the second page they talk about "feminist ethical dilemmas,"<sup>302</sup> and as soon as they begin their discussion about rights, they do so from a "feminist" perspective.<sup>303</sup> In both cases, the revelation that they approach their subject matter as feminists is significant for their analysis.

While Holmes and Peterson are unambivalent about their feminist

---

299. See Holmes & Peterson, *supra* note 234.

300. See Holmes, *supra* note 233.

301. *Id.* at 251.

302. Holmes & Peterson, *supra* note 234, at 72.

303. See, e.g., *infra* text accompanying notes 306-12; see also Holmes & Peterson, *supra* note 234, at 83 (noting two purposes for discussing informed consent, one of which is "to present feminist, woman-affirming perspectives on this issue").

perspectives, they are not altogether certain about what those perspectives mean for their work. In the article they write jointly, they are clearly troubled by the use of rights discourse. They set forth what they consider to be the feminist critique of rights, while at the same time they seem to want to get around the critique. And although they discuss in detail their concerns about rights, carefully explaining what they mean when they use the term, their article turns out to be the least rights focused of any I examine. Holmes and Peterson respond to this ambivalence in two ways: first, they justify some uses of rights, even in the face of a harsh critique (that they themselves posit); and second, they continue their article with few references to rights, human rights, or human rights discourse or law.

In the introduction to the article, Holmes and Peterson set the stage for their concern about language:

In this article we will discuss several different areas in health care for women in which conceptual and ideological problems arise because of the nature of the health care system. First we examine how the very language we use in health care policymaking and discussion is patriarchal in its origin and implication.<sup>304</sup>

In their first section, entitled "Beyond Rights,"<sup>305</sup> lies their critique of rights, as well as their response to the critique. Beginning with the claim that "the concept of 'rights' is masculinist and patriarchal, a concept that came into its own with the rise of capitalism,"<sup>306</sup> they suggest that rights discourse has been of little value to advocates of women's interests who have defined their struggles in terms of rights.<sup>307</sup>

Holmes and Peterson then launch into what they consider the feminist critique of rights, which, though resonating with early Marxist,<sup>308</sup> communitarian,<sup>309</sup> and critical legal studies critiques,<sup>310</sup> adds a cul-

304. *Id.* at 71.

305. *See id.* at 73-74.

306. *Id.* at 73.

307. *See id.*

308. *See generally* Karl Marx, *On The Jewish Question*, in *THE MARX-ENGELS READER* 26 (Robert C. Tucker ed., 2d ed. 1978); Karl Marx, *Critique of the Gotha Program*, in *THE MARX-ENGELS READER*, *supra*, at 525.

309. *See generally* MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1985); MICHAEL WALZER, *SPHERES OF JUSTICE* (1983).

310. *See, e.g.*, Gabel, *supra* note 1; Karl E. Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358 (1982); Olsen, *supra* note 1; Mark V. Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1563 (1984). For critical explorations of the arguments set forth in the above articles, see Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860 (1987); Margaret J. Raydin & Frank Michelman, *Pragmatist and Poststructuralist Critical Legal Practice*, 139 U. PA. L. REV. 1019, 1035-39 (1991); Schneider, *supra* note 1; Williams, *supra* note 1.

tural feminist<sup>311</sup> twist:

[M]any modern feminist scholars recognize that in our assertion of rights we play a masculinist game. To form a better world order we need to present an entirely different paradigm. "Rights" language seems to assume certain ideological presuppositions: that society is a collection of atomic particles in which any given individual's happiness or utility is viewed as mutually disinterested from another's, that communities or love relationships are not ethically relevant in deciding what action ought to be taken. Rights language is fundamentally adversarial and negative: it emphasizes those things which ought not to be taken from someone. It is also a property concept. Feminists seek a framework that emphasizes positive values such as helping, cooperating, and acting out of love, friendship, or relatedness, as well as fairness. Humans come into being related to one another, not as disinterested egoists, and thus duties and responsibilities are more fundamental notions than rights.<sup>312</sup>

Although Holmes and Peterson posit this critique as one employed by "many modern feminists," they do not cite anyone for support, which suggests that it is very familiar to them. The critique, I believe, reflects many of their own uncertain feelings about the ability of any rights discourse to assimilate feminist demands.

In spite of the critique, though, Holmes and Peterson justify their use of rights discourse. They intersperse their justification with more critique. They discuss, for example, how "[p]hilosophers have distinguished between rights of two sorts: claim rights . . . and liberty rights."<sup>313</sup> And, after stating that the distinction "is not as definitive as we might think,"<sup>314</sup> Holmes and Peterson perpetuate it: "The right over one's own body, which we advocate, is a liberty right and not a claim right. Such a right would specify that no such decision about any manipulation of a woman's body ought to be made unless it is the active decision of the woman herself."<sup>315</sup>

Although this distinction seems to begin their response to the critique of rights, Holmes and Peterson immediately return to the critique, discussing three more problems with rights discourse: first, "even when used in a liberty rights sense, rights language can be unproductive in a practical sense and unfortunate in a moral sense,"<sup>316</sup> second, rights discourse "fails to resolve moral disputes conclu-

---

311. I use cultural feminism here to refer to feminists who believe that for biological and/or socially constructed reasons, women tend to be more relational than men. See, e.g., CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982).

312. Holmes & Peterson, *supra* note 234, at 73.

313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.* at 74.

sively;<sup>317</sup> and third, “the concept of rights is static and does not challenge the social structure [making it] frequently necessary to appeal to moral rights (or human rights) to challenge such stipulative rules and rights.”<sup>318</sup> Even with this devastating critique, particularly of positive rights, Holmes and Peterson conclude the section by returning to a defense of rights, which is now quite diluted:

We use rights language here in a nonabsolutist fashion to include both legal rights and the moral rights used to challenge legal rights. These are liberty rights, although some of the conceptual connection with the claim rights may not be avoidable. Primarily, we wish to affirm other moral criteria than rights — such as duty, loyalty, friendship, responsibility, goodness, and justice — as the basis of moral action and as the basis for resolution of moral dilemmas.<sup>319</sup>

They then continue with the rest of the article, as if the rights problem were resolved. In doing so, though, they conspicuously avoid using rights discourse.

Holmes and Peterson mention human rights instruments at only one point in the article, in the midst of the section that critiques rights. After they define the “right over one’s own body,”<sup>320</sup> they point out “that no such right is mentioned in the Universal Declaration. Parts of Article 3 (security of person) and Article 6 (recognition as a person before the law) are most similar to this notion.”<sup>321</sup> Rather than trying to assimilate the right to these provisions of Universal Declaration, as doctrinalists might do, they just accept the limitations of the discourse. They do so even though they believe that the principles behind the Declaration would indicate such a right.<sup>322</sup> Perhaps the overt external posture taken by Holmes and Peterson permits them readily to accept that the Universal Declaration does not include a right over one’s body. That is, they do not aim to convince human rights advocates, judges, or international organizations or institutions to acknowledge the right’s existence. They are nevertheless still uneasy about letting go of rights rhetoric altogether. Hence, they defend the general existence of the right, even though it may not be guaranteed in positive international law.

Holmes’s approach to the Universal Declaration in her later article

---

317. *Id.*

318. *Id.*

319. *Id.*

320. *See id.* at 73.

321. *Id.* at 73-74.

322. After juxtaposing the language of the Declaration with that of a 1905 Illinois judicial opinion, they conclude: “Since status as a valid human being is a theme that seems to underlie all the articles in the Universal Declaration, it is curious that the framers of this statement did not include bodily integrity as the Illinois court saw fit to do.” *Id.* at 74.



makes clear her external status as a biologist and a feminist. Perhaps that status gives her the leeway to attack so extensively the language of the Universal Declaration of Human Rights. While Holmes is more critical of the Declaration in this work than in the earlier one, she also accepts the use of rights rhetoric, never even raising the issue discussed in the previous article. Here, Holmes plunges herself into the human rights paradigm by critiquing the Declaration. The tone of this article conveys anger that an important document exists for the protection of human rights, but that its very language possibly prevents its inclusion of women. Holmes is uncertain about whether the language can in fact be interpreted to apply to women, or whether its "maleness" precludes such application.

The first three paragraphs of Holmes's article best portray this uncertainty. The first two affirm the Declaration:

The Universal Declaration of Human Rights (UDHR) is a magnificent document. It is a clear testimony that some human beings — represented by the framers of the Declaration — hold within their hearts a deep respect for the personhood of all members of the human species. . . . If the UDHR were truly in effect — if, in fact, each and every government in those 48 nations [that have adopted the Declaration] held to each and every Article — the lives of all men *and* all women would be greatly advanced. Oppression, want, suffering, and injustice would be lessened.<sup>323</sup>

By emphasizing the potential significance of the Declaration, Holmes gives her critique more bite. But the third paragraph, where she begins the critique, seems to contradict the first two. She suggests that even if States followed the Declaration, women's rights might be neglected:

Even when nations in good faith do implement the UDHR, women encounter problems in obtaining their human rights. The phraseology of many of the Articles betrays the (I hope) unconscious bias of the framers that women are not actual persons. Indeed, there is evidence that, when certain Articles of the UDHR *have* been implemented by nations (or by global organs such as the World Bank), women in some parts of the world have even lost some of the meager rights they previously had. Subtle bias in language usage may translate into deprivation of rights for as much as 51 percent of humankind.<sup>324</sup>

By suggesting that women might be affirmatively harmed by the Dec-

---

323. Holmes, *supra* note 233, at 250.

324. *Id.* In support of the proposition that some women have lost rights as a result of the Declaration, Holmes adds an endnote that quotes from article 17, dealing with property rights, and then explains that some "international (World Bank) land 'reform' programs . . . have removed ownership of land from women, to the extreme detriment of women's livelihood." *Id.* at 261 n.3 (citing Barbara Rogers, *Land Reform: The Solution or the Problem?*, HUM. RTS. Q., Spring 1981, at 96-102, and Lisa Bennett, *Women, Law, and Property in the Developing World: An Overview*, HUM. RTS. Q., Spring 1981, at 88-95).

laration's language, Holmes raises the stakes for her analysis even higher.

Holmes sets out to uncover the "unconscious biases" in the text. The belief (and hope) that the biases are unconscious — that the framers meant well — allows her to suggest new interpretations of the Declaration's provisions with the faith that those in control might accept her interpretations. For the most part, Holmes approaches interpretation of the Declaration much the same way she and Peterson did in the earlier article. Holmes expresses clearly what she sees as the limits of the Declaration, so that when she suggests reinterpretations, it is clear that they are reinterpretations. Far from arguing in a doctrinal mode that the language of the Declaration guarantees certain rights she advocates, she contends that it does not.

Holmes launches into an article-by-article examination of the Declaration, discussing a number of provisions that she believes either neglect or hamper women's rights. For example, she attacks article 16(3), which protects the family,<sup>325</sup> on four different grounds. Her main critique is that "protection of the family can harm individuals, depriving them, in many cases, of the rights granted to them [by other parts of the Declaration]."<sup>326</sup>

Holmes similarly analyzes article 16(1), which reads: "Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family."<sup>327</sup> She is concerned about possible interpretations of this provision. One issue is that "[t]he word order in the phrase 'right to marry and to found a family' gives a strong implication that marriage is required before procreation."<sup>328</sup> Another is that if a right to procreate exists, then the State might have an obligation to make it possible for all persons to procreate, even those who are biologically and/or financially incapable of doing so.<sup>329</sup> Rather than accepting this latter interpretation as she does with article 16(3), Holmes challenges it. Since Holmes believes

---

325. See Holmes, *supra* note 233, at 251-53. Article 16(3) reads: "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State." The Universal Declaration of Human Rights, *supra* note 64, art. 16(1).

326. Holmes, *supra* note 233, at 253; see also *id.* at 252-53 (describing the other three grounds: "a definition for 'family' is the first problem, since each of us has a personal mental image of this concept"; second, "families as they have come to function in the twentieth century may be a shaky base on which to build world peace and justice"; and third, "the family fosters patriarchy and hierarchy").

327. *Id.* at 255 (quoting the Universal Declaration of Human Rights).

328. *Id.*

329. *Id.* at 256 ("In order for procreation to be a positive right, it must be made available to all, both rich and poor, and to those who are infertile for any reason whatsoever.").

that "this would be a ludicrous expenditure of money"<sup>330</sup> and women would generally be harmed,<sup>331</sup> she ultimately suggests that women not advocate a "positive right" to procreate. Instead, they ought to interpret the provision so as not to require such a right.

I believe that such women should not be tempted by suggestions that they might be able to have this procedure granted to them as a "right." Is it not far better for society to find other means for recognizing the worth of women? Accordingly, I recommend that the first sentence of Part 1 of Article 16 be interpreted as follows: "Men and women . . . have the right not to be prevented by the state from marrying or from having children." Such an interpretation protects individual liberties without subtly encouraging pronatalism.<sup>332</sup>

Holmes does not base her interpretation on any inherent meaning, or scientific deduction, of the Declaration, but rather on her beliefs about what will best benefit women.

At another point Holmes repeats her and Peterson's earlier critique, this time by claiming that there is "a missing right": "A third flaw in the UDHR is the failure to make an explicit statement of *the right to one's own body*. Alternatively, this right could be called control over one's body, the right to bodily integrity, or the right to oneself."<sup>333</sup> Holmes is much less ambivalent in this article than the earlier one about what the implications of that right might be:

The right to one's own body, if it could actually be implemented in full, would thus have profound implications for women. As a primary benefit, women could really decide when *to* and when *not to* have children! Women then would be given information about their bodies and the full range of selection of methods to control fertility.<sup>334</sup>

Holmes's critique of rights discourse disappears completely in her analysis of the Declaration. As for the "right to one's own body," her only concerns are that the right might be incapable of implementation and that it is not explicitly mentioned in the Declaration. Her argument suggests that if only the Declaration's framers had been more careful, perhaps more pluralistic, women's status in the world would be improved.<sup>335</sup>

By challenging the very language of human rights discourse as

330. *Id.*

331. *Id.* ("[W]omen who are accepted for in vitro fertilization have their bodies and their sex activities monitored closely; they pay large amounts of money; and most attempts end in failure.").

332. *Id.*

333. *Id.* at 256.

334. *Id.* at 258.

335. Note the similarities between this approach and that of Meron, who argues that the framers of the Women's Convention should have, through more careful planning, avoided infringing on rights of privacy and free religion. See *supra* Part 1.

male, Holmes suggests that the human rights system might not be able to accommodate women. Indeed, for her, the discourse does more than exclude women; it sometimes affirmatively harms them. In many ways, though, Holmes has backed off from her earlier challenge, particularly from her critique of rights. Hence, this article could be seen as a reversion to human rights discourse. Although Holmes is not loath to attack human rights discourse for ignoring or harming women, she is reluctant to abandon the discourse altogether:

The UDHR is to be praised for what it has done; we have no way of knowing how much worse the world would be without it. But sometimes it may have come closer to achieving its goals with men than with women; language may have been responsible for the difference.<sup>336</sup>

Holmes implies that if the language were only changed and/or reinterpreted, women's rights could be protected in the world, just as men's rights are protected. She no longer expresses any desire to give up on rights; she just wants to see them properly distributed.

From Eisler to Holmes, the external critics openly challenge human rights discourse to accommodate women. Unlike doctrinalists and institutionalists, they do not assume that the discourse was ever meant to assimilate their feminist demands. Nevertheless, they all generally believe that, with enough restructuring, human rights discourse could accommodate women's issues/concerns/rights. And if they do not believe that the accommodation can ever fully occur, they turn to the discourse anyway, for an apparent lack of anything better.

Although all the external critics eventually return to human rights discourse, the challenges they pose are deep. Unlike the institutionalists' critiques, their critiques do not imply solutions. Even as the critics sit at different places external to human rights discourse, they uncover similar difficulties. The public/private distinction, for example, is a hurdle that they agree must be confronted, one way or another, before the discourse will fully accommodate women. And although they disagree about what the hurdle looks like and how it should be confronted, they all seem to believe they can overcome it.

It often seems amazing that external critics return to human rights discourse. After planting seeds of disruption, no one fully pursues their growth.

## CONCLUSION

Those who assume that human rights would naturally incorporate women's rights might find it surprising that women's rights advocates

---

336. Holmes, *supra* note 233, at 259.

approach human rights law and discourse in so many different ways, and that they struggle with such a variety of issues. I am convinced by women's human rights advocates that the international human rights framework has — in doctrine, institutional structure, theory, practice, and rhetoric — subordinated the particularity of women's rights to what it has considered to be universal rights. But I also believe that it has paid more than lip service to women's concerns in each of these areas, in a way that has made it seem a good forum in which to address those concerns. Thus the struggle.

Through my own experience learning about and working in the human rights field, I have felt many of the tensions and ambivalences that seem to guide much of women's human rights advocacy. I have wondered whether human rights law and discourse have much to offer women, and I have therefore been uncertain about how to combine my work in feminism and human rights. Sometimes it has seemed as though they comprise two different fields altogether.

I spent the summer of 1987 doing "human rights work" in Central America. I collaborated with a group of Costa Rican-based Central American lawyers who traveled to different countries in the region, giving workshops on human rights law. Early in the summer, we went to San Salvador for a workshop with El Salvadoran human rights activists.

As soon as I arrived in San Salvador, I became very self-conscious of my status as a "gringa," a "norteamericana." I felt ambivalent about being in El Salvador to tell its citizens about how their government was violating their human rights, particularly since my own government was behind so much of their oppression. I felt that the Salvadorans would (and ought to) tell me to go back to the United States and work there, at the place where their problems originated.

To my surprise, no one reacted to me the way I expected. Instead, the people I met embraced me as a comrade, an ally, a symbol for hope that some people in the United States disagreed with the policies of the United States government and that collectively we might change things. That I was in their country to talk about human rights meant that we shared the same aspirations, for human rights and a just world.

During the workshop, I sat through lectures and discussions and working groups, mostly listening to lawyers inform activists of their "human rights." They taught them about legal procedures in El Salvador, such as habeas corpus, that they should try to use for the release of political prisoners. They taught them about the United Nations and the procedures available through Resolutions 1235 and

1503. They taught them about the Universal Declaration of Human Rights and the Civil and Political Covenant. They taught them about the El Salvadoran Constitution and all the human rights guarantees it contained. (We took copies of that Constitution to the activists, many of whom had never before read or even seen the document.)

As I sat through the workshop, a lot of questions were raised in my own mind about why we were teaching activists the law. I wondered what the U.N. or any international body could/would/should do for these people who were in the midst of a civil war. I wondered why they should spend time filing petitions for habeas corpus that the lawyers all but told them were ineffectual (something about exhausting domestic remedies?). I wondered whether we were offering them hope that we did not have to offer or if it was worth it to keep pushing the legal system, for reasons of "legitimacy" if nothing else. I wondered what it meant to tell people that their Constitution or international law guaranteed them rights, since it seemed to me that these people did not have many rights at all. No one ever explained what it meant to have certain rights on paper, even if they were not respected. We all assumed it meant something.

I pondered these questions throughout the summer, every time I heard people talking about international law and rights. I learned a lot about law, mostly international human rights law, and I learned a lot about "human rights violations" that were taking place in spite of that law. As the summer progressed, I kept learning about more rights and more law. When I learned about economic and social rights and rights of indigenous peoples, my feminist consciousness kicked in. If we were to talk about such a variety of rights, why weren't women's rights discussed? As I became more interested in women's human rights, my questions about human rights in general began to fade. I started to use the same language to talk about women's rights that I heard the lawyers use in our classes with activists. My focus shifted from the meaning of rights to the exclusion of women's rights from whatever discourse it was in which people were engaged.

At the end of the summer, I attended a two-week course in San Jose on human rights, in which people from all over Latin America participated. All the participants chose a small seminar to attend throughout the course. When we were asked to name our preferences for the seminar, I was sitting with three Salvadoran men I had met in San Salvador. When I selected the seminar entitled "Derechos humanos y no discriminacion" ("Human Rights and Nondiscrimination"), which was to concentrate on the rights of women and indigenous peo-

ples, they were surprised. They did not understand why I was choosing to spend my time in a workshop that was largely focused on women's rights. Indeed, they did not even understand why the workshop was being offered, maintaining that there were more important and urgent issues with which to concern ourselves. They chose seminars on nongovernmental organizations and economic and social rights. Suddenly, much of the solidarity I had felt among us was gone, as our aspirations were no longer so clearly shared. A difference had come between us. And although our relationships would survive in spite of that difference, we would never quite fully accept it.

The seminar I attended was one of the smallest ones at the course. Only a few of us had actually selected it as our first choice. Among us, four had chosen it for its attention to indigenous peoples' rights, two to talk about discrimination against AIDS victims, and three to learn specifically about women's human rights. About six more people selected the seminar as their second choice for a variety of reasons.

Our discussions about women's rights in the seminar concentrated on different ways that women were discriminated against — in employment, education, religion. We learned about the Women's Convention, of which many of us had no previous knowledge. With such a variety of people and interests, we invariably talked about cultural relativism, with the anthropologists suggesting that indigenous populations should not be subject to "universal" human rights law. They questioned some of us about how we could promote women's rights when cultures in the world were all so different.

While a lot of difficult issues arose in the seminar, the more adamant among us ignored the conflicts. We talked about the ways that women's issues were always subsumed by other, "more important," human rights issues. We were angry that people could talk about human rights without talking about women at all. Inside and outside of the seminar, several of us became missionaries, as we attempted to convince other people that we were a serious group studying real human rights violations.

On the last day of the course, representatives from each seminar gave a presentation about the work it had done. Our presentation came in two parts: one person discussed the group's focus on indigenous rights while another presented our work on women's rights. The presentations were forceful. The woman who discussed women's rights explained that we believed it was impossible to talk about human rights without talking about women's rights. All the participants listened, as we all did to all of the presentations. The next day, everyone returned to their countries.

Thus began my interest in women's human rights. Although I had not gone to Central America to work for "women's rights," I had become caught up in the issue (not quite a movement). While I had begun the summer with many doubts about human rights law and rhetoric, I had ended the summer by suppressing those doubts. It seemed impossible both to reject human rights and to promote women's rights. The latter issue took priority.

I devoted much of the next year to the planning and preparation of a one-day symposium with the Harvard Human Rights Program on women's rights and international human rights. Six of us worked together on the early planning of the symposium, which we eventually entitled "Women's Rights and Human Rights: Possibilities and Contradictions." Conceptualizing the program for the day was perhaps one of the most challenging things we had ever done. We were feminists and we were human rights advocates and we knew that the two things had to/should fit together, somehow. But it seemed as though our discussions were endless: On which women's rights violations should we concentrate? How could we be culturally sensitive and still talk about some of the issues we wanted to discuss? How could we get human rights organizations to listen to us? Could civil and political rights claims capture our concerns or did we need to talk about economic and social rights? How much should we focus on law? Should we talk about development? How much knowledge should we assume on the part of the audience? Who would/should our audience be?

We did not understand why the conceptualization was so difficult. Every time we thought we had a handle on the topic, it slipped away. Those who had been involved with symposium planning in previous years claimed the process had never been so difficult or complicated. They had always known what they wanted to discuss and whom to invite to participate.

Time was running out and we needed a plan. So we plowed ahead. We invited some speakers, and we had some vague notions about how the different panels might look. As some people accepted and others rejected our offers to speak, while still others gave us more ideas, the conference began to take shape. We eventually let the shape of the conference construct our picture of women's human rights. At last we had something to hold on to.

As we planned and named the symposium, my focus began to shift from the possibilities to the contradictions. When many mainstream human rights organizations turned down our offers to participate, I became cynical. A handful of people were excited, but those were the people who were the leaders of the women's human rights movement.



They were excited that a human rights program at a major university was creating a forum for them.

When the day of the conference came, it seemed that we had only attracted the converted. Consequently, the atmosphere was amiable, and there was a real sense of solidarity. But being with people who seemed largely in agreement made it easy to forget that not everyone, particularly not at all human rights organizations, thought about or saw things the way we 100 people spoke about them in Cambridge that day. As the symposium ended, I was thinking more about possibilities than about contradictions.

Regardless of whether we explicitly noted the contradictions (Felicite Gaer was one person who did), I am certain that most of us felt them. We gathered to discuss the problems ("human rights violations") that women suffer all over the globe. We juxtaposed those problems with fairly detailed formal rules (international law) that were meant to deal with them. There was a gap. People talked about filling the gap with better law, better legal arguments, better enforcement techniques, better institutions. They also talked about education, feminist solidarity, and work with nongovernmental organizations. And whether their strategy was assimilation or accommodation, all the participants seemed to leave the conference with a greater sense of hope than when they had entered.

To the extent that participants were critical of human rights discourse at the conference, they only challenged its deployment, its lack of concern for women. The human rights system and its discourse *per se* were not critiqued. The assumptions under which we operated were that the United Nations was effective, that human rights existed, and that human rights discourse was something worth engaging. We assumed that the discourse was a tool just waiting to be used for our purposes. We had to assume the system was there for us, or there would be no point for our conference. For the most part, then, the symposium — by its nature — focused on possibilities.

Just as I had suppressed my doubts about rights rhetoric and international law while I was in Central America, we did not openly discuss such doubts in the symposium. Indeed, to the extent that I sensed the doubts and contradictions during the symposium (and I did), I felt as though I were a traitor to the cause. I wondered if we had really put together a conference to talk about possibilities and contradictions, or if that had just made for a catchy title.

\* \* \* \*

The struggle to uphold the validity of human rights theory, law, or

discourse in the face of what look like huge flaws is common. It plays out in the women's human rights movement and literature in much the way it played out in my own mind during the seminar in San Jose and in many of our minds in Cambridge. We work on women's rights at the periphery of human rights discourse and constantly see problems with the core. The main difficulty we identify is that we are on the periphery. The gaps between the core and the periphery and law and reality convince us that something is wrong. So we continually seek to fill or at least patch the gaps, generally with material from the core.

We sense that our work at the periphery can only succeed if we can save the core and so, for the most part, we defend it. Sometimes we defend it by pretending that we are actually a part of it and just have not been noticed yet. Other times we clearly and proudly situate ourselves outside the core and talk about what it would have to do to make us a part of it. We tell the core that as long as we are on the periphery, the core is disingenuous; it needs the periphery to be complete. No matter how hard we push on the core, though, we never attack its essence. We are afraid that if we push too hard, it might dissolve and become useless to us. We do not look too closely at the core, for fear that we might realize that we are not on the periphery at all or that the chasm between us cannot be filled.

The literature I have examined in this article reflects this relationship between the core and the periphery. It displays the ways that the periphery both challenges the core and keeps it alive. On one hand, women's rights advocates claim that women's rights are/should be a normal part of human rights. On the other hand, they acknowledge that women and women's rights/issues/concerns are somehow different from those things with which human rights discourse concerns itself. On both hands, however, they believe that human rights are good and that human rights discourse is an important part of world order.

This struggle about whether human rights can or should assimilate or accommodate women's rights emerges through one of the driving forces of the literature; the frequent sense of a gap between law and reality often drives advocates individually and the literature as a whole. Attempts at filling the gap move the literature from a focus on doctrine to a focus on legal institutions, from a focus on legal authority to a more strategic focus, from a focus on mainstream legal institutions to a focus on specialized women's legal institutions, from a focus based in human rights law to one that is critical of human rights discourse.

Paradoxically, each time an advocate recognizes an enforcement or attitudinal gap, the move to fill it becomes more accepting of the limitations of human rights law and discourse than the earlier position. Hence, the more advocates move outside formal mainstream human rights structures, the less, in many ways, they try to change those structures. Instead, the advocates assume that the structures are flawed, even as they return to their use.

Doctrinalists, for example, generally work under the assumption that positive human rights law is authoritative, thereby reflecting a belief that there are no limitations to the discourse. But once they accept the enforcement gap, they accept that the discourse is limited in its ability to effectuate change, and they turn to strategies for making the law work. To the extent that doctrinalists do not turn to institutions, however, they believe that at least with the use of strategy, they can make doctrine work.

Institutionalists, on the other hand, by concentrating on institutions, begin with some acceptance of the limits of doctrine. For them, doctrine — at least without institutions — cannot fully assimilate women's rights. Moreover, their move from mainstream to specialized institutions reflects an acceptance of the limitations of the ability of mainstream institutions to enforce women's rights.

Similarly, external critics begin their critiques by accepting certain limitations of both human rights law and institutions. They all find significant flaws in human rights practice, which they largely accept as flaws and try to work around. Even within the external framework, each critic seems to become progressively more accepting of the limits of human rights. Hosken and Eisler, for example, believe they can make human rights theory work — as indicated by their insistence that only human rights practice, not its theory, is flawed. Other external critics, though, uncover biases within the structure and language of human rights discourse, as well as its theory, and therefore more readily accept its limitations. Hence, while Eisler does not view the public/private distinction as a real theoretical obstacle to the ability of human rights to accommodate women's rights — showing instead how the human rights régime has already penetrated the private sphere, through both its very existence and its acceptance of certain governmental regulation of the family — Burrows and Gaer accept that human rights discourse is limited in that it does not enter the private sphere. Similarly, when Holmes and Peterson attack rights discourse, and Holmes criticizes the Universal Declaration for its “maleness,” they seem less likely than other advocates to (be able to) use the discourse on behalf of women.

Of the advocates examined, then, those who are most critical of human rights law and discourse are also most accepting of its difficulties. Since advocates all ultimately return to human rights discourse, those who have apparently challenged it the least have in some ways actually challenged it the most (much to their own surprise perhaps).

Through my identification and exploration of several different approaches taken by women's rights advocates, I have suggested that the advocates have failed to recognize the full implications of their advocacy and critique. Human rights discourse is powerful. Decisions are made and lives are affected through its doctrinal, institutional, and rhetorical structures. That all authors work and struggle within the discourse in attempts to reduce women's oppression is a strength of women's human rights advocacy. In their determination to make it work, though, advocates often fail to acknowledge the potential conflicts and difficulties that emerge through even their own critiques. They also fail to learn from approaches of other advocates, largely because they rarely acknowledge their differences from those advocates.

By bringing to light many of the different assumptions and tensions in women's human rights advocacy, I hope to begin to open space for different advocates both to critique and to learn from each other. Gleaning strengths and learning from weaknesses of existing approaches, we might, I believe, begin to imagine ways of breaking out of the structures that construct our present ways of thinking about women's human rights — such as dichotomies between internal and external, doctrinal and institutional, public and private, universality and relativism, liberal feminism and radical feminism. As different advocates have grappled with various potential obstacles to the achievement of women's human rights, they have revealed useful insights about both law and feminism.

The greatest asset of Meron's work is that he recognizes potential conflicts between women's human rights — particularly those guaranteed by the Women's Convention — and other human rights, such as privacy and religious rights. Cultural differences play a part in both of those conflicts.

Meron's analysis, though, has its shortcomings. His recognition of the conflicts leads him to abandon attempts at alleviating a significant part of women's oppression. Meron dissects women's lives into public and private. He is only willing, however, to allow human rights discourse to assimilate the "public" side of women. Meron would therefore benefit by a critique from other advocates. Doctrinalists, for example, show how women's "private" rights and rights that might

conflict with religious rights (female circumcision, spousal veto, the rights of Islamic women) are guaranteed in many human rights documents, not just in the Women's Convention. Accordingly, not only is Meron's attack on the Convention unjustified, but a mere rewriting of it would not solve the problems he names. Similarly, Meron could learn from institutionalists and external critics, particularly from the different external positions on the public/private distinction. The external critics' focus on the traditional private sphere as the locus of much, if not most, of women's oppression could better inform his work.

The doctrinalists, too, have their strengths. They tend to avoid an essentialist view of women, recognizing and responding to the existence of cultural disagreements among women. And, in their attempts at guaranteeing women's rights, they do not accept the limitations of human rights doctrine. Even in their moves to strategy, they give content to doctrine and, in some ways, begin to break down the distinction between law and society.

At the same time, though, doctrinalists unquestioningly rely on positive international law and rights discourse, acknowledging only through their move to strategy that a right's existence in positive law does not guarantee its recognition or enforcement. Even though they acknowledge cultural differences among women, they use those differences to guide their strategies, rather than opening themselves to the potential disruptions that might occur from a real encounter with those who are different, those who are most affected by the issues they discuss. Doctrinalists also do not account for the power that comes from defining and deploying discourse. They perhaps naively believe that all rights derived from positive law will be treated equally. Finally, they do not recognize the effect that the perceived distinction between the public and private spheres might have on the guarantee of women's rights. Hence, the work of Meron, the institutionalists, and the external critics could sharpen the analysis and advocacy of the doctrinalists.

The greatest strength of the institutionalists is their awareness of the role of power in human rights institutional structures. As they grapple with the effects of disparate power allocations, they identify concrete difficulties with particular institutions, thereby making specific suggestions for improvement. They seem not to be bound by rights rhetoric.

Because institutionalists accept that mainstream institutions have power and do not plan to include women's rights, they make little effort to transform those institutions. They choose to work within a

separate but marginalized institutional régime, with the hope that it will eventually be granted certain powers that will demarginalize it. That the power to make the changes institutionalists propose must largely be granted by the mainstream institutional structure or that specialized institutions might themselves reject an increase in power are issues these advocates do not confront. Additionally, perhaps because of their overwhelming concern with process, institutionalists seem to avoid issues of cultural difference and the public/private split, failing to acknowledge the effects those issues might have on the difficulties they identify with enforcement and institutions. Hence, they too could benefit from the insights of other advocates.

The greatest assets of the external critics are their self-conscious approaches and nuanced understandings of human rights law and discourse. For example, the different understandings of the public/private distinction and the role it plays — whether constructed or “natural” — in keeping women’s rights on the periphery is important to understanding the relationship between women’s rights and human rights. Moreover, their close attention to language highlights significant biases within the very structure of human rights discourse.

The assets of the external critics, however, are also part of their liabilities. After posing so many challenges to human rights discourse, they seem to accept the discourse’s limits, and then decide to work within it anyway. Some of them suggest ways that the discourse might change to accommodate women’s rights, but they fail to take into account the further conflicts that might ensue from such accommodation. And although most of them understand the role that power has played in keeping women’s rights marginalized, they do not take that understanding of power into account when they propose reclaiming or reconceptualizing human rights discourse. Perhaps most importantly, in spite of all the potential obstacles to achieving women’s human rights that external critics identify, they fail to confront the possible existence and impact of differences and disagreements among women. Their focus on the exclusion of women from universal human rights avoids a recognition of such differences. These critics, then, could learn from the approaches taken by Meron and the doctrinalists.

The above is merely a preview of the ways that these different approaches might begin to critique as well as to learn from each other. My hope is that, through this method, women’s rights advocacy can begin to break out of the very structures I have outlined (and arguably perpetuated) in this article.

Until then, as women’s rights advocates pose challenge after challenge to the shape, substance and form of the human rights core, the

core nevertheless survives. All the authors fight hard to defend it in order to make it work for them. From Meron to Khushalani to Reanda to Holmes, though, seeds of disruption are planted. Women are still oppressed in this world. Twenty-two international legal instruments proscribe that oppression. The gaps abound.

All of us who have worked in human rights and in women's rights have experienced the gaps, and we have all attempted to fill them. We have tried to mold and shape both the periphery and the core to make them fit together. We have fought hard to end injustices in the world with tools that are either unable or unwilling to repair the injustices. And yet we continue to fight. While sometimes it seems we are suppressing our doubts about the inability of the tools to work, we often end up expressing them in other ways. The doubts ooze out in our decisions to try more specialized tools (such as the Women's Convention or CEDAW) and sometimes to try different tools altogether (such as education). Similarly, sometimes we think we are expressing doubts and we actually suppress them, for example, by trashing rights rhetoric and then returning to it.

The literature and movement surrounding women's human rights has possibly challenged the human rights core more than any other literature or movement. At the same time, it has become one of the core's staunchest defenders. Even as every author identifies and conveys difficulties with the discourse, they all make it somehow work for them. The core is shaken but it remains. Women are still on the periphery.