

## UNSEX CEDAW? NO! SUPER-SEX IT!

**BERTA ESPERANZA HERNÁNDEZ-TRUYOL\***

Injustice and discrimination against women persists everywhere.<sup>1</sup>

In no society do women enjoy the same opportunities as men.<sup>2</sup>

Unemployment hits poor families hard, regardless of whether it is a man or a woman who is laid off. . . . [But] women's lower employment rates, weaker control over property and resources, concentration in informal and vulnerable forms of employment with lower earnings, and less social protection, all place women in a weaker position than men to weather crises.<sup>3</sup>

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

---

\* Levin, Mabic & Levin Professor of Law, University of Florida Levin College of Law.

<sup>1</sup> Ban Ki-moon, U.N. Secretary-General, Remarks to Commission on the Status of Women, Equal Rights, Equal Opportunities and Progress for All (March 3, 2010) [hereinafter Ban Ki-moon Address] (transcript available at [http://www.un.org/apps/news/infocus/sgspeeches/statments\\_full.asp?statID=736](http://www.un.org/apps/news/infocus/sgspeeches/statments_full.asp?statID=736)).

<sup>2</sup> U.N. DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 2 (1995).

<sup>3</sup> Richard Kind & Caroline Sweetman, *Gender Perspectives on the Global Economic Crisis 2* (Oxfam Int'l Discussion Paper, 2010), available at [http://www.peacewomen.org/assets/file/Resources/NGO/ERC\\_GenderPerspectivesGlobalCrisis\\_Oxfam\\_2010.pdf](http://www.peacewomen.org/assets/file/Resources/NGO/ERC_GenderPerspectivesGlobalCrisis_Oxfam_2010.pdf) (quotations omitted).

women in the service of their countries and of humanity.<sup>4</sup>

## INTRODUCTION

This Article reflects upon Darren Rosenblum's provocative piece *Unsex CEDAW, or What's Wrong with Women's Rights*. At the outset I should note that this critical analysis should not be misinterpreted. I do not quarrel with Professor Rosenblum's observations that inequality in law and life is much broader than sex inequalities. To the contrary, I am in full accord with him that discrimination along other categorical axes is also undesirable and sometimes as prevalent as sex inequality. Indeed, oftentimes such other discriminatory tendencies dovetail with those rooted in sex discrimination.<sup>5</sup>

Where we diverge, however, is in his proposal that the category woman, and the pursuit of equality rights utilizing a focus on sex, be eliminated altogether. He claims it is wrong to focus on women's rights. Yet even in that regard I think our differences could be framed as methodological rather than substantive. Professor Rosenblum suggests that we unsex CEDAW and that the convention focus on gender in lieu of sex. Moreover, he posits that any consideration of discrimination on the basis of sex include men as well as women. I agree that the convention ought to protect against discrimination on the basis

---

<sup>4</sup> Convention on the Elimination of All Forms of Discrimination Against Women, opened for signature Mar. 1, 1980, 19 I.L.M. 33, U.N. Doc. A/34/180, at pmbl. [hereinafter CEDAW].

<sup>5</sup> See e.g., Berta E. Hernández-Truyol, *The Gender Bend: Culture, Sex, and Sexuality—A LatCritical Human Rights Map of Latina/o Border Crossings*, 83 IND. L.J. 1283 (2008) (exploring the intersections of culture, sex, and sexuality); Berta E. Hernández-Truyol, *The Latindia and Mestizajes (Trasculturación): Of Cultures, Conquests, and LatCritical Feminism*, 3 J. GENDER RACE & JUST. 63 (1999) (interrogating the Latina identity); Berta E. Hernández-Truyol, *Las Olvidadas (The Forgotten Ones): Gendered in Justice/ Gendered Injustice—Latinas, Fronteras, and the Law*, 1 J. GENDER RACE & JUST. 353 (1998) (noting impact of gender and ethnicity of matters of justice); Berta E. Hernández-Truyol, *Borders (En)Gendered—Normativities, Latinas, and a LatCrit Paradigm*, 72 N.Y.U. L. REV. 882 (1997) (reviewing the multidimensionality of Latinas); Berta E. Hernández-Truyol, *Building Bridges—Latinas and Latinos at the Crossroads: Realities, Rhetoric and Replacement*, 25 COLUM. HUM. RTS. L. REV. 369 (1994) (noting multidimensionality of Latinas/os).

of gender as well as sex. Moreover, there is no question that the category sex includes men as well as women, although it is incontrovertible that the aim of CEDAW was to protect women because of the privations women experience in their lives—a reality around the world, north and south, east and west alike. Thus, our disagreement is narrow and centers on the ongoing relevance and significance—indeed, necessity—of the category woman.

In this response I grapple with this narrow point: it is not only relevant but necessary to continue to have women, *qua* women, be an organizing category. To be sure, “woman” is not a singular, essential category.<sup>6</sup> I have already suggested that “woman” should not be the sole category for analysis. Moreover, while I contend that the category “woman” should not be—indeed cannot be—monolithic, I urge that such a category should remain among the myriad classifications relevant to rights discourse; to conversations about marginalized, subordinated, or peripheral actors in the local as well as the world stage.

This position does not equate to a blind concession that CEDAW is perfect; it is patent that it is incomplete. However, one should not fall into the trap of (forgive the cliché) throwing the baby out with the bathwater. There are ways to achieve Professor Rosenblum’s goals while still recognizing the realities of women’s lives.

## **I. FLASHBACKS**

### **A. Senior year in high school, college application season:**

I was born in Cuba and raised in Puerto Rico, where I attended high school. My parents were educated at the University of Havana. So when it was time to fill out college applications, Mr. Wedge—Ernest Wedge, the headmaster at my school—was the only one who could provide any guidance and advice with respect to attending college in the U.S.

---

<sup>6</sup> See *id.*

When I met with Mr. Wedge to discuss college choices, he suggested that I apply to Cornell through its early admissions program. He wanted me to go to an Ivy League school—not that anyone in my family had a clue what that meant. But, as he was the expert, his desires were *faits accomplis*.

Notwithstanding my healthy, youthful skepticism, once he explained what early admissions meant, I really thought he was up to something good. Any sixteen-year-old would prefer to fill out one application instead of a bunch of them—especially when her then-boyfriend was coming home for the weekend from MIT and the plan was to go sailing. What sixteen-year-old wouldn't choose sailing if there was an option? So I happily went home thinking that it would be one form, not six, that I had to complete. But then I read the directions in the Cornell forms, which clearly stated that early admission was only for boys. Deflated and resigned, I would not get to play much that weekend, I proceeded to fill out six forms..

On Monday I went to report my discovery to Mr. Wedge. Mind you, I was not shocked by the exclusion; I took it as a fact of life. Mr. Wedge, however, did not believe me. He called the admissions office at Cornell to inform it that I had made a mistake in my application—that it should have been for early admissions. He was quickly told that it could not be done; early admissions was only for boys.

#### **B. As a lawyer in Washington working for the Federal Government:**

A friend working at a firm called me to let me know there was an opening for which she thought I would be a perfect candidate. Not one to close doors, I went to an initial screening interview, then to a full day interview, and finally on the call-back to meet the “big partner” with whom I’d be working most closely. In the course of the “big partner” chat he said, and I am paraphrasing as closely as I can recall, “so I am not sure that it is the proper place for a girl to work with labor leaders who smoke cigars and use foul language.” Unlike my reaction in high school, this time I was upset. At that point I knew I was not going to get the job; I did not care because at that point, I did not want it. However, the kicker came when I told my mom (who is

a lawyer and diplomat by training) and dad the story. My dad quickly said, "Didn't you tell him you are not a woman, that you are a lawyer?" This from the same man who just a few weeks earlier had been considering whether he could make an offer to the best candidate he interviewed for a job because she was a woman. The catch there was that he was concerned whether the clients (read: men) in Latin America would accept dealing with her because she was a woman.

And although that was some time ago, and I doubt many legal employers would be so vocal about a similar situation today even if they still felt the same way, the landscape has not changed. I still regularly get stunned female students coming into my office, aghast that during their interviews, they were asked about plans to get married or to have children. Many of these women report that their male friends do not experience the same inquiries. Sexism persists, particularly sexism against women.

### **C. While interviewing for law teaching positions:**

I was in a major city at an on-campus interview when, after an apparently successful visit, my host, a lovely gentleman, led me to his office and offered me a cup of coffee to wind down a "terrific day." I accepted, requesting decaf. He went to get the coffee. While he was out, another member of the appointments committee came in to his office and said "I hope Joe doesn't mind that we voted without him but we'd like to make you an offer so let me take you to the Dean." In the meantime, my host entered his office and was told about the vote. He said, "Terrific day indeed." As he handed me my cup he said "you know, I don't think of you as a minority." Woman is not a monolithic category.<sup>7</sup>

\* \* \*

This Article first addresses the ongoing relevance of the category "woman." To support that stance, in Part II the piece presents data on women's status today; it shows how women currently remain in precarious positions around the world simply

---

<sup>7</sup> See *id.*

because they are women. Next, there is no doubt that discrimination's reach is greater than just women—there are also the categories of race, class, sexuality, and gender to name a few of the axes along which there is rampant disparity in status, dignity, and respect. Thus, Part III suggests certain interpretive tools that can result in a broader deployment of CEDAW's protections which, in turn, could expand the reach and utility of CEDAW. Such a move would provide some, although not all, of the relief that Professor Rosenblum desires.

Finally, in Part IV, I acknowledge that, notwithstanding the suggested interpretive tools, the Convention would better serve humankind if its provisions were more far-reaching. Consequently, this work proposes that rather than giving up on CEDAW, it should be amended by protocol to expand its reach. The proposal encourages an incorporation of principles, much like the Yogyakarta Principles ("Principles"), as a second optional protocol to CEDAW.

The work concludes that the inquiry into whether the category woman is one that should be valid in an ideal world is not ripe in today's world. People who are perceived to comprise the category "woman" are less likely to enjoy the trappings of full personhood. Thus at present, the reality about the condition of women around the globe translates to it being a necessary category, albeit a non-monolithic, non-essentialized one.

## **II. The Ongoing Relevance of "Woman"**

This Part's goal is to show, in light of facts about the condition of women around the world, that the category "woman" remains essential. This portion of the Article utilizes two general sources: one, a rich complex of information presented by the Secretary-General of the United Nations on the occasion of the celebration of International Women's Day; two, facts and figures culled from a number of recent reports on the condition of women around the world.

### **A. Secretary-General Ban Ki-moon's International**

### Women's Day Address<sup>8</sup>

When on March 3, 2010, United Nations Secretary-General Ban Ki-moon addressed the Commission on the Status of Women in order to mark International Women's Day, he called attention to the UN's unwavering commitment to women's

---

<sup>8</sup> See Ban Ki-moon Address, *supra* note 1. The irony does not escape me that I am using an address delivered on International Women's Day to establish the relevance of the category. I can almost hear Darren saying: "Why International *Women's* Day? There is no International Men's Day?" But here I need to reiterate that I am not advocating for the *exclusion* of any category, just for the continued inclusion of "woman," because work in regard to women's equality is far from done.

equality,<sup>9</sup> noting the organization's support for "equal rights, equal opportunities and progress for all."<sup>10</sup> He also claimed that "gender equality and women's empowerment are fundamental to the very identity of the United Nations," rights that he labeled

---

<sup>9</sup> *Id.* This claim in the speech is, of course, a reflection of the existing international law. CEDAW provides that:

[T]he Universal Declaration of Human Rights affirms the principle of the inadmissibility of discrimination and proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex."

CEDAW, *supra* note 4, at pmbl. CEDAW also has a general provision prohibiting discrimination:

For the purposes of the present Convention, the term 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

*Id.* at art. 1. Other Human Rights documents also include such a prohibition against discrimination on the basis of sex. *See, e.g.* International Conference on Human Rights, Apr. 22–May 13, 1968, Declaration of Tehran, P 2, U.N. DOC. A/CONF.32/31 art. 2 (May 13, 1968), reprinted in United Nations, Human Rights, A Compilation of International Instruments 43–44 (1988) [hereinafter UNHDR] ("Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."); International Covenant on Civil and Political Rights, Dec. 19, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant of Economic, Social, and Cultural Rights, 16 Dec. 16, 1966, 993 U.N.T.S. 3, 6 I.L.M. 368 [hereinafter ICESCR]; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222; American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 673; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights, *opened for signature* Nov. 17, 1988, 9 I.L.M. 673 [hereinafter Protocol of San Salvador].

<sup>10</sup> *See* Ban Ki-moon Address, *supra* note 1.

“inalienable.”<sup>11</sup>

During the address, the Secretary-General delivered both the good and the disheartening news. He provided examples of women’s advances since the 1995 Beijing Declaration and Programme of Action—the documents that were the product of the Fourth World Conference on Women. One area of progress he noted was the proliferation of local policies and laws that protect and promote equality as well as reproductive rights and health.<sup>12</sup> He also observed that around the world a growing numbers of girls are receiving a primary education, an increasing number of women are business owners and loan recipients, and more women are participating in government both by enjoying the franchise and by being elected as representatives to local and international positions.<sup>13</sup>

Secretary General Ban Ki-moon praised the women’s movement of today as a global movement. He recognized that “[w]omen everywhere are mobilizing for equality and empowerment – and succeeding.”<sup>14</sup>

But the Secretary-General’s comments also addressed less pleasant realities. He conceded that the work of attaining equality for women was far from completed; a substantial struggle lies ahead because “injustice and discrimination against women persists everywhere.”<sup>15</sup>

For example, he recognized the sad reality that seventy percent of women experience violence in their life, often justified as cultural tropes or acceptable traditions that are untouchable.<sup>16</sup> In a move that could not have been popular among relativists, the Secretary-General rejected the cultural

---

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> See Ban Ki-moon Address, *supra* note 1

pretexts for violence<sup>17</sup> and specifically condemned numerous practices that some claim as untouchably cultural, such as early and forced marriages, honor killings, sexual abuses, and trafficking. Instead of accepting these acts as culturally contingent, he called them out as abuse and even as criminal conduct.<sup>18</sup>

Beyond violent acts, Secretary-General Ban Ki-moon also took note of some other areas in which women still find progress lacking. Noteworthy among these are concerns of health, social inequalities, and economic privation. With respect to health concerns, high maternal and infant mortality rates still plague many locations around the world, and many women lack access to family planning.<sup>19</sup>

Beyond health, social factors such as gender stereotyping and discrimination are still global realities that impede women's progress. Women's political representation has been abysmal, a fact Professor Rosenblum's own work confirms.<sup>20</sup> Finally, economic realities still get in the way of women's thriving—women are disproportionately poor, and suffer other economic privations such as low wages, unstable informal employment, and unsafe conditions of employment.<sup>21</sup>

These preliminary observations, and others that will follow, serve to establish that we are not in a legal, social, cultural or economic space in which we can even contemplate rendering redundant the category "woman." Before presenting more data, however, it is appropriate to make some observations regarding

---

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Darren Rosenblum, *Parity/Disparity: Electoral Gender Inequality on the Tightrope of Liberal Constitutional Traditions*, 39 U.C. DAVIS L. REV. 1119 (2006) (arguing in favor of quotas for women's political representation); Darren Rosenblum, *Internalizing Gender: Why International Law Theory Should Adopt Comparative Methods*, 45 COLUM. J. TRANSNAT'L L. 759 (2007).

<sup>21</sup> See Ban Ki-moon Address, *supra* note 1.

the Secretary-General's address. Twice in the comments the Secretary-General used the concept of gender separate and apart from the concept of woman. The first time was when he talked about "gender empowerment and women's equality"; the second was when he talked about gender stereotyping. While these moves are significant, they presented him with a missed opportunity. The observations plainly recognize two interrelated yet distinct categories: gender and sex (although the latter was raised as "woman"). By collapsing the categories rather than problematizing or critically analyzing them vis à vis the principle of equality,<sup>22</sup> the Secretary-General gave credence to the critique that the UN only utilizes "gender" as a synonym for woman. This move is soundly and effectively challenged in Professor Rosenblum's paper, a criticism with which I fully agree. Yet, that does not mean that the category "woman" is irrelevant or superfluous. As the reports discussed below show, it is still a necessary category.

## B. Recent Reports

Five recent reports reveal the ongoing significance and importance to the goal of equality of retaining the category woman.<sup>23</sup> The research in these works focuses on different populations, varied issues, and utilizes different methodologies. Given these differences, their uniform findings are striking: women's inequality is ubiquitous—across continents, cultures,

---

<sup>22</sup> For some literature that underscores the gender/sex differences see K. DAVIS, M. EVANS AND J. LORBER, NAT'L WOMEN'S STUD. ASSOC., HANDBOOK OF GENDER AND WOMEN'S STUDIES (2006), available at <http://www.nwsa.org/research/genderstudies.php>.

<sup>23</sup> INT'L LABOUR ORG., WOMEN IN LABOUR MARKETS: MEASURING PROGRESS AND IDENTIFYING CHALLENGES (2010), available at [http://www.ilo.org/wcmsp5/groups/public/---cd\\_emp/---emp\\_elm/---trends/documents/publication/wcms\\_123835.pdf](http://www.ilo.org/wcmsp5/groups/public/---cd_emp/---emp_elm/---trends/documents/publication/wcms_123835.pdf) [hereinafter WOMEN IN LABOUR MARKETS]; U.N. NATIONS DEV. PROGRAMME, POWER VOICE AND RIGHTS: A TURNING POINT FOR GENDER EQUALITY IN ASIA AND THE PACIFIC (2010), available at <http://www2.undprcc.lk/ext/pvr/?q=node/3> [hereinafter POWER VOICE AND RIGHTS]; PLAN INT'L, BECAUSE I AM A GIRL: THE STATE OF THE WORLD'S GIRLS (2007) [hereinafter BECAUSE I AM A GIRL]; UNICEF, THE STATE OF THE WORLD'S CHILDREN 2007: WOMEN AND CHILDREN—THE DOUBLE DIVIDEND OF GENDER EQUALITY (2006) [hereinafter DOUBLE DIVIDEND]; RICARDO HAUSMAN, LAURA D. TYSON & SAADIA ZAHIDI, THE GLOBAL GENDER GAP: REPORT 2007 (2007).

religions, social classes, and nations.<sup>24</sup> The materials and the conclusions are significant for legal analysis as they establish that culture, society, politics, and economics all play a role in the reality of human lives—women’s lives—and the quest for equality.

The International Labor Organization’s March 2010 report, titled *Women in labour markets*,<sup>25</sup> provides data on women and work. This study unequivocally reports that women in the labor force are experiencing “continuing gender disparity . . . in terms of both opportunities and quality of employment.”<sup>26</sup> Approximately one quarter of the women who work fall into the classification of “unpaid contributing family workers” which essentially means that they do not get paid for their work.<sup>27</sup>

Even when women do get paid for their work, they experience disparities in the labor they perform and the pay they receive. Work segregation—the so called pink collar phenomenon—is a reality: working women are concentrated in “low pay, long hours . . . and informal” jobs.<sup>28</sup> Significantly, because of the nature of women’s employment, and because of a “male breadwinner bias” favoring men for employment, it is not surprising that women’s jobs have been disproportionately

---

<sup>24</sup> Although some of the reports use the term woman and some use the term gender, they really are focusing on women, not gender or gender identity. Significantly, the discussion on gender is salient because of its absence.

<sup>25</sup> WOMEN IN LABOUR MARKETS, *supra* note 23. Although this and the following reports are on Asia, it should not be translated into a unique geographic phenomenon. Women around the world face the same conditions and obstacles. See *infra* notes 47–51 and accompanying text. See also BERTA E. HERNÁNDEZ-TRUYOL & STEVE POWELL, JUST TRADE 192–205 (2009) (focusing on gender issues in work in the Americas).

<sup>26</sup> *Id.* at x.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*, see generally Berta E. Hernández-Truyol, *Law Is Not Enough*, 37 GEO. WASH. INT’L L. REV. 1031 (2005). (reviewing ANNE-MARIE MOONEY COTTER, GENDER INJUSTICE: AN INTERNATIONAL COMPARATIVE ANALYSIS OF EQUALITY IN EMPLOYMENT (2004)) (discussing women’s subordinate status in the workplace and work segregation).

negatively affected by the economic crisis.<sup>29</sup>

The report recognizes that as long as gender stereotypes exist they will influence the workforce and "gender justice" will remain an elusive aspiration. Stereotypes (proscribed by CEDAW) embed bias in "economic and social institutions and development processes." The suggested solution is a "new 'gender approach.'"<sup>30</sup> This ILO report thus grapples with the related issues of gender roles and sex discrimination, making clear the relevance of both categories in attaining equality.

The other 2010 report, *Power, Voice and Rights: A Turning Point for Gender Equality in Asia and the Pacific*, confirms these concepts. In addition, it lists the problems that flow from prevalent and systemic sex/gender inequalities.

In every country across Asia and the Pacific, pervasive gender inequality remains a barrier to progress, justice and social stability, and deprives the region of a significant source of human potential. Inequality persists despite robust growth and progress, and cuts even

---

<sup>29</sup> WOMEN IN LABOUR MARKETS, *supra* note 23, at 45. The study in Asia provides as follows: "In terms of identifying why the crisis will impact men and women differently, the report points to gender-based job segregation (see the discussion in box 7), the fact that women make up a greater share than men of the "buffer workforce" listed above, a stronger tendency for women than men to fall outside of the labour force rather than continue with the job search (the so-called "male breadwinner bias"), the shift to informal employment for both sexes but probably more so for women than men, and an "added worker" effect if women take up work to help the family to withstand the crisis and the possible negative consequences when it comes to children's welfare."

<sup>30</sup> WOMEN IN LABOR MARKETS, *supra* note 23, at xi, xii. The "new" gender approach would "(1) encourage men to share family responsibilities through behaviour-changing measures (such as paternity leave); (2) quantify the value of unpaid care work; (3) develop educational systems that challenge stereotypical gender roles [reference omitted]; (4) challenge tendencies toward a discrimination- or exploitation-based definition of "women's work" (for example, by broadening access for women to employment in an enlarged scope of industries and occupations while also encouraging male employment in sectors traditionally defined as "female" as a means of raising both the average pay and status of the occupation); and finally, (5) focus on raising the quality of work in all sectors, extending social protection, benefits and security to those in non-standard forms of work." *Id.* at xii.

deeper for poorer or otherwise excluded groups. It is time to catalyze change by focusing on institutions in three arenas—economics, politics and the law. Deliberate public policy choices, combined with attitudes and assessments that favour social justice can foster progress towards gender equality.<sup>31</sup>

Two 2007 reports reinforce the 2010 reports and provide some disturbing details about girls' and women's lives. The first report, *Because I am a Girl: The State of the World's Girls 2007*,<sup>32</sup> delivers bleak factual realities on a number of important markers. It establishes that 100 million girls are missing.<sup>33</sup> On family life, it reveals that girls spend more time on non-economic work than boys,<sup>34</sup> resulting in girls having less time for school and play.<sup>35</sup> When it comes to education, the report provides the now familiar but still depressing data that, of the estimated 115 million children of age who did not attend school in 2001, 62 million were girls.<sup>36</sup> This translates to the reality that a disproportionate number of girls are not receiving an education simply because they are girls.<sup>37</sup> With respect to health, the data is grim. For instance, 66 percent of the children between fifteen and nineteen years old who are newly infected with HIV in sub-Saharan Africa are girls.<sup>38</sup> The figures on economics and violence support the dismal data that the Secretary-General emphasized in his previously discussed address. With respect to

---

<sup>31</sup> POWER, VOICE AND RIGHTS, *supra* note 23.

<sup>32</sup> BECAUSE I AM A GIRL, *supra* note 23.

<sup>33</sup> *Id.* at 23.

<sup>34</sup> *Id.* at 33.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 51

<sup>37</sup> BECAUSE I AM A GIRL, *supra* note 23, at 51, 55.

<sup>38</sup> *Id.* at 67. Other health issues for girls include nutrition (in some cultures men and boys eat first and there often is not enough left), reproductive health, mental health, and STDs. *Id.* at 67–83.

the economic privation women experience, it is shocking that 70 percent of the 1.5 billion persons living on \$1 per day or less are female.<sup>39</sup> Similarly disturbing is the date on violence: approximately half of the sexual assaults worldwide are on girls fifteen or younger.<sup>40</sup>

These dire realities are confirmed in *The State of the World's Children 2007: Women and Children: Double Dividend of Gender Equality*.<sup>41</sup> This report bluntly notes:

Gender discrimination is pervasive. While the degrees and forms of inequality may vary, women and girls are deprived of equal access to resources, opportunities and political power in every region of the world. The oppression of girls and women can include the preference for sons over daughters, limited personal and professional choices for girls and women, the denial of basic human rights and outright gender-based violence.<sup>42</sup>

A World Health Organization study cited in DOUBLE DIVIDEND revealed that up to 70 percent of women experience physical or sexual assault from an intimate partner, making domestic violence the most common form of violence against women.<sup>43</sup>

Beyond the realities of women's lives already discussed—the violence; the health and education deficits; the disproportionate poverty; the home life in which they have responsibility for the family but are often not the decision

---

<sup>39</sup> *Id.* at 85. For the issues of job segregation, unemployment, child labor, concentration in the informal economy, and domestic work. *Id.* at 85–101.

<sup>40</sup> *Id.* at 103. Girls from minority and indigenous groups, girls with disabilities, girls in conflict, refugees, homeless girls face particularly precarious lives. *Id.* at 103–115.

<sup>41</sup> DOUBLE DIVIDEND, *supra* note 23.

<sup>42</sup> *Id.* at 6 (citations omitted). Although this report uses the term “gender” it addresses women’s and girls’ disadvantages because of their sex.

<sup>43</sup> *Id.* at 7.

makers; and the work where they toil longer hours for less pay—women also experience two other “gaps.” One is an “asset gap”: in comparison with men, women own only a fraction of available land.<sup>44</sup> And, notwithstanding a modicum of progress noted by Secretary-General Ban, women also experience a gap in political representation.<sup>45</sup> This is significant in women’s progress because studies show that women in politics make a difference with respect to issues that are important to women.<sup>46</sup>

While economists utilized a different methodological approach in their 2007 *Global Gender Gap Index* study,<sup>47</sup> their conclusion was consonant with the other studies discussed: ongoing gender disparities persist. Indeed, the opening lines of the report not only echo the discussions above, they establish the ubiquity of women’s unequal position around the world: “Gender based inequality is a phenomenon that affects the majority of the world’s cultures, religions, nations and income groups.”<sup>48</sup>

This study, rather than measure absolutes, measures gender gaps. These gaps in turn are measured in opportunities rather than available resources. Similarly, the study measures outcomes in order to show where men and women are located with respect to the measured variables; it does not measure starting points. Finally, it ranks countries vis à vis gender equality as opposed to empowerment.<sup>49</sup> It measured these gaps in four “pillars”—categories the analysts deems fundamental: economic participation and opportunity, educational attainment, political

---

<sup>44</sup> *Id.* at 41.

<sup>45</sup> See Ban Ki-moon Address, *supra* note 1. *But see* Rosenblum, *supra* note 20.

<sup>46</sup> DOUBLE DIVIDEND, *supra* note 23, at 51.

<sup>47</sup> RICARDO HAUSMAN, LAURA D. TYSON & SAADIA ZAHIDI, WORLD ECON. FORUM, THE GLOBAL GENDER GAP: REPORT 2007 (2007).

<sup>48</sup> *Id.* at 3.

<sup>49</sup> *Id.* at 3–4.

empowerment, and health and survival.<sup>50</sup>

The conclusions gleaned from data gathered from 128 countries are telling:

[T]he 128 countries covered, representing over 90% of the world's population, are close to eliminating the gap between women and men's health and education outcomes: almost 92% of the educational outcomes gap and 96% of the health outcomes gap has been closed. However, the gap between women and men on economic participation and political empowerment remains wide: only 58% of the economic outcomes gap and only 14% of the political outcomes gap has been closed.<sup>51</sup>

Here it is relevant to consider this study's approach. With respect to the health and education outcomes, for example, the fact that the gap has been closed to a large degree does not signify that everyone is educated and healthy. To the contrary, it just means that where everyone is educated, women and men are close in education—women lag only a little behind. However, it also means that when the population as a whole is lacking in literacy—women and men are equally lacking in education—women are nevertheless a little behind. The same is true for health. And, of course, the gaps in political empowerment and economic participation, even with this methodology, show that conditions of life are hugely disparate for men and women, with women lagging behind men simply because of their sex.

In sum, no matter who reports, or the methodology utilized,

---

<sup>50</sup> *Id.* at 4. Fourteen different indicators were utilized for the measurements in the four categories. *Id.*

<sup>51</sup> *Id.* at 13. Consistently, when the results were broken down by region, the weakest performers overall, as well as in the specific pillars of economic participation and opportunity, educational attainment, and health and survival were Asia, the Middle East and North Africa, and sub-Saharan Africa (not in the same order). Interestingly, in the political empowerment pillar, the three weakest regions were the Middle East and North Africa, Eastern Europe, and North America, followed by Sub-Saharan Africa, Latin America and the Caribbean, Asia, and Oceania, with Western Europe being the strongest. *Id.* at 13–15.

the world data shows that women do not fare as well as men in any reporting category: health, education, welfare, economic well-being, work and its conditions, or political participation. All these realities are global and cut across religion, race, class, and nation. They thus confirm that the non-essentialized, non-monolithic category of woman is a relevant and important one.

### III. Interpreting CEDAW

#### A. A Look at the Convention

The UN General Assembly adopted the Convention in 1979, and it entered into force in 1981,<sup>52</sup> just one year before I started teaching law school and almost twenty years after the United States included sex in the list of prohibited bases of discrimination in Title VII of the Civil Rights Act of 1964.<sup>53</sup>

The Convention constituted an effort by the Commission on the Status of Women (CSW) comprehensively to address the locations of women's inequality. To be sure, myriad human rights documents already proscribed discrimination against women.<sup>54</sup> Moreover, the CSW had worked on numerous conventions that protected particular rights of women.<sup>55</sup> However, the CSW recognized that such an approach was fragmentary. It thus shifted its focus to CEDAW, which represented a comprehensive effort to address the multiple

---

<sup>52</sup> In 1963 the General Assembly adopted Resolution 1921 requesting the Economic and Social Council to ask the Commission on the Status of Women to prepare a draft declaration on the elimination of discrimination against women. Such a declaration was drafted and adopted by the General Assembly in 1967. The idea of a binding treaty arose in 1972 and the text was drafted between 1976 and 1979. By resolution 34/180, the General Assembly adopted CEDAW in 1979 and commented that it would be desirable to have it come into force soon. The Convention entered into force, as per its terms, 30 days after the ratification of the twentieth state. See, e.g., <http://www.un.org/womenwatch/daw/cedaw/history.htm>.

<sup>53</sup> Civil Rights Act of 1964, tit. vii, 42 U.S.C. § 2000c-2 *et seq.*

<sup>54</sup> See sources and accompanying text *supra* note 9.

<sup>55</sup> See *Short History of CEDAW Convention*, DEP'T OF ECON. & SOC. AFFS., U.N. DIVISION FOR THE ADVANCEMENT OF WOMEN, <http://www.un.org/womenwatch/daw/cedaw/history.htm> (last visited June 19, 2011).

locations of women's inequality with the aim of ending all discrimination against women.<sup>56</sup>

Social realities also influenced the decision to concentrate on an all-inclusive document. For example, during the 1960s there was much growth in the understanding of the complex nature of discrimination against women—of the subtle patterns and the cultural veils that effected inequalities.<sup>57</sup> Similarly, evidence emerged of the negative effect of development policies on women.<sup>58</sup> In addition, it was becoming apparent that, notwithstanding the inclusion of the prohibition against sex discrimination in the general human rights documents, the general human rights system was not being effective in the goal to eradicate women's inequality.

The Convention, in an incontrovertibly male/female binary framework, defines discrimination against women broadly; it reaches social, political, economic, cultural, and civil realms.<sup>59</sup> As such, it recognizes that women's inequality is a reality and unacceptable not only in the public but also in the private sector. With such realities providing context, the Convention provides a blueprint for nations to end such discrimination, including state

---

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> CEDAW, *supra* note 4, at art. 1 (providing that "'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.").

undertakings to eliminate discrimination in both sectors.<sup>60</sup>

The Convention is unique in recognizing that the myriad locations of concern for women's equality include, among others, the civil (e.g., political participation), economic (work), social (maternity, child-care), cultural (roles), health (reproductive in particular). It focuses specifically on matters of human reproduction as well as the impact of culture and cultural tropes on women's equality. The Convention also expressly recognizes the indivisibility and interdependence of the different categories of rights. For example, without social supports for family life, including child-care, there is a diminished ability to participate in public life, including work.

These observations are not to suggest that the Convention is not flawed, or that in today's world it might not be drafted utilizing different language. To be sure, some of its shortcomings—beyond those engaged by Professor Rosenblum—are patent. For example, the Preamble plainly rejects racism.<sup>61</sup> Yet, the Convention itself is silent on race. Like Professor Rosenblum's gendered critique, this silence renders the treaty vulnerable to a race-essentialist critique; a challenge that it contemplates a monolithic (white/Western/Northern) woman when the reality is quite different. Women around the world are richly diverse in terms of (among other things) race, sexuality, class, ethnicity, religion, culture, and gender.

However, these shortcomings are not unique to CEDAW. Rather, the critiques can similarly be deployed with respect to

---

<sup>60</sup> *Id.* at art. 2 (requiring, *inter alia*, inclusion of principle in "national constitutions or other appropriate legislation"; and taking "appropriate measures to eliminate discrimination against women by any person, organization, or enterprise"; and taking measures "to modify"). See also *id.* at art. 3 (asking state parties to ensure women's full exercise of human rights by taking "appropriate measures" in "all fields, in particular in the political, social, economic and cultural fields..."); art. 5 (requiring measures to change cultural patterns on stereotyped sex roles, including recognition of "maternity as a social function" and that both men and women have roles to play in raising children).

<sup>61</sup> See *id.* at pmbl. (explicitly stating that: "Emphasizing that the eradication of apartheid, all forms of racism, racial discrimination, colonialism, neo-colonialism, aggression, foreign occupation and domination and interference in the internal affairs of States is essential to the full enjoyment of the rights of men and women.").

other treaties that focus on particular populations. For instance, the Convention on the Elimination of all Forms of Racial Discrimination (CERD) broadly focuses on race with the same aims regarding race as CEDAW has regarding sex. Also, like CEDAW, CERD is underinclusive; it is silent on sex and gender. Yet we know from CEDAW's preamble of the interrelationship of sex and race in creating inequality.

Thus, the solution, I posit, is not to throw out CEDAW and any or all other imperfect agreements. There exists a human rights regime, the aim of which is to achieve justice.<sup>62</sup> In pursuing that goal, it has focused on those who historically have been vulnerable. But history and learning is not static. Every day creates history. In much earlier times it would have been unthinkable that women and racial minorities, for example, would be entitled to equality. There existed categories that dared not speak their names. In contemporary times thinking has evolved—aided by sociology, anthropology, psychology, law, science, medicine, technology—and different vulnerable and excluded categories are ripe for recognition and naming. Thus, rather than trash existing protections, we should both craft new ones and utilize interpretive tools to develop, expand, and transform the meaning and content of the protections that exist. This way, the Convention can be a living document that can be of use in modern times.

### A. Interpretive Moves

In this Subpart I want briefly to suggest three ways in which the Convention can be interpreted to achieve the

---

<sup>62</sup> Although I embrace the indivisibility, interdependence and interrelatedness paradigm of the international human rights system, it is not uncritically that I do so. In separate works I have soundly criticized the system for its multiple biases including its North/West, heteronormative, sexed, gendered, racialized, and class biases. I have suggested reformations to remedy the biases and it is with that reformed model in mind that I offer my analysis here as a means to SuperSex CEDAW. See generally Berta E. Hernández-Truyol, *Human Rights, Globalization, and Culture – Centering Personhood in the International Narrative*, in *MORAL IMPERIALISM—A CRITICAL ANTHOLOGY* (Berta E. Hernández-Truyol ed., 2002); Berta E. Hernández-Truyol, *Sex and Globalization*, 11 *HARV. LATINO L.R.* 173, 182 (2008). On the critique of the human rights system, see also DAVID KENNEDY, *THE DARK SIDE OF VIRTUE* (2004).

protections that Professor Rosenblum desires. First is the basic point that the discrimination prohibited by the Convention is on the basis of sex. To be sure, it focuses on women. However, the Preamble invokes the UDHR, noting its prohibition against sex discrimination.<sup>63</sup> It also mentions that the Covenants mandate equality and non-discrimination.<sup>64</sup> Furthermore, Article 1 of CEDAW defines discrimination against women as discrimination on the basis of sex.<sup>65</sup> Thus, notwithstanding the title of the Convention, it is plain that it prohibits sex discrimination. Consequently, particularly in light of contemporary thinking about and usage of the terms sex and gender, it can be argued that men should also be able to invoke the Convention's prohibitions against discrimination. To be sure, there is precedent in local law to support such an interpretation notwithstanding the norm's original goal.<sup>66</sup>

Second, it is significant, particularly in the context of the time when the Convention was adopted, that it pays much attention to what we, in today's language, would call gendered (as opposed to sex-based) concerns.<sup>67</sup> The Convention specifically prohibits the use of gendered roles in raising families, in educational paths, in employment choices, in

---

<sup>63</sup> CEDAW, *supra* note 4, at pmbl. ("Noting that the Universal Declaration of Human Rights affirms the principle of the inadmissibility of discrimination and proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind including distinction based on sex.").

<sup>64</sup> *Id.* ("Noting that State Parties to the International Covenants on Human Rights have the obligation to ensure the equal rights of men and women to enjoy all economic, social, cultural, civil and political rights.").

<sup>65</sup> *Id.* at art. 1 ("[T]he term 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex . . .").

<sup>66</sup> *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998) (holding males can be target of discrimination by members of same sex).

<sup>67</sup> See, e.g. CEDAW *supra* note 4, at pmbl. (referring to traditional roles of men and women); *id.* at art. 2 (requiring measures to "modify or abolish existing laws, regulations, customs and practices" that are discriminatory); *id.* at art. 3 (stating to parties to take measures in, inter alia, cultural fields so as to guarantee human rights and fundamental freedoms); *id.* at art. 5 (mandating abolition of stereotyped roles); *id.* at arts. 10, 11 (requiring elimination of stereotyped notions of appropriate education and work, respectively).

pretextual deployment of cultural tropes, and in customary (as well as conventional) laws. Thus, given the "living law" model, the Convention's prohibitions against sex-based stereotypes can be viewed as constituting the use of dated language which today can be interpreted as meaning sex or gender.

Third, beyond the Convention itself, we can look at international and regional legal decisions that support an interpretation of its provisions in a way that develops, expands, and transforms them. For example, the Article 1 non-discrimination provision in the Convention prohibits discrimination and mandates equality in "any . . . field."<sup>68</sup> This open-ended language uses "field," rather than "status," because it is a "status" treaty.<sup>69</sup> However, the documents that are "field" based—the UDHR (including civil, political, social, economic, and cultural rights) and the two Covenants, the ICCPR and the ICESCR—prohibit discrimination on the familiar litany of status-based classifications as well as on "other status."<sup>70</sup>

The open-endedness of the "other status" and "any field" language is useful in proposing this broad interpretive model. In *Toonen v. Australia*,<sup>71</sup> a member of the Tasmanian Gay Law Reform Group claimed discrimination and challenged Tasmania's criminalization of sodomy. The Human Rights Committee found that Australia violated the Covenant because, for purposes of Article 17's privacy protections, "adult consensual sexual activity in private is covered by the concept of

---

<sup>68</sup> CEDAW, *supra* note 4, at art. 1.

<sup>69</sup> Human rights treaties can be classified into those that address a particular field such as civil or political rights or social, economic and cultural rights and those the concern of which is a person's status such as being children, women, or racial minorities.

<sup>70</sup> See UDHR, *supra* note 9, at art. 2; ICCPR *supra* note 9, at art. 2; ICESCR *supra* note 9, at art. 2.

<sup>71</sup> *Toonen v. Australia*, U.N. Doc. CCPR/C/50/D/488/1992, Decision on Admissibility, (U.N. Hum. Rts. Comm. Nov. 5, 1992).

'privacy.'"<sup>72</sup> Moreover, the HRC noted that it did not have to reach the question of whether sexual orientation was covered by "other status" because "in its view[,] the reference to 'sex' in articles 2, paragraph 1, and 26 [of the ICCPR] is to be taken as including sexual orientation."<sup>73</sup>

This decision supports a broad and inclusive reading of the term "sex" in international human rights documents generally and in CEDAW specifically, expanding its reach. Indeed, it supports not only the explicit application of the treaty to sexual orientation, but it also implies the inclusion of gender. This interpretive move is facilitated by the Convention's express concern with sex role stereotyping and its "other fields" language that show an intent for the document not to be frozen in words or, I suggest, in time.

In sum, the Convention's reference to gender stereotypes and to culture, taken together with the prohibitions in the Convention as well as in other documents against sex discrimination, can be utilized to expand and modernize the reach and application of CEDAW in light of the existing interpretations expanding the meaning of terms such as "sex." I posit that, given its importance in light of the reality of women's lives (see Part II) and the potential for expansive interpretive moves, we need not contemplate unsexing CEDAW. In addition to the suggested interpretative moves this work urges that we super-sex CEDAW. That is, by protocol, transform and effectively update it by expanding it to cover men, as well as gender, gender identity, and sexuality categories.

However, because I agree that such moves are not enough literally or symbolically and thus not a complete solution to the

---

<sup>72</sup> *Id.* at ¶ 8.2. At issue were two provisions of Tasmania's Criminal Code which criminalized sodomy between consenting adult males. The European Court of Human Rights has also stated that Ireland's laws prohibiting consensual adult homosexual conduct violate the privacy protections of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. See *Norris v. Ireland*, App. No. 10581/83, 13 EHRR 186 (Eur. Ct. H.R. 1988). The South African Constitution of 1996 protects the rights to privacy and to dignity and, the equal protection clause expressly lists gender, and sexual orientation as prohibited grounds for discrimination.

<sup>73</sup> *Id.* at ¶ 8.7.

challenges Professor Rosenblum presents, I suggest that we further super-sex CEDAW. This would involve developing, expanding and transforming the content and meaning of the Convention by Protocol so as to include prohibitions against discrimination not only against women but also explicitly on the grounds of sex, sexuality, gender and gender identity. Moreover, just as the category women should be understood as non-essentialized and non-monolithic, so, too, the expanded categories of coverage should be understood and underscored to be non-essentialized and non-monolithic. Indeed, the Protocol should make clear the understanding of the multidimensional nature of every human being. The next Part engages that proposal.

#### **IV. Super-Sexing CEDAW**

The suggestions presented in Part III can provide some comfort in terms of the reach of the Women's Convention. Nonetheless, we still have to face its exclusionary and incomplete nature.

Start with the name. I cannot envision the name totally changing—for both symbolic and historical reasons. But in today's world there are concerns beyond sex that are intimately related to sex, such as gender, sexuality and gender identity, that the Convention can and should address explicitly. For that reason I propose a methodological move: amend the Convention to be more inclusive and reflect modern realities. As such, beyond Professor Rosenblum's suggestions that gender or sex replace "woman," I suggest that not only should gender and sex join "woman" as identitarian categories covered by the treaty, but that the treaty should also cover sexual and gender identity. One way of achieving this is by a second optional protocol to CEDAW which, much like the protocol of San Salvador amended the American Convention on Human Rights to expand the meaning and content of social, cultural and economic

rights,<sup>74</sup> will amend CEDAW by expanding its meaning and content to include gender, gender identity, sex, and sexual identity—all categories that should not be considered to be binary, dichotomous, monolithic, or essentialized.

This is by no means a fully safe model. For years now, feminist, queer, and critical race theories have engaged in deconstructive analyses of identitarian categories including race, sex, gender, and sexuality and their multidimensional presentations and performances. Any social category that can be named, can be—and likely will be—contested.<sup>75</sup> However, I urge that it is better to err on the side of inclusion with respect to protections. In addition, it is imperative to ensure that there is constant monitoring on the development of knowledge so that law and reality can work together to make a more just world for all.

With these caveats in mind, I propose the incorporation of principles akin to the Yogyakarta Principles, as a second optional protocol to CEDAW.<sup>76</sup> The Yogyakarta Principles, to be sure, are subject to the general critiques to which human rights as a discipline has been subject, to wit, that they focus on statist efforts over other organizing strategies that might better effect

---

<sup>74</sup> See Protocol of San Salvador, *supra* note 9. The American Convention, *supra* note 9, as initially adopted, included a chapter entitled “Economic, Social, and Cultural Rights” that was comprised of only one article, Article 26 named Progressive Development which required “State Parties . . . to adopt measures . . . with a view to achieving progressively . . . the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States . . . .” The Protocol of San Salvador effects the development, expansion and transformation of the American Convention by creating specific obligation pertaining to Economic, Social and Cultural Rights including non-discrimination (art. 3), right to work (art. 6), just, equitable and satisfactory conditions of work (art. 7), trade union rights (art. 8), right to social security (art. 9), right to health (art. 10), right to a healthy environment (art. 11), right to food (art. 12), right to education (art. 13), right to benefits of culture (art. 14), right to the formation and protection of families (art. 15), rights of children (art. 16), protection of the elderly (art. 17), protection of the handicapped (art. 18).

<sup>75</sup> See JUDITH LOBER, *BREAKING THE BOWLS* (2005) (promoting the idea to “de-gender”).

<sup>76</sup> From the discussion in the latest draft of UNSEX CEDAW that I have seen, Professor Rosenblum would appear to agree with such approach.

equality and that its multiple structural biases fail to promote full personhood for all.<sup>77</sup> The Principles are based on legal standards that will bind states. And while they are “neutral” in terms of hierarchies, among the marginalized the reality of life is quite different, with structural racial, gendered, and sexed biases permeating across cultures.<sup>78</sup> Regrettably, neutrality on paper does not translate to equality in real life.

These Principles are useful to suggest the necessary amendments to super-sex CEDAW and include sexuality, gender, and gender identity to its coverage so that it reach its potential for promoting human dignity and full personhood. The Principles “affirm that human rights admit no exceptions.”<sup>79</sup> Much like the background history that led to CEDAW, the Yogyakarta Principles were developed in response to reality:

[H]uman rights violations targeted toward persons because of their actual or perceived sexual orientation and gender identity constitute a global and entrenched pattern of serious concern. They include extrajudicial killings, torture and ill treatment, sexual assault and rape, invasions of privacy, arbitrary detention, denial of employment and education opportunities, and serious discrimination in relation to the enjoyment of other human rights.<sup>80</sup>

---

<sup>77</sup> See, e.g., *Kennedy supra* note 62; Hernández-Truyol, *supra* note 62.

<sup>78</sup> See Berta Espcranza Hernández-Truyol, *The Gender Bend: Culture, Sex, and Sexuality—A LatCritical Human Rights Map of Latina/o Border Crossings*, 83 IND. L.J. 1283 (2008); Berta E. Hernández-Truyol, *Out of the Shadows: Traversing the Imaginary of Sameness, Difference, and Relationalism—A Human Rights Proposal*, 17 WIS. WOMEN'S L.J. 111 (2002); Berta E. Hernández-Truyol, *Crossing Borderlands of Inequality with International Legal Methodologies—The Promise of Multiple Feminisms*, 44 GER. Y.B. INT'L L. 113 (2001).

<sup>79</sup> Conference of International Legal Scholars, Yogyakarta, Indonesia, Nov. 6-9, 2006, Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (Mar. 2007), available at [http://www.yogyakartaprinciples.org/principles\\_cn.pdf](http://www.yogyakartaprinciples.org/principles_cn.pdf).

<sup>80</sup> *Id.*

These realities dovetail with women's realities around the world, including the compounding of the problem with the added dimensions of "race, age, religion, ability, economic, social or other status."<sup>81</sup> The substantive protections urged by the Principles also dovetail with CEDAW's protections: equality and non-discrimination, personhood, life, security, privacy, trafficking, work, education, housing, health, family, and culture. With these compatible aims, the methodological proposal for super-sexing CEDAW—adopting a protocol that develops, expands, and transforms CEDAW into a broader document that promotes justice and full personhood for all—should be unproblematic, indeed uncontroversial.

## CONCLUSION

This short Article urges that, instead of unsexing CEDAW, it should be super-sexed by expanding the convention to include sexuality, gender, and gender identity. The proposal, which agrees with the substance of Prof. Rosenblum's argument in principle but not in methodology, is grounded upon the reality that "woman" as a sex category is still needed. Yet, it would be irresponsible and unprincipled to ignore that sex, race, gender, sexuality, and gender identity are all axes upon which marginalization and exclusion of, as well as violence against, "others" takes place.

In all cases, and with respect to all categories, it is imperative not to essentialize. We need to be cognizant that it is the dominant ideologies and discourses that create the subjectivities with which Professor Rosenblum's piece, as well as this response, grapple. Identity is performed within social and cultural frameworks; the legal frameworks need to be sensitive to this reality. Whether the classification "woman" is legitimate, and in spite of the fact that there is no such thing as a unitary woman, people who are perceived to constitute that category (and that can be different persons in different cultural settings, and in varied geographical and social contexts) are less likely to enjoy full personhood and its trappings. These exclusions are exacerbated when multiple outsider categories converge in one

---

<sup>81</sup> *Id.*

performance. The same conclusions flow if one substitutes gender or sexual minority/outsider, or gender identity.

This is the flaw Professor Rosenblum uncovers in CEDAW: The coexisting reality that vulnerable men—be they poor; not male-gendered; sexual, religious, or racial minorities—suffer deep privations of civil, political, social, economic, and cultural rights. CEDAW's focus on women obscures and impedes these conversations. However, CEDAW, as it stands, serves to underscore that worldwide human beings experience privation at a disproportionate rate *because* they are women. Rather than abandon a legitimate and useful category, we ought to center multidimensionality and include sex, gender, gender identity, and sexuality in the international narrative on equality in order to promote all human flourishing.