

# **FEMINISM AS LIBERALISM: A TRIBUTE TO THE WORK OF MARTHA NUSSBAUM**

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It is a great pleasure for me to participate in this symposium organized to honor the work of Professor Martha Nussbaum. In her scholarship, Professor Nussbaum has accomplished over and over again something that is altogether too rare in the academy; she manages simultaneously to take seriously both theory and the material conditions of people's lives, producing work that is both rigorous and relevant. Her scholarship has long informed my own both in feminist legal theory and in human rights advocacy, helping me to bridge the gap between theory and practice. For this reason, I am especially grateful for the opportunity to participate in this symposium.

In this essay, I revisit and expand an argument I have made with respect to the limited usefulness of liberalism in defining an agenda for guaranteeing women's rights and improving women's conditions. After laying out this case, I discuss Martha Nussbaum's capabilities approach to fundamental rights and human development and acknowledge that her approach addresses to a significant degree many of the objections I and other feminist scholars have raised. I then turn to fieldwork that I have done in South Africa on the issue of custom and women's choices with regard to marriage and divorce. Applying Professor Nussbaum's capabilities approach in this setting, I speculate as to the types of regulatory schemes that would be either demanded or tolerated by her approach. In the final part of the essay, I suggest that the capabilities approach offers a powerful means of specifying the preconditions for women's exercise of autonomy within the liberal state but that it proves somewhat less useful as a guide to policy choices under conditions that fall far short of this ideal.

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## I. FEMINISM AND LIBERALISM

### A. Feminist Critiques

Liberalism's core idea is a simultaneous commitment to equal citizenship in the public realm and the accommodation of competing conceptions of the good in the private realm. Liberals surely disagree about precisely where the boundary between public and private should be drawn and about how robust our conceptions of freedom and equality must be in the public realm. But for a theory to be recognizable as "liberal," I suggest, this basic idea has got to be there. For example, John Rawls, in the introduction to *Political Liberalism*, states that "the problem of political liberalism is: How is it possible that there may exist over time a stable and just society of free and equal citizens profoundly divided by reasonable though incompatible religious, philosophical, and moral doctrines?"<sup>1</sup> Similarly, for Martha Nussbaum liberalism "must respect and promote the liberty of choice, and it must respect and promote the equal worth of persons as choosers."<sup>2</sup>

Feminist legal theorists, responding to liberalism, ask a different question: Can liberalism sustain a concept of equality that is sufficiently robust to eliminate women's subordination in both the public and private domains? Of course, feminists disagree on the answer.<sup>3</sup> Yet even feminist fans of liberalism concede that feminists have elaborated at least two key ideas that, at a minimum, call into question the usefulness of liberalism to

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<sup>1</sup> JOHN RAWLS, *POLITICAL LIBERALISM* xvii (1993).

<sup>2</sup> MARTHA C. NUSSBAUM, *SEX AND SOCIAL JUSTICE* 57 (1999) [hereinafter *NUSSBAUM, SEX AND SOCIAL JUSTICE*].

<sup>3</sup> Compare WENDY BROWN, *STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY* 142 (1995) (arguing that "liberalism is premised on and perpetuates a sexual division of labor, the actual powers of which are obscured by the terms of liberal discourse"), and CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 216 (1989) (articulating the inherent tension in liberal definitions of equality as sameness and gender as difference), and CAROLE PATEMAN, *THE SEXUAL CONTRACT* (1988) (arguing that the social contract upon which liberalism is premised is inextricably linked to the sexual contract of the patriarchal nuclear family), with Linda C. McClain, "Atomistic Man" Revisited: *Liberalism, Connection, and Feminist Jurisprudence*, 65 S. CAL. L. REV. 1171 (1992) (defending a liberal connection of autonomy against various feminist critiques), and NUSSBAUM, *SEX AND SOCIAL JUSTICE*, *supra* note 2, at 55–80 (critiquing the feminist critique of liberalism), and Susan Moller Okin, *Humanist Liberalism*, in *LIBERALISM AND THE MORAL LIFE* 39–53 (Nancy L. Rosenblum ed., 1989) (articulating a liberalism that might accommodate some of the concerns of feminist critics).

feminist objectives.<sup>4</sup> First, feminists have argued repeatedly and, to my mind, persuasively that private power is at least as significant a threat to women's freedom as is state power. Here, consider power as it is wielded within the patriarchal nuclear family or within broader community structures such as religious institutions. Second, feminists have argued that the centrality of choice to liberal conceptions of freedom is problematic in view of the implications of gender subordination to women's exercise of choice.<sup>5</sup> I shall describe each of these ideas briefly and then explore their implications for Nussbaum's conception of human capabilities as a means of articulating core political commitments.

First, with respect to the public/private distinction, feminists have argued that the exercise of private power threatens women's liberty and equality, regardless of whether it mimics the exercise of power by the state. Indeed, accepting provisionally the liberal distinction between public and private power, feminists have argued that the latter constitutes the principal threat to women's liberty and equality.<sup>6</sup> For example, some have claimed that international human rights standards forbidding torture but placing domestic violence outside the scope of international concern fail to address the central source of violent coercion in women's lives on a global scale.<sup>7</sup> The argument is not that the abusive husband acts under color of state law or to promote the interests of the state<sup>8</sup> but that a meaningful right to

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<sup>4</sup> See NUSSBAUM, *SEX AND SOCIAL JUSTICE*, *supra* note 2, at 55–80. Defending liberalism against feminist critiques, Nussbaum frames them somewhat differently than I do here, focusing primarily on feminist claims that liberalism is both too individualistic and to rational, paying too little attention to care and emotions. *Id.*

<sup>5</sup> On all this, see text accompanying notes 6–24, *infra*.

<sup>6</sup> Indeed, Catharine MacKinnon argues that private not state power serves as the foundation to women's inequality:

Unlike the ways in which men systematically enslave, violate, dehumanize, and exterminate other men, expressing political inequalities among men, men's forms of dominance over women have been accomplished socially as well as economically, prior to the operation of law, without express state acts, often in intimate contexts, as everyday life.

MACKINNON, *supra* note 3, at 161.

<sup>7</sup> See, e.g., Charlotte Bunch, *Transforming Human Rights from a Feminist Perspective*, in *WOMEN'S RIGHTS HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES* 11, 15 (Julie Peters & Andrea Wolper eds., 1995).

<sup>8</sup> However, private violence may function in these ways. See Catharine A. MacKinnon, *Crimes of War, Crimes of Peace*, in *ON HUMAN RIGHTS: THE OXFORD AMNESTY*

freedom, bodily integrity, and security for women must include effective remedies against private violence.<sup>9</sup> Feminists have made similar arguments in many other contexts, ranging from pornography's silencing of women's speech<sup>10</sup> to the regulatory effects of stranger-violence on women's lives.<sup>11</sup> Although women are surely protected in many respects by constraints on public power, these protections do not afford women the same degree of liberty and equality as men, nor do they address some of the most profound obstacles to equal citizenship for women.<sup>12</sup>

Second, feminists have done a lot of thinking about the way patriarchy creates gendered capacities for individual agency. Recognizing that the exercise of individual choice is always constrained by culture and context, feminists have argued that under conditions of gender inequality, assumptions about choice and responsibility are not politically neutral. This critique has at least two distinct but related strands. The first and earlier strand emphasizes women's position in various social relationships—women as providers of care.<sup>13</sup> According to this critique, liberal notions of

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LECTURES 83, 89 (Stephen Shute & Susan Hurley eds., 1993) (describing mass rape of Muslim and Croatian women by Serbian forces in the early 1990s). And, of course, placing emphasis on the regulatory effects of private violence is not meant to suggest that the state is not implicated in such violence. Feminists have long argued that the state is complicit in structuring the exercise of power in the private sphere in myriad ways. *See, e.g.*, Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J. L. REFORM 835 (1985).

<sup>9</sup> *See* Bunch, *supra* note 7, at 13–14 (arguing that states must be held accountable for sustaining conditions that enhance women's vulnerability to private violence).

<sup>10</sup> *See, e.g.*, CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 157–58 (1987) (noting that the Constitution's approach to free speech "tends to presuppose that whole segments of the population are not systematically silenced socially, prior to government action").

<sup>11</sup> *See, e.g.*, ROBIN WEST, *PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT* 58–65 (1994) (using the marital rape exemption to argue for an interpretation of equal protection as targeting the denial of the state's protection to some of its citizens from private violence, aggression, and wrongdoing).

<sup>12</sup> I have written about this subject in the context of women's equal citizenship and its implications for the exercise of judicial review. Tracy E. Higgins, *Democracy and Feminism*, 110 HARV. L. REV. 1657 (1997) (applying the argument about private violence to an analysis of equal citizenship for women).

<sup>13</sup> Much of this work was influenced by the enormously important early work of the feminist psychologist Carol Gilligan on the implications of gender for perceived differences in women's moral reasoning. *See* CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982) For examples of feminist legal theory, see Robin L. West, *The Difference in Women's Hedonic Lives: A*

autonomy posit an unrealistically unencumbered individual or “atomistic man.”<sup>14</sup> Beginning from this conception of liberal autonomy, some feminists have argued that liberalism undervalues care and connection and, as a result, is distinctly masculine in its orientation.<sup>15</sup> Others, Susan Moller Okin and Linda McClain, for example, have defended Rawlsian liberalism against such critiques, insisting that Rawls’s use of the heuristic device of the “veil of ignorance” compels the exercise of empathy in the original position.<sup>16</sup>

Yet their defense does not respond fully to a more important relational feminist claim: that, by positing the self as unencumbered or atomistic, liberalism treats the work of caring as a voluntarily-assumed, private activity<sup>17</sup> and, in so doing, renders it invisible.<sup>18</sup> This move, some feminists have argued, is convenient or even necessary for liberalism. As Wendy Brown explains, “the autonomous subject of liberalism requires a large population of nonautonomous subjects, a population that generates,

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*Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN’S L.J. 81 (1987) [hereinafter West, *Hedonic Lives*]; Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988) [hereinafter West, *Jurisprudence*].

<sup>14</sup> See generally West, *Hedonic Lives*, *supra* note 13; West, *Jurisprudence*, *supra* note 13.

<sup>15</sup> See, e.g., Seyla Benhabib, *The Generalized and the Concrete Other*, in FEMINISM AS CRITIQUE: ON THE POLITICS OF GENDER (Seyla Benhabib & Drucilla Cornell eds., 1987); West, *Hedonic Lives*, *supra* note 13.

<sup>16</sup> See Susan Moller Okin, *Reason and Feeling in Thinking About Justice*, 99 ETHICS 229, 238–39 (1989); McClain, *supra* note 3, at 1206–09.

<sup>17</sup> See ROBIN WEST, CARING FOR JUSTICE 83–84 (1997). West emphasizes the severe consequences of this assumption for women. She warns:

The many women and the occasional man who define themselves as not-selves suffer a decreased sense of personal autonomy, of independence, of individuation, and of integrity. There is no reason to celebrate these stunted selves whose very existence is dramatic evidence of massive societal injustice, by misconstruing the selflessness they exemplify as the virtue of compassion.

*Id.* at 83.

<sup>18</sup> As Okin herself points out, Rawls acknowledged reproductive work as socially necessary only very late in his career. See Susan Moller Okin, *Justice and Gender: An Unfinished Debate*, 72 FORDHAM L. REV. 1537, 1563 (2004); see also John Rawls, *The Idea of Public Reason Revisited*, in JOHN RAWLS: COLLECTED PAPERS (Samuel Freeman ed., 1999).

tends, and avows the bonds, relations, dependencies, and connections that sustain and nourish human life.”<sup>19</sup>

The second strand of the agency critique concerns itself less with the constraints of relationship—the bonds of family and emotional obligation—than with the more diffuse and subtle constraints of culture. This critique begins from the assumption that cultural norms, including language, law, custom, and morality, are not merely products of human will and action but define and limit the possibilities for human identity.<sup>20</sup> Feminists have argued that this social construction of identity is gender-differentiated, contributing to women’s subordination. Thus, feminist social constructionists are concerned not so much by the liberal preoccupation of state limits on individuals (implying external constraints), but by the way a combination of forces creates or defines gendered individuals (implying both internal and external constraints).<sup>21</sup> If women are socially constructed in ways that afford them less agency relative to men, then liberalism’s tendency to regard liberty as the absence of external constraints (or, even more narrowly, the absence of state-sponsored external constraints) leaves women less free than men in ways that are not legally cognizable.<sup>22</sup>

Although this concept of internalized, socially-defined constraints on women’s identity has long been a part of feminist theorizing,<sup>23</sup> feminist legal theorists in particular have focused on the question of freedom as it

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<sup>19</sup> BROWN, *supra* note 3, at 157.

<sup>20</sup> See, e.g., JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 5 (2d. ed. 1990) (emphasizing social construction of identity and arguing that “feminist critique ought also to understand how the category of ‘women,’ the subject of feminism, is produced and restrained by the very structures of power through which emancipation is sought”).

<sup>21</sup> See, e.g., Nancy J. Hirschmann, *Toward a Feminist Theory of Freedom*, 24 POL. THEORY 46, 52 (1996) (suggesting that patriarchal rules constitute “not only . . . what women are allowed to do but . . . what they are allowed to *be* as well: how women are able to think and conceive of themselves, what they can and should desire, what their preferences are”).

<sup>22</sup> See Higgins, *supra* note 12 (making a related argument that internal constraints must be taken into account in any adequate theory of women’s citizenship within a democracy).

<sup>23</sup> Even a liberal theorist like Mary Wollstonecraft recognized the significance of social constraints on gender roles. She wrote: “I will venture to affirm, that a girl, whose spirits have not been damped by inactivity, or innocence tainted by false shame, will always be a romp, and the doll will never excite attention unless confinement allows her no alternative.” MARY WOLLSTONECRAFT, *VINDICATION OF THE RIGHTS OF WOMAN* 129 (Miriam Brody Kramnick ed., Penguin Books 1982) (1792).

relates to choice or voluntariness. For example, Kathryn Abrams has developed a theory of partial agency in the context of women's sexuality that has important implications for any definition of decisional autonomy.<sup>24</sup> Abrams argues for a feminist conception of the self that "juxtaposes women's capacity for self-direction and resistance, on the one hand, with often-internalized patriarchal constraint, on the other."<sup>25</sup> Abrams suggests that premising legal analysis of private choice on this model of individual agency would lead to better interpretations of women's sexual decision making—for example, identifying coercion and consent in rape cases.<sup>26</sup> Adopting her approach, however, would also have implications for the boundary between public and private because it entails scrutiny of the circumstances and internal motivations of private choices ordinarily shielded from view and invites a second-guessing of those choices that would narrow the scope of women's decisional privacy as traditionally defined. In short, the agency critique renders problematic reliance on the concept of individual choice as a boundary for state regulation of the private sphere.

## B. Nussbaum's Response to Feminist Critiques

Professor Nussbaum responds to these feminist critiques of liberalism in several ways. First, she notes that the claim that liberalism is too "individualistic" disregards the importance that many liberal thinkers assign to family and community.<sup>27</sup> At the same time, she concedes that liberals do indeed regard the individual (not the family or the state) as the primary unit for political thought.<sup>28</sup> She suggests that this should be an appealing idea for feminists, and notes that "when we reflect that a large number of the world's women inhabit traditions that value women primarily for the care they give to others rather than as ends, we have all the more reason to insist that liberal individualism is good for women."<sup>29</sup> Yet the feminist critique of liberalism can also be understood not as a rejection of

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<sup>24</sup> Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304 (1995).

<sup>25</sup> *Id.* at 346.

<sup>26</sup> *See id.* at 361–62.

<sup>27</sup> NUSSBAUM, *SEX AND SOCIAL JUSTICE*, *supra* note 2, at 61–62.

<sup>28</sup> *Id.* at 62.

<sup>29</sup> *Id.* at 63.

individualism as a normative commitment but rather as a challenge to it as a descriptive claim. In other words, to the extent that women in fact function less autonomously than men because of their greater connection to family and especially to children, liberalism's protection of individual autonomy primarily through the guarantee of negative liberties is less effective for women than it is for men.

Professor Nussbaum concedes that this criticism may be valid but suggests that it should be understood not as a critique of liberal individualism, but rather as an argument that, with respect to the family, liberalism has not been individualistic enough.<sup>30</sup> In her view, liberal thinkers can be rightly accused of paying too little attention to inequality within the family. She notes: "Liberal thinkers tended to segment the private from the public sphere, considering the public sphere to be the sphere of individual rights and contractual arrangements, the family to be a private sphere of love and comfort into which the state should not meddle."<sup>31</sup> In the interest of preserving private choice, Nussbaum concedes that "too few questions were asked about whose choices were thereby protected."<sup>32</sup> She therefore rejects liberal insulation of the family from state regulation, seeing the family instead as a creature of state power and thus fully open to criticism where it falls short as measured against her social justice norms.<sup>33</sup>

Professor Nussbaum also takes seriously feminist arguments that socially constructed preferences are shaped by and reinforce gender subordination, calling into question liberal definitions of freedom as the individual realization of such preferences. Indeed, her capabilities approach responds both to welfarist economic theory and related political conceptions of autonomy by simultaneously offering an alternative means of measuring human well-being and defining the pre-conditions for meaningful autonomy. Put succinctly, Professor Nussbaum's approach asks not how satisfied we are but rather what are we able to do and be? Or, as she explains, "We ask not only about the person's satisfaction with what she does, but about what she does, and what she is in a position to do (what her

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> NUSSBAUM, SEX AND SOCIAL JUSTICE, *supra* note 2, at 64.

<sup>33</sup> See MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT 241–97 (2000) [hereinafter NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT] (discussing the role of the family).



opportunities and liberties are),”<sup>34</sup> as measured against a robust list of human capabilities.<sup>35</sup> This move is critical to questions of gender equality because, as Professor Nussbaum and others have shown, women may report satisfaction with their condition even though they are demonstrably materially, socially, and politically worse off than men, simply because they are habituated to accept their status.<sup>36</sup> This is an appealing approach for feminists concerned about internalized constraint because it takes into account not simply the problem of distorted preferences but also the ways in which gender characterizes the distortions.

Although Professor Nussbaum takes preferences neither as fixed nor as ultimately determinative of human well-being, autonomy and choice are nevertheless central to her conception of justice.<sup>37</sup> Normative though they are, capabilities are really *possibilities*, not requirements, and Nussbaum emphasizes the distinction between capabilities and functioning.<sup>38</sup> She warns, “[I]f we were to take functioning itself as the goal of public policy, pushing citizens into functioning in a single determinate manner, the liberal pluralist would rightly judge that we were precluding many choices that citizens may make in accordance with their own conceptions of the good.”<sup>39</sup> She adds, “The reason for proceeding in this way is, quite simply, the respect we have for people and their choices.”<sup>40</sup>

But how can we determine whether an individual’s choice to eschew a certain form of human functioning is freely made? Under what circumstances are we obliged to respect that choice? One of the things I like most about Professor Nussbaum’s work in this area is that she takes this question very seriously. She acknowledges, “It will not always be easy to say at what point someone is really capable of making a choice, especially when there are traditional obstacles to functioning.”<sup>41</sup> She adds that, in

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<sup>34</sup> *Id.* at 71.

<sup>35</sup> For Nussbaum’s list, see *id.* at 78–80.

<sup>36</sup> See *id.* at 119–47 (critiquing the concept of preference as a basis for measuring human well-being).

<sup>37</sup> See *id.* at 86–96 (discussing the distinction between functioning and capability).

<sup>38</sup> *Id.* at 86–87.

<sup>39</sup> *Id.* at 87.

<sup>40</sup> *Id.* at 88.

<sup>41</sup> See NUSSBAUM, SEX AND SOCIAL JUSTICE, *supra* note 2, at 49.

some cases, “our best strategy may well be to look at actual functioning and infer negative capability (tentatively) from its absence.”<sup>42</sup> Indeed, she concedes that “[i]f we judge that persistent inequalities or hierarchies may have created emotional barriers to full participation, we may be justified in using special incentives to encourage functioning,”<sup>43</sup> though she thinks these situations will be rare.

Professor Nussbaum thus helps us to address the question: What conditions must obtain in women’s lives before women’s choices should be regarded as binding, as entitled to respect under law? For her, the set of preconditions is quite robust. It includes the existence of available alternatives, education about those alternatives, and the absence of coercive social norms that would preclude formally available nontraditional choices. As Nussbaum explains, “[T]he capability view insists that choice is not pure spontaneity, flourishing independently of material and social conditions. If one cares about autonomy, then one must care about the rest of the form of life that supports it and the material conditions that enable one to live that form of life.”<sup>44</sup>

At this point, I will confess that Professor Nussbaum’s work goes further toward convincing me of the compatibility of feminism and (at least some forms of) liberalism than does the work of almost any other theorist to have addressed this set of questions. If liberalism is capacious enough to contain Nussbaum’s theory, it may be a comfortable place for me as well, (though one might ask, somewhat tendentiously, whether we are still recognizably in the domain of liberalism). The more important question I have, though, and the one to which I will devote the balance of this essay, is what policy guidance does Nussbaum’s work give us in a world in which women’s capabilities fall far short of her ideal?

## II. APPLYING THE THEORY

Like Professor Nussbaum, I have now spent a considerable amount of time talking with women in the developing world, mostly in Africa, about the conditions of their lives.<sup>45</sup> In the course of this work, I have tried

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<sup>42</sup> *Id.* at 49.

<sup>43</sup> See NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT, *supra* note 33, at 93.

<sup>44</sup> See NUSSBAUM, SEX AND SOCIAL JUSTICE, *supra* note 2, at 50.

<sup>45</sup> I have conducted field work on issues of gender and family in Ghana, Kenya, South Africa, and Malawi. I have also interviewed women informally on these issues in Tanzania, Senegal, Rwanda, and Botswana.

to understand how the constraints of poverty, a lack of education, and patriarchal family structures inform women's decision-making about their lives and the lives of their children.<sup>46</sup> As an outsider (living within her own constraints, to be sure), I have come to accept that certain things about these women's lives are and will remain opaque and impenetrable. At the same time, I have also learned from this experience, and from Nussbaum, that certain aspects of their condition may be more evident to me than to the women themselves precisely because I am an outsider.

One thing that is clear to me is that women everywhere are pragmatic. To be sure, they want more resources, more power and more control over their lives. But, at the same time, they are realistic about their circumstances and wary of change that might unsettle the existence they have negotiated for themselves given the conditions under which they live. Their choices, then, must be understood within the particular social context in which they are made. Moreover, social policy and legal norms must be fashioned in a way that accounts simultaneously for existing constraints and for aspirations for gender justice. Nussbaum's capabilities approach gives us a powerful way of defining these aspirations, though I have found it a less clear guide to the formation of policy in a world in which gender justice is far from a reality.

Let me illustrate with two examples. In many regions of sub-Saharan Africa, customary law and social practices create complex pressures and incentives for women confronted with domestic violence. In the patrilineal and patrilocal communities with which I have worked, the spouses reside in the husband's community and the children are regarded as part of their father's family line.<sup>47</sup> This arrangement increases a woman's vulnerability to violence in a number of ways. First, all married women in the community are outsiders in that they are not a part of the bloodline and are therefore marginalized to some degree.<sup>48</sup> Yet, the first source from

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<sup>46</sup> See Jeanmarie Fenrich & Tracy E. Higgins, *Promise Unfulfilled: Law, Culture, and Women's Inheritance Rights in Ghana*, 25 FORDHAM INT'L L.J. 259 (2001); Mehlika Hoodboy, Martin Flaherty, & Tracy E. Higgins, *Exporting Despair: The Human Rights Implications of Restriction on U.S. Health Care Funding in Kenya*, 29 FORDHAM INT'L L.J. 1 (2005); Tracy E. Higgins, Jeanmarie Fenrich, & Ziona Tanzer, *Gender Equality and Customary Marriage: Bargaining in the Shadow of Post-Apartheid Legal Pluralism*, 30 FORDHAM INT'L L.J. 1653 (2007); Chi Mgbako, Jeanmarie Fenrich, & Tracy E. Higgins, *And We Will Still Live: Confronting Stigma and Discrimination Against Women Living with HIV/AIDS in Malawi*, 31 FORDHAM INT'L L.J. 528 (2008).

<sup>47</sup> See TW BENNETT, CUSTOMARY LAW IN SOUTH AFRICA 308–09 (2004) (describing the patrilineal family and the affiliation of children with the husband's lineage).

<sup>48</sup> *Id.*

which a woman is expected to seek help in the event of violence is her husband's family.<sup>49</sup> Second, although she may find some measure of security with his family,<sup>50</sup> if she chooses to leave his community, she must leave her children and much of her property.<sup>51</sup> To complicate matters further, even if she is willing to leave under these terms, her own family may not welcome her back because they may be forced to return the *lobolo*, or bridewealth, something they may be unwilling or unable to do.<sup>52</sup>

In these communities, therefore, customary family structures operate to disempower women economically, socially, and politically in ways that are far-reaching, deeply-rooted, and complex. In cases of domestic violence, these social structures create tremendous pressure for women either to resolve matters within the family or to endure the abuse.<sup>53</sup> Under such circumstances, women will not necessarily be able or even willing to invoke available remedies for domestic violence. Thus, in our interviews with NGOs working on domestic violence in South Africa and with police charged with responding to such complaints, we learned that

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<sup>49</sup> See *id.* at 250.

<sup>50</sup> One traditional leader, Chief Ngangomhlaba Mathanzima, the Head Chief of the House of Traditional Leaders in Bisho, Eastern Cape, explained that the extended family will discuss the matter and often recognize the problems. He suggested that the suspicion is often on the man, who is encouraged to move out and leave the woman to care for the home and children. Interview with Ngangomhlaba Mathanzima, Head Chief, House of Traditional Leaders, in Bisho, S. Afr. (May 24, 2006) (notes on file with author).

<sup>51</sup> This is generally the case unless the children are very young. If so, she may leave with them, but must return them when they reach an appropriate age. For example, the Subheadman of the Xhosa village of Ngcengane in the Eastern Cape, M. Similo, explained to us that, if a woman leaves, she must leave the children with the man's family. If they are very young, she may take them but must return them when they are older. Interview with M. Similo, Subheadman, in Ngcengang, S. Afr. (May 26, 2006) (notes on file with author) [hereinafter Similo Interview]. See also BENNETT, *supra* note 47, at 285 (noting that "parental rights are determined by payment of lobolo [bridewealth]").

<sup>52</sup> For example, in Ngcengane, Subheadman M. Similo explained the process for the dissolution of marriage. He insisted that there was no divorce in his court. Rather, when the woman decides to leave the man, the family of the woman must retrieve her. She then stands naked outside the *kraal* of her family, where the cattle are kept, and must drive the cattle from the *kraal* to return the *lobolo*. Similo Interview, *supra* note 51.

<sup>53</sup> One of the members of the House of Traditional Leaders in Bisho, Eastern Cape, explained to us that customary law is conciliatory. Even in the case of domestic violence, the family will be brought together to settle the dispute. Interview with Nkosi T. Magadla, Chief, House of Traditional Leaders, in Bisho, S. Afr. (May 24, 2006) (notes on file with author).

incidents are reported formally only in the most severe cases.<sup>54</sup> The state's legal mechanism for responding to domestic violence is rarely invoked, even when an initial report is made.<sup>55</sup> Women themselves reported that they will not consider going to the police "unless there is blood."<sup>56</sup> Even then, women will typically attempt to resolve the issue within the family whenever possible.

I am not, of course, suggesting that women are not eager to be free from domestic violence. On the contrary, safety is a critical issue for African women, as it is for women everywhere. At the same time, women do become habituated to violence, seeing it as a husband's prerogative to discipline his wife.<sup>57</sup> Rather, the issue I am raising is some women's apparent "preference" for traditional means of addressing the problem, such as a preference for family mediation rather than police intervention or even shelters.

Fashioning appropriate policy responses to domestic violence therefore requires an understanding of the complex structure of patriarchy in a given culture, including issues of educational inequality, economic dependence, gendered religious and cultural norms, and hierarchical family structures. It is never simply a matter of legal reform. Indeed, in the communities with whom we worked, adding a civil cause of action to existing remedies is not likely significantly to improve the situation of women facing abuse.

If women themselves decline to utilize existing remedies (or even resist state intervention in the family or community), what then is the appropriate policy response? Further investigation sometimes reveals obstacles that have nothing to do with culture or with choice: hostility or insensitivity on the part of police, the necessity (real or perceived) of paying

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<sup>54</sup> See Interview with N.P. Ngum, Captain, in Coffee Bay, Eastern Cape, S. Afr. (May 27, 2006) (notes on file with author) (explaining that most cases of domestic violence are not reported and, if they are reported, charges are not pursued by the accuser).

<sup>55</sup> See *id.* (noting that occasionally an order of protection is sought, but the victim almost never pursues the case, and the man is almost never prosecuted).

<sup>56</sup> See Interview with Anonymous, Member of ANC Women's League, in Makhado, S. Afr. (May 26, 2006) (explaining that "if he beats me too much and there's blood, I go straight to the police").

<sup>57</sup> For example, Lungiswa Mamela, a woman working at the Women's Centre in Khyelitsha, explained that women must simply endure the abuse. Indeed, women are taught to expect a certain level of abuse as a condition of marriage. Interview with Lungiswa Mamela, Women's Centre, in Khyelitsha, Cape Town, S. Afr. (May 28, 2006) [hereinafter Mamela Interview].

bribes, the lack of the minimum resources necessary to access support services, etc.<sup>58</sup> Yet, even assuming these obstacles can be overcome, Professor Nussbaum's capabilities approach presses us to consider the impact that women's subordination has, not just on the scope of available alternatives, but also on women's willingness to take advantage of those alternatives. From a justice perspective, we cannot be satisfied with removing external obstacles and noting that, if women choose not to access available remedies, their decision to rely on traditional means must be respected. That choice is meaningful *only* if women in fact are fully free to choose from a range of alternatives, including exit from the community.

What the capabilities approach does less well, I think, is guide us as to what to do in the meantime. Until we can be confident that women experience themselves as having meaningful alternatives in this context, how do we respond to the problem of domestic violence? Some policy choices are easier than others. For example, educational efforts aimed at local leaders may be somewhat effective in curtailing domestic violence and would not seem to entail much of a trade-off between liberty and equality. Though state efforts to persuade local communities to promote gender equality by voluntarily reorganizing traditional structures would, for some liberals, (though not, I think, for Professor Nussbaum), violate liberal neutrality toward competing conceptions of the good.<sup>59</sup> The state might be even more aggressive, for example, by imposing civil liability on local leaders for failure to refer domestic violence cases to the police or by implementing mandatory arrest policies. The state might also alter the terms of the underlying family structure, redefining child custody norms to ensure that a woman fleeing domestic violence need not choose between her safety and her children. Law reform efforts might also target the issue of *lobolo*, providing that in cases of spousal abuse, it need not be returned.<sup>60</sup>

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<sup>58</sup> See, e.g., Mamela Interview, *supra* note 57 (noting that women are told by police, "Do you know what this will do to your marriage? We can give you the interdict but where would you go? Look you have small children."); see also Interview with Linki Maremana, in Ga-Matlala, South Africa (May 24, 2006) (The interviewee explains that "in domestic violence cases if a woman goes to the chief, the first question is 'where are you contributing to the headman or chief'? If no contribution, then they won't listen to your case.").

<sup>59</sup> See NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT, *supra* note 33, at 281 (expressing doubt about whether Rawls's commitment to neutrality regarding competing conceptions of the good would permit government support for women's collectives).

<sup>60</sup> See BENNETT, *supra* note 47, at 277-78 (describing conditions under which *lobolo* need not be returned upon dissolution of marriage); Interview with Sibongile Ndashe, Women's Legal Centre, in Cape Town, S. Afr. (May 28, 2006) (notes on file with author).

These reform efforts, however, intrude substantially into the domain of the traditional family structure and potentially alter the way that structure functions to organize the social, political, and even spiritual life of the community. Many South Africans, men and women, would resist such intrusions; indeed, many see customary family structures as a source of authentic African identity in the face of colonial oppression and in the wake of apartheid.<sup>61</sup> Moreover, it is at least possible that, in the short or even medium term, destabilizing traditional family structures would increase rather than decrease women's vulnerability to domestic violence.<sup>62</sup> Thus, we are left with the following question: In the face of resistance or indifference, including from women, how aggressive should state policy be in re-shaping family relations judged to disempower women? Moreover, how far must the state go toward restructuring traditional communities in the name of gender equality before we must respect women's choice to remain located within such communities?

### III. TAKING CHOICE SERIOUSLY

In the example of domestic violence, women's preferences are inferred from their actions. Remedies are available, at least in theory. If women do not make use of them, we either assume they prefer alternative means of addressing the problem, or that obstacles remain such that the

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(describing a case involving a king where domestic violence is being raised as a defense to the return of *lobolo* after the dissolution of marriage) [hereinafter Ndashe Interview].

<sup>61</sup> With respect to *lobolo*, or bridewealth, Bennett writes: "As an institution, *lobolo* is central to the African conception of marriage." BENNETT, *supra* note 47, at 220. Bennett describes *lobolo*'s durability, "whatever its social, economic and political functions," noting that it "has survived major transformations in the economy and society, not to mention the determined onslaught of missionaries, colonial governments and the courts," although it has changed "in form, composition, and function." *Id.* at 223 (citations omitted). "Whatever its social and economic disadvantages, however, very few people would be prepared to support" its abolition, as "[i]ts symbolic functions remain a powerful force" and "[e]qually important, today, is its function to mark marriages as distinctively African." *Id.* at 224 (citations omitted).

<sup>62</sup> A male interviewee in one rural community expressly linked an increase in family violence to the constitutional changes in South Africa. He explained, "It started in 1994, after the new government took over. Women have rights, children have rights, but men do not have rights. The transformation of this government is the one that has made [domestic violence] become worse. The government tried to remove them from their existing culture and introduce them to new systems of life. After the rights were given to women and children, this is when women started to disrespect the men." See Interview with Ngcengane Community, in Eastern Cape, S. Afr. (May 26, 2006) (notes on file with author).

remedies ought not be regarded as available in a meaningful sense. In other contexts, it may be possible to structure law reform efforts more explicitly around the goal of ensuring that autonomous choices are made. If law can ensure a better process for informed decision-making, individual choices in favor of hierarchy over equality can be respected and given legal force without undermining a commitment to equal citizenship in the public domain—or so the theory goes.

Another example from South Africa illustrates the difficulties with this approach. The South African Constitution to some degree sets up a conflict between equality and tradition by giving both protected status. For example, Section 30 provides: “Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.”<sup>63</sup> Section 31 adds: “Persons belonging to a cultural, religious, or linguistic community may not be denied the right, with other members of that community (a) to enjoy their culture, practice their religion and use their language. . . .”<sup>64</sup> Subsection (2) limits this right by requiring that such rights “may not be exercised in a manner inconsistent with any provision of the Bill of Rights”;<sup>65</sup> however, the degree to which private ordering within a community implicates the Bill of Rights is unclear.<sup>66</sup> Finally, to complicate matters further, Section 211(3) states that “[t]he courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.”<sup>67</sup>

The statutory and common law regulating the family in South Africa (both legacies of colonialism) are informed by liberal individualism as described above. Within certain bounds, individuals are imagined as able contractually to define what the family relationship might look like as it pertains to obligations between spouses, the economic consequences of the

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<sup>63</sup> S. AFR. CONST. 1996 § 30.

<sup>64</sup> S. AFR. CONST. 1996 § 30(1).

<sup>65</sup> The extent to which the Bill of Rights applies directly to relations between private citizens is a subject of some dispute. *See, e.g.,* *Du Plessis & Others v. De Klerk & Another*, 1996 (3) SA 850 (CC) (S. Afr.) (interpreting the interim constitution and denying “horizontal” application). Nevertheless, section 9, the provision on discrimination clearly demands “horizontal” application and prohibits unfair discrimination on the basis of gender, age or sex by one person against another person. *See* S. AFR. CONST. 1996 § 9.

<sup>66</sup> S. AFR. CONST. 1996 § 211.

<sup>67</sup> S. AFR. CONST. 1996, §§ 30, 31, 211.



marital relationship (through the use of prenuptial agreements), and inheritance (making a will rather than relying on the rules of intestate succession). Although originally characterized by gender inequality, common law norms have been subject to statutory reforms equalizing the status of men and women in marriage, divorce, custody, and inheritance.<sup>68</sup>

In contrast, in the domain of customary law, the family is constructed very differently. If the family is considered one of the building blocks of society in the West, this is even more profoundly the case in traditional African communities. We might say that the family itself gives rise to legal and political power and that these are a product of kinship ties, not the reverse.<sup>69</sup> For example, the creation of nuclear families is not seen primarily as the union of two individuals, but rather as the linking of two families or clans.<sup>70</sup> Cattle and land are at stake as well as the lineage. In this

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<sup>68</sup> See SA Law Commission Project 15, *The Matrimonial Property Law with Special Reference to the Matrimonial Affairs Act, 1953, the Status of the Married Woman, and the Law of Succession in so far as it affects the Spouses* (1982) (describing changes to rectify gender inequality in laws of marriages but exempting customary marriage).

<sup>69</sup> See BENNETT, *supra* note 47, at 294–95. Describing differences in African and Western conceptions of the family, Bennett writes: “The common law and customary law hold widely differing views as to when legal personality begins and ends. The common law is prepared to attribute rights to a child, even unborn, whereas customary law would consider survival at birth a minimum condition. On the question of death, the positions are reversed. According to the common law, physical death marks the termination of personality, whereas in customary law death is not an instant event that is measured physically.” *Id.*

Bennett adds:

Although customary law is not insensitive to the vulnerability of children, they are not chosen for preferential treatment, as is the case in Western legal systems. Rather, customary law realistically appreciates that their welfare is inseparable from that of their families. It follows that, in the short term, children may be required to sacrifice their interests for what, in the long term, will be the common good. . . . Whenever social life depends on mutual support and sharing, the risk of conflict between the individual and the group is minimized by underplaying individual interests.

*Id.* at 295–96 (citations omitted). A system of succession, for example, has as one of its functions “to preserve the purity of a family’s bloodline. Thus, children who are biologically related to a deceased are preferred to those whose relationship is only social or legal.” *Id.* at 315 (citations omitted).

<sup>70</sup> See *id.* at 217. Bennett explains that “[c]ustomary marriage is not completed by the performance of a single act nor does it need the approval of a public authority. Instead, it can best be described as a (potentially lengthy) process that affects only the spouses and their families . . . [for the Tswana], this process begins with a series of meetings between two

sense, family formation is a political and legal act that has potentially broad implications. The particulars of this act are therefore not understood as properly under the control of the individuals who form the marital couple, but rather under the control of the extended family and community.<sup>71</sup> Moreover, both generational and gender hierarchy characterize the idealized family under customary law, with parents and other elders exercising considerable control over younger family members and men exercising control over women.<sup>72</sup>

These two systems, the common law and the customary law, can coexist within a constitutional regime premised on equality only by “civilizing” customary law through the liberal palliative of individual choice. In other words, insofar as the family is regarded by the dominant liberal-legal culture as a domain that can (and should) be organized privately, customary family structures can be treated as legitimate (from a constitutional standpoint) if voluntarily entered. If individuals choose to embrace customary law within the privacy of the family, the argument goes, the patriarchal character of that law does not create a problem for public norms of equality.

This compromise is evident in South Africa’s Recognition of Customary Marriages Act (“RCMA”), legislation intended to incorporate customary marriages into the formal regulatory sphere of family law.<sup>73</sup> By

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families at which they negotiate terms. . . . Go-betweens and family elders are always available to testify to the celebration of a marriage, and the status of the union will be a matter of general repute, since members of the community have witnessed the negotiations, the wedding ceremony and the delivery of lobolo.” *Id.* (citations omitted).

<sup>71</sup> *See id.*, at 180–81. Bennett notes that “the vertical extension of the nuclear family, in the form of eponymous, patrilineal clans, is still prevalent today. Currently, however, these units serve few functions, apart from determining a permissible range of marriage partners. Clans normally segment into more manageable units-lineages-which are generally four to six generations deep.” *Id.* (citations omitted).

<sup>72</sup> *Id.* at 248. (“The term ‘patriarchy’ signifies the authority and the range of special rights and privileges enjoyed by senior males. By implication, all women, as well as junior men, are subordinate. Patriarchal societies are remarkably common, and, in precolonial times, they were present in all parts of southern Africa.”).

<sup>73</sup> Recognition of Customary Marriages Act 120 of 1998. The Act responds to the longstanding refusal of colonial and apartheid regimes to recognize fully marriages celebrated under African customary law. To this end, the Act recognizes two types of customary marriages: those valid under customary law and existing prior to passage of the RCMA, and those entered into subsequent to the passage of the RCMA that comply with the Act’s requirements. *See* Recognition of Customary Marriages Act 120 of 1998, § 2(1)–(2). The Act also explicitly recognizes polygamous customary marriages, and does not subject customary matrimonial law to a repugnancy clause. *Id.* at § 2(3)–(4).

expanding recognition of customary marriages, the RCMA improved the status of women in these marriages by allowing married women and widows to protect their legal rights and ensure that their spouses and in-laws meet their legal obligations. Yet the Act also grants legal sanction to an institution that is highly patriarchal, not least because these marriages are all potentially polygynous and many actually so.<sup>74</sup> The RCMA attempts to mitigate this problem by ensuring that the participants enter the marriage by choice and, to a lesser degree, by regulating the institution directly to make it somewhat more egalitarian. For example, the Act makes the consent of the parties themselves (as opposed to their families) a necessary element of customary marriage.<sup>75</sup> Additionally, the statute establishes a minimum age requirement for the parties to marry, though, with the parents' consent, the minimum age can be waived.<sup>76</sup> The statute also alters, formally at least, the terms upon which the individuals may exit the marriage by providing for dissolution of customary marriages on the same terms as civil marriages, including "irretrievable breakdown" or "no-fault."<sup>77</sup>

Where custom operates most comprehensively, it also defines status and relationships within the broader family and community, including governance structures and informal procedures for the allocation of land, for the determination of inheritance rights, and for dispute resolution more broadly.<sup>78</sup> Choosing between customary marriage and civil marriage is therefore not simply a matter of choosing the set of legal obligations that attach to the marital relationship. Rather, opting out of customary marriage means exiting the larger social system that is comprehensively structured by

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<sup>74</sup> Recognition of Customary Marriages Act 120 of 1998, § 3(1)(a)(ii).

<sup>75</sup> *Id.* Importantly, though, the Act does not require the consent of a first wife to the husband's decision marry other wives. The Act requires notice to existing wives and the partition of marital property, but not consent.

<sup>76</sup> *Id.* at § 3(3)(a).

<sup>77</sup> *Id.* at § 8(1)–(2).

<sup>78</sup> See BENNETT, *supra* note 47, at 164, explaining

The absence of fully centralized state structures in most precolonial African societies meant that courts could not force litigants to accept the win-or-lose decisions associated with adjudication. Instead, the courts tended to mediate or arbitrate, thereby seeking to reconcile the disputing parties in a compromise of interests. Rules were not essential for this type of settlement.

*Id.* (citations omitted).

customary law. Indeed, whatever the formal requirements of the RCMA, the decision to enter customary marriage often does not rest with the individuals themselves.<sup>79</sup> Rather, male members of the two families negotiate the terms of the marriage, sometimes without the knowledge of the individuals involved.<sup>80</sup> The transaction is in part an economic one, with significant bridewealth or *lobolo* paid by the groom's family to the bride's family.<sup>81</sup> In return, the groom's family secures the labor of the wife as part of their community and in support of their household.<sup>82</sup> Conflicts within marriage are mediated within the larger family and the community with an emphasis on reconciliation.<sup>83</sup> If the wife leaves her husband, she must leave the community, including her children (who, in patrilineal societies, are regarded as part of the father's family), and her own family may be compelled to return the *lobolo* payment.<sup>84</sup>

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<sup>79</sup> See *id.* Bennett notes, "A father's control over the marriages of his children is synonymous with the African cultural tradition. Hence, in the official version of customary law, the consent of a father, especially the bride's father, is regarded as an essential ingredient of a valid marriage." *Id.* at 204 (emphasis added).

<sup>80</sup> See *id.* Bennett notes that "[t]raditionally, customary law treated marriage as an agreement between families, to be negotiated by senior males and sealed by payment of *lobolo*. Strictly speaking, the consent of the spouses, especially the bride, was irrelevant." *Id.* at 199, 204 (citations omitted).

<sup>81</sup> A "typical contemporary explanation for the practice" involves compensating the loss of a daughter which in large part includes "the expenditure on her upbringing and education" to the bride's family. *Id.* at 224. Nevertheless, it also reflects an economic transaction between the families that constrains entry into marriage as well as the terms of the marriage itself.

<sup>82</sup> See *Id.* at 213. According to all the systems of customary law in South Africa, marriage is patri- or virilocal. In other words, a bride is expected to live with her husband, either at his own or his father's homestead.

<sup>83</sup> We heard this repeatedly in our interviews with women and traditional leaders throughout South Africa. Almost universally we heard that first the family attempted to resolve the issue, then it might be taken before traditional leaders. Police or magistrates courts would become involved only in extreme cases.

<sup>84</sup> See BENNETT, *supra* note 47, at 277. Bennett continues:

Although the full amount is seldom given back, return of at least some is an important token of dissolution of the marriage. To this end, the husband could demand the same cattle that he had originally given. Depending on the extent to which the parties had fulfilled their marital obligations, however, the wife's guardian may retain a certain portion. The first criterion for determining how much might be retained is related to the main purpose of marriage: procreation. Thus, a guardian is entitled

Under these circumstances, regarding an individual's decision to enter and remain in a customary marriage as signifying an expression of individual autonomy seems deeply problematic. Of course, this point is not lost on women in South Africa, particularly women who are in the vanguard of women's rights. For example, Sibongile Ndashe of the Women's Legal Centre in Cape Town observes:

To say because I belong to a particular group, that [I] have agreed not to have certain fundamental rights applicable to [me] is wrong. I find myself in this situation that I was born into, that I married into. People need to be able to get out when they wish to. Women are given one job, one choice. If they can articulate [their choice], 'I like being here, I'm more comfortable here,' okay. My problem is that everyone who is similarly situated should be able to leave it. That is the promise of the constitution. If that is your respect, your dignity, your choice at an individual level, fine, but the broader constitution is promising you can remove yourself.<sup>85</sup>

Here, Ms. Ndashe speaks the language of liberalism—individual choice and self-determination are essential components of freedom. Indeed, she acknowledges that this may sometimes entail respecting the choices of women to remain in hierarchical relationships in the name of tradition or cultural authenticity. Yet, Ndashe qualifies the point in the same way that Nussbaum does: Women's choices should be respected, but only if those choices are meaningful.

The RCMA fails in this regard. It recognizes—and constitutionally rationalizes—customary marriages despite their patriarchal structure by building into the statute rather weak procedural guarantees of consent. The statute leaves in place all of the social and economic constraints on women's actual choices. At the same time, women are not necessarily made better off by a state's refusal to recognize customary marriage. If prior to the passage of the RCMA, women were left without a way to enforce even the meager protections of customary marriage in the case of widowhood or divorce, perhaps the RCMA is better than nothing. The danger, of course, is that the half step helps to reify the traditional power structure by sanitizing

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to keep one head of cattle for every child born by his daughter. This rule holds good even for miscarriages, and even for children fathered by men other than the husband.

*Id.* at 277 n.103 (citations omitted).

<sup>85</sup> Ndashe interview, *supra* note 60.

it in constitutional terms. The compromise then relieves political pressure for more radical change.

The better idea, of course, would be to ensure meaningful choice for women at the time they enter marriage. Yet, even if one could figure out how to accomplish this, the result might be such a thorough transformation of traditional families and communities that there would be no customary arrangement left to choose. I am not uncomfortable with this result, and perhaps neither is Professor Nussbaum, but I suspect many liberals would be.

#### IV. CONCLUSION

At the end of the day, I sympathize with the need to expand the scope of women's choices and control over their lives and resources, even, as Ndashe eloquently reminds us, while honoring those choices with which I might disagree. At the same time, I worry about the ease with which liberal regimes (even very progressive ones) rely on the formal mechanism of individual choice as a means of rationalizing traditional systems with legal and constitutional commitments to gender equality.

However difficult we find the equality/autonomy dilemma at the level of policy, Professor Nussbaum always reminds us to keep in mind women's capacity to alter their life plans and to remake their aspirations as circumstances change. Ms. Ndashe similarly expressed this insight in the interview previously quoted. She recalled, "Women walked around [Jacob] Zuma's trial with signs saying 'No Women Presidents.'<sup>86</sup> Wondering why, she observed:

When you're ready to remove yourself that is the ideal. [But] they need the certainty that something else will be able to protect them. Is equality going to put food on my table? That's the power of the mind—all sorts of factors collude. The social and the cultural are more compelling than the economic and constitutional. This must be understood. They collude to put women in a space that is not comfortable.<sup>87</sup>

Finally, Ms. Ndashe notes that, although these women must be understood and respected as they are, their opportunities must always be preserved: "It is very important that they always be given the chance to say

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<sup>86</sup> Ndashe interview, *supra* note 60.

<sup>87</sup> *Id.*

this does not work for me. Those women with the signs at Zuma's trial can come back next month and be a candidate for presidency."<sup>88</sup>

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<sup>88</sup> *Id.*

