

COUNTENANCING THE OPPRESSION OF WOMEN: HOW LIBERALS TOLERATE RELIGIOUS AND CULTURAL PRACTICES THAT DISCRIMINATE AGAINST WOMEN

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I. INTRODUCTION

For centuries, arguments based on religion and culture¹ have been used to justify and perpetuate both sex and race discrimination. In the American South in the nineteenth century, white slave owners justified their right to subjugate the black race based on religious precepts.² All major religions in the world have historically supported and justified slavery. Christianity, Islam, and Judaism relied on the Old Testament for the justification of slavery.³ Most recently, the white minority in South Africa justified its apartheid regime as embodying its divinely ordained supremacy over black Africans.⁴ However, notwithstanding the deep religious origins

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¹ The definition of culture is extremely broad and encompasses almost every aspect of human life. For example, Bhikhu Parekh defines culture as "a historically created system of meaning and significance or ... a system of beliefs and practices in terms of which a group of human beings understand, regulate, and structure their individual and collective lives. It is a way of both understanding and organizing human life." Bhikhu Parekh, Rethinking Multiculturalism: Cultural Diversity and Political Theory 143 (2000). According to Will Kymlicka, a societal culture is "a culture which provides its members with meaningful ways of life across the full range of human activities, including social, educational, religious, recreational, and economic life, encompassing both public and private spheres." Will Kymlicka, Multicultural Citizenship 76 (1995). Religion is one aspect of culture, which has traditionally been accorded considerable accommodation by the liberal state. Ayelet Shachar, Multicultural Jurisdictions: Cultural Differences and Women's Rights 26 (2001). The breadth of the definition of culture poses a serious problem where culture is invoked as a justification for discrimination.

² Harriet Jacobs, Incidents in the Life of a Slave Girl 74-83 (Signet Classic 2000) (1861); David Richards, Women, Gays and the Constitution 57 (1998).

³ Courtney W. Howland, The Challenge of Religious Fundamentalism to the Liberty and Equality Rights of Women: An Analysis under the United Nations Charter, 35 Colum. J. Transnat'l L. 271, 359 (1997).

⁴ *Id.* at 348.

of slavery, these days religion is no longer perceived as a justification for either slavery or for racism in general, and religious and cultural precepts can no longer be used to circumvent criticism and condemnation of racism.⁵

While there seems to be widespread agreement that religious and cultural norms can no longer serve as justifications for discrimination of racial, ethnic, or religious groups,⁶ religious and cultural norms continue to be the most prevalent and widely-accepted justifications for discrimination on the basis of sex.⁷ Though most countries around the world allegedly espouse equality between the sexes, and this notion is incorporated both in international and national laws, simultaneously there is widespread

⁵ See, e.g., Howland, *supra* note 3, at 362-65; Charles R. Lawrence III, The Id, the Ego, and Unequal Protection: Reckoning with Unconscious Racism, 39 Stan. L. Rev. 317 (1987). "While our historical experience has made racism an integral part of our culture, our society has more recently embraced an ideal that rejects racism as immoral." *Id.* at 322-23. Lawrence contends that while racism has been excluded from the conscious level, it still influences the unconscious level. I agree with Lawrence and I submit that sexism has not even reached the point at which it is excluded from the conscious level. Sexist norms are still viewed as moral by many, especially when they can be anchored in religious and cultural precepts. Needless to say, there still exist groups of extremists that try to promote racial, ethnic, and religious discrimination as legitimate ideologies; however, most people vehemently reject such ideologies, at least on the conscious level. See also discussion, *infra* Part III.A (on the International Convention on the Elimination of all Forms of Racial Discrimination).

⁶ In this article, I will discuss interchangeably discrimination on the basis of race, ethnicity, and religion. Though race, ethnicity, and religion are each different characteristics, often groups can be distinguished from one another by two or more of these characteristics, and it is often hard to tell which one of them is the cause of intolerance toward the group. Further, these three bases for discrimination are often discussed interchangeably. For example, the International Convention on the Elimination of all Forms of Racial Discrimination defines racial discrimination as distinction based on race, color, descent, or national or ethnic origin. International Convention on the Elimination of all Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195, 216 [hereinafter Race Convention]. The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities talks interchangeably about national, ethnic, religious, and linguistic groups. Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, G.A. Res. 135, U.N. GAOR, 47th Sess., Supp. No. 49, at 211, U.N. Doc. A/RES/47/135 (1992).

⁷ See Hilary Charlesworth & Christine Chinkin, The Boundaries of International Law: A Feminist Analysis 239 (2000) ("While the right to gender equality on the one hand, and religious and cultural rights on the other, can be reconciled by limiting the latter, in political practice cultural and religious freedom are accorded much higher priority nationally and internationally."). See also Ann Elizabeth Mayer, Reflections on the Proposed United States Reservations to CEDAW: Should the Constitution Be an Obstacle to Human Rights?, 23 Hastings Const. L.Q. 727, 771 (1996) (discussing the defeat of ERA and the refusal of the United States to ratify the Convention on the Elimination of All Forms of Discrimination Against Women, Mayer notes, "Opponents of women's rights have discovered that religious ideologies afford one of the few effective weapons that they can deploy against women's rights; the rise of well-funded and energetic religiously-oriented organizations opposed to women's rights continues to be a factor in keeping the United States from adopting more mainstream ideas about women's rights.").

acceptance of the notion that groups have the right to maintain religious and cultural norms that discriminate against women.⁸

Though modern liberal theory is commonly understood as guaranteeing similar rights to both men and women, I will argue that there exists a tremendous gap between this understanding of liberal theory and the reality of both liberal theory and liberal practice in relation to discrimination against women.⁹ A similar gap exists between the liberal attitude toward sex discrimination and the liberal attitude toward racial, ethnic, and religious discrimination. My main focus will be on why there is such a considerable gap between the ostensible liberal stance on discrimination against women and the liberal practice regarding such discrimination, especially when the discrimination stems from religious and cultural practices. Even more important, I will attempt to give some insight into how this gap is maintained and how the acceptance of what sometimes amounts to blatant discrimination against women can be promoted as liberal concern for human rights.

In particular, a major reason that sex discrimination due to religious and cultural norms is perceived as almost benign and far less insidious than discrimination on the basis of race, ethnicity, and religion, is the erroneous and detrimental manner in which the situation of women is compared to that of racial, ethnic, and religious groups. Those who conclude that discrimination against women due to cultural and religious norms either does not exist or is not as insidious as discrimination against racial, ethnic, and religious groups do so without taking into account the structural, political, sociological, and psychological differences between women as a group and racial, ethnic, and religious groups. It is imperative to understand the differences in the way these groups are structured, in the way their members are situated vis-à-vis each other and vis-à-vis their oppressors, and in the way the discrimination against them is justified, perpetuated, and inculcated. Also, discrimination against women is so enmeshed into the fabric of society that it sometimes becomes invisible and therefore uncontestable. Only by understanding this can liberals come to realize the

⁸ For example, as will be discussed later, liberal democracies such as Israel and India maintain religious family laws that discriminate against women, the Israeli government has initiated segregation between men and women in certain public transportation routes and in certain vocational training courses in order to accommodate the demands of leaders of the ultra-Orthodox Jewish community, and many countries including the United States give public support in the form of tax exemptions or financial aid to religious institutions that discriminate against women. For further examples, see Susan Moller Okin, *Is Multiculturalism Bad for Women?*, in *Is Multiculturalism Bad for Women?* 9 (Joshua Cohen et al. eds., 1999) (discussing issues such as polygamy, female genital mutilation, and child marriages) [hereinafter Okin, *Bad for Women*].

⁹ See, e.g., Deborah L. Rhode, *Speaking of Sex: The Denial of Gender Inequality* (1997); Carole Pateman, *The Disorder of Women: Democracy, Feminism, and Political Theory* 4-5 (1989) [hereinafter Pateman, *The Disorder of Women*].

true insidious nature of sex discrimination, and recognize that religious and cultural norms can no more serve as justifications for sex discrimination than they can serve as justifications for racial, ethnic, and religious discrimination.

In this article, I will discuss various aspects of discrimination against women due to religious and cultural practices in three liberal democratic countries: India, Israel, and the United States. While these countries differ markedly in their histories, cultures, and the structure of their respective societies, they are all liberal democracies that espouse equality for women on the declaratory level.¹⁰ Nevertheless, as I will explain, in all these countries discrimination against women due to religious and cultural practices persists, and rather than being challenged by the state, it is at times sanctioned and perpetuated by it.

Part II of the article will briefly discuss the feminist critique of liberalism and will argue that discrimination on the basis of sex is as insidious as discrimination on the basis of race. Part III will include an examination of international and national laws and how they deal with the intersection between race and sex discrimination, and religious and cultural practices.

Subsequent parts of the article will examine various reasons and mechanisms that can account for the different attitudes toward race and sex discrimination that are a result of religious and cultural practices. The first mechanism, explored in Part IV, is familial ideology. As the basic unit of society, the structure of the family and the traditional gender roles in the family have played a crucial role in defining women's status. At the same time, the centrality of the family in all religions and cultures, as well as its definition as a private sphere in which the state should not interfere, have made the familial realm a central site of oppression for women. In the time of slavery, slaves were considered the private property of the patriarch along with the patriarch's wife and their children, and the patriarch was presumed to treat them with love and care as part of his extended family.¹¹ While the falsity of this construct has long been exposed, the construct of the wife as the property of her husband and a beneficiary of his unqualified love and care still plays a significant role in many contemporary models of the family.

¹⁰ In both the United States and India, women's right to equality is protected by a constitution. In the United States, women's general right to equality is protected by the equal protection clause of the Fourteenth Amendment of the U.S. Constitution. U.S. Const. amend. XIV § 1. In India, women's general right to equality, as well as their right to equality of access to public services and to equal employment opportunities, is protected by Articles Fourteen, Fifteen, and Sixteen of the Indian Constitution. India Const. art. 14, 15, 16. In Israel, which does not have a constitution, women's right to equality is protected by law. The Women's Equal Rights Law, S. H. 248 (1951).

¹¹ Richards, *supra* note 2, at 461.

Part V will discuss a second mechanism that is especially pertinent to women—the rhetoric of choice. One of the strongest myths that obstruct feminist struggles is the myth that many of the infringements of rights women suffer are the result of their own choices. Respecting choices made by free autonomous individuals is a fundamental tenet of liberal theory, which is based on individual autonomy.¹² Cultural and religious groups that do not place any value on the free choices of their members have exploited this aspect of liberalism to counter feminist attacks on violations of women's rights that are committed by the group.¹³ Questions about how choices are made and how they should be examined are crucial to evaluating women's acceptance and endorsement of religious and cultural practices that subjugate them. Similar choice and consciousness problems can arise for religious, ethnic, and racial minorities that suffer from discrimination. However, for reasons that I will discuss, such problems are less severe in those circumstances and, more often than not, third parties do not perceive them as legitimate justifications for the continuation of those types of oppression.

Additional issues that affect the treatment of religious and cultural justifications for sex discrimination and for race discrimination will be the subjects of Parts VI and VII. In Part VI, I will discuss how, unlike racial, ethnic, and religious groups, women comprise a group, but they are not a community. The implications of this include: a lack of space for women in which to form an awareness of their oppression, minority women's forced choice between loyalty to their minority group and their rights as women, the different effects on women as opposed to racial and ethnic minorities of the essentialization of sameness and difference between groups and inside groups, and the different effects on women as opposed to racial and ethnic minorities of the essentialization of religion and culture. In Part VII, I will discuss the role of politics and its effect on the acceptance of religious and cultural justifications for sex discrimination, as well as its effect on the rejection of such justifications for racial discrimination.

Part VIII of the article looks at suggested remedies for the problem of the wide acceptance of sex discrimination due to religious and cultural reasons.

¹² See, e.g., Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. Rev. 1559, 1562 (1991); James Miller, *Of Choice*, 66 Soc. Res. 1121, 1121 (1999).

¹³ See, e.g., discussion *infra* Parts III.C, VI.E, and VII.B (on segregation between men and women in public services in Israel).

II. LIBERALISM, WOMEN'S RIGHTS, AND THE IMPORTANCE OF EQUALITY FOR WOMEN

A. Liberalism and Women's Rights

Liberalism is generally understood to be a political theory that places the individual at the center and sees each individual as a free and equal person.¹⁴ Recognition of every individual's uniqueness and humanity lies at the core of liberalism, which sees all persons as deserving of mutual respect, civil and political liberties, and decent life chances.¹⁵ Liberalism promotes tolerance and protects freedom of conscience, religion, speech, and assembly.¹⁶ While many liberal theorists believe personal autonomy is the fundamental tenet of liberalism, other liberal theorists regard tolerance as liberalism's fundamental principle.¹⁷ Notwithstanding the egalitarian basis of liberalism, critical legal scholars, post-colonial theorists, and feminists have all criticized liberalism as exclusionary and as maintaining the hegemony of dominant groups.¹⁸

¹⁴ See Pateman, The Disorder of Women, *supra* note 9, at 4; see also John Rawls, The Idea of Public Reason Revisited, 64 U. Chi. L. Rev. 765, 774 (1997).

¹⁵ Amy Gutmann, Introduction, in Charles Taylor, Multiculturalism: Examining the Politics of Recognition 3, 9 (Amy Gutmann ed., 1994).

¹⁶ Steven C. Rockefeller, Comment, in Multiculturalism: Examining the Politics of Recognition, *supra* note 15, at 87, 90.

¹⁷ Kymlicka, *supra* note 1, at 154-55.

¹⁸ See, e.g., Mary J. Matsuda, Looking to the Bottom: Critical Legal Studies and Reparations, 22 Harv. C.R.-C.L. L. Rev. 323, 326-27 (1987). Describing the critical legal studies perspective, Matsuda says:

The movement known as Critical Legal Studies is characterized by skepticism toward the liberal vision of the rule of law, by a focus on the role of legal ideas in capturing human consciousness, by agreement that fundamental change is required to attain a just society, and by a utopian conception of a world more communal and less hierarchical than the one we know now.

Id. at 326-27.

See also Kimberlé Williams Crenshaw, Race Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 Harv. L. Rev. 133 (1988) (discussing the role of liberal ideology in the perpetuation of racial discrimination through adherence to formal equality and embrace of legitimating hegemonic visions, while criticizing other Critical Legal Studies scholars for focusing their criticism exclusively on liberal ideology, neglecting the role of racism as a hegemonic ideology); Chantal Thomas, Causes of Inequality in the International Economic Order: Critical Race Theory and Postcolonial Development, 9 Transnat'l L. & Contemp. Probs. 1 (1999) (a critique of liberalism from the perspective of postcolonial development theory). For feminist critiques of liberalism, see notes 22-31 and accompanying text.

Though liberal political theory has rarely put the issue of women's equality at the center of its concerns,¹⁹ it has espoused the notion of equality between men and women, at least on the declaratory level. However, most liberal theorists have been much more concerned with equality among men than with equality for women.²⁰ One of the manifestations of this attitude toward women's rights is the belief shared by many, including many liberals, that discrimination against women is not as harmful or as insidious as discrimination on bases such as race, ethnicity, and religion.²¹

While feminists disagree on whether modern liberalism is irredeemably patriarchal²² or whether the perpetuation of discrimination against women is due to a combination of intertwined liberal ideologies (patriarchy and capitalism²³), there is widespread agreement amongst feminists both that classical liberalism was deeply patriarchal and that sexual inequality is still prevalent today.²⁴ Carole Pateman believes that democratic theory itself has to undergo radical change in order to allow the incorporation of women as fully equal citizens.

Women have always been incorporated into the civil order as "women," as subordinates or lesser men, and democratic theorists have not yet formulated any alternative. The dilemma remains. All that is clear is that if women are to be citizens as *women*, as autonomous, equal, yet sexually different beings from men, democratic theory and practice has [sic] to undergo a radical transformation.²⁵

¹⁹ See, e.g., Susan Moller Okin, Justice, Gender, and the Family 7-8 (1989) [hereinafter Okin, Justice]; Valerie Lehr, Queer Family Values Debunking the Myth of the Nuclear Family 19 (1999); Martha C. Nussbaum A Plea for Difficulty, in Is Multiculturalism Bad for Women?, 105, 105 (Joshua Cohen et al. eds., 1999).

²⁰ One notable exception is John Stuart Mill, The Subjection of Women (Susan M. Okin ed., 1988). Carole Pateman argues that political theory is thoroughly patriarchal and is only concerned with the political relationships between men, which she terms the fraternal social contract or the fraternal pact. See Pateman, The Disorder of Women, *supra* note 9, at 33-53.

²¹ See, e.g., Charlsworth & Chinkin, *supra* note 7, at 230; Martha Nussbaum, Women and Human Development: The Capabilities Approach 298-99 (2000) [hereinafter Nussbaum, Women and Human Development]; Ann Elizabeth Mayer, A "Benign" Apartheid: How Gender Apartheid has been Rationalized, 5 UCLA J. Int'l L. & Foreign Aff. 237, 247 (2000) [hereinafter Mayer, Apartheid].

²² I use the term "patriarchy" in this context to describe men's domination over women, both politically and sexually. See Carole Pateman, The Sexual Contract 2 (1988) [hereinafter Pateman, The Sexual Contract].

²³ Rogers M. Smith, Beyond Tocqueville, Myrdal, and Hartz: The Multiple Traditions in America, 87 Am. Pol. Sci. Rev. 549, 556 (1993).

²⁴ Pateman, The Sexual Contract, *supra* note 22, at 19.

²⁵ Pateman, The Disorder of Women, *supra* note 9, at 14 (emphasis in original). Elaborating on this point, Pateman states that:

She disagrees with what is called “the dual-systems argument,” which sees patriarchy and liberal capitalism as two autonomous systems²⁶ and argues that liberal capitalism and the capitalist economy have a patriarchal structure, which prevents women from being recognized as individuals, as workers, and as heads of families.²⁷

Suzan Okin holds a similar view regarding women’s unequal position in liberal political theory and in a capitalist economy. She believes that only a radical restructuring of both the family and the political order will enable women to participate in society as equal members.²⁸ Okin points to the benefits to capitalist economy from women’s inequality:

The continuing inequality of women, and not only of those within the work force, clearly performs important functions for the capitalist economy in which we live. Outside of the recognized work force, women perform the functions held to be natural to their sex—child-rearing and housework—which are given no economic recognition at all. As a number of feminists have pointed out, conventional notions of the family and its sex roles have facilitated the distinct separation of the public and private spheres, and of productive labor into two types.²⁹

The theoretical and social transformation required if women and men are to be full members of a free, properly democratic (or properly “civilized”) society is as far-reaching as can be imagined. The meaning of “civil society” ... has been constructed through the exclusion of women and all that we symbolize. To “rediscover” a patriarchal conception of civil society will do little to challenge men’s patriarchal right. To create a properly democratic society, which includes women as full citizens, it is necessary to deconstruct and reassemble our understanding of the body politic. This task extends from the dismantling of the patriarchal separation of private and public, to a transformation of our individuality and sexual identities as feminine and masculine beings. These identities now stand opposed, part of the multi-faceted expression of the patriarchal dichotomy between reason and desire. The most profound and complex problem for political theory and practice is how the two bodies of humankind and feminine and masculine individuality can be fully incorporated into political life. How can the present of patriarchal domination, opposition and duality be transformed into a future of autonomous democratic differentiation?

Id. at 52-53.

²⁶ Pateman points to Heidi Hartmann and Zillah Einstein as two of the feminists who rely on the dual systems argument. See Pateman, *The Sexual Contract*, *supra* note 22, at 38.

²⁷ *Id.*

²⁸ Susan Moller Okin, *Women in Western Political Thought* 286, 289 (1979).

²⁹ *Id.* at 291.

Notwithstanding feminist attacks on the patriarchal nature of liberal theory, most liberal theorists deem liberalism an egalitarian theory for both men and women.³⁰ Furthermore, most liberals assume that liberal practice, as manifested in many liberal democracies, is itself egalitarian and succeeds in living up to liberal theory's promise of equality for women.³¹ However, if the feminist critics of liberalism are correct in thinking liberal theory does not give women the equality it purports to give them, then it is hardly surprising that discrimination against women is a persistent phenomenon in the practice of liberal societies, such as those discussed in this article.

In addition to the aforementioned difficulties in incorporating women's rights into liberal theory, liberalism has a special difficulty coping with violations of women's rights due to religious and cultural practices. The liberal distinction between the public sphere and the private sphere serves to marginalize and obscure discrimination against women. Additionally, the liberal emphasis on tolerance, despite its benign intent and its many positive aspects, serves to further obscure the insidious nature of religious and cultural practices that discriminate against women. The public/private distinction has functioned as an ideological device that justifies restrictions on women and maintains their inferior status by relegating them to the private sphere while reserving the public sphere for men.³² At the same time, religion has been confined to the private sphere in an attempt to ensure the co-existence of conflicting religious beliefs and to guarantee freedom of conscience to all.³³ The confinement of religion to the

³⁰ See Okin, *Justice*, *supra* note 19, at 11-13.

³¹ See, e.g., Susan Faludi, *Backlash: The Undeclared War Against American Women* (1991).

To be a woman in America at the close of the 20th century—what good fortune. That's what we keep hearing anyway. The barricades have fallen, politicians assure us. Women have "made it," Madison Avenue cheers. Women's fight for equality has "largely been won," *Time* magazine announces. Enroll at any university, join any law firm, apply for credit at any bank. Women have so many opportunities now, corporate leaders say, that we don't really need equal opportunity policies. Women are so equal now, lawmakers say, that we no longer need an Equal Rights Amendment. Women have "so much," former president Ronald Reagan says, that the white house no longer needs to appoint them to higher office. Even American Express ads are saluting a woman's freedom to charge it. At last women have received their full citizenship papers. And yet....

Id. at ix.

³² Helena Znaniecka Lopata, *The Interweave of Public and Private: Women's Challenge to American Society*, 55 J. Marriage & Family 176, 176 (1993).

³³ Rex J. Ahdar, *Worlds Colliding: Conservative Christians and the Law* 83 (2001).

private sphere has significantly curtailed its power in the public sphere. However, the notion of religion as a private matter along with the primacy of tolerance, freedom of conscience, and the right to privacy, has served to create an almost impenetrable sphere in which religious and cultural practices that discriminate against women continue to exist undisturbed by the liberal state and are at times even aided by it.

While co-existence of different racial, ethnic, and religious groups is perceived as a public matter of vital importance to the liberal state that calls for toleration and mutual concessions, co-existence between men and women is deemed a private matter which the state should keep out of, especially where it involves religious and cultural norms. As a result, indiscriminate respect for cultural and religious practices of different racial, ethnic, and religious groups is hailed as a manifestation of tolerance, whereas the fact that some of these practices discriminate against women is marginalized and ignored. Similarly, other manifestations of discrimination against women in liberal societies are often dismissed as inevitable or unimportant.

B. How Important is Women's Equality?

Discrimination against women is a phenomenon that is as unjust, severe, and debilitating as discrimination against racial, ethnic, and religious groups.³⁴ The fact that it is often not perceived as such is one major explanation for society's continuing acceptance of it. In a memorandum prepared for the President's Commission on the Status of Women, which was convened at the request of President Kennedy in 1961 to study the position of women in American society, black feminist lawyer and civil rights activist Pauli Murray argued that the gravity and nature of women's subordination were akin to those of racial oppression.³⁵ Murray reasoned that women, like racial minorities, were an easily identifiable group that to a large degree was unrepresented in formal decision-making processes. Women's legal history was one of slow progress against considerable resistance from the dominant male group. Their inferior position, like that of blacks, was premised on supposedly inherent differences, so that legal distinctions based upon sex were particularly susceptible to applications prolonging and reinforcing women's inferior status.³⁶ In a presentation before the commission, Murray argued that "[t]he

³⁴ See, e.g., Okin, *Justice*, *supra* note 19, at 174-75; bell hooks, *Ain't I a Woman: Black Women and Feminism* 1 (1981); Mayer, *Apartheid*, *supra* note 21, at 337-38. See also Mary E. Becker, *The Politics of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective*, 59 U. Chi. L. Rev. 453, 484-86 (1992).

³⁵ Serena Mayeri, Note, "A Common Fate of Discrimination": Race-Gender Analogies in Legal and Historical Perspective, 110 Yale L.J. 1045, 1056-57 (2001).

³⁶ *Id.* at 1057.

attributes of sex have obscured the attributes of humanity in much the same way the attributes of the slave as property also obscured his attributes as a thinking human being.”³⁷ In drawing the analogy between sex discrimination and race discrimination, Murray relied on, among other things, Gunnar Myrdal’s influential 1944 study of the racial problem in the United States, “An American Dilemma,” which included an appendix on the similarities between racism and sexism. According to Myrdal, women, similar to blacks, “were branded intellectual inferiors, deemed uneducable, confined to certain societal roles, excluded from many fields of employment, denied citizenship rights and mythologized as ‘content’ in their subordinate positions.”³⁸ Though Myrdal’s study was published in 1944, its description of women’s oppression is still very pertinent today in many parts of the world, especially in traditional communities. What is even more striking is that such oppression still exists in traditional communities that reside in liberal countries, such as the ultra-Orthodox Jewish community in Israel and the Oriya Hindu community in India, and the liberal countries in which they reside do not see it as their duty to put an end to this oppression.³⁹

In the 1973 case Frontiero v. Richardson, a plurality of the United States Supreme Court agreed with the appellants’ contention that sex discrimination was parallel to racial discrimination and should therefore be subjected to strict judicial scrutiny.⁴⁰ Though the strict scrutiny test for sex discrimination was never adopted by a majority of the Supreme Court, who chose instead to subject sex-based classifications to intermediate scrutiny,⁴¹ it is worthwhile mentioning the reasoning of the court in Frontiero. Reflecting on the history of women’s oppression in the United States, the plurality stated that “our Nation has had a long and unfortunate history of sex discrimination” that was rationalized by an attitude of paternalism which in effect

³⁷ *Id.* (quoting from Pauli Murray, Presentation to the Committee on Civil and Political Rights of the President’s Commission on the Status of Women 351 (1962)). Murray’s main incentive for insisting that sex discrimination be recognized as the severe problem that it is, and treated accordingly, was her belief that such recognition was an imperative if black women were to be granted any rights. Mayeri, *supra* note 35, at 1063.

³⁸ Mayeri, *supra* note 35, at 1058.

³⁹ See *infra* Part IV.C.3 (on the Oriya Hindu community in India); *infra* Parts IV.C.2, VI.E, and VII.B (on the ultra-Orthodox Jewish community in Israel).

⁴⁰ Frontiero v. Richardson, 411 U.S. 677, 682 (1973).

⁴¹ The test announced in United States v. Virginia states that the government must have an “exceedingly persuasive justification” for classifications based on sex. See United States v. Virginia, 518 U.S. 515, 531 (1996). However, this test might no longer be good law in light of Nguyen v. I.N.S., 533 U.S. 53 (2001). In Nguyen, a majority of the court applied the heightened scrutiny test in a manner that the four dissenters referred to as “a stranger to our precedents,” *id.* at 74 (O’Connor, J., dissenting), and “a deviation,” *id.* at 97 (Breyer, J., dissenting).

put women, not on a pedestal, but in a cage. ... [T]hroughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children.⁴²

The Court continued to say:

In part because of the high visibility of the sex characteristic, women still face pervasive, although at times more subtle, discrimination. ... [S]ex, like race and national origin, is an immutable characteristic determined solely by the accident of birth ... [which] frequently bears no relation to ability to perform or contribute to society.⁴³

For all these reasons, the Frontiero plurality found that sex discrimination is as severe and as unjust as racial discrimination and should be subject to the highest level of scrutiny.

Some of the restrictions described by the Frontiero plurality, such as the inability to hold office, hold or convey property, and serve as legal guardians, are no longer generally applicable either to women or to racial minorities in the American legal system. However, these restrictions, as well as others, are still very applicable to women in many parts of the world, and are justified as manifestations of religious and cultural norms. Even in the United States, women who are barred from ministerial positions because of their sex have no recourse to the law,⁴⁴ and the Supreme Court has refused to intervene where an ordinance passed by an American Indian tribe denied inheritance rights to children of women tribe members who married outside of the tribe while extending those rights to children of male members who married outside of the tribe.⁴⁵ Thus, as discussed below,

⁴² Frontiero, 411 U.S. at 684-85.

⁴³ *Id.* at 686.

⁴⁴ *E.g.* EEOC v. Catholic University of America, 83 F. 3d 455 (D.C. Cir. 1996) (refusing to intervene where a Catholic University professor claimed that she was denied tenure due to sex discrimination). *See also* discussion *infra* Part III. B.

⁴⁵ Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (finding ordinance passed by the tribe denied membership in the tribe to children of women tribe members who married outside of the tribe while extending membership to children of male tribe members who married outside of the tribe. As a result of the denial of membership the children, although raised on the reservation and residing there as adults were barred from voting in tribal elections or holding secular office in the tribe; had no right to remain on the

religious and cultural norms that are maintained by various groups, and that are sanctioned by some liberal societies, prevent women from holding public offices, from inheriting property, and from being legal guardians of their own children. As a result, the situation of many women in liberal societies today is in some respects parallel to the situation of women in the nineteenth century in the United States, mainly because various forms of gender oppression continue to be justified by many liberals in the name of upholding religious and cultural norms.

In addition to its devastating effects on women, discrimination against women and its perseverance contribute directly to the continuation of other forms of discrimination and oppression. Historically, the justification and perpetuation of slavery and of discrimination against blacks in the United States was inexorably linked with white men's sexist attitudes toward black women, white women, and black men.⁴⁶ Anti-miscegenation laws and the lynching of black men were justified by the need to protect white women's chastity; white women's confinement to the house was justified by the need to protect them from black men; and black women's sexual slavery and the hard physical work they were forced to do were justified by the racist and sexist perception of them as the opposite of the chaste and delicate white woman on the pedestal.⁴⁷ The sociologist Orlando Patterson identifies both the misogyny in the contemporary American black community and the animosity between the sexes, which he attributes at least in part to the legacy of slavery and racial oppression, as the keys to the continuing difficulty of this community to improve its socio-economic status.⁴⁸ According to Patterson, what he terms the "Black gender crisis" should be at the top of the internal agenda of the black community.⁴⁹

Other scholars see the achievement of equality for women as an essential step in eliminating poverty and fostering development.⁵⁰ Due to

reservation in the event of their mother's death, or to inherit their mother's home or her possessory interests in the communal lands. *Id.* at 52-53)

⁴⁶ See Richards, *supra* note 2.

⁴⁷ *Id.* at 222-23, 461. See also Adele Logan Alexander, "She's No Lady, She's a Nigger": Abuses, Stereotypes, and Realities from the Middle Passage to Capitol (and Anita) Hill, in *Race, Gender and Power in America: The Legacy of the Hill-Thomas Hearings* 3, 7 (Anita Hill & Emma Jordan eds., 1995); Emma Coleman Jordan, *The Power of False Racial Memory and the Metaphor of Lynching*, in *Race, Gender and Power in America: The Legacy of the Hill-Thomas Hearings*, *supra*, at 37, 39-41.

⁴⁸ Orlando Patterson, *The Crisis of Gender Relations Among African Americans*, in *Race, Gender and Power in America: The Legacy of the Hill-Thomas Hearings*, *supra* note 47, at 56.

⁴⁹ *Id.* at 56, 95.

⁵⁰ See, e.g., Nussbaum, *Women and Human Development*, *supra* note 21, at 4-5; Susan Moller Okin, *Reply*, in *Is Multiculturalism Bad for Women?*, *supra* note 8, at 117, 120.

reasons such as lack of proper education, lack of property rights, wage discrimination, women's unpaid work, and cultural and social disadvantage, women comprise seventy percent of the world's poor.⁵¹ Women's poverty has a direct effect on the well-being of children; in the United States alone, more than half of the poor households with dependent children are maintained by a single female parent.⁵² In addition, some scholars identify the family as the most important school of justice and morality, and contend that it will be impossible to achieve a just society as long as injustice and prejudice are inculcated into children through their experiences growing up in unjust and unequal families.⁵³ The above examples illustrate how critical the eradication of discrimination against women is—not only to women, but also to society as a whole and to eradicating all forms of prejudice and injustice.

III. INTERNATIONAL AND DOMESTIC LAWS

A. International Law

An examination of international and domestic laws shows that the laws often apply quite different standards to race discrimination and to sex discrimination. On the international level, a multitude of conventions and courts prohibit all forms of racism and create enforcement mechanisms, including criminal sanctions.⁵⁴ The International Court of Justice has wholly rejected South African apartheid, although it was based on strong religious beliefs.⁵⁵ Also, the preamble to the International Convention on the Elimination of All Forms of Racial Discrimination ("Race Convention") states the following:

Convinced that any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for racial discrimination, in theory or in practice, anywhere, ... *Convinced* that the existence of racial barriers is repugnant to the ideals of any human society, *Alarmed* by manifestations of racial discrimination still in evidence in some areas of the world and by governmental policies based on racial superiority or hatred, such as policies of *apartheid*, segregation or separation⁵⁶

⁵¹ Charlesworth & Chinkin, *supra* note 7, at 8.

⁵² Okin, *Justice*, *supra* note 19, at 3.

⁵³ *Id.* at 17-22.

⁵⁴ Mayer, *Apartheid*, *supra* note 21, at 241-47.

⁵⁵ Howland, *supra* note 3, at 347-49.

⁵⁶ Race Convention, *supra* note 6, at 214 (emphasis in original).

In contrast, the strongest language that can be found in the preamble to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) states,

Recalling that discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity⁵⁷

While racial discrimination and the idea of racial supremacy are intrinsically bad—scientifically false, morally condemnable, socially unjust and dangerous, without justification, and repugnant to the ideals of any human society—sex discrimination is none of that. The chief problem with sex discrimination is factual rather than intrinsic: it is an obstacle to women's equal participation in the life of their countries, hampers the growth of the prosperity of society and the family, and decreases women's ability to contribute to their countries and to humanity. Further, the main victim of sex discrimination is not the woman herself, but society. Thus, reading the preamble to CEDAW, especially when contrasted with the preamble to the Race Convention, one could conclude two things. First, there is nothing intrinsically wrong with sex discrimination, and if the factual problems discussed in the preamble would somehow be solved, then sex discrimination would no longer be problematic. Second, as society is the main victim of sex discrimination, it should have the right to decide that it is willing to bear the burden of having at its service women whose potentials are not fully developed, and to continue to discriminate on the basis of sex. Though this reading of CEDAW may seem incongruous, it reflects the way the international community tends to view discrimination against women that is motivated by religious and cultural precepts. One of the obstacles women face in the area of international law is the general consensus among states that oppression on the basis of race is considerably more serious than oppression on the basis of sex.⁵⁸

In two of its central provisions, Articles Two and Five, CEDAW proclaims that states should take all appropriate measures to modify existing legislation, customs, practices, and social and cultural patterns of conduct that discriminate against women or that are based on the idea of the

⁵⁷ Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, 15 [hereinafter CEDAW].

⁵⁸ Charlsworth & Chinkin, *supra* note 7, at 230.

inferiority or superiority of one of the sexes.⁵⁹ However, many states have made reservations from these provisions, mainly on religious grounds, stating that these provisions are inapplicable as far as they contradict their domestic or religious laws as interpreted by them. The result is that those countries whose religious and cultural practices are the most oppressive to women have no international obligation to change these practices. This creates the impression that unlike other international human rights treaties, such as the Race Convention, CEDAW is not a binding international obligation, and that these reservations should not “be scrutinized against the yardstick of international standards of equality for women because of the religious and cultural sensitivity of the subject matter.”⁶⁰ In contrast to the multitude of reservations from CEDAW, there are few substantive reservations to the Race Convention, and none of them are on the basis of religion or culture.⁶¹ Perhaps the most telling difference between race and sex discrimination in international law is that while the prohibition on race discrimination is considered *jus cogens* and is therefore non-derogable, the prohibition against sex discrimination is not.⁶²

Thus, when compared to the strong language used in international documents prohibiting race discrimination, the language in international documents such as CEDAW uses a much more qualified and reticent vocabulary and gives the states much more latitude in implementing its provisions.⁶³ As some feminist commentators argue, the existing jurisprudence of international law has legitimized the unequal position of women around the world rather than challenged it.⁶⁴ The public/private distinction in international law, which keeps “private matters” such as the family out of the purview of international law, allows it to co-exist side by side with cultural and religious practices that discriminate against women, without the need to criticize or condemn those practices.⁶⁵ Similar to the public/private distinction in liberalism, the public/private distinction in international law is specifically intended to keep women’s subordination outside the realm of legal intervention.⁶⁶

⁵⁹ CEDAW, *supra* note 55, at 16-17.

⁶⁰ Charlsworth & Chinkin, *supra* note 7, at 108.

⁶¹ *Id.* Most reservations to the Race Convention are to its dispute resolution provisions. Race Convention, *supra* note 6, at 268-318.

⁶² *Id.* at 120.

⁶³ Mayer, *Apartheid*, *supra* note 21, at 246-48.

⁶⁴ Charlsworth & Chinkin, *supra* note 7, at 1.

⁶⁵ *Id.* at 57.

⁶⁶ Celina Romany, *State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law*, in *Human Rights of Women: National and International Perspectives* 85, 90 (Rebecca J. Cook ed., 1994) [hereinafter *Human Rights of Women*].

B. American Law

On the domestic level, many countries, such as the United States, have strict prohibitions on race discrimination that cannot be evaded on the grounds of contrary religious beliefs. Thus, while American law gives religious institutions some exemptions from the application of anti-discrimination legislation, these exemptions do not include permission for religious institutions to discriminate on the basis of race.⁶⁷ In Bob Jones University v. United States,⁶⁸ the Supreme Court affirmed an Internal Revenue Service policy denying tax-exempt status to private schools with racially-discriminatory admissions policies. The schools claimed that the Internal Revenue Service could not revoke their tax-exempt status due to their racially-discriminatory policies since these policies were based on sincerely-held religious beliefs. The court rejected this claim, holding that a limitation on the free exercise of religion can be justified where it is essential to accomplish an overriding governmental interest. As the interest in eradicating racial discrimination in education is a fundamental and overriding interest, the government is justified in revoking tax exemptions from religious institutions that discriminate on the basis of race because of religious beliefs.⁶⁹

Though the American anti-discrimination laws prohibit religious institutions from discriminating on the basis of sex, as well as race, the courts have in fact refused to interfere with religious autonomy where women alleged that they were discriminated against by religious institutions in their employment conditions because of their sex.⁷⁰ For example, the Fourth Circuit refused to intervene when a church declined to hire a woman for the position of an associate pastor, holding that "state scrutiny of the church's choice would infringe substantially on the church's free exercise of religion and would constitute impermissible government entanglement with church authority."⁷¹ Similarly, the Fifth Circuit refused to intervene when a female reverend was paid less than men holding the same position and was later dismissed when she came back from maternity leave, holding that the Free Exercise Clause precluded the court from considering the case even

⁶⁷ Samuel Estreicher & Michael C. Harper, Cases and Materials on Employment Discrimination and Employment Law 626-29 (2000).

⁶⁸ 461 U.S. 574 (1983).

⁶⁹ *Id.* at 603-04.

⁷⁰ Cass R. Sunstein, Should Sex Equality Law Apply to Religious Institutions?, in Is Multiculturalism Bad for Women?, *supra* note 8, at 85, 85-86.

⁷¹ Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1165 (4th Cir. 1985).

though the alleged discrimination was “purely nondoctrinal.”⁷² Despite the overt discrimination against women carried out by various religious institutions, the government denies these institutions neither tax exemptions, nor subsidies, nor government contracts.⁷³

C. Israel

Israel is a liberal democracy that prides itself on its alleged adherence to the principle of equality on the bases of race, sex, and religion.⁷⁴ The Women’s Equal Rights Law sets out the principle of gender equality in all areas of life.⁷⁵ However, the law specifically states that religious laws, which in Israel govern all matters of marriage and divorce, will not be subject to the principle of gender equality. This provision was needed precisely because the religious laws of marriage and divorce blatantly discriminate against women.⁷⁶ The law further states that the principle of equality will not apply to religious positions in religious institutions such as rabbis and religious court judges.⁷⁷

Another area in which the principle of gender equality has recently been restricted in order to accommodate discriminatory religious and cultural practices is that of segregation between men and women in various public services. In the last few years, the Israeli Supreme Court has refused to interfere with governmental policy that segregates the sexes in certain

⁷² Combs v. Cent. Texas Annual Conference of the United Methodist Church, 173 F.3d 343, 350 (5th Cir. 1999).

⁷³ Becker, *supra* note 34, at 485-86.

⁷⁴ This principle is stated in paragraph thirteen of the Israeli Declaration of Establishment and in various laws such as the Equal Employment Opportunities Law, S.H. 38 (1988), and it is also considered a common law principle (see H.C. 98/69, Bergman v. Minister of Finance, 23(1) P.D. 693).

⁷⁵ The Women’s Equal Rights Law, S.H. 248 (1951).

⁷⁶ For example, according to Jewish religious law the wife has to have her husband’s consent in order to get a divorce. Without a divorce, the wife is forbidden from remarrying, and if she has children with another man, they are considered bastards. In contrast, if a woman refuses her husband’s request for divorce, the husband can get permission from the rabbinical court to marry a second wife, and even if he has children from another woman without obtaining permission to remarry, his children will not be considered bastards. The fact that Jewish women cannot start a new family without first obtaining their husband’s consent for divorce affects the entire marital relationship and especially the divorce settlement, in which women often give up all their property rights in exchange for their husband’s consent. Francis Raday, On Equality, in Women’s Status in Israeli Law and Society 19, 45-48 (Francis Raday et al. eds., 1995) [hereinafter Raday, On Equality].

⁷⁷ This provision was added in an amendment to the law in March 2000, which gave legal sanction to a preexisting situation. The Women’s Equal Rights Law, S.H. 167 amend. 2, art. 7(3) (2000).

vocational training courses and in certain public transportation routes due to religious reasons.⁷⁸ In order to legalize such discrimination, a recent law forbidding discrimination in public services and public accommodations contains an exception according to which segregation between men and women in public services or accommodations will not be considered discrimination when the absence of segregation will prevent some of the public from using the public service or accommodation.⁷⁹ This exception has been introduced into the law specifically to legalize segregation between men and women in public services such as vocational training or public transportation as an accommodation of discriminatory cultural and religious practices.⁸⁰ The law does not allow any exception for racial discrimination, and all discrimination on the basis of race, ethnicity, and religion is strictly forbidden.⁸¹

IV. FAMILIAL IDEOLOGY

A. Introduction

The family is the basic unit of society. This assumption stands not only at the base of many dominant religions, but also at the base of liberalism and many contemporary political theories. Contemporary theorists of justice assume the existence of the family, while further assuming that the subject of their theories is the male head of a traditional household.⁸² Women's roles inside the home as caregivers and nurturers are

⁷⁸ H.C. 7942/98, Ovadia v. Minister of Labor (Jan. 14, 1999) (regarding segregation in vocational training) (unreported; on file with author); H.C. 5079/97, Israeli Women's Network v. Minister of Traffic (May 5, 1999) (unreported) (discussed in Ruth Halperin-Kaddari, Women, Religion and Multiculturalism in Israel, UCLA J. of Int'l L. & Foreign Aff., Fall 2000, at 339, 363-64) (regarding segregation in public transportation). Considering prior court decisions regarding segregation between Jews and Arabs, H.C. 6698/95, Kaadon v. Israel Land Admin., 54(1) P.D. 258, it seems safe to assume that if the cases involved segregation between Jews and Arabs, the court would have precluded such segregation on the basis of religious beliefs.

⁷⁹ Prevention of Discrimination in Products, Services, and Entrance to Public Entertainment and Public Places Law, S.H. 58 art. 3(a)(3) (2001), *available at* <http://www.knesset.gov.il/laws/heb/FileD.asp?Type=1&LawNum=1765&SubNum=2> [hereinafter Prevention of Discrimination Law].

⁸⁰ In the final hearing on the proposed legislation, some parliament members from religious parties suggested that the exception state specifically that the segregation between men and women is due to "reasons of religion and tradition." This proposal was rejected on the grounds that the meaning of the exception and its purpose were patently clear even without this addition. Proposed Legislation Prevention of Discrimination in Products, Services and Entrance to Public Entertainment and Public Places, 15th Parliament, Session 164, (2000) (2nd and 3rd vote) (on file with author).

⁸¹ Prevention of Discrimination Law, *supra* note 79, at art. 3(a).

⁸² *See, e.g.*, Okin, Justice, *supra* note 19, at 9. *See also* Lehr, *supra* note 19, at 19.

central not only to religious thought, but also to contemporary western political thought.⁸³ Familial ideology is also central to capitalism. The family, as the realm in which one builds permanent and caring relations, is the haven in which one escapes the marketplace, where one sells labor and negotiates business in competitive, temporary, and contingent relations that are buttressed by law and legal sanctions.⁸⁴ The nurturing nature of the family, in contrast with the marketplace, generates the belief that the impersonal force of the state should be kept out of the familial realm.⁸⁵ Finally, the family and women's reproductive role, as well as their roles as care-givers and nurturers, are central to nationalism, which views women as reproducers of the nation, transmitters of its culture, and symbols of the nation.⁸⁶

Thus, it is not surprising that the allegiance forged between religion, nationalism, and the state, in order to use women's capacities and labor as a means of preserving the family, has made it extremely difficult for women to break free from familial responsibilities and claim their equal positions in society. It is perhaps even less surprising that many states, including liberal states, are extremely reluctant to challenge religious and cultural practices that are oppressive to women and that are perceived as related to women's role in the family and as occurring in the sphere of the family.

The structure of the family and its traditional gender roles have made the family a central site of oppression for women. The construct of the wife as the property of her husband and as a beneficiary of his unqualified love and care still plays a significant role in many contemporary models of the family and determines decision-making and policy-formation worldwide. For example, economist Gary Becker's economic model of the family, which had enormous influence on modeling and information-gathering around the world, views the family unit as the relevant space of comparison, and not its individual members.⁸⁷ Becker's model assumes that

⁸³ Okin, *Justice*, *supra* note 19, at 8; Lehr, *supra* note 19, at 19.

⁸⁴ Lehr, *supra* note 19, at 19.

⁸⁵ *Id.* at 20.

⁸⁶ Floya Anthias & Nira Yuval-Davis, *Introduction*, in *Woman-Nation-State* 1, 7 (Nira Yuval-Davis & Floya Anthias eds., 1989) [hereinafter *Woman-Nation-State*]. See also Patricia Hill Collins, *Producing the Mothers of the Nation: Race, Class and Contemporary US Population Policies*, in *Women, Citizenship and Difference* 118 (Nira Yuval-Davis & Pnina Werbner eds., 1999) (discussing nationalism and women in the United States); Partha Chatterjee, *The Nationalist Resolution of the Women's Question*, in *Recasting Women Essays in Colonial History* 233 (Kumkum Sangari & Sudesh Vaid eds., 1989) (discussing nationalism and women in India); Nira Yuval-Davis, *National Reproduction and 'The Demographic Race' in Israel*, in *Woman-Nation-State*, *supra*, at 94 (discussing nationalism and women in Israel). See generally *Woman-Nation-State*, *supra*, for a review of nationalism and women in various other countries.

⁸⁷ Nussbaum, *Women and Human Development*, *supra* note 21, at 63.

the head of the household is a beneficent altruist who will adequately distribute resources and opportunities to the family members.⁸⁸ Thus, this model assumes that a man, who is generally the head of the household, will always act in the best interests of his wife, neglecting the possibility that she might have individual needs that might conflict with those of her spouse.⁸⁹ Even liberalism's most prominent contemporary theorist, John Rawls, bases his theory of justice on the assumption that the family is a just institution. Rawls entrusts the formulation of the principles of justice in the hands of heads of families, under the assumption that they can fairly and adequately represent the interests of other family members, thus preventing the latter (usually women and children) from having any say in the matter.⁹⁰

B. Familial Ideology and the Discourse of Equality and Difference

The centrality to religious thought of familial ideology and of confining women to the roles of wives and mothers, on the one hand, and

⁸⁸ *Id.* at 63-64.

⁸⁹ The centrality to a man's self-image of the role of benefactor of women, and the way in which this role can serve as an allegedly unobjectionable excuse for sexism, have been suggested as reasons for the different attitudes people tend to have toward racism and sexism. In an essay entitled *Sexism and Racism: Some Conceptual Differences*, Laurence Thomas argues that sexism is considered less objectionable than racism for two reasons. Laurence Thomas, *Sexism and Racism: Some Conceptual Differences*, 90 *Ethics* 239-50 (January 1980). One reason is that "sexism, unlike racism, readily lends itself to a morally unobjectionable description." *Id.* at 240. The morally unobjectionable description according to Thomas is that sexism (the belief in women's natural inferiority and their duty to take care of men) results in men being the benefactors of women (the ones who protect them and provide them with the comforts of life). Thus, the result of sexism can be described as a benign result and not a pernicious one, while the results of racism cannot be described in a similarly benign way. The second reason Thomas points to is that "the positive self-concept of men has been more centrally tied to their being sexists than has been the positive self-concept of whites to their being racists." *Id.* Thomas argues that man's traditional role as a benefactor of women is "one of the most deeply entrenched views of our society," and therefore "there is no getting around the fact that the positive self-esteem of men has been centrally tied to their being sexists." *Id.* at 247-48. In contrast, neither the racial identity nor the self-esteem of whites have been centrally tied to their being racists, as the "whiteness" of a white person was neither measured nor defined by his racism. Thus, according to Thomas, man's traditional role as benefactor of his wife, and its centrality in his own self esteem even today, are the main reasons why sexism is more acceptable to most people than racism.

⁹⁰ Susan Moller Okin, *Justice and Gender*, 16 *Phil. & Pub. Aff.* 42, 48-49 (1987). Rawls's theory is based on principles of justice that people in what Rawls terms "the original position" can agree upon. The "original position" is characterized by the fact that people do not know what their future position will be in the just society they are creating. This is meant to ensure that those formulating the principles of justice know that they might end up occupying less fortunate positions in the just society and thus formulate principles that promise justice to those who are worst off. By making the individuals in the original position heads of families, Rawls assumes that the family is just and that there is no need to consider the well-being of the individual members of the family separately from the well-being of the head of the family. *Id.*

the need to conform to the contemporary discourse of equality, on the other, have generated new definitions of equality that seemingly allow for both equality and difference. For example, since the Beijing Conference on Women, the Vatican has vigorously advanced its position on the human rights of women, which is based on the belief that although men and women are human beings to the same degree, they perform different but complementary roles in life.⁹¹ According to this position, “the ‘construction of a stable society’ must recognize the inseparable link between women’s ‘commitments to God, family, neighbor and especially to their children’.”⁹² The Vatican has opposed the ideal of equal rights for women while embracing a much more restricted ideal of equal dignity. Women and men are considered as being of equal dignity in all areas of life without this implying an equality of roles and functions.⁹³

A similar rhetoric can be found in the reservations of Islamic states to certain CEDAW provisions. In its reservation to Article 16, regarding women’s equality in marriage and the family, Egypt states that its compliance must be without prejudice to the Islamic Sharia laws that govern marital relations, which cannot be questioned because their sanctity derives from firm religious beliefs. The reservation states that what guarantees true equality between the spouses is the complementarity between them, which is achieved by according women rights that are equivalent to those of their husbands and that ensure a just balance between the spouses.⁹⁴ A similarly misleading use of equality was made by certain Islamic countries in the Beijing conference when they argued for granting women and girls “equitable”—meaning different—succession and inheritance rights to those of men.⁹⁵

Familial ideology coupled with a version of equality, which the Hindu Right in India terms “harmony in diversity,” defines the Hindu Right’s approach towards women’s rights.⁹⁶ Women’s roles in the family as wives and mothers are the cornerstone of this approach, and they underlie the understanding of women’s equality. Women and men are equal, but they are not the same. “They are like the two wheels of the chariot of the

⁹¹ Doris E. Buss, Robes, Relics and Rights: The Vatican and the Beijing Conference on Women, 7(3) Soc. & Legal Stud. 339, 345 (1998).

⁹² *Id.* at 346 (quoting Professor Mary Ann Glendon, the head of the Vatican delegation to the Beijing Conference).

⁹³ *Id.* at 347.

⁹⁴ Michele Brandt & Jeffrey A. Kaplan, The Tension Between Women’s Rights and Religious Rights: Reservations to CEDAW by Egypt, Bangladesh and Tunisia, 12 J.L. & Religion 105, 120 (1995-96).

⁹⁵ Buss, *supra* note 91, at 347.

⁹⁶ Ratna Kapur & Brenda Cossman, Subversive Sites: Feminist Engagements with Law in India 274 (1996).

family,” and it is their diversity that creates harmony.⁹⁷ As a prominent leader of the Hindu Right, who today serves as India’s prime minister, has said, “women who want to become men and want to make other women [like] men are worthy of ridicule.”⁹⁸ The double standard embedded in the equality through difference approach becomes clear in light of a “fundamental tenet of Hindu religious doctrine, which requires that ‘during childhood, the woman is under the control of her father; during her youth she is under the control of her husband; in old age she is under the control of her son; a woman is never fit for independence.’”⁹⁹

As in other religions, the “natural” differences between men and women are central to Orthodox Judaism’s attitude toward women.¹⁰⁰ Although women are allegedly equal to men, they are nevertheless different because it is women’s vocation to give birth and raise children. Women and men are complements to one another and have different religious duties and different roles in life.¹⁰¹ The falsity of the equality through difference construct in Judaism is perhaps best reflected in the daily morning prayer of Orthodox Jews, in which the Orthodox Jewish man thanks God for not having made him a woman, while the Orthodox Jewish woman thanks God for having made her according to his will.¹⁰²

As a result of a similarity of interests of religions, states, and national ideologies, the discourse of compatibility and of a qualified equality which is based on difference, stemming first and foremost from familial ideology and from women’s preordained roles as wives and mothers, remains largely unchallenged.¹⁰³ Though such discourse was

⁹⁷ *Id.* at 246-47.

⁹⁸ *Id.* at 246 (quoting the statement of Atal Bihari Vajpayee, the current prime minister of India. Vajpayee has been serving as the prime minister of India since 1996 and, as of 2002, is in his third consecutive term in office).

⁹⁹ Kirsten K. Davis, Equal Protection for Women in India and Canada: An Examination and Comparison of Sex Equality Provisions in the Indian and Canadian Constitutions, 13 *Ariz. J. Int’l & Comp. L.* 31, 33 (1996) (quoting Manju Kumar, Social Equality: The Constitutional Experiment in India 110 (1982)).

¹⁰⁰ Nira Yuval-Davis, The Personal is Political: Jewish Fundamentalism and Women’s Empowerment, in Religious Fundamentalisms and the Human Rights of Women 33, 38 (Courtney W. Howland ed., 1999) [hereinafter Religious Fundamentalisms].

¹⁰¹ See, e.g., Ellen M. Umansky, Feminism in Judaism, in Feminism and World Religions 179, 191-92 (Arvind Sharma & Katherine K. Young eds., 1999); Niza Yanay & Tamar Rapoport, Ritual Impurity and Religious Discourse on Women and Nationality, 20 *Women’s Stud. Int’l F.* 651, 661 (1997); Tamar El-Or, Next Pessach: Literacy and Identity of Young Religious Zionist Women 183-215 (1998).

¹⁰² Yuval-Davis, The Personal is Political: Jewish Fundamentalism and Women’s Empowerment, *supra* note 100, at 38.

¹⁰³ In many cases, the mainstream non-religious discourse of equality in itself stems from women’s roles as wives and mothers and is motivated by their difference. For example, the parliamentary discussions of the Israeli parliament, the Knesset, regarding the

regarded as legitimate in the past with regard to racial, ethnic, or religious minorities, as it was with race in the United States and South Africa, and caste in India, such a discourse is no longer legitimate today, and rightfully so.¹⁰⁴ What is striking is how legitimate and normative this discourse is when applied to women.

C. Selflessness and Self-Sacrifice—The Angel in the House

1. Christianity

An inseparable part of familial ideology, which serves as a tool for control over women and as a means of organizing society, and which Virginia Woolf terms “the Angel in the House,” is the ideology of selflessness and self-sacrifice.¹⁰⁵ Most, if not all, religions emphasize selflessness and self-sacrifice as noble virtues. This emphasis, which is directed mainly toward women, is also particularly appealing because many women tend to define themselves and their worth mostly in relation to their ability to care for and protect others, and to define “goodness” as meeting one’s obligations and responsibilities to others.¹⁰⁶

Christianity, through the crucifixion of Jesus, praises self-sacrifice as the primary virtue and valorizes suffering.¹⁰⁷ Thus, Christian women can find in their faith a justification for the sacrifices they make for others, such

enactment of the Women’s Equal Rights Law that granted equal rights to women, revolved around women’s right to equality as mothers and wives. See Nitza Berkovitch, Motherhood as a National Mission: The Construction of Womanhood in the Legal Discourse in Israel, 20 *Women’s Stud. Int’l F.* 605, 611-12 (1997). As one commentator put it, parliament members believe that “women should be given equality, treated well, and protected through legislation because women are mothers and mothers are wonderful.” Susan Sered, What Makes Women Sick?: Maternity, Modesty, and Militarism in Israeli Society 22 (2000).

¹⁰⁴ This is not to say that one cannot find avid supporters of such theories, but it is beyond question that they will not gain the legitimacy and the respectability that these theories have as pertaining to women.

¹⁰⁵ Virginia Woolf, Women and Writing 59 (Michele Barrett ed., 1979) [hereinafter Woolf, Women and Writing]. “You who come of a younger and happier generation may not have heard of her—you may not know what I mean by the Angel in the House. I will describe her as shortly as I can. She was intensely sympathetic. She was immensely charming. She was utterly unselfish. She excelled in the difficult arts of family life. She sacrificed herself daily. If there was chicken, she took the leg; if there was a draught she sat in it—in short she was so constituted that she never had a mind or a wish of her own, but preferred to sympathize always with the minds and wishes of others. Above all—I need not say it—she was pure. Her purity was supposed to be her chief beauty—her blushes, her great grace. In those days—the last of Queen Victoria—every house had its Angel.” *Id.* at 58-59.

¹⁰⁶ Carol Gilligan, In a Different Voice 66, 79 (2d ed. 1993). See also Jean Baker Miller, Toward a New Psychology of Women 50 (1976).

¹⁰⁷ Becker, *supra* note 34, at 472.

as sacrificing their own self-realization in order to take care of their families, as well as a justification for the suffering that they feel as a result of such sacrifices.¹⁰⁸ It is religious women's faith that directs them to make these sacrifices and endure the suffering that they entail. Christian religions present as ideal the traditional images of women as caretakers, nurturers, and servants of others. Empirical evidence indicates that Christian church attendance is generally more strongly correlated with anti-feminist beliefs such as opposition to abortion, equal rights for women, and affirmative action for women, than are education, income, occupational status, class, age, residence, and most other social traits.¹⁰⁹ This creates a paradox of self-abnegation within religious women—the more religious the woman is, the more subordinate her position is and the bigger her sacrifice and suffering are, but at the same time the stronger her conviction is that she is leading the ideal life and that she is fulfilling her true calling. In order to *affirm* herself as a "person," a human being worthy of God's love, the woman has to *negate* herself as a "person," a human being with personal needs and wants, who is entitled to see her needs and wants as central and not as always and forever subordinate to those of others.

2. Judaism—Ultra-Orthodox Jews

A similar pattern of self-abnegation can also be found in Judaism. The typical ultra-Orthodox¹¹⁰ woman in Israel is expected to give birth to and raise many children, take care of the home, take care of her husband who pursues Talmudic studies all day, and work outside the home as the major breadwinner since her husband does not work.¹¹¹ In spite of the fact that these women have a far broader secular education than their husbands, and support them financially, they still remain totally subordinate to their husbands and to the needs of their families and communities. They accept their subordinate role as divinely ordained. Such acceptance is explained

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 474. Research shows that across Christian denominations church attendance is strongly correlated to opposition to both the Equal Rights Amendment and abortion. See also Kathleen A. McDonald, Battered Wives, Religion, & Law: An Interdisciplinary Approach, 2 Yale J.L. & Feminism 251, 262-63 (1990) ("Religious devoutness is the most important variable in consistently predicting attitudes about familial roles, extra-familial roles, male/female stereotypes, social change, and gender role preference.").

¹¹⁰ Ultra-Orthodox Judaism is a fundamentalist religious movement. The ultra-Orthodox Jewish community in Israel is a closed community that constitutes approximately six percent of the Israeli population and leads a very religious and mostly secluded way of life. Tamar El-Or, Visibility and Possibilities: Ultraorthodox Jewish Women Between the Domestic and Public Spheres, 20 Women's Stud. Int'l F. 665, 666 (1997).

¹¹¹ The ultra-Orthodox women take on low-paying female-dominated jobs, working as teachers, seamstresses, typists, and babysitters. *Id.* at 666-67.

both by the indoctrination these women experience growing up in the ultra-Orthodox society and by their fear that rebelling against the norm might seriously harm their status and, even more importantly, the status of their children.¹¹² In this context of selflessness and self-sacrifice, it is important to note that in the ultra-Orthodox community it is the ultra-Orthodox men who are considered to be performing the noblest self-sacrifice, since devoting one's life to Talmudic studies is considered the highest virtue (accorded only to men).¹¹³ Thus, the demand of self-sacrifice is directed at men as well as women, but in very different ways. Many an observer would question the hardship inherent in devoting one's time to studying Talmudic studies as opposed to taking care of eight children, a husband and a home, and working outside the home to support the family, while at the same time being completely subordinate to your husband's will. It is telling that in a society which values self-sacrifice above all else, women, who are expected to sacrifice more than anyone, do not even get due recognition for their sacrifice.

3. *Hinduism—Oriya Hindus*

Another example of the ideal of women's self-sacrifice and suffering, as well as the paradox of self-abnegation, can be found in the customs of the upper-caste Oriya Hindus as they are described by anthropologist Usha Menon.¹¹⁴ The moral order advanced by the Hindu religion is one that cherishes self-control, self-refinement, and duty to the family. Most Hindus, both men and women, would find the Western emphasis on the primacy of the individual immoral and futile because they believe that the self does not exist apart from its connections with others.¹¹⁵ Hindus do not think of the person as indivisible and bounded, but as

¹¹² Menahem Friedman, *The Honor of the King's Daughter is Outside, in Blessed Are You God for Having Made Me a Woman?: Women in Judaism from the Tanach to Today* 189, 205 (David Yoel Ariel et al. eds., 1999). The fear that these women have about the status of their children stems from the fact that in the ultra-Orthodox society, all marriages occur via matching a son's or daughter's prospects, and a good match is ruined by his or her parents' divorce. Another reason Friedman gives as to why ultra-Orthodox women are reluctant to rebel is that they do not feel that the society outside the ultra-Orthodox community offers them anything better than what they have in their community. Thus, they prefer to stick with a known evil and not to take chances with an unknown one.

¹¹³ *Id.* at 200.

¹¹⁴ The following account of Hindu moral order and Oriya Hindu family practices is taken from Usha Menon, *Does Feminism Have Universal Relevance? The Challenges Posed by Oriya Hindu Family Practices*, *Daedalus*, Fall 2000, at 77. It is important to point out that I use Menon's account for a purpose opposite to hers. Menon's purpose in this article is to criticize feminism and to show that women can lead fulfilling lives in what feminists regard as a highly discriminatory and oppressive system.

¹¹⁵ *Id.* at 78-79.

divisible, "continually changing and being reconstituted by the givings and receivings he or she engages in."¹¹⁶ Hindus transform themselves through daily practices and rituals of refinement. Women are especially permeable because they menstruate and reproduce, and as a result they are required to be more concerned than men about their connections with others, their daily practices, and their rituals of refinement. To regulate their exchanges with others, Oriya Hindu women must seclude themselves within family compounds, have virtually no contact with strangers, and meticulously observe prescribed daily practices.¹¹⁷

Oriya Hindu women are usually literate in the local language, but not necessarily schooled. They have arranged marriages, spend their entire life within the compounds of their natal and conjugal extended households, and have only minimal contact with the outside world.¹¹⁸ Both Oriya men and women regard the domestic sphere as the most important sphere of human action.¹¹⁹ The senior women within an extended household control and manage all household affairs, including the household finances and expenses. Thus, according to Menon, it would not be correct to cast men as oppressors and women as victims, but rather to speak of the more senior family members controlling the activities of the more junior.¹²⁰ Unlike men, Oriya Hindu women do not inherit property.¹²¹

Married women are believed to embody the family's fund of auspiciousness and its future. If the woman is irresponsible in the management of the family resources or is promiscuous, then the family will be ruined. Oriya Hindus insist that the control over greed and lust must come from within. This can only be achieved through the surrender of one's sense of self and service to others. These are the two basic duties of married women. Thus, in order to enable them to achieve self-control, married women are expected to cook, serve food, fast, eat last, eat leftovers, and

¹¹⁶ *Id.* at 81.

¹¹⁷ *Id.*

¹¹⁸ According to Menon, the women do not even desire to move about freely or interact with other people. Shunning contact with the outside world and maintaining exclusivity is a sign of superiority for Oriya Hindu women. *Id.* at 88.

¹¹⁹ *Id.* at 85. Marriage is the most important ritual of refinement for Hindus everywhere. Once married, Oriya women wear distinct clothes and jewelry that are believed to protect their husbands' health and long lives. Oriya women believe that they are the custodians of the lives and well-beings of their husbands and families. Menon states that she does not know of any Oriya Hindu woman in the town in which she conducted her research, no matter how unhappily married, who deliberately removed her special clothing and jewelry, an action that in indigenous thinking is tantamount to murder. *Id.* at 86.

¹²⁰ *Id.* at 88. Menon concedes that senior men are accorded deference, but she sees it as being only formal deference. The real power struggle in the house, according to her, is between the various women. *Id.* at 91.

¹²¹ *Id.* at 94.

selflessly take care of the physical as well as the emotional needs of the members of the extended family.¹²²

According to Menon, though junior women find the first years in the conjugal home—to which they are obliged to move after their arranged marriage—difficult, they ascribe their difficulties to their own failure to open themselves completely in order to assimilate and be remade into the substance of their conjugal family. Further, all women understand that even the most junior women can start acquiring power to make decisions for themselves and later for the family by building relationships and exerting influence through cooking, serving, and taking care of others.¹²³ Junior women do not complain about their situation, both because they know that such complaints would be futile and would jeopardize their efforts to gain more power and position by assimilating into the family, and because they know that someday they will occupy the positions of power as senior women in the family.¹²⁴

Menon concludes that the Oriya Hindu women lead “fairly fulfilling, contented lives” for several reasons.¹²⁵ First, their identification with the Goddess Devi, who embodies the energy and power of the universe, is a source of substantial self-worth. Second, Oriya Hindu women are universally regarded as being central to the material and spiritual welfare of their families.¹²⁶ Third, within a few years of marriage, they

¹²² *Id.* at 86-87. In addition, the most important quality in a woman is chastity. The woman is responsible for her own chastity and needs to discipline herself to be chaste for the continuing welfare of her husband and family.

¹²³ *Id.* at 90. “Through every act of cooking, serving, and feeding, she is giving of herself to others within the family, making herself a vital channel within the family body, and bringing others within the ambit of her influence.” *Id.*

¹²⁴ *Id.* at 92. As the younger brothers in a family marry, the wives of the older brothers gain more power. When the most senior woman of the household is widowed, she loses all her power and is “relegated severely to the background, expected to contribute nothing to the household and expecting little in return.” *Id.* at 93.

¹²⁵ *Id.* at 94-95.

¹²⁶ Making women’s behavior the determiner of the family’s happiness and well-being is a practice that is prevalent in other religions, as well. For example, in Judaism the welfare and happiness of the family depend on the woman’s strict obedience to the rules of ritual purity (*niddah*). Zionist Orthodox Judaism in Israel makes women responsible not only for their families’ well-being, but also for the survival of the Jewish people and the state of Israel itself, through strict adherence to the rules of *niddah*. Yanay and Rapoport, *supra* note 101, at 659. However, as Yanay and Rapoport point out, far from empowering women, this responsibility only serves as a further tool of their domination and subordination. While women carry all the responsibility for the well-being of the family and nation on their shoulders, the rules on how this responsibility should be met are set exclusively by men, and the rules are intentionally complicated and vague at the same time, directing women to consult their male rabbis on almost every move that they make. *Id.* at 657-59. It is quite puzzling that Menon identifies a similar situation (allocation of high responsibility with no authority) as a reason for contentment.

identify themselves completely with the conjugal family and their sense of self emerges from their involvement with it.¹²⁷

This account of the lives of Oriya Hindu women demonstrates beautifully how religion and culture make a selective use of the ideals of selflessness and self-sacrifice in order to subjugate women, while at the same time persuading them that they are leading good and fulfilling lives. Such an account also explains why Oriya Hindu men are convinced that they are not subjugating the women. First, like the women, the men are brought up to believe that the functions women fulfill and their highly-restricted existence reflect their special powers and not their weakness.¹²⁸ Second, the enormous benefits men get from living in a moral order of this kind are bound to quench any doubts about its legitimacy that they might entertain. Third, as the moral order under which the group exists is so all-encompassing, as well as uncompromising, that individual men do not feel they have any say in its shaping. Feeling they are as bound by the moral order as the women are and that they are prevented from changing it, men do not feel any responsibility and therefore no guilt for its continuing existence.

A very disturbing aspect in Menon's description of the Oriya Hindu family practices is the empathetic manner in which she describes these deeply subjugating practices, devoid of any form of criticism.¹²⁹ By neglecting to ask what happens to a woman who does not want to abide by the unbelievably strict rules that apply to her and that literally leave her no choice in any major life decision, Menon manages to describe a world in which all women are content, regardless of how difficult their lives are. Further, Menon neglects to mention what restrictions this elaborate moral order, that has such an exceedingly restricting (not to say debilitating) effect on women's lives, puts on the lives of Oriya Hindu men, except to say that young Hindu men also "live with certain constraints."¹³⁰ Thus, the reader might be left with the distinct impression that there is nothing wrong with the Oriya Hindu moral order, and that it is just a different way of life in which consenting adults freely choose to live in equality and harmony.

¹²⁷ Oriya Hindus believe that women are being reborn into the conjugal family through marriage. Menon, *supra* note 114, at 83.

¹²⁸ This is reminiscent of the notion of "the pedestal" in Western culture.

¹²⁹ The only criticisms Menon offers in this article are of feminism and feminist activists. Menon, *supra* note 114, at 77-80, 96-97.

¹³⁰ *Id.* at 88. Menon concedes that these constraints are much different from those placed on women.

4. Should a Social Order Exalting Women's Self-Abnegation Be Condoned or Condemned?

The reason I dwell on Menon's presentation of the Oriya Hindu family practices is that her attitude toward this highly discriminatory and subjugating system is typical of the reaction of third parties to encounters with religious and cultural practices that discriminate against women and subjugate them. This reaction consists of an adamant refusal to criticize, a fervent adherence to the group's right to free exercise of religion and of culture, and an assumption that if it can be shown that some women in the group are content, then no real issue of discrimination remains. Such a reaction is in striking contrast to most reactions one would get if one were giving a similar account in which the actors were not men and women, but people from two different races or ethnicities, or in the Indian context, two castes.

Imagine a group consisting of two races in which members of race X are confined to the houses chosen for them by others for most of their lives. They are often not schooled, and are not allowed to go out to work, earn money, or inherit. They are expected to cook, serve food, fast, eat last, eat leftovers, and selflessly take care of the physical as well as emotional needs of the members of race Y. They have virtually no way out of this arrangement. Members of race Y, on the other hand, inherit all the property, and are free to go wherever they choose and do whatever they choose. They are free to work and earn money (some of which they are expected to give race X for house expenses), and when they go home, they are treated with special deference. They are fed with the best food, and race X takes care of all their emotional and physical needs. The two races share a system of belief that stipulates this arrangement, stating that a person's race is the sole determinant of his proper role in life and exalting the role of race X for its selflessness and service to others. Members of race Y are the sole creators and interpreters of this system of belief.

It is highly likely that such an account would enrage most of the outsiders to this group and that they would condemn race Y as racist and its religion as a travesty. They would find it disturbing that many people from race X adhere to a system of belief that subjugates them so much, but would probably conclude that this is not a sufficient motive to let things stand as they are. Buttressed by their strong belief that racial discrimination is morally condemnable, socially unjust and dangerous, without justification in theory or in practice, and repugnant to the ideals of any human society,¹³¹ they would call for immediate intervention.

While in the past religion was used as a prevalent justification for racism, this is no longer the case. For example, research shows that while an increase in Christian commitment indicates an increase in sexist attitudes, it

¹³¹ See preamble to the Race Convention, *supra* note 6, at 212-16.

does not indicate an increase in racist attitudes. Though moderately active Christians are on average more racist than those who do not attend church at all, the most committed church members are as tolerant of racial minorities as non-members, while at the same time are the most sexist.¹³² Thus, by changing their teachings, Christian churches that not so long ago decreed that it is God's will for the white race to rule over the black race, have succeeded in significantly changing their members' attitudes toward racial minorities. At the same time, churches purposefully choose to maintain their sexist teachings entrapping devout women in a paradox of self-abnegation and perpetuating male dominance. This paradox of what seems a free choice of self-abnegation, as well as the unquestioning acceptance by society of female self-abnegation, might lie at the crux of the difficulty in fighting sex discrimination in general, and religious and cultural norms that perpetuate sex discrimination in particular.

V. FREE CHOICE

A. Individuals as Collaborators in Their Own Oppression

It is quite obvious that the fact that an oppressed person is highly susceptible to becoming a collaborator in his own oppression cannot serve to justify the oppression. While this simple truth is often recognized with regard to oppression on the basis of race, ethnicity, or religion, it is seldom recognized with regard to the oppression of women.

The process through which a slave becomes a collaborator in his own slavery is clearly described in a quote from the autobiography of Jawaharlal Nehru, former prime minister of India:

For many generations the British treated India as a kind of enormous country-house (after the old English fashion) that they owned. They were the gentry owning the house and occupying the desirable parts of it, while the Indians were consigned to the servants' hall and pantry and kitchen The fact that the British Government should have imposed this arrangement upon us was not surprising; but what does seem surprising is that we, or most of us, accepted it as the natural and inevitable ordering of our lives and destiny. We developed the mentality of a good country-house servant. Sometimes we were treated to a rare honour—we were given a cup of tea in the drawing-room. The height of our ambition was to become respectable and to be promoted individually to the upper regions. Greater than any victory of arms or diplomacy was this psychological triumph of the British

¹³² Becker, *supra* note 34, at 477.

in India. The slave began to think as a slave, as the wise men of old had said.¹³³

The process that Nehru describes in the context of British rule over India goes much deeper in the context of women's subjugation. Unlike Indians who had nothing in common with their British rulers, women share everything with their oppressors, including the oppressors' culture, religion, language, living space, children, family, and community.¹³⁴ This does not make women's oppression less pernicious and should not be understood by outsiders as justifying non-intervention and non-condemnation. Indeed, quite the opposite is true.

Furthermore, the ideology of selflessness and self-sacrifice, which is a primary tool in the subjugation of women, is an especially effective way of preventing dissidence as it instills in a woman an almost instinctive negation of her own wants and needs, and a complete obedience to a higher authority—the man. As Virginia Woolf eloquently put it when describing her struggles to become a woman writer at the beginning of the twentieth century, in order to be able to sit down and write even one line, she first had to engage in a long and bitter struggle against her personal “Angel in the House,” who was lurking inside her, preventing her from having and expressing a mind of her own, from questioning and critiquing:

Had I not killed her she would have killed me. She would have plucked the heart out of my writing She died hard. Her fictitious nature was of great assistance to her. It is far harder to kill a phantom than a reality. She was always creeping back when I thought I had despatched her. ... Killing the Angel in the House was part of the occupation of a woman writer.¹³⁵

Considering how hard it is for a strong-willed, free-minded woman like Virginia Woolf to “kill the Angel in the House,” it is hardly surprising that the average religious and traditional woman often finds it impossible to struggle against the paradox of self-abnegation into which both her religion and her culture, two of the most powerful forces in her life, have thrown her. Many religious communities often practice very traditional cultures,

¹³³ Jawaharlal Nehru, *An Autobiography* 417 (Bodley Head 1989) (1936) (quoted in Nussbaum, *Women & Human Development*, *supra* note 21, at 150).

¹³⁴ As one commentator argues, “Sex colonization is insidious. Not only are women dominated as a group—socially, politically and economically—but unlike any other colonized group, they must share the homes and beds of their colonizers.” Kathlyn Barry, *Female Sexual Slavery* 165 (1979) (quoted in Geraldine Moane, *Gender and Colonialism: A Psychological Analysis of Oppression and Liberation* 23 (1999)).

¹³⁵ Woolf, *Women and Writing*, *supra* note 105, at 59-60.

which are in themselves blatantly discriminatory on the basis of sex.¹³⁶ Such cultures are generally very cohesive and demand absolute conformity from their members.¹³⁷ They place a very high intrinsic value on conformity and thus create in women (as well as in men) a deep moral need to obey their sexist dictates. This need is particularly overwhelming since it is accompanied by the corresponding religious need to obey a sexist religion.

B. The Individual Will and Traditional Cohesive Communities

In order to understand the extraordinary force that a cohesive traditional community can have on its members, one which can prevent them from showing or even conceptualizing any resistance, it is worthwhile to reflect on the way the sociologist Emile Durkheim analyzes the forms of solidarity in society, and to apply this analysis to the situation of women in cohesive traditional communities. Durkheim identifies two forms of solidarity in societies, which he terms mechanical and organic solidarity. Both types of solidarity are present everywhere, but while mechanical solidarity is more dominant in communities that are extremely cohesive and traditional, organic solidarity becomes more dominant as a group advances and transforms into what we know as modern society. Since the communities discussed here are dominated by mechanical solidarity, I will concentrate on Durkheim's analysis of this type.¹³⁸

Durkheim suggests that in cohesive traditional communities in which mechanical solidarity is dominant, the ideas and tendencies common to all members of the society are greater in number and intensity than those that pertain personally to each member. Thus, most of the ideas and tendencies of a member of a cohesive traditional society are ideas and tendencies that are common to all other members, and not his or her own individual ideas and tendencies. According to Durkheim, mechanical solidarity can grow only in inverse ratio to the members' individual personalities. As a result, in order to maintain mechanical solidarity (a cohesive, closely-knit, traditional society), it is vital that the group's members have as little leeway as possible to develop individual personalities.

Durkheim posits that in each person there are two consciences. One is common to the group in its entirety and is not really the self, but society living and acting within the self. The other represents what is truly personal and distinct in the self and makes each person an individual. In a society

¹³⁶ On the connection between traditional cultures and the oppression of women, see Okin, *Bad for Women*, *supra* note 8, especially 12-16.

¹³⁷ See, for example, cultures discussed in this article such as the ultra-Orthodox Jews, *infra* Parts IV.C.2, VI, and VII, and the Oriya Hindus, *infra* Part IV.C.3.

¹³⁸ The following analysis is taken from Emile Durkheim, *The Division of Labor in Society* 129-31 (Free Press 1st ed. 1964) (1933).

characterized by mechanical solidarity, the conscience that is common to the group is dominant in almost all aspects of life, and especially in those aspects that are most important to the group. The individual conscience dominates only in the very few aspects of life that are less important to the group and in which the group allows for individuality. When mechanical solidarity is at its strongest, the collective conscience envelops each individual conscience and completely coincides with it. At that moment, the individuality of each person is nil. Durkheim describes the individual conscience and the collective conscience as two contrary forces. The moment that mechanical solidarity exercises its force, the individual personality vanishes—for a person is no longer herself, but the collective life. In extremely cohesive and traditional societies where mechanical solidarity is highly developed, the individual never appears; individuality is something that the society completely envelops.

Durkheim's analysis of society can lead us to a better understanding of what is typically perceived as women's willing cooperation with their own subjugation, especially where this cooperation takes place in cohesive, closely-knit traditional societies. Incidentally or not, the more oppressive a society is to its women, the more it coincides with Durkheim's description of a society in which mechanical solidarity is most dominant. Thus, the dominant conscience of women, as well as men, in these societies is the one which is common to the group in its entirety and which is not really the self, but society living and acting within the self. The common conscience of the group holds strong beliefs about women's proper role in the group, as can be seen in all the examples described above, including Christian extremists, ultra-Orthodox Jews, and Oriya Hindus. The women of the group, their consciences dominated by the group conscience, are likely to hold similar beliefs, no matter how damaging they might be to themselves. Further, since the control over women is of unusually high importance to such groups,¹³⁹ women's issues will be the issues in which the group will exert its common conscience to the maximum, enveloping each individual conscience and completely coinciding with it.¹⁴⁰ Consequently, it will be virtually impossible for most women in these societies to show any

¹³⁹ It has been recently noted by various thinkers that fears about autonomy for women are a major focus of attention in all fundamentalist groups. See John Stratton Hawley, *Fundamentalism*, in *Religious Fundamentalisms and the Human Rights of Women*, *supra* note 100, at 3, 4.

¹⁴⁰ While men in such groups are also fairly restricted in their actions, they are much less restricted since the group does not place such high importance on controlling these actions. Interestingly, this relative freedom allows men to use their individual consciences in those spheres relevant to them, and reach independent conclusions that can enable them to fight for even more freedom. Thus, the effectiveness of the control over women depends on its totality.

opposition, or indeed even to think about opposing the group in any manner on the matters most crucial to their lives.¹⁴¹

While Nehru's description of the British rule over India illustrates that racial, ethnic, and religious groups also find it difficult to form the consciousness needed in order to object to oppression and struggle against it, the analysis above can explain why women most often find it difficult to object to their oppression. While women share a culture, a religion, and a collective conscience with their oppressors, different racial and ethnic groups usually practice different religions, come from different cultures, and have distinct, often contradictory, collective consciences. Conquerors throughout history have attempted to convert their subjects to their own religions in order, among other things, to be able to control them better through religious influence, but this has not always been successful. Furthermore, even where it has been successful, the subjugated groups still had their own cultures in which to develop their resistance to subjugation, and their own collective consciences to sustain them and to strengthen their defiance. Oppressed racial, ethnic, and religious groups are usually not a wholly integral part of the cohesive traditional society that oppresses them. Such groups most often come from a different society and are not in a position to lose their own conscience and be enveloped by the conscience of the oppressing society. This is not to imply that racial and ethnic oppression is a lesser problem or that it is not highly difficult for oppressed racial, ethnic, and religious minorities to free themselves from oppression. This analysis, however, suggests why we find that in many cases of women's oppression a large number of the women identify deeply with the oppressing system, while we do not often find a similar depth and breadth of identification in racial, religious, and ethnic oppression.¹⁴²

C. Lack of Options

It should be stressed that the aforementioned sociological and psychological phenomena are not the only factors affecting women's free

¹⁴¹ Applying Durkheim's analysis to the rise of feminist movements, it is not surprising that it coincided in time and place with the move from mechanical solidarity to organic solidarity. Only after women acquired relative freedom to use their individual consciences were they able to object to their own subjugation.

¹⁴² Though Nehru's observations (*see* note 133 and accompanying text) suggest that Indians have experienced a similar phenomenon of identification with their oppressors, I would argue that the phenomenon Nehru describes is qualitatively different from the phenomenon experienced by women in oppressing groups. It seems to me that women's identification with their oppression in cohesive traditional societies is much deeper. While most Indians probably knew they were being used by the British but thought that it was futile to fight for unattainable freedom, most women in religious traditional societies genuinely believe that their circumstances are exactly as they should be and that it is a mortal sin to try to change them.

choice. Another crucial factor is the set of options from which a person may choose. Thus, if a woman in a Muslim society chooses to wear the veil since it is the easiest way to avoid sexual harassment in the public sphere,¹⁴³ this should by no means be considered a free choice that exempts society from the responsibility to ensure that a woman can venture into the public sphere unveiled without being harassed. Similarly, when a woman in the U.S. chooses not to go out alone after dark for fear of being assaulted, the fact that it is her choice to stay indoors should not obscure society's duty to ensure that women can go out at night without fearing for their well-being.

The oppression of women and the curtailment of their rights through a deliberate or semi-deliberate lack of appropriate options occur in all societies, and the argument of free choice should in most cases be examined with extreme caution. This caution should be doubled given the sociological and psychological phenomena discussed above, which could make even physically available options emotionally unavailable to many women. When third parties consider societies in which the oppression of women is taking place, they should not be so quick to adopt the easy explanation, namely that this oppression is consensual. Just as it is highly unlikely that oppression on ethnic, racial, and religious grounds is consensual, it is highly unlikely that in most cases oppression on the basis of sex is freely consented to in a true sense, and the appearance of free consent is achieved through sociological and psychological influences as well as through a lack of more egalitarian options. The more cohesive, religious, traditional, and closely-knit the society is, the less credence should be given to the free choice argument and the more closely the possibilities for genuine free choice should be examined.

VI. WOMEN AS A GROUP, BUT NOT A COMMUNITY

A. Groups and Communities

Each individual in society belongs to some social group or other. Social groups are collections of persons who share something that is socially significant.¹⁴⁴ While some social groups are voluntary and their members share joint commitments and joint projects, other social groups, such as those defined by race or gender, are not voluntary and their members share social constraints as a result of their membership in the

¹⁴³ Lama Abu-Odeh, *Post Colonial Feminism and the Veil: Considering the Differences*, 26 New Eng. L. Rev. 1527, 1530 (1992) (discussing both the empowering and the disempowering aspects of wearing a veil, Abu-Odeh describes the wearing of a veil in order to avoid sexual harassment as an empowering experience for women).

¹⁴⁴ Ann E. Cudd, *Nonvoluntary Social Groups*, in *Groups and Group Rights* 58, 60 (Christine Sistare et al. eds., 2001).

group.¹⁴⁵ By developing awareness of the membership in an involuntary group and by creating solidarity, common ideals, and common projects, an involuntary group can become a voluntary social group.¹⁴⁶ Marxist theory makes a similar distinction between the concept of a class in itself (one that exists according to objective criteria), and a class for itself (one with a self-conscious collective identity, able to act on its own behalf).¹⁴⁷

All women are members of an involuntary social group based on gender and many of them perceive this as a voluntary social group that shares an identity, common ideals, and common projects. Nonetheless, most women do not feel that the social group based on gender is a community, and many of them question the communality of women's needs and ideals. A recurring criticism against feminists, as well as within feminist theory, is that the feminist project tends to essentialize women and not account for historical and social differences between women of different cultures, races, religions, etc., which are of crucial importance in determining their experiences, their needs, and their aspirations.¹⁴⁸ Thus, women's affiliations with various racial, ethnic, religious, and national communities exclude the possibility of women being a community in and of themselves.

Racial, ethnic, and religious groups are almost always considered to be communities. W.E.B. Du Bois defines race as "a vast family of human beings, generally of common blood and language, always of common history, traditions and impulses, who are both voluntarily and involuntarily striving together for the accomplishment of certain more or less vividly conceived ideals of life."¹⁴⁹ Though this definition is controversial, it points to various characteristics that are common to communities such as shared language, history, traditions, and aspirations, and which are lacking from the social group of women.¹⁵⁰ Further, in addition to the fact that women as

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 64.

¹⁴⁷ Sara Evans, Personal Politics: The Roots of Women's Liberation in the Civil Rights Movement and the New Left 218 (1979).

¹⁴⁸ See, e.g., Charlesworth & Chinkin, *supra* note 7, at 52-53; Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 Stan. L. Rev. 581, 588 (1990); Vasuki Nesiah, Toward a Feminist Internationality: A Critique of U.S. Feminist Legal Scholarship, 16 Harv. Women's L.J. 189, 199-200 (1993); Chandra Talpade Mohanty, Under Western Eyes Feminist Scholarship and Colonial Discourses, in Third World Women and the Politics of Feminism 51, 55-56 (Chandra Talpade Mohanty et al. eds., 1991).

¹⁴⁹ W.E.B. Du Bois, The Conservation of Races, in W.E.B. Du Bois: A Reader 20, 21 (David Levering Lewis ed., 1995).

¹⁵⁰ Another definition of communalism sees religion as the center of the community and projects the belief that "because a group of people follow a particular religion, they have as a result, common social, political and economic interests." Bipan Chandra, Communalism in Modern India 1 (1984) (*quoted in* Amrita Chhachhi, Forced Identities: the State, Communalism, Fundamentalism and Women in India, in Women, Islam and the State 144, 144 (Deniz Kandiyoti ed., 1991)).

a whole do not form a community, even distinct groups of women, who all belong to a common racial, ethnic, or religious community, tend to see themselves first and foremost as part of that racial, ethnic, or religious community and only then as part of the group of women, if at all. This is especially true for women who are part of minority communities. As bell hooks beautifully stated with regard to black women in the United States:

Contemporary black women could not join together to fight for women's rights because we did not see "womanhood" as an important aspect of our identity. Racist, sexist socialization had conditioned us to devalue our femaleness and to regard race as the only relevant label of identification. In other words, we were asked to deny a part of ourselves—and we did.¹⁵¹

The fact that women are a group, but not a community, has several implications for the way in which oppression against women due to religious and cultural norms is practiced and maintained, and for the way in which it is perceived and dealt with by the oppressed, by the oppressors, and by third parties. Some of these implications will be discussed below.

B. A Space of One's Own

1. Lack of Space to Develop Individual Recognition of Oppression

In *A Room of One's Own*, Virginia Woolf opines that what women need to become writers is a room of their own in which they can sit down quietly and write, and a fixed income that will ensure them the independence and the freedom to write.¹⁵² Similarly, an important prerequisite for the formation of both an individual and a group consciousness of oppression and discrimination is a space in which to develop such a consciousness. Women's abilities to identify and resist their oppression are seriously hindered by the fact that their whole existence is inexorably weaved into the society that oppresses them. They are born into that society, educated into its culture and religion, and its teachings become as much a part of them as of any man in that society. Further, throughout their lives they are surrounded mainly by people, many of whom are the people that they love and respect the most, who place a very high value on their shared culture and religion, including all the oppressive values

¹⁵¹ hooks, *supra* note 34, at 1. A similar phenomenon is described by Lee Maracle in the context of Native American women: "Until March 1982, feminism, indeed womanhood itself, was meaningless to me. Racist ideology had defined womanhood for the Native woman as nonexistent" Lee Maracle, *I Am Woman: A Native Perspective on Sociology and Feminism* 15 (Press Gang 2d ed. 1996) (1988) (quoted in Moane, *supra* note 134, at 23).

¹⁵² Virginia Woolf, *A Room of One's Own* (Harvest 1989) (1929).

embedded in them. Instead of being surrounded by people who would help them recognize their oppression for what it truly is, they are usually surrounded by people who will do everything in their power to persuade them that no such oppression exists. Thus, it is highly difficult for them to get the external support needed to create a space—physical, mental, and emotional—in which they can achieve the realization that they are oppressed, let alone resist their oppression. This is especially true in traditional, all-encompassing societies in which culture and religion control all aspects of life and which are, as a rule, the most oppressive cultures for women.¹⁵³

Though an oppressed racial or ethnic group can share with its oppressor a religion and a culture that justify the oppression, it is highly unlikely that a situation exists where the members of the oppressed group have no space in which they can at least recognize their oppression. The history of the subjugation of blacks in America, which is one of the worst cases of racial subjugation, can illustrate that point. Torn from their homeland, their culture, and their way of life, and converted to a form of Christianity which anchored their subjugation in religious precepts, blacks in America were extraordinarily susceptible to internalizing their own inferiority and perceiving white supremacy as the natural order.

In his autobiography *Black Boy*, the author Richard Wright describes a post-slavery, black American society that has deeply internalized its subordinate status and the restricted roles prescribed to blacks by whites.¹⁵⁴ Wright's ambition to become a writer is ridiculed and even perceived as dangerous by his black friends and family. Any rebellion against the subordinated status accorded to blacks, even in the form of aspiring to pursue an occupation that blacks are not supposed to pursue, is condemned and discouraged by the black community. In this respect, Wright's black community is as disempowering for him as a traditional community would be for a woman who considers pursuing an "inappropriate" career. Where Wright's story differs from the usual story of a woman in an oppressive society is in the fact that, born and raised in an exclusively black community, which was vividly aware of its oppression, Wright had the space in which to develop an acute realization of his oppressed state, a necessary first step toward successfully resisting the oppression. It is rare for women in oppressive societies to have such a space, and therefore it is much harder for them to develop the realization that they are oppressed.

Not only do women lack the physical and emotional space to develop resistance, but they also lack a space of their own in the historical sense. While racial, ethnic, and religious communities can look back to a

¹⁵³ See Okin, *Bad for Women*, *supra* note 8, at 12-16.

¹⁵⁴ Richard Wright, *Black Boy* (1945).

common past in which they were free from oppression and use this historical perspective in order to develop a vision of a free future, women do not have a past to look back to in which they were free from gender oppression. Rediscovering and embracing a shared history in which the oppressed group lived as a free community is considered essential for the building of resistance.¹⁵⁵ However, since women do not have such a history, they cannot rediscover it or use it as a basis for building resistance.

2. Lack of Space to Develop Communal Recognition of Oppression

In her book Personal Politics, which discusses the roots of the women's liberation movement in the United States and which ties them to women's involvement in the civil rights movement of the 1960s, Sara Evans identifies what she terms as essential preconditions for an insurgent collective identity.¹⁵⁶ The first precondition she identifies is a set of social spaces in which members of an oppressed group can develop an independent sense of worth that stands in contrast to their received definitions as inferior citizens. Other important preconditions are role models who have rebelled and an ideology that can explain the oppression, justify revolt, and offer a vision of a better future.¹⁵⁷ It was only through their participation in the civil rights movement of the 1960s that a few rebellious American women found the needed social space, role models, and ideology to form their resistance.

Further, it was only through their participation in the civil rights movement that two additional preconditions could be met.¹⁵⁸ First, a confrontation occurred between the inherited cultural definitions and their newfound sense of self, which was created through their participation in the civil rights struggle. Second, these women could utilize the communication network created during the civil rights struggle in order to spread their new ideology and create a new social movement. Considering that even in a relatively free society like American society, extraordinary circumstances like the civil rights struggle and women's participation in it had to transpire for the women's movement to emerge, it is not surprising that such movements rarely emerge in more traditional, cohesive societies.

¹⁵⁵ Moane, *supra* note 134, at 90. Among other scholars Moane discusses with regard to the importance of a shared history, she quotes the Native American activist and feminist Maracle who argues in relation to Native Americans that "without a firm understanding of what our history was before the settlers came to this land, I cannot understand how we are to regain our birthright as caretakers of this land and continue our history into the future." *Id.* (quoting Maracle, *supra* note 151, at 40).

¹⁵⁶ Evans, *supra* note 147, at 219.

¹⁵⁷ *Id.* at 219-20.

¹⁵⁸ *Id.* at 220.

In addition, it is important to note that in the United States, as in other parts of the world, the women's movement was created mostly by those women who came from more open and egalitarian families,¹⁵⁹ women who since childhood had the individual space needed to develop at least the beginnings of feminist awareness. The most effective socialization occurs at childhood. For example, a study has shown a high correlation between one's religious training as a child and one's religious commitment as an adult. In some Christian denominations in the United States such as Baptists, Episcopalians, and Lutherans, around ninety percent of the people who were raised practicing these denominations continued to practice them as adults.¹⁶⁰ As a result, children who are socialized into religious beliefs and cultural and religious practices that oppress women are highly likely to continue to follow these beliefs and practices throughout their lives, never having had a genuine choice in the matter. As philosopher Elizabeth Minnich observes, "it is in and through education that a culture, and polity, not only tries to perpetuate but enacts the kinds of thinking it welcomes, and discards and/or discredits the kinds it fears."¹⁶¹ Due to the significant impact of education and of exposure to other ways of life on children, the United States Supreme Court has recognized the right of certain secluded communities, such as the Amish, to effectively isolate their children from the outside world.¹⁶² While this right may be compatible with protecting the religious freedom of Amish parents, it is not necessarily compatible with the best interests of Amish children. This is especially true for Amish girls who are educated in a patriarchal system of belief that regards women as "unequal helpers of men," and in which the girls are effectively isolated from any competing vision of life.¹⁶³

Though the spreading of feminist ideas has exposed these ideas, at least in part, to more women in traditional and religious communities both in the United States and elsewhere, this exposure is critically hindered by several factors. One factor is the inculcation from an early age of religious doctrines that are oppressive to women, which literally prevents women from having the emotional and mental space in which to be receptive to feminist ideas. Additional debilitating factors are the vehement rejection of feminist ideas by the leaders of the community, the conflict between feminist ideas and the community's culture and religion, and the lack of

¹⁵⁹ *Id.* at 123-24.

¹⁶⁰ Becker, *supra* note 34, at 477 (citing Public Opinion Report, America: Land of the Faithful 96, 101 (American Enterprise 1990)).

¹⁶¹ *Quoted in* Martha Minow, Not Only for Myself: Identity, Politics and the Law 107 (1997).

¹⁶² Wisconsin v. Yoder, 406 U.S. 205 (1972).

¹⁶³ Stephen Macedo, Liberal Civic Education and Religious Fundamentalism: The Case of God v. John Rawls?, 105 *Ethics* 468, 488-89 (1995).

physical space in which these women can discuss feminist ideas and seriously reflect on them.

In contrast, ideologies demanding freedom for racial, ethnic, or religious groups rarely encounter opposition from the leaders of these groups and rarely contradict the group's culture and religion. Such groups do not usually lack the space to discuss their oppression, even if only covertly, and though they might disagree on the means to fight the oppression, it is most likely that many of them agree that the oppression exists and should be resisted. Perhaps most importantly, the education that children (including girls) in oppressed racial, ethnic, and religious communities receive from their parents and their close community does not deny their ethnic, racial, or religious oppression and does not urge them to believe that they are not oppressed. This allows their knowledge of this oppression to become an integral part of their system of beliefs and values and a challenge to the oppression.

In his writings, the civil rights leader W.E.B. Du Bois describes a sense of double-consciousness in which the black man lives:

This sense of always looking at one's self through the eyes of others, of measuring one's soul by the tape of a world that looks on in amused contempt and pity. One ever feels his two-ness,—an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being torn asunder.¹⁶⁴

While this sense of double consciousness, of being both an insider (an American) and an outcast (a black person), is debilitating and damaging, it can at the same time help one to recognize his oppression and fight against it. This feeling of double consciousness exists for women too, as they are at the same time both part of the group and an outcast whose status is inferior and whose opinions are irrelevant. What is missing in the experiences of many women, which can help transform their double consciousness from a debilitating burden to a tool for change, are the conditions in which to form a deep inner conviction that their situation is one of oppression and injustice and the space in which to transform this conviction into resistance in cooperation with others.

As psychologist Geraldine Moane explains,

liberation must be an interactional process: that is, one which occurs in interaction with others. It can only be undertaken and sustained in the context of supportive relationships, and it requires groups which are formed for specific reasons, communities which build on traditions and provide connection and ritual, and a

¹⁶⁴ W.E.B. Du Bois, *The Souls of Black Folk* 2 (Candace Ward ed., Dover Publications 1994) (1903).

culture which gives positive expression to the identity and history of the oppressed group.¹⁶⁵

While racially-, ethnically-, and religiously-oppressed communities strive to instill in their members the recognition of their own oppression and create a space in which they can fight this oppression as a community, societies that oppress their women strive to deprive them of that recognition and to prevent them from creating the space and the cooperation required to form resistance. Consequently, it is not surprising that women who are oppressed on the basis of their sex find it much harder to recognize their oppression and to act against it than people in oppressed racial, ethnic, and religious groups.

C. Minority Women and the Need to Choose Between Gender and the Community

Even women who are aware of their oppression and try to fight against it might find themselves deliberately relinquishing the fight after being singled out as traitors to their community, or after coming to believe they should prioritize what is perceived as the rights of their community over their own rights as women. This is especially true of women in minority communities, where women's struggles to change the community's oppressive practices are seen as a betrayal of the community's culture and traditions and as a threat to its stability, all of which are perceived by the community as the last line of defense against the hostile world of the larger society.

1. African-American Women in the United States

Women from minority communities often feel the need to choose between their struggle against the sexism inside their communities and the racism directed against them. For example, black feminist scholar Kimberlé Crenshaw describes the dilemma that she faced when an obscenity charge was filed against the black rap group 2 Live Crew for its extremely misogynistic lyrics glorifying violent sexual acts against women.¹⁶⁶ According to Crenshaw, the lyrics in question were undoubtedly misogynistic and those in the black community concerned about its high rates of gender violence must be troubled by the possible connections

¹⁶⁵ Moane, *supra* note 134, at 110.

¹⁶⁶ Kimberlé Williams Crenshaw, *Beyond Racism and Misogyny: Black Feminism and 2 Live Crew*, in *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* 111, 120-32 (Mary Matsuda et al. eds., 1993).

between violence against women and the images portrayed in such lyrics.¹⁶⁷ Nevertheless, Crenshaw objected to the obscenity charges brought against 2 Live Crew because she believed it was specifically targeted for prosecution as a result of racism, while other groups whose lyrics were no less or even more misogynistic were not prosecuted.¹⁶⁸ Thus, Crenshaw found herself having to choose between her concerns about sexism in her community and her concerns about racism against her community, and chose the latter. While doing so, she pointed out that

Although concerns about racism fuel my opposition to the obscenity prosecution, I am also troubled by the uncritical support for and indeed celebration of 2 Live Crew by other opponents of that prosecution. If the rhetoric of anti-sexism provided an occasion for racism, so too, the rhetoric of anti-racism provided an occasion for defending the misogyny of Black male rappers.¹⁶⁹

2. Muslim Women in India

A striking example of the conflict between a woman's fight for her rights and her membership in a minority community is the Indian case of Shah Bano. Shah Bano was a seventy-three-year-old Muslim woman whose husband of forty-three years divorced her and left her destitute. She brought a petition for maintenance that reached the Indian Supreme Court, in which she claimed that she was entitled to monthly support according to the Indian Criminal Procedure Code. Her husband claimed that the law governing the case was the Muslim personal law, according to which she was not entitled to maintenance.¹⁷⁰ In 1985, the Indian Supreme Court decided in favor of Shah Bano, holding that the Indian Criminal Procedure Code prevailed. In its decision, the court further stated that allowing the maintenance would not violate the Quran, and called for the enactment of a Uniform Civil Code to govern all marriages in India.¹⁷¹

In India each religious community has its own personal laws that are governed by its own religious law. The result is highly discriminatory

¹⁶⁷ Crenshaw describes the lyrics as follows: "We hear about cunts being fucked until backbones are cracked, asses being busted, dicks rammed down throats, and semen splattered across faces. Black women are cunts, bitches and all-purpose 'hos' ... Occasionally, we do hear Black women's voices, and those voices are sometimes oppositional. But the response to opposition typically returns to the central refrain: 'Shut up, bitch. Suck my dick.'" *Id.* at 122.

¹⁶⁸ *Id.* at 123-24.

¹⁶⁹ *Id.* at 127.

¹⁷⁰ Radhika Coomarswamy, To Bellow like a Cow: Women, Ethnicity, and the Discourse of Rights, in Human Rights of Women, *supra* note 66, at 39, 58.

¹⁷¹ Kapur & Cossman, *supra* note 96, at 63.

toward women, and women's organizations have been advocating for the enactment of a Uniform Civil Code that will govern all marriages in India and will be based on equality between spouses. The Shah Bano controversy intensified the debate over a Uniform Civil Code, and has highlighted the conflict between the Muslim community and the Hindu Right, which supports the enactment of the Code as a way of attacking minority rights in general and the rights of the Muslim minority in particular.¹⁷²

Conservative and orthodox forces within the Muslim community responded to the Indian Supreme Court's decision in the Shah Bano case with outrage, seeing it as undermining Islamic law and as a threat to the authority of Muslim theologians, whom they felt were the only ones permitted to interpret the Quran.¹⁷³ The Muslim community organized mass demonstrations, strikes, and petitions calling for a reversal of the judgment. In 1986, succumbing to the pressure from the Muslim community, the Indian Parliament passed the Muslim Women's Protection of the Right to Divorce Bill, which withdrew the right of Muslim women to appeal for maintenance under the Criminal Procedure code.¹⁷⁴ Shah Bano found herself in the middle of an intense controversy involving, on one side, her community, and on the other, the Hindu Right, which was her community's biggest enemy, but which allegedly was her ally, along with the feminists. She was considered a traitor by her community,¹⁷⁵ and was threatened and made to feel responsible for the communal riots that the judgment on her case had generated. Finally, she herself asked that the judgment be withdrawn.¹⁷⁶

3. Arab Palestinian Women in Israel

One last example of the conflict that can arise between women's rights and community rights is the debate around the passage of a law that would allow Muslim and Christian women in Israel to file suits regarding alimony and child custody in Israeli civil courts. The Israeli personal law is based on the religious laws of the various recognized religious communities

¹⁷² *Id.* at 64.

¹⁷³ *Id.* at 63.

¹⁷⁴ Chhachhi, *supra* note 150, at 146. It is important to point out that the stance of the Muslim community itself was not as monolithic as its leaders portrayed it. There has been opposition to the Muslim Women's Protection of the Right to Divorce Bill from reformist Muslim organizations, from large sections of the Muslim intelligentsia, and from Muslim feminist groups. That opposition, however, along with the opposition from feminist and other groups outside the Muslim community, was not sufficient to prevent the passing of the bill. *Id.* at 168.

¹⁷⁵ Coomaraswamy, *supra* note 170, at 54.

¹⁷⁶ Chhachhi, *supra* note 150, at 168.

in Israel.¹⁷⁷ This system of personal law is a legacy of the British rule over Palestine and has been sustained by the State of Israel in order to appease the Jewish religious sector.¹⁷⁸ All the personal laws of the various religious communities in Israel discriminate against women to varying degrees.¹⁷⁹

Over the years the Israeli legislature has passed several laws that have ameliorated to some extent the discrimination against Jewish women, by granting civil courts parallel jurisdiction to that of the Jewish religious courts over various matters, including matters of alimony and custody of the children.¹⁸⁰ As a result, under some circumstances, Jewish women may file suits regarding alimony and child custody in civil court, instead of the religious court, guaranteeing them a more egalitarian hearing and a fairer decision. For a long time, no similar legislation was passed pertaining to the courts of the Muslim and Christian communities.¹⁸¹ These courts retained exclusive jurisdiction over all matters of personal law, including alimony and child custody. As a result, Muslim and Christian women had no recourse against the discrimination that they faced in the religious courts of their respective communities.¹⁸²

In 1995, a coalition of Arab Palestinian women's organizations, Jewish civil rights organizations, and Jewish women's rights organizations initiated an amendment to the Family Court Act that would allow Muslim and Christian women to file suits regarding matters of alimony and custody of children in civil family courts under certain circumstances.¹⁸³ The initiative for this amendment has sparked a lively debate inside the Arab Palestinian community, between Arab Palestinian feminists and the Arab Palestinian community leaders, as well as between some Arab Palestinian feminists and Jewish feminists.

¹⁷⁷ Raday, *On Equality*, *supra* note 76, at 45.

¹⁷⁸ Haim Kohen, *Religious Coercion in Israel*, in 2 *Berenson Book* 297, 305-06 (Aharon Barak & Haim Berenson eds., 2000).

¹⁷⁹ Raday, *On Equality*, *supra* note 76, at 48.

¹⁸⁰ Francis Raday, *Religion and Equality in the Mirror of Judicial Decisions*, in *Berenson Book*, *supra* note 178, at 341, 364 [hereinafter Raday, *Religion and Equality*].

¹⁸¹ The Muslim and Christian communities in Israel make up the bulk of the Arab Palestinian community in Israel. Most (81.7%) of the Arab Palestinians are Muslims and the rest are Christians and Druze. The Arab Palestinian citizens in Israel comprise about 18.7% of the country's population, and they should not be confused with the Palestinian residents in the territories occupied by Israel, who are not Israeli citizens and are also mostly Muslims and Christians, but who have religious courts of their own established according to Jordanian law. Israeli Central Bureau of Statistics, at http://www.cbs.gov.il/shnaton53/st02_01.pdf (last visited Oct. 10, 2002).

¹⁸² Raday, *Religion and Equality*, *supra* note 178, at 365-66. For example, if a Muslim woman remarries she immediately loses custody of her children. *Id.* at 367.

¹⁸³ *Id.* at 366.

Many of the Arab Palestinian parliament members, especially the religious ones, as well as the Arab Palestinian religious community leaders, objected strenuously to the proposed amendment. In a parliamentary hearing regarding the amendment, the president of the Muslim court of appeals said that, if passed as law, the amendment would be a disaster for Muslims in Israel because the Muslim community would be deprived of its entitlement to complete autonomy and non-interference from the state in matters of personal law that are at the core of their religious beliefs.¹⁸⁴ The Muslim parliamentary members objecting to the proposed amendment argued that it would create unwanted massive interference in matters of the Muslim community and that, if asked, most of the Arab Palestinian population would object to the passing of the amendment.¹⁸⁵ To circumvent the proposal, the Muslim leaders of the Arab Palestinian community have even issued a *fatwa*—an official threat against the life of the initiators of the proposal.¹⁸⁶

In the face of such adamant objection to the proposed amendment, and due to inherent mistrust of the Israeli judicial system as a result of continuing discrimination against the Arab Palestinian minority in Israel, many Arab Palestinian feminists decided to oppose the amendment. While recognizing that the religious courts discriminate against women, these feminists refused to choose the trade-off that the proposed amendment required. They would be rejecting the community's religious institutions, which discriminate against women, for the sake of the state's secular courts, which are part of a system that discriminates against their community and against them as members of the community. As Lisa Hajjar eloquently explains,

[t]o use the issue of women's rights as a means of attacking religious authorities forces a rigid distinction between 'gender interests' and 'communal interests.' For Arab women in Israel, this is a spurious dichotomy, since they have more in common with men of their community—structural discrimination and political marginalization—than with many Jewish women. Why should Arab women embrace a bill that generalizes about gender interests and assumes that the Israeli state's secular institutions can 'save' them from religion, when it was the Israeli state that made

¹⁸⁴ Menashe Shawa, *The Proposed Family Court Act (Amendment no. 4) (Comparing Jurisdictions)*, 1998—Is it Truly a Blessing for Muslim and Christian Women?, 44 *Hapraklit* 358, 396 (1999).

¹⁸⁵ Parliamentary member Muhamad Kena'an, Session 237 of the 15th Knesset, Oct. 23, 2001, *The Proposed Family Court Act (Amendment no. 5)*, 2001 (2nd and 3rd readings) (on file with author).

¹⁸⁶ Raday, *Religion and Equality*, *supra* note 180, at 366.

religion so significant to their status and rights (or lack of rights) as women and as Arabs?¹⁸⁷

Consequently, these Arab Palestinian feminists objected to the proposed bill and advocated continuing to try to change the system from within.¹⁸⁸

Eventually, after six years of struggle, the Arab Palestinian women's organizations that supported the amendment, together with Jewish civil rights organizations, Jewish women's rights organizations, and several parliament members who were committed to the issue (including all female parliament members), succeeded in its passage.¹⁸⁹ It remains to be seen whether these organizations will succeed in persuading Arab Palestinian women to utilize this new venue in order to advance their rights, or whether the objection to the amendment within the Arab Palestinian community will transform the amendment into a dead letter. However, the existence of a partial alternative to the religious courts for Muslim and Christian women who wish to avail themselves of it is in itself of great importance and may even spur change within the religious court system itself to benefit all Muslim and Christian women in Israel.

The above examples serve to demonstrate why oppression against women in minority communities often remains unchallenged by the women inside the community. Women from minority communities often find themselves in a double bind, which prevents them from fighting for their rights as women for fear of further jeopardizing the already unequal rights of their communities. Unfortunately, many states take advantage of this reluctance and interpret it to mean that minority women are content in their oppressive circumstances. This view is shared by many outsiders to the community and serves as a convenient basis for arguing that these communities have the right to be left alone to continue oppressing their women. The falsity of this view should be clear from the examples given above. The duty of the liberal state and of liberals in general is to prevent the discrimination against the minority community (which is responsible for minority women's reluctance to go against their community) and, at the same time, to prevent minority communities from discriminating against the women in their communities. Far from being contradictory duties as some multiculturalists argue, these are complementary duties that cannot be achieved separately.¹⁹⁰

¹⁸⁷ Lisa Hajjar, *Between a Rock and a Hard Place: Arab Women, Liberal Feminism and the Israeli State*, Middle East Report, Summer 1998, at 27.

¹⁸⁸ Advocates have been attempting this for years without much success.

¹⁸⁹ The amendment was passed on November 5, 2001.

¹⁹⁰ Many multiculturalists argue that an essential part of respecting a minority community is allowing it to continue its oppressive practices since these practices are at the heart of the community's culture and religion. Thus, these multiculturalists believe that imposing liberal values such as gender equality on minority communities is, in itself, a

D. Essentializing Sameness and Difference

Perhaps liberals embrace religious and cultural justifications given by various groups for their oppressive practices against women in part because of the human tendency to essentialize sameness and difference, which operates to subsume women into a racial, ethnic, or religious group while accentuating the differences between these groups.

Contemporary social psychology views categorizing persons into their respective social groups as "central and fundamental to human cognitive processing," and stereotypes, generalized descriptions of a group and its members, "emerge inevitably from this categorisation process."¹⁹¹ The cognitive consequences of social categorization include the exaggeration of differences between groups, the accentuation of similarities between self and other members of the in-group, and the tendency to perceive an out-group and its members as more homogeneous than in-group members.¹⁹²

As a result, people tend to perceive racial, ethnic, and religious groups other than their own as highly homogeneous groups that are significantly different from their own. The women in these groups get subsumed into the group and their interests are assumed to be identical to the interests of the group as a whole. Consequently, many liberals rarely question the male leaders of racial, ethnic, or religious groups when these leaders interpret their group's culture and religion to suit their needs, claiming that such an interpretation is essential to the group's identity and is favored by the entire group, including its female members.

The roots of subsuming women into a male-dominant group and assuming that the interests of the women match those of the group go even deeper and have to do with the perception of women as part of a male-dominated family unit. For example, as mentioned earlier, one of the most influential economic models of the family sees the family as the relevant unit of comparison and assumes that the head of the family, the man, will adequately take care of all the members of the family.¹⁹³ This theory

violation of their rights. See, e.g., Bhikhu Parekh, A Varied Moral World, in Is Multiculturalism Bad for Women?, *supra* note 8, at 69, 69-72; Azizah Y. Al-Hibri, Is Western Patriarchal Feminism Good for Third World/Minority Women?, in Is Multiculturalism Bad for Women?, *supra* note 8, at 41. See also Chandran Kukathas, Are There Any Cultural Rights?, 20 Pol. Theory 105, 132-34 (1992); Avishai Margalit & Moshe Halbertal, Liberalism and the Right to Culture, 61 Soc. Res. 491 (1994).

¹⁹¹ Working Group of the Directorate of Social Issues, Australian Psychological Society, Racism and Prejudice: Psychological Perspectives § 4.2 (1997).

¹⁹² *Id.* On the social categorization of people into social groups and the prejudices that follow, see also Lawrence, *supra* note 5, at 336-39.

¹⁹³ Nussbaum, Women and Human Development, *supra* note 21, at 63-64.

assumes that the man, who is generally at the head of the household, will always act in the best interests of his wife, neglecting the possibility that she might have individual needs that might actually conflict with those of her spouse.

Thus, the effect of the process of essentialization of intra-group and inter-group sameness and difference on the perception of the needs and wants of women in groups is twofold. First, because of the tendency to perceive an out-group as homogeneous, the women in the group are assumed to have the same interests as the men. Second, because of the tendency to exaggerate the differences between groups, liberals are willing to believe that, as a result of their difference, the members of the other group have a need to maintain a way of life that oppresses women, even if liberals themselves might not have a similar need.

Ignoring the possibility that the female members of a racial, ethnic, or religious group might actually oppose the dominant subjugating interpretation of their culture and religion, while at the same time exaggerating the differences between the other group and themselves, allows liberals to believe that they are applying liberal principles by neglecting women's rights to equality and embracing the group's right to maintain its oppressing practices.

E. The Myth of Culture and Religion

One aspect of essentializing and exoticising other groups is attributing every action or practice within those groups to culture and religion. Many feminist writers have attacked this tendency, both out of concern for the oppression of women that the tendency helps to justify and perpetuate, and out of concern for the racism that it manifests. One example of this is the Western liberal attitude toward Muslimness, which assumes that any person from a Muslim origin is a religious Muslim and that the Muslim religion is what its most fundamentalist interpreters say it is. The consequence of this attitude is that, in the name of multicultural tolerance, the most horrendous acts of gender apartheid committed by religious fundamentalists in the name of Islam are allowed to continue without interference.¹⁹⁴

Another example is dowry murder in India. As in other parts of the world, domestic violence is an issue of serious concern for women in India. Some, but definitely not all, of the domestic violence in India can be associated with the practice of killing the wife if she is unable to meet her

¹⁹⁴ Marie-Aimee Helie-Lucas, *What Is Your Tribe?: Women's Struggles and the Construction of Muslimness*, in *Religious Fundamentalisms*, *supra* note 100, at 21, 23-24.

in-laws' demands for dowry.¹⁹⁵ Although it is only a part of the phenomenon of domestic violence in India, the issue of dowry murders is portrayed by Westerners, as well as by some Indians, as the central, if not the only, cause of domestic violence in India. Even more important, dowry murder is portrayed as an ancient Hindu cultural tradition, when in fact it is a modern phenomenon that has nothing to do with Indian religious and cultural traditions.¹⁹⁶ Thus, instead of addressing the issue of domestic violence in India as strictly an issue of women's human rights, this issue is given unwarranted religious and cultural dimensions. These religious and cultural dimensions hinder the struggle against domestic violence in India,¹⁹⁷ and at the same time reinforce cultural stereotypes that are inaccurate and often racist.¹⁹⁸

The tendency to essentialize culture and religion, and to attribute everything to cultural and religious traditions, ignores the fact that what is portrayed by the conservative leaders of religious and cultural groups as a religious or cultural tradition that has lasted from time immemorial and which is essential to the identity of the group, is often an invented tradition. Eric Hobsbawm identifies three types of invented traditions: "a) those establishing or symbolizing social cohesion or the membership of groups, real or artificial communities, b) those establishing or legitimizing institutions, status or relations of authority, and c) those whose main purpose was socialization, the inculcation of beliefs, value systems and conventions of behavior."¹⁹⁹ The Indian case of Shah Bano illustrates the power of invented traditions. Historical analysis shows that the family laws, which Muslims and Hindus in India venerate, and which were at the center of the Shah Bano controversy and upheld as defining the authentic Muslim/Hindu identity, are actually a mix of various elements, including intervention by colonial administrators.²⁰⁰ Thus, the traditions that are

¹⁹⁵ Ratna Kapur, The Tragedy of Victimization Rhetoric: Resurrecting the 'Native' Subject in International/Post Colonial Feminist Legal Politics, 15 Harv. Hum. Rts. J. 1, 13-17 (2002).

¹⁹⁶ *Id.* Though dowry itself is a traditional practice in some Indian communities, dowry murder is a modern phenomenon that is related to the setting up of a market economy in India and the growth of a consumer-oriented culture.

¹⁹⁷ *Id.* They do this both by deflecting attention from the real causes of domestic violence and by creating an atmosphere that would enable defendants to raise cultural defenses in criminal trials involving violence against women.

¹⁹⁸ *Id.*

¹⁹⁹ Eric Hobsbawm, Introduction: Inventing Traditions, in The Invention of Tradition 1, 9 (Eric Hobsbawm & Terence Ranger eds., 1983). Hobsbawm defines "invented tradition" as "a set of practices, normally governed by overtly or tacitly accepted rules and of a ritual or symbolic nature, which seek to inculcate certain values and norms of behavior by repetition, which automatically implies continuity with the past." *Id.* at 1.

²⁰⁰ Chhachhi, *supra* note 150, at 161.

resurrected in order to stress and enforce communal identity are often both invented and selective.²⁰¹

Similarly, in Israel a few years ago, the leaders of the ultra-Orthodox Jewish community pressured the government into segregating women in certain public transportation routes and vocational training courses.²⁰² Though the demands for strict segregation on the basis of sex were portrayed as stemming from norms of modesty that have always existed, they were in fact new demands that should be attributed to the growing extremity in the ultra-Orthodox community in Israel, which manifests itself in increasingly stricter norms of modesty for women.²⁰³

Thus, the tendency to explain all practices that oppress women in terms of religious and cultural norms, and to show tolerance of these so-called norms, seriously obstructs the struggle against violations of women's rights. No similar phenomenon exists with regard to religious and cultural practices that discriminate on the basis of race, ethnicity, or religion, since religious and cultural norms are no longer acceptable grounds for this type of discrimination, and as a result there is no point in fabricating such norms or in continuously expanding and manipulating them. Furthermore, contemporary rejection of religious and cultural norms as justification for racism, even when such norms are primordial, makes the respect shown to religious and cultural norms that discriminate against women, no matter how authentic they might be, highly questionable.

VII. POLITICS

A. Women's Lack of Political Power

One of the major reasons for the different treatment of cultural and religious justifications for sex discrimination and cultural and religious justifications for race discrimination is women's lack of political power and their virtual absence from positions of decision-making and policy-forming.²⁰⁴ Though racial, ethnic, and religious minorities are often weak politically, it is almost invariably the men amongst them who hold any and all political power that the group has. In addition, we should not forget that

²⁰¹ *Id.* at 162.

²⁰² For further discussion, see notes 78-81 and accompanying text.

²⁰³ On the increasing extremity of modesty norms for women in the ultra-Orthodox Jewish community in Israel, see Ora Cohen, Woman's Modesty in the Modern Age 154 (2000).

²⁰⁴ For example, in their book concerning feminist analysis of international law, Charlesworth and Chinkin state that the book's "central argument is that the absence of women in the development of international law has produced a narrow and inadequate jurisprudence that has, among other things, legitimated the unequal position of women around the world rather than challenged it." Charlesworth & Chinkin, *supra* note 7, at 1.

all political leaders, like all human beings, belong to racial, ethnic, or religious groups and see it as their mission to represent the interests of their respective groups. Since most leaders, both of minority and non-minority groups, are men, the results of their political interaction and their political give and take are most often to the detriment of women in general, and of minority women in particular.

While in the past overt racism was an acceptable phenomenon, this is no longer the case today. The most significant events that led to the rejection of overt racism were World War II and the process of decolonization. World War II led to the adoption of the Universal Declaration on Human Rights,²⁰⁵ whose purpose was to guarantee basic civil and political rights to all individuals regardless of their race, ethnicity, or religion.²⁰⁶ Later, the process of decolonization that took place during the same period as the adoption of the Race Convention led to the strong condemnation of race discrimination in the Convention. The decolonization that occurred during the 1960s and 1970s created newly independent African and Asian states that advocated vigorously for strong language condemning race discrimination.²⁰⁷

In contrast, the historical association between CEDAW, the rise of Islamic fundamentalism, and the reluctance to confront Islamic oil-producing states, has prevented similar condemnation of sex discrimination.²⁰⁸ Furthermore, attempts to introduce into CEDAW fact-finding mechanisms and complaint procedures similar to those in the Race Convention were strongly opposed by socialist and developing nations that argued that violations of women's rights could not be placed on the same footing as those occurring under repressive and racist regimes.²⁰⁹ It is doubtful that such arguments could have been used as a means of stripping CEDAW of most of its practical significance if more representatives in the General Assembly were women.²¹⁰

²⁰⁵ International Bill of Human Rights: A Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., pt. 1, at 71, U.N. Doc. A/810 (1948).

²⁰⁶ Kymlicka, *supra* note 1, 2-3.

²⁰⁷ Charlesworth & Chinkin, *supra* note 7, at 108. The Race Convention was adopted in 1966.

²⁰⁸ *Id.* CEDAW was adopted in 1979, the same year of the Islamic revolution in Iran.

²⁰⁹ *Id.* at 221.

²¹⁰ As of March 8, 2001 (International Women's Day), only eleven out of 189 U.N. Member States had women as their Permanent Representatives to the U.N. WomenWatch—International Women's Day 2001, available at http://www.un.org/womenwatch/confer/events/IWD2001/50-50_rem_frechette.html (Mar. 8, 2001).

B. The Politics of Multiculturalism

Multiculturalism, the notion that certain groups should be accorded special group rights or privileges in order to protect their cultures even when such rights conflict with individual human rights, dominates social, political, and academic thought today, both on international and domestic levels.²¹¹ The area in which cultural and religious arguments are most often invoked is women's rights.²¹² While ideally multiculturalism should be a means toward the end of enabling the full development of minority groups and ensuring equality for their members,²¹³ it has in effect been used as a political tool that serves mainly to oppress women, and even, in some circumstances, to oppress the same groups that it was intended to protect.

Women in general, and minority women in particular, are often the victims of the power dynamics between the male leaders of the state and the male leaders of racial, ethnic, and religious communities, and their rights are sacrificed in the name of cultural tolerance.²¹⁴ By granting communities internal control over matters, such as family law, that are essential for the leaders of the community to demarcate the boundaries of the community and maintain power over it, the leaders of the state can control the various communities at what is perceived to be a very low cost for the state, albeit it at a high cost for women.²¹⁵ In order to maintain the pretense that allowing

²¹¹ Charlesworth & Chinkin, *supra* note 7, at 222; Himani Bannerji, The Paradox of Diversity: The Construction of a Multicultural Canada and "Women of Color", 23 *Women's Stud. Int'l F.* 537, 553 (2000); Clare Beckett & Marie Macey, Race, Gender and Sexuality: The Oppression of Multiculturalism, 24 *Women's Stud. Int'l F.* 309, 310 (2001). Beckett and Macey describe current times as "a time when the dominance of multiculturalism is such that critical voices are silenced, oppressive cultural practices invisibilised and contradictions between the ideals of multiculturalism and those of liberal democracy masked." *Id.*

²¹² Charlesworth & Chinkin, *supra* note 7, at 222; Stratton Hawley, *supra* note 139, at 4. *See also* Beckett & Macey *supra* note 211, at 309 (dominant multiculturalism ideology sanctions and facilitates gender oppression).

²¹³ Kymlicka, *supra* note 1, at 194.

²¹⁴ *See* Beckett & Macey, *supra* note 211, at 316. Beckett and Macey argue that the divisions that multiculturalism has created between various oppressed groups, including groups of women, have "facilitated collusion in the control of sexuality, particularly women's, between diverse groups of powerful heterosexual men—Black and White, academics and practitioners, politicians and policy makers, community leaders and high court judges." *Id.*

²¹⁵ A good example of that is the Indian case of Shah Bano (see notes 157-163 and accompanying text). As one commentator writing about the Shah Bano case put it: "Thus, from the lowest to the highest levels of male society, she became nothing more than a pawn through whom men played their various games of honour and shame." Veena Das, Communities & Political Actors, the Question of Cultural Rights, in Gender and Politics in India 441, 460 (N. Menon ed., 1999). It seems that Shah Bano was persuaded by her sons to sue her husband for maintenance as part of a property dispute between the sons and the father. After the Supreme Court decision, she was persuaded by leaders of the Muslim

racial, ethnic, and religious communities to continue the oppression of women is compatible with adherence to human rights principles, leaders of liberal states collude with the leaders of various racial, ethnic, and religious communities to portray a picture according to which any insistence by the state to improve the status of women would constitute a grievous violation of the fundamental rights of the community and its members. By creating a dichotomy between women's rights and the rights of racial, ethnic, and religious communities and choosing to defend the rights of the latter at all costs, the liberal state exempts itself from the need to protect and promote the rights of women in these communities, avoids conflicts with the leaders of the communities, and even gains their cooperation, and at the same time portrays itself as a champion of human rights.

The segregation of women in various public services in Israel, which was initiated by the state a few years ago in order to cater to the demands of the leaders of the ultra-Orthodox Jewish community, is a good example of the dynamics of such a political maneuver.²¹⁶ While portraying itself as a champion of multiculturalism and minority rights by initiating the segregation in certain public services, the state has simultaneously gained important points with the leaders of the ultra-Orthodox Jewish community, a minority that is extremely strong politically in Israel. The women inside the ultra-Orthodox Jewish community, who were the main victims of the segregation and whose opposition to it might have prevented it, did not speak out against it, and their silence was interpreted as endorsement. This silence should not be surprising considering the fact that women in the ultra-Orthodox community are not supposed to speak their minds, let alone in objection to a decree by their male leaders on the issue of the proper rules of modesty for women.²¹⁷ The women outside the ultra-Orthodox Jewish

community to reject the court's decision. As a result of the power struggle that ensued between the male leaders of the Muslim community, the male leaders of the Hindu Right and the male leaders of the state, a law was passed that annulled the Supreme Court decision to the satisfaction of both the male leaders of the Muslim community and those of the state, but at the expense of Muslim women. The demand of feminist organizations to pass an egalitarian Uniform Civil Code that would ameliorate the discrimination that Indian women suffer in the area of family law was once again left unanswered, to the detriment of all Indian women.

²¹⁶ The segregation was initiated in certain public transportation routes that cater mostly to the ultra-Orthodox Jewish community, and in some vocational training courses that were taken from the general pool of courses and allotted to the ultra-Orthodox community. See also discussion *infra* Parts III.C and VI.E.

²¹⁷ See, e.g., Cohen, *supra* note 203, at 155 (describing the perception in the ultra-Orthodox Jewish community of a woman as entirely responsible for maintaining her modesty through strict adherence to the rules of modesty. The need for strict rules of modesty and for women's complete and unquestioning adherence to those rules is explained by the fact that women are too ignorant and too simple to understand for themselves what can excite a man and lead him to sin, and it is therefore the duty of men to lay down strict rules of modesty for women from a very early age and the duty of women to obey without question.); Yanay and Rapoport, *supra* note 101, at 657-59 (Yanay and Rapoport describe a

community who were injured by the segregation spoke out and even petitioned the Israeli Supreme Court, but were summarily dismissed as insensitive to minority rights and as outsiders to the community with no right to speak.²¹⁸

Some commentators argue that multiculturalism itself is actually a form of covert racism, or at least can be used to maintain racism while giving it a seemingly benign explanation.²¹⁹ In severe criticism of the official state policy of multiculturalism in Canada, Himani Bannerji argues that multicultural policy was initiated by the Canadian state to obscure the racial discrimination and exclusion from which minorities in Canada suffer.²²⁰ According to her, by focusing on issues such as the "wearing or non-wearing of turbans," the Canadian state has managed to make even the minority communities forget "how much less important these were than their full citizenship rights, their demands for jobs, non-discriminatory schools and work places, and a generally non-racist society."²²¹ The real issue of racial, ethnic, and religious discrimination is "what the cultural language and politics of diversity obscures, displaces, and erases. It is obvious that the third world or non-white immigrants are not the beneficiaries of the discourse of diversity."²²²

Along these lines, it should be noted that the way in which outsiders to the community assume and accept the existence of discriminatory practices against women in minority communities is in itself a form of racism since it is based on the feelings of superiority that the outsiders have toward the community. The assumption that it is natural and inevitable for a certain community to oppress its female members is correlated with the assumption of the inferiority of the community. A good

similar situation in relation to the rules of ritual impurity, *nidah*. The ritual of impurity compels women to maintain extremely strict and complex rules in order to maintain their purity, while at the same time women have no say in the formation of the rules, which are dictated exclusively by the male leaders of the community.).

²¹⁸ See H.C. 7942/98, *Ovadia v. Minister of Labor* (Jan. 14, 1999) (regarding segregation in vocational training. The plaintiff was a non-ultra-Orthodox woman who was promised a spot in a vocational training course given by the Ministry of Labor for the unemployed, but was later denied the spot because of her sex when the course was allocated to ultra-Orthodox men.) (unreported; on file with author); H.C. 5079/97, *Israeli Women's Network v. Minister of Traffic* (May 5, 1999) (not published) (discussed in Ruth Halperin-Kaddari, *Women, Religion and Multiculturalism in Israel*, 5 UCLA J. of Int'l L. & Foreign Aff. 339, 363-64 (2000) (regarding segregation in public transportation. The plaintiff was one of the leading Israeli women's rights organizations.).

²¹⁹ See, e.g., Helie-Lucas, *supra* note 194, at 27-28; Kenan Malik, *The Perils of Pluralism: A Re-examination of the Terms of Engagement Between Races and Cultures, and a Plea for Equality*, 9 Diversity Factor 31 (2001).

²²⁰ Bannerji, *supra* note 211, at 553.

²²¹ *Id.*

²²² *Id.*

example of that is the way in which the imperial powers in the nineteenth century justified colonization by pointing to women's inferior status in the subjugated cultures relative to their status in Europe, seeing it as proof of the inferiority of these communities, which in turn justified their colonization.²²³

C. Control Over Women as a Substitute for Overt Racism

Finally, the illegitimacy of overt racism and of overtly manifesting feelings of racial, ethnic, or religious superiority is in itself a cause for the continued acceptance of cultural and religious practices as justification for the oppression of women. Control over women has always been associated with the need to preserve the boundaries of the community and to prevent inter-racial, inter-ethnic, and inter-religious mixing.²²⁴ In the past, strict boundaries between racial, ethnic, and religious communities could be maintained not only through control of women, but also through ideologies. These ideologies stress the inferiority of other races, ethnicities, or religions and ensure that the members of the community do not desire any contact with "inferior" outsiders. This is no longer the case today since the promotion of such ideologies is no longer legitimate. Thus, controlling women's sexuality, their independence, and their exposure to the outside world has become the only politically-legitimate channel by which community leaders can ensure that the boundaries of the community are not crossed, and that it remains homogenous and "untainted." In other words, control over women has become the only channel through which to express covert racism and ethnic and religious intolerance. The prevalence of racial, ethnic, and religious intolerance, combined with the inability to overtly express that intolerance, is one of the reasons why control over women is fiercely defended by the leaders of each community and is perceived as necessary and inevitable by all others.

VIII. REMEDIES

In this article I have tried to suggest possible answers to two questions. The first question is why there is such a considerable gap between the ostensible liberal stance on discrimination against women and the liberal practice regarding such discrimination, especially in cases in which the discrimination stems from religious and cultural practices. The second and even more important question I addressed is how it is possible that, while this gap is maintained and even expanded in contravention of women's fundamental right for equality, its perpetuation and expansion can

²²³ Janaki Nair, *Women and Law in Colonial India: A Social History* 51 (1996).

²²⁴ See Anthias & Yuval-Davis, *supra* note 86, at 7.

be portrayed as liberal concern for human rights without raising any eyebrows. I looked at these two questions from the prism of a third and, in my view, closely-related question of why cultural and religious justifications for the oppression of women are still normatively acceptable to many, while cultural and religious justifications for racial, ethnic, and religious discrimination, which used to be normatively acceptable in the past, are no longer sanctioned.

The purpose of looking at these questions through the prism of the difference between attitudes toward sex discrimination due to religious and cultural norms and attitudes toward discrimination of racial, ethnic, and religious groups on the same grounds, is to highlight structural, political, sociological, and psychological differences between these types of discrimination and between these groups. Highlighting these differences serves the dual purpose of explaining the existence of different attitudes toward these forms of discrimination, while at the same time exposing the facts that the difference in the attitudes is unjust and that discrimination against women due to religious and cultural reasons is a phenomenon which is as insidious as discrimination against racial, ethnic, and religious groups due to religious and cultural reasons.

I pointed out several mechanisms I think contribute to the continuing acceptance of religious and cultural justifications for the oppression of women, namely the fundamental nature of familial ideology and of women's roles as wives and mothers in most religions and cultures, as well as in other controlling ideologies, including: liberalism, capitalism, and nationalism; the incompatibility of the current perception of free choice to the situation of women, and especially women in traditional and cohesive societies, which are usually the most oppressive; women's unique situation as an oppressed group that is not a community and whose members have distinct and often clashing allegiances with other communities, which they are taught to prioritize; and women's lack of political power, which results in their plight being taken lightly by decision-makers and their rights being used as political commodities to be traded and exchanged between male leaders of various groups.

The question that needs to be addressed next is what steps should be taken in order to change current perceptions about the legitimacy of religious and cultural norms that discriminate against women. Because the acceptance of such norms stems from structural, political, sociological, and psychological factors, and because it is related to women's responses to their own oppression as much as to society's creation of it, we should take steps aimed at achieving deep and fundamental changes in the attitudes of both men and women, as well as achieving structural and political changes. What follows is a sketch of the changes I think are necessary to create a liberal society in which discrimination against women due to religious and cultural norms is recognized as unjust, and dealt with accordingly. This is not meant to be an exhaustive list of changes, nor is it meant to offer a

detailed analysis of each of the changes. Such an analysis would be a subject for a different article. Rather, this list of suggestions is meant to demonstrate the extent of the changes I think are needed, and to provide a basis for further elaboration and discussion. My purpose is to draw attention to serious deficiencies in the structure and practices of many liberal democratic states, which facilitate and entrench discrimination against women due to religious and cultural norms, as well as sex discrimination in general.

A. Correcting the Liberal Blind Spot

As I argued in Part II, on the theoretical level the liberal acceptance of religious and cultural practices that discriminate against women can be traced to the importance of the liberal distinction between the public and private spheres and the liberal emphases on tolerance and state neutrality. The manner in which these aspects of liberal theory play out in the context of religious and cultural practices that discriminate against women tends to obscure the damage caused to women by the discriminatory practices, and to emphasize the importance of non-interference in the private sphere and in individual preferences, as well as the importance of showing deference to religious beliefs and traditions. While religious beliefs and traditions should be respected, and privacy is important, neither can justify non-interference with practices that discriminate against women. As Deborah Rhode has pointed out, “[c]ontrary to liberal assumptions, the state’s refusal to intervene in private matters does not necessarily expand individual autonomy; it often simply substitutes private for public power.”²²⁵ This is especially true when the substitute offered to the power of the liberal state is the power of illiberal religions and cultures, which simultaneously shape women’s preferences and dictate their subordination. The liberal blind spot with regard to religious and cultural practices that discriminate against women can only be corrected through application of a much closer scrutiny to the private sphere and to what is being done in the name of culture and religion and under the guise of personal preferences in order to ensure that the liberal promise of equality for women does not remain illusory.

²²⁵ Deborah L. Rhode, *Feminism and the State*, 107 Harv. L. Rev. 1181, 1187 (1994).

B. National and International Law and Politics: Increasing Women's Political Participation and Stopping State Support for Discriminatory Practices

1. Political Participation

More political participation of women is a fundamental, necessary change, both on the national and international level, and in leadership positions inside cultural and religious communities. As discussed earlier, women's lack of participation in politics is one of the main reasons for the dismissal of discrimination against women as unimportant and for the prioritization of religious and cultural norms over the rights of women.²²⁶ With regard to discrimination against women due to religious and cultural norms, women's lack of political participation is threefold. First, women are totally absent from most, if not all, religious and cultural leaderships of the racial, ethnic, and religious groups that interpret the groups' religions and cultures, and demand accommodation from the state or from the international community according to that interpretation. Second, women are severely underrepresented in the national political leadership that makes the decisions about whether and how to accommodate the religious and cultural demands of various groups.²²⁷ Third, women are severely underrepresented in the international forums that formulate international law and policy.²²⁸ This threefold absence of women creates a situation in which women are virtually nonexistent in both the creation of the illiberal ideology that discriminates against them, and the allegedly liberal affirmation of that ideology by the liberal states or the international community.

Under such circumstances, it is hardly surprising that the illiberal as well as the liberal attitudes toward the discriminatory practice at hand are, at the same time, extremely skewed and highly compatible. Therefore it is imperative to take all necessary steps to increase women's political participation, including the introduction of affirmative action measures on both the national and the international levels, with the goal of achieving gender balance in all branches of government, as well as in all other

²²⁶ Charlesworth & Chinkin, *supra* note 7, at 1.

²²⁷ In national parliaments, for example, the average proportion of women legislators is fourteen percent. WomenWatch—International Women's Day 2001, available at http://www.un.org/womenwatch/confer/events/IWD2001/50-50_rem_frechette.html (Mar. 8, 2001).

²²⁸ At the Millennium summit of the United Nations in September of 2000, which was "the biggest gathering of leaders the world has seen," only four out of the U.N.'s 189 Member States were represented by women. *Id.*

strategic decision-making positions.²²⁹ The introduction of quotas for women in decision-making positions is gaining much currency in many parts of the world, such as Europe. In Europe it is understood that without equal representation of women in decision-making bodies there can never be true equality between men and women.²³⁰ Studies have shown that women's political participation significantly advances women's rights, and that women in positions of power are much more likely than men to advance the interests of women.²³¹ Furthermore, the example of the treatment of race discrimination on the international level is highly constructive in this context since the dramatic increase in the participation of representatives of third world countries in the United Nations as a result of the process of decolonization has had a major impact on the wording and scope of the Race Convention.²³²

2. State Support for Discriminatory Religious and Cultural Practices

Another important point related to political participation of women is that governments should put a stop to their direct and indirect support of religious and cultural practices that discriminate against women. Thus, governments should not in any way subsidize or support groups that restrict women's participation in leadership roles, including religious leadership roles, due to religious and cultural norms.²³³ In addition, there is a strong argument against allowing political parties to participate in general elections if these parties explicitly prevent women, because of their sex, from becoming political representatives. Similarly, governments should give neither direct nor indirect aid that would be used to maintain religious and cultural practices that discriminate against women. For example, governments should abolish all family laws that are based on religious precepts that discriminate against women. Likewise, no public funding

²²⁹ Fourth World Conference on Women Platform for Action, Women in Power and Decision-Making, G. 181, G. 190 at <http://www.un.org/womenwatch/daw/beijing/platform/decision.htm> (last visited Oct. 10, 2002).

²³⁰ Mary Becker, Towards a Progressive Politics and a Progressive Constitution, 69 Fordham L. Rev. 2033-38 (2001); Margaret Plattner, The Status of Women Under International Human Rights Law and the 1995 UN World Conference on Women, Beijing, China, 84 Ky. L.J. 1249, 1259, 1268 (1995-96).

²³¹ See, e.g., Susan J. Carroll, The Politics of Difference: Women Public Officials as Agents of Change, 5 Stan. L. & Pol'y Rev. 11 (1994); Amy Caiazza & Meghan Purvis, Does Women's Representation Lead to Women Friendly Policy? A State-by-State Analysis, at <http://pro.harvard.edu/papers/118/118004CaiazzaAmy.pdf> (Aug. 29, 2001); Sara Childs, Hitting the Target: Are Labour Women MPs 'Acting For' Women?, at <http://pro.harvard.edu/papers/072/072005ChildsSara.pdf> (Aug. 29, 2001).

²³² Charlesworth & Chinkin, *supra* note 7, at 108.

²³³ See Becker, *supra* note 34, 484-86.

should be used in any way that discriminates against women, such as subsidizing public transportation in which segregation between men and women is maintained and women are ordered to sit in the back. In the American context a prohibition on public funding for organizations that practice or promote discrimination against women would prevent the launching of federally-funded faith-based initiatives if the organizations requesting the funds discriminate against women in hiring or other employment decisions, or if these organizations promote doctrines that are discriminatory towards women.²³⁴

People's preferences and expectations are shaped to a large extent by the existing situation and the legal rules supporting it.²³⁵ As a result, the support given by a government through legislation or financial aid to religious and cultural norms that discriminate against women exacerbates this discrimination and creates a vicious circle in which breaking free from the discrimination becomes harder as state support for it continues. For example, the initiation of segregation between the sexes in public transportation in Israel has in itself significantly strengthened a preference, which Orthodox Jews may not have held previously, for the creation of segregation between women and men in public transportation. In this way an allegedly innocuous and tolerant act of the state towards a religious minority has considerably exacerbated discrimination against women and has paved the way to further exacerbation through repeated demands for the expansion of segregated public services.

C. Familial Ideology—State Intervention as a Means for Achieving Equality in the Private Sphere

1. *Intervention in the Family*

It has become a truism that the familial realm is one of the most important sites of oppression for women, if not the most important. The main argument used to legitimate and continue oppression of women in the family is the argument for non-intervention based on the perception of the family as a private sphere outside the state's reach.²³⁶ The use of the argument of non-intervention is particularly conducive to the entrenchment of sex discrimination based on religious and cultural practices, as many of

²³⁴ For an analysis of the chances of anti-discrimination suits for discriminatory hiring by federally-funded faith-based organizations, see Elbert Lin et. al., *Faith in the Courts? The Legal and Political Future of Federally-Funded Faith-Based Initiatives*, 20 Yale L. & Pol'y Rev. 183, 214-21 (2002).

²³⁵ Nussbaum, *Women and Human Development*, *supra* note 21, at 142-43; Cass Sunstein, *Preferences and Politics*, 20 Phil. & Pub. Aff. 3, 8-9 (1991).

²³⁶ See, e.g., Okin, *Justice*, *supra* note 19; Nussbaum, *Women and Human Development*, *supra* note 21, at ch. 4; Pateman, *The Sexual Contract*, *supra* note 22.

these practices are seen as occurring in the private sphere and therefore exempt from legal scrutiny.²³⁷

However, as feminist scholars have repeatedly pointed out, the notion of non-intervention in the family is nothing more than a myth. The family is created and the power structures in it are maintained by constant intervention of the state through laws that determine the structure of the family and what rights and duties family members have toward each other.²³⁸ People who support the notion of non-intervention in the family and object to state intervention do not perceive the existing laws that structure the family as state intervention, but see them as a reflection of the natural state of affairs. Far from being neutral, however, these laws represent a profoundly ideological intervention by the state, which is aimed at preserving and strengthening male dominance in the family.²³⁹ Perhaps the best example of such intervention is state treatment of marital rape. A majority of states in the United States still retain some form of marital rape exemption.²⁴⁰ Some states, such as Minnesota and South Carolina, do not even recognize marital rape as an offense unless the couple is living apart.²⁴¹ Thus, if the notion of state non-intervention in the family is only a myth that obscures clearly ideological intervention, there is no reason why the state should not intervene in the family in order to protect and promote the rights of women and girls inside the family. Not only that, but it is the state's duty to intervene in the family and change existing laws and customs as a way of countering the damage to women that has been caused by state perpetuation of male dominance in the family.

Consequently, I would argue that all claims rejecting state intervention in religious and cultural practices that concern the family and discriminate against women should be rejected, and that the state should see it as its duty to interfere in the family to ensure equality for women. Thus, for example, many of the Oriya Hindu practices discussed at length in this article should be forbidden by the state, including practices such as preventing girls from receiving education, performing arranged marriages without the woman's consent, secluding women, and denying women inheritance rights.

²³⁷ Charlesworth & Chinkin, *supra* note 7, at 225.

²³⁸ See, e.g., Nussbaum, *Women and Human Development*, *supra* note 21, at 261-64; Frances Olsen, *The Myth of State Intervention in the Family*, 18 J.L. Reform 835 (1985).

²³⁹ Olsen, *supra* note 238, at 845-55.

²⁴⁰ Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 Cal. L. Rev. 1373, 1375 (2000). According to Hasday, "A majority of states still retain some form of the common law regime: They criminalize a narrower range of offenses if committed within marriage, subject the marital rape they do recognize to less serious sanctions, and/or create special procedural hurdles for marital rape prosecutions." *Id.*

²⁴¹ *Id.*

2. Mandatory Education for Equality

One of the major obstacles in abolishing religious and cultural practices that discriminate against women is that the women who are subjugated by these practices are taught to believe that they are in fact not subjugated and that their situation is divinely ordained. Nowadays most, if not all, states do practically nothing to change this situation through education. The emphasis placed on the parental right to determine the child's education creates a situation in which women are educated from birth to believe in their own inferiority. Unlike the restrictions on parents that prevent them from causing their child bodily harm or from refusing to administer necessary medical care, there is no restriction on parents from educating their child to believe that she is an inherently inferior being suited only to fulfill certain specific inferior functions.

For example, as a consequence of the decision of the United States Supreme Court in the case of *Wisconsin v. Yoder*,²⁴² the Amish community is free to educate its girls that they are second-class human beings, while at the same time shutting them off from the outside world in which they might be exposed to competing visions of life.²⁴³ I would argue that serious consideration should be given to the need to expose all children of both sexes to the notion of equality between the sexes. Similar to the manner in which the state dictates minimum standards of education in private schooling, it should also dictate a minimum standard of education for equality between the sexes in private schooling that would ensure that female children are at least allowed to consider the notion that they are not the inferior beings their communities and families are trying to persuade them that they are.²⁴⁴ The consequences of educating young girls in religious and traditional communities to perceive themselves as equal can be far-reaching, since such an education can help girls resist their oppression later in life and struggle for change from within, which would completely transform the communities in which they are living.

3. State-Subsidized Care

As discussed earlier in the article, liberalism, capitalism, nationalism, and traditional cultures and religions share a common interest in keeping women at home. Alongside the shared ideological interest, there

²⁴² 406 U.S. 205 (1972).

²⁴³ Macedo, *supra* note 163, at 488-89.

²⁴⁴ I would argue that this minimum standard should encompass all notions of equality and not just equality between the sexes, though as I have argued in this article the situation of women is unique in that they are taught by their own families and communities to believe in their own inferiority and not in the inferiority of others.

exists also an economic interest in using women's unpaid labor to take care of the young, the old, and the infirm. The liberal and capitalist dread of increased government spending in daycare for children and in welfare for the old and the infirm fits nicely with the religious paradigm that sees it as woman's divinely ordained mission to take care of her family. In addition, the lack of state-subsidized care forces women to remain at home and provide that care as a practical necessity and not just as a religious duty.

Thus, it is imperative to create state-subsidized care that would take responsibility for taking care of the young, the old, and the infirm. The existence of state-subsidized care would sever the unholy pact between the state and religion designed to keep women at home. If compelled to provide subsidized care, the state would have a considerably-increased interest in women going out of the home to do paid work, helping the economy cover the costs of state care. Due to this interest, the state would be much more reluctant to support religious and cultural practices that discriminate against women and prevent them from realizing their full capabilities. Simultaneously, by going out to work, women in general would gain more economic independence and involvement in the public sphere, while women from religious and traditional communities would also gain exposure to different ways of life. These gains would help women to struggle for changes both on the state level and inside their communities.

D. Free Choice—The Need for Closer Scrutiny of Practices that Disadvantage Women

A major obstacle in recognizing the insidiousness of sex discrimination due to religious and cultural norms is the prevalence of the belief that women who are part of the group with the discriminatory practice, or demanding support for it, consent to the discrimination and do so out of their own free will. As I tried to show in this article, however, the process by which women's free choice and their consent are analyzed and assumed is flawed, so these conclusions are misguided. Furthermore, if women's choices and preferences are shaped by the existing situation, then justifying the existing situation on the basis of these same preferences becomes highly questionable.²⁴⁵

I would therefore like to suggest that when examining cases in which the conflict between women's rights and religious and cultural practices arises, we should not concentrate on the question of choice, but on the question of disadvantage, and ask ourselves whether the practice in question disadvantages women.²⁴⁶ If the answer to this question is

²⁴⁵ Nussbaum, *Women and Human Development*, *supra* note 21, at 142-43; Sunstein, *supra* note 235, at 8-9.

²⁴⁶ This approach is similar to Martha Nussbaum's approach in her book *Women and Human Development*. Nussbaum suggests that instead of focusing on women's free

affirmative, then the disadvantageous practice should not be allowed unless overwhelming evidence proves that the practice is consented to by all the women involved, out of their own, genuine free choice. I would argue that consciously or subconsciously, we apply a similar strategy when dealing with discrimination on the basis of race, ethnicity, or religion. Thus, if we are faced with a discriminatory practice that disadvantages people on the basis of their racial, ethnic, or religious affiliation, and we are told by the people benefiting from the practice (or even by some of those disadvantaged by it) that the disadvantaged group supports the practice, we dismiss this information as incredible or irrelevant and condemn the practice. A similar attitude should be employed toward arguments justifying religious and cultural practices that discriminate against women.

The Canadian Supreme Court has adopted the disadvantage approach in order to determine whether or not discrimination exists.²⁴⁷ According to this approach, if it can be shown that a distinction or a practice targeted at the disadvantaged group worsens their disadvantage, then the distinction or practice is discriminatory, even when there is no intent to discriminate.²⁴⁸ Disadvantage is determined contextually by examining the plaintiff's social, political, and legal reality "[T]he test of 'disadvantage' requires judges to look at women ... in their place in the real world and to confront the reality that the systematic abuse and deprivation of power women experience is because of their place in the sexual hierarchy."²⁴⁹

My contention is that other courts, as well as anybody else trying to formulate an opinion regarding a religious or cultural practice that discriminates against women, should adopt a similar approach, and should refuse to allow the questionable argument of free choice to take undue precedence over the very real facts of discrimination and disadvantage.

Under the disadvantage approach, a decision such as that of a federal district court in EEOC v. Sears, Roebuck and Co., later affirmed by the Seventh Circuit, would be erroneous.²⁵⁰ In this case the EEOC filed an employment discrimination suit against Sears claiming that the company discriminated against its female employees in hiring and promotion by reserving commission sales jobs mostly to its male employees and relegating

choice we should focus on their capabilities, a list of which she develops in her book, and refuse to endorse a religious or cultural practice if it hinders women's capabilities. See Nussbaum, Women and Human Development, *supra* note 21, at 165.

²⁴⁷ Kathleen E. Mahoney, Canadian Approaches to Equality Rights and Gender Equity in the Courts, in Human Rights of Women, *supra* note 66, at 437, 445.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ EEOC v. Sears, Roebuck and Co., 628 F.Supp. 1264 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988).

female employees to much lower-paying non-commission sales jobs. The EEOC relied on statistical evidence, which reflected substantial underrepresentation of women in commission sales jobs. The court refused to find against Sears, accepting its claim that the statistical patterns reflected women's preferences rather than Sears' own discriminatory practices. The court found that women were reluctant to work irregular hours and felt uncomfortable with unfamiliar products and competitive compensation structures and as a result were much less likely than men to choose a commission sales job regardless of its higher pay.²⁵¹ Letting its own cultural biases regarding woman's nature as feminine, nurturing, and unsuited for the vicious competition in the male-dominated world of commission selling dictate the result, the court preferred to attribute women's concentration in the lower-paying non-commission sales jobs to their own free choice.²⁵² Had the court given the proper weight to the disadvantages women suffer as a result of their exclusion from commission sales jobs, and had it insisted that the plaintiffs submit overwhelming evidence that women choose to concentrate in the low-paying non-commission sales jobs, instead of relying on biased assumptions, it would in all likelihood have reached a very different result. Furthermore, it seems likely that had the case revolved around job segregation along racial lines and blacks were relegated to lower-paying non-commission sales jobs while whites were given most of the higher-paying commission sales jobs the court would have found the choice argument much less compelling and would have decided for the plaintiffs.²⁵³

IX. CONCLUSION

In comparing the continued acceptance of sex discrimination due to religious and cultural norms with the rejection of racial, ethnic, and religious discrimination due to religious and cultural norms, I do not mean to suggest that these forms of oppression are identical. I do, however, argue that contrary to popular belief, discrimination on the basis of sex is as insidious as discrimination on the basis of race, ethnicity, and religion. I also argue that in order to understand the severity of discrimination on the basis of sex, it is imperative that an analysis of discrimination against women should take into account the unique structural, political, sociological, and psychological circumstances that surround the oppression of women, and the way in which these circumstances differ markedly from

²⁵¹ Deborah L. Rhode, *The "No-Problem" Problem: Feminist Challenges and Cultural Change*, 100 Yale L.J. 1731, 1768 (1991).

²⁵² Vicki Schulz, *Telling Stories About Women And Work: Judicial Interpretations of Sex Segregation In The Workplace In Title VII Cases Raising The Lack of Interest Argument*, 103 Harv. L. Rev. 1750, 1753 (1990).

²⁵³ *Id.* at 1770-71.

the circumstances surrounding discrimination on the basis of race, ethnicity, and religion.

I believe that there are three lessons to be learned from my analysis. First, the inclination to perceive situations of oppression in women's lives that stem from religious and cultural practices as acceptable and inevitable is misguided. Reflecting on similar situations in the context of the oppression of racial, ethnic, and religious groups makes it clear that the benign explanations for women's inferior status are not as benign as they may seem at first glance, that women's alleged acceptance of oppressive religious and cultural practices is not necessarily a genuine acceptance nor should it be determinative of a third party's acceptance of such practices, and that many decisions that are made and actions that are sanctioned in the name of religious and cultural tolerance should be examined much more closely and critically.

Second, the tendency to overlook the special difficulties women face in combating their oppression due to religious and cultural norms has skewed the understanding of this oppression to the detriment of women. Because women are raised as part of the group that oppresses them, because many times they do not have the space to form an awareness of their oppression, because instead of being educated to resist their oppression they are educated to believe that it does not exist, and because of the other reasons discussed in this Article, women's reactions to their oppression are often quite different from the reactions of racial, ethnic, and religious groups to their oppression. This difference has been wrongly interpreted to mean that unlike racial, ethnic, and religious oppressed groups, women are content in their oppression. As a result, the oppression of women due to cultural and religious norms is perceived as legitimate and is allowed to continue unhindered with total disregard to the true plight of many women.

Third, I hope that this Article has helped to expose the falsity of the contemporary liberal stand on the conflict between religious and cultural practices and women's rights. By allowing groups to oppress women in the name of religion and culture, liberals in general and liberal states in particular are neither protecting human rights, nor are they most often truly concerned with protecting women. The rhetoric of human rights is used to disguise misogyny, the serving of political interests, and misconceptions about religion, culture, and women's allegedly willing participation in their own oppression. Eager to appear tolerant towards other cultures and religions, while at the same time happy to avoid conflict, liberals too readily embrace cultural and religious practices that blatantly discriminate against women. Keeping in mind that it was not so long ago that religion and culture played a major role in justifying racial, ethnic, and religious oppression that has now become unacceptable, it is high time that liberals start to question what has now become the inseparable link between respecting religious and cultural practices and countenancing the oppression of women.