

LESSONS ABOUT AUTONOMY AND INTEGRATION FROM INTERNATIONAL HUMAN RIGHTS, LAW JOURNALS, AND THE WORLD OF GOLF

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In this essay I will consider the questions posed by the symposium—"why have a feminist law journal?" and the specific question of this panel, "which master, autonomy or integration, do we or should we serve?"—together with the parallel questions that arise in the debate among international human rights advocates and scholars about whether to address women's human rights issues separately from "mainstream" human rights. However, I want to begin on a slightly different (but not unrelated) topic: women and sports. I am relatively newly married and, in one of those important early negotiations of couplehood, I agreed to let my husband educate me about golf; in return, he has agreed to develop a deeper appreciation for feminist theory. Our interests have coincided in a series of recent events in the sporting world. Let me provide just a few highlights.

In May of this year, Annika Sorenstam, often called "the world's most dominant female golfer," participated in the Colonial Invitational, an event on the Professional Golfers' Association (PGA) Tour. Sorenstam played from the same tees as the men, with no special accommodations. According to the Washington Post, her decision to play the event "touched off debate among men and women over whether the experiment is good for the sport and whether Sorenstam can ultimately compete."¹ It touched off that same debate in my house. Other versions of this drama are playing out elsewhere in the world of golf and have provoked significant emotion, especially if accommodations, such as closer tees, are made for women.²

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¹ Steve Fainaru, *Sorenstam to Play in PGA Tour Event*, Wash. Post, Feb. 13, 2003, at D1. Although she did not make the cut, Sorenstam was widely lauded for her performance. She "proved she could play with the boys." Associated Press, *Valuable Lesson*, http://sportsillustrated.cnn.com/golfonline/news/2003/05/24/sorenstam_follow_ap/ (last visited Oct. 20, 2003). Sorenstam shot seventy-one and seventy-four in the initial rounds, missing the cut by four strokes. *Id.*

² My favorite example of the emotion raised by the issue of women competing with men (or girls competing with boys) is the story of seventeen-year-old Jenny Suh. Suh won the Virginia AAA high school golf championship last year—the boys championship—playing from the same course but different (closer) tees. Fern Shen, *Chantilly Girl Tops the*

Then there is the controversy about this year's Masters Tournament, one of the most prestigious events of the PGA Tour, held at Augusta National Golf Club, a private club that does not allow women to become members. Martha Burk of the National Council of Women's Organizations has been a vocal opponent, and the council has argued that the club, in light of its very public role, should not be permitted to exclude women. They argue that the PGA and CBS, which broadcasted the event, are complicit in this sex discrimination.³ There has been heated commentary on both sides of the issue—but many of the well-known figures of golf, such as Tiger Woods, have been largely silent.⁴

Finally, there are the current discussions over the future of Title IX, the federal law that prohibits sex discrimination in any educational program or activity that receives federal funds.⁵ Although it applies to all educational opportunities, it is best known for its impact on sports. The biggest issues are around funding and the loss of some men's programs, allegedly as a result of the need to divert funds to women's programs. Those who protest Title IX often argue that an equal allocation of funds and opportunities does not make sense because women are "just not as interested in sports as men."⁶

There is certainly a great deal of ambiguity in our feelings about women and sports, perhaps because men's sports continue to define our normative conception of sports. Women are the extra letter—the WNBA or

Boys, Wash. Post, Dec. 6, 2002, at C12. This prompted not just jeers from some of the boys, but also a chiding column on the Washington Post's Kid Page that concluded, "So, who is the best high school golfer in Virginia? I don't know. But I don't think it's Jenny Suh." Fred Bowen, An Uneven Playing Field?, Wash. Post, Dec. 6, 2002, at C12.

³ See National Council of Women's Organizations, NCWO Takes on Augusta National Golf Club, <http://www.womensorganizations.org/news/position04.htm> (last visited Aug. 20, 2003); National Council of Women's Organizations, Hall of Hypocrisy, <http://www.augustadiscriminates.org> (last visited Aug. 20, 2003); see also Kate Zernike, Burk Fights the Battle She's Given, N.Y. Times, Apr. 11, 2003, at S1.

⁴ See, e.g., Clifton Brown, Augusta Marches On, With Its Rules Intact, N.Y. Times, Apr. 10, 2003, at S1; Bill Pennington, She Did Not Prevail This Year, but Burk Has Time on Her Side, N.Y. Times, Apr. 14, 2003, at D1; Leonard Shapiro, Trying to Master the Situation, Augusta, Ga., Becomes Field of Battle for Debate Over Men-Only Golf Club, Wash. Post, Dec. 12, 2002, at D1.

⁵ See 20 U.S.C. § 1681 (1999) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance.").

⁶ That argument is belied by both common sense and by women's and girls' actual participation in sports. For example, since the enactment of Title IX, female participation in high school athletics has increased by more than 800%. National Women's Law Center, The Battle for Gender Equity in Athletics: Title IX at Thirty 4, 11-12 (2002). At the college level, women's participation has increased from about 32,000 women to more than 150,000, an increase of about 400%. *Id.*

LPGA—or the illegitimate competitors who get “special treatment” (or, yes, the cheerleaders). Because men’s sports are so powerful and sports is still so powerfully gendered male,⁷ these current controversies highlight all the hard issues of differences between women and men—the physical differences (though not with the usual focus on sexuality and reproduction) and also differences in history, interest, and opportunity. I think they “tee up” consideration of recurring themes about autonomy versus integration. Should women and men be treated the same or measured by a different standard? Do we want to play together or on our own? How much of the difference between women and men, even in the physical realm, is “real” and how much is constructed? Because I am a human rights teacher and lawyer (and not much of a golfer), I want to consider how these questions play out in the international human rights arena, and I will try to draw it all together briefly at the end.

By way of background, I should explain that within the United Nations (UN) system, there are instruments and mechanisms directed at promoting and protecting human rights such as the Human Rights Commission and the Human Rights Committee, and there are separate instruments and mechanisms intended to address women’s issues such as the Commission on the Status of Women and the Committee on the Elimination of Discrimination Against Women (“CEDAW Committee”).⁸ Feminists have increasingly criticized the international system for this bifurcated approach to human rights and women’s rights, raising the call prominently at the 1995 Beijing Conference and elsewhere that “women’s rights are human rights.”⁹ The criticism is directed not just at the purported substantive split or division of subject matter, but also at the practical realities involved. Typically, the “mainstream” human rights mechanisms have greater prestige, larger and predominantly male membership, generate

⁷ See Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. Mich. J.L. Reform 13, 82-107 (2001) (discussing the culture of sport and its dominant construction as masculine).

⁸ See Michael O’Flaherty, *Human Rights and the UN: Practice Before the Treaty Bodies* 15-45, 95-123 (2d ed. 2000) (describing the procedures and work of the Human Rights Committee and the CEDAW Committee); Nigel S. Rodley, *United Nations Non-Treaty Procedures for Dealing with Human Rights Violations, in Guide To International Human Rights Practice* 61 (describing the non-treaty procedures for addressing human rights violations) (Hurst Hannum ed., 3d ed. 1999).

⁹ See *Report on the Fourth World Conference on Women, Beijing Declaration and Platform for Action*, at 2-132, U.N. Doc. A/CONF.177/20/Rev.1, U.N. Sales No. E.96.IV.13 (1995); see also Anne F. Bayefsky, *The UN Human Rights Treaty System: Universality at the Crossroads* 127-28 (2001) (using the principle that “women’s rights are human rights” to support a recommendation that the CEDAW Committee should be moved to Geneva to be more integrated with the other human rights treaty bodies).

more attention to their findings, and have better working conditions and longer working sessions than the women's rights mechanisms.¹⁰

In considering our topic for the symposium panel, I wonder if there are not many similar concerns that arise in the context of a feminist law journal—specifically denominated as such and separate from the “mainstream” law journals. Does the separation of feminist law journals from other law journals provide a forum for discussion of gender issues that would otherwise remain unaddressed? Does it create a false sense that feminist concerns can be parceled off from traditional legal issues? Does it bring greater attention for women's issues or make them easier to ignore? These questions are largely unresolved at the international level, and I think the same is true in the law school context. I suspect there are many potential comparisons that could be made, but I will focus on just a few that raise these questions around differences in history, interest, and opportunity.

History. In my research for this symposium, I noticed a number of commonalities between the international women's human rights movement and the smaller movements to create feminist law journals at particular schools. One that most struck me was that, at a basic level, both grew out of environments that seemed (or were) “hostile” to the women in them.¹¹ There was a general and deep dissatisfaction with the adequacy of those environments to incorporate and address the needs, interests, and concerns of women.

I am most familiar with the origins of the women's human rights movement, so I will begin there. Although the UN created a separate Commission on the Status of Women as early as 1946, women's issues did

¹⁰ See Hilary Charlesworth et al., Feminist Approaches to International Law, 85 Am. J. Int'l L. 613, 621-24 (1991) (discussing underrepresentation of women in UN human rights bodies, particularly how the CEDAW Committee has faced pressure to increase male representation, while no “male dominated” committees have faced criticism for having too few women, *id.* at 624); Hilary Charlesworth & Christine Chinkin, The Boundaries of International Law: A Feminist Analysis 174-87 (2000) (discussing the disproportionate representation of men in the UN's membership and bureaucracy); Anne Gallagher, Ending the Marginalization: Strategies for Incorporating Women into the United Nations Human Rights System, 19 Hum. Rts. Q. 283, 294-309 (1997) (discussing the role of gender in the treaty bodies).

¹¹ See, e.g., Charlotte Bunch, Women's Rights as Human Rights: Toward a Revision of Human Rights, 12 Hum. Rts. Q. 486, 487 (1990) (“only recently have significant challenges been made to a vision of human rights which excludes much of women's experiences”); Hilary Charlesworth, What are “Women's International Human Rights?”, in Human Rights of Women: National and International Perspectives 58, 59 (Rebecca J. Cook ed., 1994) (noting that the developments in human rights “are built on typically male life experiences and in their current form do not respond to the most pressing risks women face”); see also Preface, 1 Hastings Women's L.J. (1989) (the female law student faces an additional burden and “must recognize the fact that she is entering a male dominated profession”); Shawn Marie Boyne et al., Beginnings, 1 S. Cal. Rev. L. & Women's Stud. 1 (1992) (describing the struggles and frustrations of their law school experiences that led to the creation of the journal).

not have much prominence at the UN until the 1970s.¹² The 1970s were declared the Women's Decade (a strategy for drawing attention to issues), and the UN commenced a series of World Conferences on Women, starting in 1970 in Mexico City and followed in 1975 in Copenhagen.¹³ This both generated and fed momentum, and in 1979, the UN adopted the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW or the Women's Convention).¹⁴ There was a third World Conference on Women in Nairobi in 1985, and then a fourth in 1995 in Beijing.¹⁵ By at least the early 1990s, however, scholars and activists had begun explicitly questioning this separate track for women and calling for integration of women's issues with so-called mainstream human rights.

The feminist critique of international human rights law and institutions covers familiar territory. It argues that international law has developed along male-oriented norms and fails to account for women's experiences, that the international mechanisms follow that orientation and are composed primarily of men, and that rights discourse is not necessarily a meaningful or comprehensive response on many issues.¹⁶ However, the question of autonomy or integration remains unresolved—or perhaps it is more accurate to say that both strategies have been pursued. The separate tracks continue to exist at the international level, and in some respects the “women's” mechanisms have been strengthened. However, at the same time, there has been some progress toward “mainstreaming” gender concerns and the general trend of reform at the UN is toward consolidation of the human rights mechanisms.¹⁷

There is something of a shared history when we look at law schools and law journals. I was moved by the stories told in inaugural or

¹² See Division for the Advancement of Women, Commission on the Status of Women, <http://www.un.org/womenwatch/daw/csw/index.html> (last visited Mar. 31, 2003).

¹³ See Report of the World Conference of the International Women's Year, Mexico City, June-July 1975, U.N. Doc. E/CONF.66/34, U.N. Sales No. E.76.IV.1 (1976); Report of the World Conference of the United Nations Decade for Women: Equality, Development and Peace, Copenhagen, 15-30 July 1980, U.N. Doc. A/CONF.94/35, U.N. Sales No. E.80.IV.3 (1980).

¹⁴ See Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981).

¹⁵ See Report of the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace, Nairobi, 15-26 July 1985, U.N. Doc. A/CONF.116/28/Rev.1, U.N. Sales No. E.85.IV.10 (1986); Report on the Fourth World Conference on Women, *supra* note 9.

¹⁶ See Charlesworth, Feminist Approaches to International Law, *supra* note 10 (articulating the main points of criticism).

¹⁷ See Bayefsky, *supra* note 9, at 133-39 (recommending consolidation of existing treaty bodies).

commemorative volumes of journals (and reflected in mission statements) that described the feelings of disconnect or isolation that prompted students to create feminist law journals.¹⁸ Law school classrooms, law textbooks, and the legal system itself can feel (and be) alienating, detached, and even hostile to women. I think it is not coincidental that the first feminist journals were created in the 1970s at the same time of increasing feminist activism both in the United States and internationally.¹⁹ I think there is a similar parallel between the energy of the “women’s human rights movement” in the early 90s and the subsequent wave of new gender journals created at that time.²⁰ I assume that the discussion of integration versus autonomy is a regular one among journal folk, who desire to push other journals to broader consideration of feminist issues, and yet recognize the continuing need for a separate space.

Interest. This shared history is important in its own right, but it is also connected to the question of women’s and men’s different interests, real or constructed, in law schools, in international law, or even in sports. One of the most powerful arguments for a separate set of institutions, for women’s human rights or for feminist legal studies, is the need for different or more fora for discussing issues.

At the international level, this has been the rationale behind separate “women’s rights” organizations, conferences, and treaties. As always, there is an initial question of: what is a women’s, feminist, or gender issue? There is also the ever-present risk (or perhaps certainty) of essentializing women in our efforts to discuss issues of concern to some, or even many, women.²¹ Much of international women’s human rights work

¹⁸ See *supra* note 11.

¹⁹ The Women’s Rights Law Reporter, published at Rutgers University School of Law starting in 1972, was apparently the first women’s law journal. Women’s Rights Law Reporter, *About the Reporter*, <http://newark.rutgers.edu/~wrlr/> (last visited Apr. 2, 2003). It was followed in 1978 by the Harvard Women’s Law Journal. Harvard Women’s Law Journal, http://www.law.harvard.edu/studorgs/woman_law_journal/ (last visited Apr. 2, 2003). See also Christine A. Littleton, *Q & A: Why a Women’s Law Journal?*, 1 UCLA Women’s L.J. 3 n.1 (1991) (describing the history of the development of women’s law journals).

²⁰ The majority of current gender journals started in the late 1980s and early 1990s: in 1989, Columbia Journal of Gender and Law, Hastings Women’s Law Journal, and Yale Journal of Law and Feminism; in 1990, Texas Journal of Women and the Law; in 1992, American University Journal of Gender, Social Policy and the Law, Buffalo Women’s Law Journal, Southern California Review of Law and Women’s Studies, UCLA Women’s Law Journal; in 1993, Cardozo Women’s Law Journal, Michigan Journal of Gender and Law, William & Mary Journal of Women and the Law; and in 1994, Duke Journal of Gender Law and Policy.

²¹ See Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, in *Critical Race Feminism: A Reader* 11 (Adrien Katherine Wing ed., 1997) (criticizing gender essentialism in feminist legal theory); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Color*, 43 Stan. L. Rev.

has focused on issues of violence against women in its myriad forms and issues tied to the status and biology of women—marriage, family, reproduction. In many respects, activists have made progress in adding these issues to international dialogue. However, there is a growing global feminist critique that even this “expanded” forum for women is limited to topics of interest to women of privilege and excludes many others.²² We need to continue to work to ensure that there is room to accommodate a broad range of women’s interests.

For feminist law journals, the objective of creating a new forum or new space for women’s expression may be even more straightforward and more compelling.²³ In many ways, that is what defines a publication; discussion, debate, and dialogue are its primary purposes. Like the international bodies, feminist journals face the question of breadth of coverage (what is a gender issue?) and also the real risk of essentializing women in the attempt to promote discussion. Even a quick review shows that the subjects that appeared in the earliest feminist journals—reproductive rights, marriage and divorce, discrimination in the workplace—are the same subjects that are still being discussed today.²⁴ And while these topics do make their way into traditional law journals, it is certainly not with the same frequency or consistency. That may illustrate the limitations of a feminist law journal, or it may suggest the perennial nature of those topics.

1241 (1991) (noting the criticism of feminism in the United States by women of color as focused too much on concerns of white, middle-class women); *see also* Chandra Talpade Mohanty, *Under Western Eyes: Feminist Scholarship and Colonial Discourses*, in *Third World Women and the Politics of Feminism* 51 (Chandra Talpade Mohanty et al. eds., 1991) (providing a critique of Western feminism).

²² *See generally* Mohanty, *supra* note 21.

²³ Several women’s law journals are explicit about the goal of providing a new or expanded forum for discussing gender issues. *See, e.g.*, *Preface*, 1 Colum. J. Gender & L. (1991) (“The Journal is intended to serve as a forum for topics inadequately addressed by most law journals and reviews.”); Founding Committee, *The Birth of a Journal*, 1 Am. U. J. Gender & L. v (1993) (“Our intent is to fill a void in feminist legal scholarship by providing an opportunity for academic discussion that is otherwise overlooked by traditional journals.”).

²⁴ For example, the first volume of the Yale Journal of Law and Feminism in 1989 included articles on reproductive rights, autonomy, pornography, and women in legal education; its 2001 volume contains articles on sexual harassment, violence against women, and women’s health. *See Table of Contents*, 1 Yale J.L. & Feminism (1989); *Contents*, 13 Yale J.L. & Feminism (2001). The first volume of the Harvard Women’s Law Journal in 1978 had articles on women and the legal profession, the Equal Rights Amendment, women and athletics, sex discrimination and employment, parenting rights, and the treatment of women under international law. *See Contents*, 1 Harv. Women’s L.J. iii (1978). Its 2000 and 2001 volumes had articles on alimony, women and athletics, reproductive-based discrimination, sexual harassment, and battered women. *See Contents*, 23 Harv. Women’s L.J. (2000); *Contents*, 24 Harv. Women’s L.J. (2001).

Opportunity. I will raise just one more area that is related to this question of women's and men's different interests: their different opportunities. At the international level, more mechanisms and institutions (even separate ones with lower status) have simply provided more opportunities for women to make their voices heard. I think this has been particularly true at the global women's conferences and with the increasing role given to non-governmental organizations at the international level. And we see its impact in the development of human rights law. Again, however, I do not think we can claim that women from various places and perspectives are heard equally, and that is an area we need to give much more attention.

For journals, the questions of opportunity are also raised in sharp relief. On the one hand, more journal space is more journal space—more chances for feminist scholars to have their work published, more room for law students to experience working on a journal, more symposia on topics of interest. On the other hand, there just are not that many feminist journals—fewer than twenty in comparison to almost 200 general law reviews and about 450 total law journals.²⁵ Moreover, there continue to be issues of journal hierarchy. But I am optimistic. Although the hierarchy exists, technology has been a great equalizer. Because so much legal and scholarly research is now conducted online, where searches tend to be more explicitly by topic or key word and not limited to particular journals as hard-copy research tends to be, some of the traditional distinctions among journals may have less significance. Regardless, gender journals serve an important role in providing meaningful opportunities for more and broader discussion of feminist issues.

Let me try to conclude on these points of comparison. When we look at women's law journals, women's human rights, and women's sports, there are some shared issues: a history of exclusion, the nature and validity of the conclusions we draw about women's and men's different interests, and the role and merit of expanded opportunities. I think it is important to periodically ask questions like the ones posed by this symposium. Why a feminist law journal? Why a feminist law journal in 2003? We can similarly ask why a Women's Convention? What are we trying to achieve? Should these separate mechanisms eventually become obsolete—should we put ourselves out of business? Or will they have a continuing role and continuing value, at least for the foreseeable future?

So we return to the question of which master we want to serve, autonomy or integration? The answer to that question must be grounded

²⁵ See Anderson Publishing Co., Law School Publications, Directory of Law Reviews, <http://www.andersonpublishing.com/lawschool/directory/> (last visited July 27, 2003) (compiled by Michael H. Hoffheimer). According to the lists provided, there are 444 student-edited law journals overall. Of those, 176 are general law reviews and 268 are specialty journals. Only seventeen are gender and law journals.

firmly in the particular context and the particular time it is asked. It may (and I think it does) make sense to keep moving in the direction of integration of women's rights and human rights mechanisms at the level of the international legal system. It may equally make sense (and I think it does) to maintain or create feminist law journals at law schools across the country. The separate international mechanisms may be reaching the end of their effectiveness, while I think feminist journals are coming into their own. And I think we are only just beginning to see how women will radically reconceptualize our understanding of sports in the same way we have begun to transform the law.

In this time and place, we need to serve both masters—with all the complications that might entail. Autonomy makes sense sometimes—we need a WNBA and an LPGA. But we also need to protest when separation discriminates rather than encourages—we should shine the spotlight on Augusta National. Ultimately we need women like Annika Sorenstam to challenge our understanding of what a male-dominated activity or institution like golf looks like and who can compete.