

UNSEX CEDAW, OR WHAT'S WRONG WITH WOMEN'S RIGHTS

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PROLOGUE

Before I go on, I want to tell a story. During high school, I had an English teacher who often wore a pendant from the National Organization of Women. I asked her about it and we began a conversation that continued for years as she fed my voracious mind with Gloria Steinem, Alice Walker and other feminist literature. One day, on my way home from a meeting of Gay and Lesbian Youth of New York, I picked up the Village Voice and saw an announcement for a women's rights conference. My dad drove me into the city for the conference, which well over a thousand people attended. As part of the forum, individuals reported back from the 1985 World Conference on Women held in Nairobi. As people entered the hall, a slide show of conference photos ran alongside Helen Reddy's "I am Woman."¹ Perhaps two or three men were there.

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¹ HELEN REDDY, *I Am Woman, on I AM WOMAN* (Capitol Records 1972).

Throughout the day, attendees approached me to inquire where they could find coffee or if I was in the right place. As a sixteen-year old boy with darker-than-average skin, I must have struck the attendees as some sort of coffee boy. Why else would I be there?

While I took no offense, this experience exposes the long-standing separatist tendencies of many women's rights efforts. Even recently, Gloria Steinem spoke at a conference at the University of Baltimore, saluting the women who have taken inspiration from her.² Although I may have thought that such assertions included the woman inside of me, and although I do not think Steinem meant to slight men, her statement was not only exclusionary, but also self-defeating. As a child and as an adult, I struggled with gender. I continue to explore gender, sexuality and the law in their many interactions. Yet, I hesitate to make the argument that women's rights are too narrow a focus for issues of gender equality and balance. Some may dismiss the argument because I am a man. Worse, feminists may think I belong to some reactionary men's movement and that I do not "get" the struggle at some core level. This troubles me because, in many ways I am just a big girl, and always have been. For this reason, this Article is not a purely academic exercise for me—my goal is to aid in the fight against gender inequality.

INTRODUCTION

CEDAW,³ signed on July 17, 1980 by sixty-four countries, has as its principal goals the protection and promotion of women's rights and the elimination of discrimination against women.⁴ As of March 7, 2011, 186 countries—more than ninety-percent of the United Nations' member states—are parties to the

² Vidcotape: Gloria Steinem Keynote Address (Univ. of Baltimore Sch. of Law 2008), available at <http://law.ubalt.edu/template.cfm?page=928>.

³ 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].

⁴ See Fourth World Conference on Women, Beijing, China, Sept. 4–15, 1995, *Progress in Elimination of Discrimination Against Women*, ¶¶ 11–12, U.N. DOC. A/CONF.177/7 (June 21, 1995) [hereinafter *Beijing Conference*].

Convention.⁵ The most notable non-party to the Convention is the United States.⁶ In addition, as of May 15, 2010, there are seventy-nine Signatories and ninety-nine Parties to the Optional Protocol, a supplement to CEDAW designed to remedy some of the treaty's shortcomings.⁷ Although challenges have hobbled implementation of CEDAW, it remains the central pillar of gender equality norms at the international level.⁸

The Convention, despite its focus on women's rights, is also the preeminent treaty on gender inequality. It cannot succeed, however, in creating gender equality if it continues to focus so narrowly and exclusively on women. As Lady Macbeth gathers the strength to achieve her evil ends, she implores the spirits to "unsex me here."⁹ She believes that her feminine gender obstructs the ability to commit evil. Only by "unsexing" herself will she be empowered to kill King Duncan. Viewing "unsexing" as part of Lady Macbeth's evil reinforces the objectionable set of ideas I seek to criticize. Although Lady MacBeth's "unsexing" is normatively opposite of what I seek here, CEDAW must also be "unsexed" to realize its potency.

It is amazing then to note that while CEDAW defines many central terms, at no point does it attempt to define its central subject, "women." At the time of CEDAW's adoption, the

⁵ See CEDAW, *supra* note 3.

⁶ *Id.*

⁷ *Id.* See also Press Release, Optional Protocol to Women's Convention Comes into Force, U.N. DOC. WOM/1242 (Dec. 21, 2000), available at <http://www.un.org/womenwatch/daw/ccdaw/protocol/wom1242.htm> (noting that the Optional Protocol "provides an international remedy for violations of women's rights").

⁸ See generally Darren Rosenblum, *Internalizing Gender: Why International Law Theory Should Adopt Comparative Methods*, 45 COLUM. J. TRANSNAT'L L. 759 (2007) [hereinafter *Internalizing Gender*].

⁹ As Lady Macbeth prepares to murder Duncan, she says: "The raven himself is hoarse/That croaks the fatal entrance of Duncan/Under my battlements. Come, you spirits/That tend on mortal thoughts, unsex me here/And fill me from the crown to the toe top-full/Of direst cruelty. Make thick my blood." WILLIAM SHAKESPEARE, *MACBETH* act 1, sc. 5. Many thanks to Bridget Crawford for alerting me to this passage's relevance to my critique of CEDAW.

complexity of sex and gender was only recognized in a few contexts. CEDAW's focus on "women" enshrines the male/female binary in the core of international law' when CEDAW's goals would be better served by seeking the elimination of the categories themselves. While more recent international law efforts have shifted toward a focus on gender and sexuality,¹⁰ the Convention remains bound to "women's rights."

Strikingly, legal scholars have not directly targeted the centrality of the term "women" in CEDAW. Although it is beyond the scope of this Article to catalogue the oeuvre of feminist international law theory, any discussion of CEDAW must address the foundational book by Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law*.¹¹ This book addresses every relevant area of international law from a feminist perspective.¹² In doing so, Charlesworth and Chinkin demonstrate that international law has excluded women's concerns in many areas, including human rights and interstate relations.¹³ Their conclusion is that international law should recognize these feminist issues generally and that feminists

¹⁰ Many institutions, such as Columbia University, Harvard University, Yale University, and others, have programs that focus not only on women, but on gender and sexuality more broadly. COLUMBIA UNIVERSITY INST. FOR RESEARCH ON WOMEN & GENDER, <http://www.columbia.edu/cu/irwag/index.html> (last visited June 19, 2011); YALE UNIV. WOMEN'S, GENDER, & SEXUALITY STUDS, <http://www.yale.edu/wgss/> (last visited June 19, 2011); WOMEN, GENDER, AND SEXUALITY @ HARVARD UNIVERSITY, <http://wgs.fas.harvard.edu/icb/icb.do> (last visited June 19, 2011).

¹¹ HILARY CHARLESWORTH & CHRISTINE CHINKIN, *THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS* (2000) (discussing, among other things, prominent feminist theories in international law, modes of international law-making, the law of treaties, the idea of the state, international institutions, human rights, the use of force in international law and peaceful settlements in dispute).

¹² See *id.*

¹³ See *id.* at 218–40 (discussing the inadequacies of human rights law for women). The authors point out that, with the exception of the Children's Convention and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, "all the 'general' human rights instruments use only the masculine pronoun." *Id.* at 232. This vocabulary, it is argued, reinforces the hierarchies based on sex, gender, and sexual orientation. *Id.*

should “use existing mechanisms and principles wherever possible to improve women’s lives.”¹⁴

Many other scholars, notably Karen Engle,¹⁵ Dianne Otto,¹⁶ Janet Halley¹⁷ and Lara Stemple, have been critical of various aspects of international women’s human rights law. In particular, Halley has criticized feminist-influenced international law as “Governance Feminism,” the engagement of feminist efforts in the governance of a wide variety of regulatory forms, from states to quasi-state institutions.¹⁸ This anti-identitarian impulse is correct insofar as strict adherence to identity may lead to unintended consequences.

David Kennedy presents a much less sanguine vision of international human rights law (IHRL) than Charlesworth and Chinkin in *The Dark Sides of Virtue*. Although Kennedy admits that IHRL has undeniably accomplished many positive things,

¹⁴ *Id.* at 336.

¹⁵ See generally Karen Engle, *After the Collapse of the Public/Private Distinction: Strategizing Women’s Rights*, in RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW 143 (Dorinda G. Dallmeyer ed., 1993) [hereinafter *After the Collapse*]; Karen Engle, *Feminism and Its (Dis)contents: Criminalizing Wartime Rape in Bosnia and Herzegovina*, 99 AM. J. INT’L L. 778. (2005) [hereinafter *Feminism and Its Discontents*].

¹⁶ See generally Dianne Otto, *Disconcerting ‘Masculinities’: Reinventing the Gendered Subject(s) of International Human Rights Law*, in INTERNATIONAL LAW: MODERN FEMINIST APPROACHES 105 (Doris Buss & Abreana Manji eds., 2005).

¹⁷ See generally JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* (2006) [hereinafter *SPLIT DECISIONS*]. Janet Halley, *Rape in Berlin: Reconsidering the Criminalisation of Rape in the International Law of Armed Conflict*, 9 MELB. J. OF INT’L L. 78 (2008) [hereinafter *Rape in Berlin*]; Janet Halley, *Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law*, 30 MICH. J. INT’L L. 1 (2008) [hereinafter *Rape at Rome*].

¹⁸ See *Rape in Berlin*, *supra* note 17, at 79. Janet Halley, in her work on international criminal law, criticized “governance feminism” for its push to eliminate consent as a defense to genocidal rape. *Id.* at 78. According to Halley, governance feminists rely on an excessive criminalization of sexuality in which some contact may be consensual. *Id.* This example demonstrates how governance feminism’s havoc falls on men, which has led Halley to “take a break from feminism.” *SPLIT DECISIONS*, *supra* note 17, at 33.

he alleges that it is riddled with hidden risks, costs, and unintended consequences.¹⁹ This critique could easily apply to CEDAW. For example, Kennedy argues that efforts to attract the widest number of signatories to a treaty result in watered down, vague standards. These treaties do little to attack the causes of inequalities and divert attention away from a resolution of the problem.²⁰ In short, Kennedy does not view IHRL as a fruitful path toward resolving human rights problems, a critique which inherently includes CEDAW.

My goal is to strive for a middle ground between Charlesworth and Chinkin on the one hand, and Kennedy on the other, that encompasses use of the sharpest critical tools without dismissing CEDAW's aspirations. It is possible that CEDAW, as Kennedy would argue, not only fails to meet its drafters' goals, but also that it actually does more harm than good. To me, however, the Convention appears to foster connections among networks of nongovernmental activists, which lends strength to some gender equality efforts. Although I am not an outright positivist who believes in a direct causal link between legal goals and social norms, sometimes law may foster progress.

With regard to the project Charlesworth and Chinkin established, my goal here is not to argue against them or the feminist internationalism that their book represents. They take on women as their clients, with their singular goal the representation of women both as bystanders to interstate activity

¹⁹ DAVID KENNEDY, *THE DARK SIDES OF VIRTUE* 3–35 (2004). For example, another crucial point of Kennedy's, one made in a different vein by Janet Halley's work, is the argument that IHRL establishes an all-encompassing discourse in which all actors become either the "victim," "violation," or "bystander." *Id.* at 14–15.

²⁰ *Id.* at 24–25. Take, for example, a state signing up for a norm against discrimination. This action takes the place of actually ending the problem. *Id.* at 25. In this regard, human rights treaties are similar to warfare treaties that actually legitimize violence rather than prevent it through vague standards and lax enforcement. *Id.* at 25. Vague standards, in an effort to sign on the largest number of countries, can actually validate injustice as states interpret and utilize a treaty in varying degrees. CEDAW follows this model to some extent.

and as outsiders to rights protections.²¹ This Article does not disagree with the descriptive assessment of women's place in international law, and my interpretation of CEDAW's shortcomings does not cut against their understanding of the import of "improving women's lives."²² The disagreement is with the reason behind this inequity. Women face subjugation by the power relationship that establishes men as superior but more significantly from the division of humanity into two groups, one of which necessarily sits on top. Focusing only on "improving women's lives" serves to reinforce the very binary that must be dismantled to achieve change. This does not mean that women's lives do not merit improving—my problem is with the central and exclusive framing of the issue in this light. "Women's lives" cannot be improved until being a "woman" or a "man," or for that matter one of the many other sexes that exist, means less in terms of social, legal and political standing. This is the challenge posed to women-centered feminism by transgender movements (in the United States and elsewhere) and by Scandinavian feminism (which expressly seeks the reduction of gender differences). It is a challenge that has led to the Yogyakarta Principles,²³ a non-binding agreement of international law experts who specialize in sexuality and gender-related rights.

Here this Article attempts to turn that critique back on

²¹ See CHARLESWORTH & CHINKIN, *supra* note 11, at 1 (describing their attempt to give expression to women, a category which has "been thoroughly obscured by and within the international legal order").

²² *Id.* at 336.

²³ 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_en.pdf [hereinafter Yogyakarta Principles].

CEDAW. This study centers on a textual analysis of CEDAW,²⁴ and its goal is not to destroy or even undermine the Convention. Rather, this Article aims to force those of us who take sex and gender and even women's rights seriously to see the treaty for what it is: a sometimes useful tool of international law that's emphasis on "women" reinforces the sex binary. All this Article seeks is an admission of CEDAW's limitations.

Part I discusses why CEDAW continues to be relevant as the primary source of international law on sex discrimination. Until the advent of the Convention on the Rights of the Child (CRC), CEDAW was the most widely-subscribed international treaty. Some of the draft language of CEDAW reflects the tension between category and identity and how "women" won the debate. Part II contrasts CEDAW with the Convention for the Elimination of Racial Discrimination (CERD).²⁵ It points to the identitarian focus of CEDAW as a core reason for its failures. Had CEDAW reflected a category focus, as CERD did, it would more directly incorporate the breadth of sex discrimination.²⁶ Part III argues that CEDAW should include all sexes—CEDAW's focus on women excludes men, women who are not victims and all other sexes. The Article concludes by arguing that the counterproductive engagements by CEDAW suggest the need for a radical refashioning of this crucial treaty.

Several consequences may follow. While my intention is

²⁴ It is important to note that this Article focuses on the text rather than examining the CEDAW Committee's work or interpretations among signatories. That extensive material holds much fruit for further analysis of CEDAW's questionable reliance on identity, including historical work on the drafting and formation of the Convention as well as empirical work on the functioning of the CEDAW Committee over the past three decades. See e.g., Oona A. Hathaway, *Do Human Rights Treaties Make A Difference?*, 111 YALE L.J. 1935, 2006-10 (2002); Engle, *supra* note 15; Otto, *supra* note 16.

²⁵ International Convention on the Elimination of all forms of Racial Discrimination, G.A. Res. 2106, (Jan. 4, 1969) [hereinafter CERD].

²⁶ See CEDAW, *supra* note 3 ("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.").

not to disown responsibility for finding solutions, detailing their tenor and shape would involve far more vision than this Article can accommodate. What is clear to me is that to move sex equality into international law's mainstream, CEDAW must incorporate this anti-essentialist and anti-identitarian critique.²⁷ At this point, three potential repairs arise, each of which requires broad interstate political will that likely does not exist. CEDAW may require amendment to incorporate broader definitions or a Protocol to respond to its shortcomings. Such a Protocol could draw extensively on the Yogyakarta Principles. At the very least, recognition of the limitations of CEDAW's language could spur reinterpretation of the Convention to reflect nonbinaristic understandings of sex. To the extent that CEDAW is a living document, its implementation depends on actors in States' Parties—including governmental and non-governmental actors (mostly women)—working in transnational activist networks. These networks have the power to rethink CEDAW.

In concluding that CEDAW should be more inclusive, this Article does not intend to exclude the need for remedies that focus on the inequality that women face based on their identity; rather, it argues that the principal treaty on sex discrimination should not solely focus on this group. It is easy to construct the need for a protocol, even a treaty, such as CEDAW, but it must be part of a broader recognition of the complexity of sex discrimination and not the sole treaty featured on the international landscape.

I. The Errant Centrality of "Women"

The meaning of "women" holds a clear appeal—its universality and biologically-driven clarity make it the apparently optimal focus for an international treaty reaching toward legitimacy in a wide range of cultures. However, CEDAW's drafters erred in placing "women" at the center of the Convention. This Part first describes CEDAW's continued

²⁷ Anti-essentialism focuses on presumptions of meaning based on identity—it is a descriptive project, or a counter-descriptive project. Anti-identitarianism by contrast focuses on legal and political consequences of identity commitments. Darren Rosenblum, *Parity/Disparity: Electoral Gender Inequality on the Tightrope of Liberal Constitutional Traditions*, 39 U.C. DAVIS L. REV. 1119–27 (2006) [hereinafter *Parity/Disparity*].

relevance as a central pillar of international gender equality law. It then presents potential rationales for the presence of “women” at the heart of CEDAW. Finally, although attempts have been made to reformulate the use of the term “women” in a broader fashion, notably by Catharine MacKinnon, this Part argues that “women” as a term cannot reflect the full panoply of sex and gender.

A. CEDAW’s Continued Relevance

The drafters of CEDAW sought to situate women’s rights as a preeminent international concern.²⁸ Women throughout the world confronted sexist institutions, and the drafters’ goals centered on utilizing international law to ameliorate these harms.²⁹ CEDAW reflects the universalist goal of guaranteeing rights but with the focus on women—a group that had previously been excluded from much IHRL enforcement.³⁰ Despite the Convention’s limited enforcement, one major success of CEDAW is the extent to which some State Parties have internalized its norms within their national legal systems.³¹ Semi-formal and informal networks of women’s rights advocates can foster change in several national contexts with specific connections to CEDAW’s provisions. In these contexts, CEDAW has served both to inspire action and as a source of

²⁸ See *Beijing Conference*, *supra* note 4.

²⁹ *Id.*

³⁰ The United Nations, for example, adopted the Universal Declaration of Human Rights in 1948. International Conference on Human Rights, Apr. 22–May 13, 1968, Declaration of Tehran, P 2, U.N. Doc. A/CONF.32/31 (May 13, 1968), reprinted in United Nations, Human Rights, A Compilation of International Instruments 43–44 (1988). The Preamble proclaims that its member states have pledged to promote “universal respect for and observance of human rights and fundamental freedoms.” U.N. Charter pmbl., para. 6.

³¹ See Ryan Goodman & Derck Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 638 (2004) (drawing on the meaning of the term “acculturation,” the process through which groups adopt the behaviors and beliefs of a surrounding culture. They argue that this process can be “harnessed” by institutions in order to “socialize recalcitrant states” into complying with international norms.).

legitimization for national women's advocacy movements.³² A principal achievement of CEDAW is its attempt to bridge the divide between the public and the private in international law. As Charlesworth and Chinkin put it:

[CEDAW's] transcendence of the divide
between first and second generation rights

³² *Internalizing Gender*, *supra* note 8, at 785. (examining the utility of comparative methodologies in analyzing the process by which nations internalize international norms, specifically considering how quotas for women's representation in France and Brazil illustrate the power of international legal instruments in different State contexts). CEDAW, art. 7 requires parties "to eliminate discrimination against women in the political and public life of the country . . . In the early 1990s, Brazilian feminists drew on the international women's rights movement to address that women accounted for only ten percent of the country's representation in government. See generally Clara Araújo, *Quotas for Women in the Brazilian Legislative System*, Int'l IDEA Workshop: The Implementation of Quotas: Latin American Experiences, Feb. 23–24, 2003, available at http://www.quotaproject.org/CS/CS_Araujo_Brazil_25-11-2003.pdf. To elevate "the presence of women in political institutions and party leadership," *id.* at 4, feminists forged ties with the leftist opposition to the dictatorship. *Id.* at 4, tbls. 6 & 8. Their first victory came in persuading the largest union, Central Unica dos Trabalhadores to adopt a provision for a thirty percent minimum quota for women in its leadership, a quota followed by other political parties. Comm. on the Elimination of All Forms of Discrimination Against Women, *Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of all Forms of Discrimination Against Women: Combined Initial, Second, Third, Fourth, and Fifth Periodic Reports of States Parties: Brazil*, U.N. DOC. CEDAW/C/BRA/1-5 (June 28, 2004) France failed to satisfy its obligations under Article 7 until it passed the Parity Law of 2000. Loi 2000-493 du 7 juin 2000 de loi sur la parité [Law 2000-493 of June 7 on the Parity Law], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], June 7, 2000, p. 8560. France's Parity Law imposes a fifty percent requirement with two kinds of enforcement mechanisms, which vary depending on the election in question. *Id.* In France, list-based elections determine municipal, regional, European and certain senatorial elections. For these elections, the enforcement mechanism is of the highest level: should a party fail to present candidates of alternating gender, its list will not be registered by the Prefecture, and as a consequence it will not appear on the ballot. Thus, a political party must propose as many male and female candidates, or lose the ability to run any candidate. La Gazette de L'AFEM [Association des Femmes de l'Europe Méridionale] [Association of Southern European Women], May–June 2000, at 3. Overall France's Parity Law has proven more effective than Brazil's Quota Law—a difference that can be attributed to the more powerful enforcement mechanisms. I argue that key differences in implementation derive, in part, from the variation in the construction of gender in these two different countries. *Parity/Disparity*, *supra* note 27 at 1119–27.

acknowledges that, for women, protection of civil and political rights is meaningless without attention to the economic, social, and cultural context in which they operate. It identifies areas where discrimination against women is most marked and where women most need guarantees of rights. The Women's Convention also attempts to overcome the public/private dichotomy observed in international law.³³

In this vein, CEDAW's main provisions appropriately define discrimination against women as any:

[D]istinction, 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 marital status, on the basis of equality between men and women, of human rights or fundamental freedoms in the political, economic, social, cultural, civil, or any other field.³⁴

States' Parties agree to pursue all necessary civil, political, economic, social and cultural actions, including "temporary special measures," to guarantee women's rights.³⁵ CEDAW guarantees access to public decision-making bodies, but unlike other human rights instruments it also supports women's equality within the "private" family context. Specific provisions span many areas of equality, including the recognition of the social function of motherhood,³⁶ suppressing trafficking³⁷ and

³³ CHARLESWORTH & CHINKIN, *supra* note 11, at 217.

³⁴ CEDAW, *supra* note 3, at art. 1.

³⁵ *Id.* arts. 2-4.

³⁶ *Id.* art. 5.

³⁷ *Id.* art. 6.

ensuring a woman's right to vote and hold public office.³⁸ The Convention favors reducing stereotypes in order to establish equal access to education, employment and health care,³⁹ to share equal property rights, to increase women's ability to choose marriage and childbearing freely and to share responsibilities related to child rearing.⁴⁰ Other provisions empower the Committee with regard to permissible reservations and dispute-settlement between countries⁴¹ as well as hearing countries report their progress.⁴²

CEDAW's norms inspire a range of reactions from countries, including everything from fully compliant internalization to disdainful evasion.⁴³ Countries do to some extent internalize CEDAW's norms, as the Convention has succeeded in certain contexts in legitimizing and

³⁸ *Id.* art. 7.

³⁹ *Id.* arts. 10–14. Article 15 emphasizes the need to protect these rights for rural women, an especially vulnerable group.

⁴⁰ CEDAW, *supra* note 3, at art. 16.

⁴¹ *Id.* arts. 23–30.

⁴² *Id.* arts. 17–18.

⁴³ *Id.*

institutionalizing women's rights.⁴⁴ However, countries internalize norms in different ways. In addition to states proactively adopting international norms, international law can encourage internalization through transnational networks of activists and individuals,⁴⁵ as well as through acculturation and selective adaptation.⁴⁶ Cultural differences surface within and across national boundaries and state and non-state actors engage in political behavior based on multiple rationalities. Some international scholars may worry that cultural relativism

⁴⁴ *Id.* Only when States internalize international law do they establish domestic legal obligations. Harold Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2659 (1997). As Koh describes, "obligation to obey an international norm becomes an internally binding domestic legal obligation when that norm has been interpreted and internalized into [a state's] domestic legal system." *Id.* Without internalization, CEDAW lacks substantial impact. Along with Koh, other scholars have theorized as to how states internalize international law. See e.g., Rex Glensy, *Quasi-Global Social Norms*, 38 CONN. L. REV. 79, 86-87 (2005) (describing how "[t]ransnational norm entrepreneurs" facilitate internalization in both their home countries and abroad); Goodman & Jinks, *supra* note 31, at 638. (explaining how institutions can harness acculturation, the process in which individuals and groups adopt beliefs and behaviors of a surrounding culture, to drive internalization); L. Amede Obiora, *Toward an Auspicious Reconciliation of International and Comparative Analyses*, 46 AM. J. COMP. L. 669 (1998) (suggesting that internalization can only occur with "'local legitimation and support"). Internalization involves a translation process in which the local actor interprets the application to her state. See Pierre Legrand, *Paradoxically, Derrida: For a Comparative Legal Studies*, 27 CARDOZO L. REV. 631, 665, 705 (2005) (discussing KONRAD ZWIEGERT & HEIN KOTZ, *INTRODUCTION TO COMPARATIVE LAW* (Tony Weir trans., 3d ed. 1998)); Jacques Derrida, *Des Tours de Babel*, in *DIFFERENCES IN TRANSLATION* 179 (Joseph F. Graham ed. & trans., 1985). Examples of CEDAW internalization include Brazil and France. See *Internalizing Gender*, *supra* note 8, at 787. See also *supra* note 32 and accompanying text.

⁴⁵ See MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* 1-10 (1998).

⁴⁶ See Goodman & Jinks, *supra* note 31, at 638; *Internalizing Gender*, *supra* note 8, at 824-25.

challenges the viability of IHRL universal norms,⁴⁷ but such norms have found their way into domestic legal systems, often colored with local cultural realities.⁴⁸ Although these cultural differences may distract observers from the influence of international norms, internalization does occur.

Despite the opportunities associated with internalizing norms, CEDAW's limitations have had profound implications for its effectiveness. A principal limitation is the wealth of substantial reservations that limit its applicability.⁴⁹ The many reservations to CEDAW include those related to religious law, often reflecting resistance to changing sexist cultural and

⁴⁷ Jack Goldsmith and Eric Posner, for example, may assert that this relativism prevents universal international norms from affecting State behavior. See JACK GOLDSMITH & ERIC POSNER, *THE LIMITS OF INTERNATIONAL LAW* 11–12 (2005). See also Koh, *supra* note 44. They argue that some combination of the four models of State relations (coincidence of interest, coordination, cooperation, and coercion) can explain State behavior, rather than compliance. For a discussion on the influence of cultural relativism, see CHARLESWORTH & CHINKIN, *supra* note 11, at 222–29. They note that some scholars reject cultural relativism because it retards the development of universal standards. *Id.* at 222–23 (citing F. Teson, *International Human Rights and Cultural Relativism*, 25 VA. J. INT'L L. 869 (1985)).

⁴⁸ See *Internalizing Gender*, *supra* note 8, at 759, 821–25. For example, French and Brazilian internalization of international norms, like women's suffrage, appear distinct. See *id.* Yet international law has still impacted both countries domestic laws. *Id.* at 788–799. Variances between countries may be the result of different modes of internalization, including transnational networks of activists and individuals, acculturation, and selective adaptation. *Id.* However, this does not diminish the impact of internalization.

⁴⁹ States Parties attach reservations to particular provisions of treaties they refuse to accept. CEDAW has attracted the most significant reservations of any human rights treaty. See Jennifer Riddle, *Making CEDAW Universal: A Critique of CEDAW's Reservation Regime Under Article 28 and the Effectiveness of the Reporting Process*, 34 GEO. WASH. INT'L L. REV. 605, 606 (2002). As of 2002, fifty-five States had reservations to CEDAW, and another fourteen States had ultimately withdrawn reservations they had initially filed. *Id.* at 606.

religious norms.⁵⁰ Between and within nations, laws that affect

⁵⁰ For example, Saudi Arabia's reservation notes that "[i]n case of contradiction between any term of the Convention and the norms of Islamic law, the Kingdom is not under obligation to observe the contradictory terms of the Convention." United Nations Treaty Collection, Declarations & Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women (Apr. 10, 2006) at <http://www.un.org/womenwatch/daw/cedaw/reservations.htm> (last visited June 20, 2011) [hereinafter, United Nations Treaty Collection, Declarations & Reservations]. Saudi Arabia only recently began debating whether to allow women to drive, yet it is a signatory to CEDAW. See Linda M. Keller, *The Convention on the Elimination of Discrimination Against Women: Evolution and (non)Implementation Worldwide*, 27 T. JEFFERSON L. REV. 39, 41 (2004). See also Adia Gonzales Martinez, *Human Rights of Women*, 5 WASH. U. J. L. & POL'Y 157, 175 (2001). Libya made a similar reservation providing that CEDAW cannot conflict with Islamic laws having to do with "personal status derived from the Islamic Shari'a." See Riddle, *supra* note 49, at 627. Countries like Egypt, Bangladesh, India, and Iraq have made comparable reservations. See generally *id.* There is a debate over whether such broad reservations are legal under international law. Article 28 of the Convention, permits ratification of the Convention with reservations, provided that they are not "incompatible with the object and purpose of the present Convention." See Laboni Amena Hoq, *The Women's Convention and its Optional Protocol: Empowering Women to Claim Their Internationally Protected Rights*, 32 COLUM. HUM. RTS. L. REV. 677, 688 (2001). The Convention, however, provides no mechanism to determine whether a given reservation violates the terms of Article 28. Significantly, many argue that without this reservation process, CEDAW would have far fewer signatories. See e.g., *id.* By contrast, the Convention on the Elimination of Racial Discrimination contains more rigorous procedures for the approval of party reservations. Article (20)2 of CERD provides:

A reservation incompatible with the object and purpose of this Convention shall not be permitted, nor shall a reservation the effect of which would inhibit the operation of any of the bodies established by the Convention be allowed. A reservation shall be considered incompatible or inhibitive if at least two-thirds of the States Parties to this Convention object to it.

CERD, *supra* note 25. The drafters of CEDAW contemplated restricting reservations by subjecting them to the veto of member states, but chose a permissive reservation scheme. Riddle, *supra* note 49, at 635 (citing Laura A. Donner, *Gender Bias in Drafting International Discrimination Conventions: The 1979 'Women's Convention Compared with the 1965 Racial Convention*, 24 CAL. W. INT'L L.J. 241, 242 (1994)). In light of the large number of broadly termed reservations under the women's convention, some argue that had the CEDAW drafters included more stringent provision like those found in CERD, CEDAW might have yielded more impressive results. *Id.*

women vary substantially in ways that impact real lives.⁵¹ Depending on one's sex, nationality may determine when and whom one can marry. It may also determine whether one can divorce, control one's reproduction, own or inherit property and even whether one can vote or run for office.⁵² Most CEDAW States' Parties enforce straightforward rules on such questions, often manifesting deep gender inequalities.⁵³ As such, CEDAW provides a first step, but not a workable solution to inequality, suggested by the fact that over forty-five countries around the world—most of which have ratified or acceded to CEDAW—maintain laws that explicitly discriminate against women.⁵⁴

Indeed, many aspects of CEDAW reflect a certain level of

⁵¹ *Internalizing Gender*, *supra* note 8, at 825. For example, many large countries' legal systems reflect substantial diversity whether by design through federalism or by function.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ See Kerry L. Ritz, *Soft Enforcement: Inadequacies of Optional Protocol as a Remedy for the Convention on the Elimination of all Forms of Discrimination Against Women*, 25 SUFFOLK TRANSNAT'L L. REV. 191, 200 (2001).

softness.⁵⁵ At its inception, CEDAW only provided two procedures—the interstate procedure and the reporting procedure—to monitor State Parties' compliance with the

⁵⁵ Like many human rights endeavors, CEDAW has some soft law characteristics such as failing to delegate power to the international institution. See Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, in *LEGALIZATION AND WORLD POLITICS* 37, 58 (Judith L. Goldstein et al. eds., 2001). According to Abbot and Snidal, soft law:

[P]rovides a rational adaptation to uncertainty. It allows states to capture the “easy” gains they can recognize with incomplete knowledge, without allowing differences or uncertainties about the situation to impede completion of the bargain . . . Soft law avoids the sovereignty costs associated with centralized adjudication or other strong delegation and is less costly than repeated renegotiation in light of new information . . . ; [it] allows states to adopt their commitments to their particular situation rather than trying to accommodate the divergent national circumstances within a single text . . . ; [it] accommodates states with different degrees of readiness for legalization [and] . . . ; facilitates compromise between weak and powerful states.

Id. at 60. In contrast to *soft law*, the term *hard law* has been defined as “legally binding obligations that are precise and that delegate authority for interpreting and implementing the law.” *Id.* Thus, CEDAW’s softness may aid the cause of attaining additional signatories as states do not actually cede enforcement power. It also offers more effective ways to deal with uncertainties and “facilitates compromise—mutually beneficial cooperation, between actors with different interests and values, different time horizons and discount rates, and different degrees of power.” *Id.* at 38–39. Soft law is utilized when member States recognize a given issue but are concerned about their sovereignty and the costs and risks of entering an agreement. *Id.* at 50–51. Although CEDAW and the Optional Protocol require State members to implement general guidelines to end gender discrimination, they both set forth principles rather than rules, making CEDAW a soft law. See Ritz, *supra* note 54, at 191, 214–15. CEDAW and the Optional Protocol fail to provide precise legal obligations and do not require compliance or responsibility by parties. See *id.* at 215.

Convention, a significant limitation compared to other treaties.⁵⁶ Article 29 of CEDAW, the interstate procedure, provides for a resolution to conflicting interpretations and applications of the Convention between State Parties.⁵⁷ However, no State has ever engaged the interstate procedure,⁵⁸ likely because any State can refuse to be held to it.⁵⁹ In response to these weaknesses, international women's rights advocates pushed for the Optional Protocol to the Women's Convention.⁶⁰ The Protocol offers two

⁵⁶ See Hoq, *supra* note 50, at 684. Critics have argued that (prior to the Optional Protocol) CEDAW lacked a complaint and communication process designed to allow non-governmental organizations or individuals to bring complaints against State Parties for violations of the Convention. Julia Ernst, *U.S. Ratification of the Convention on the Elimination of all Forms of Discrimination Against Women*, 3 MICH. J. GENDER & L. 299, 337-40 (1995). By contrast, CERD contains more rigorous enforcement provisions. CERD Article 14 authorizes the Committee to review complaints made by individuals alleging to be victims of discrimination. Hoq, *supra* note 50. CERD has another enforcement advantage over CEDAW in its capacity to review complaints submitted by one state party that charge another with violating the Convention. *Id.* The CEDAW committee is limited to considering regular state reports and, as such, is limited in the extent to which substantive treaty violations are brought to its attention. *Id.*

⁵⁷ See Hoq, *supra* note 50 at 684.

⁵⁸ CATHARINE A. MACKINNON, ARE WOMEN HUMAN?: AND OTHER INTERNATIONAL DIALOGUES 305 (2006) [hereinafter ARE WOMEN HUMAN?].

⁵⁹ See Hoq, *supra* note 50, at 685. The interstate reporting procedure, set forth in Article 18, obliges State Parties to submit an initial report within one year of ratification of the Convention, followed by periodic reports at least once every four years. *Id.* The reports must include the steps the State has taken to integrate the Convention into domestic laws and policies and the difficulties the State has faced in upholding the Convention. *Id.* These reports are submitted to CEDAW, which examines the reports. *Id.* Article 17 gives specific authority to CEDAW to review State Parties' reports and scrutinize their implementation and adherence to the Convention before the international community, and, if needed, CEDAW may issue general recommendations regarding the nature and extent of State Parties' compliance. See *id.* See also Katherine M. Culliton, *Finding a Mechanism to Enforce Women's Right to State Protection from Domestic Violence in the Americas*, 34 HARV. INT'L L.J. 507, 529 (1993). However, CEDAW may not impose sanctions for noncompliance with the Convention or engage in any form of arbitration between State Parties, or an individual and a State Party, regarding the interpretation or application of the Convention. See Ritz, *supra* note 54, at 204; Hoq, *supra* note 50, at 685.

⁶⁰ See Hoq, *supra* note 50, at 683.

new mechanisms: 1) the communications procedure, which provides individuals and groups the right to lodge complaints with CEDAW regarding States' violations of the Convention's terms; and 2) the inquiry procedure, which enables CEDAW to conduct inquiries into States' serious and systematic abuses of women's human rights.⁶¹ However, a State must still consent to any visit from the CEDAW committee,⁶² hampering the Convention's efficacy.⁶³ In addition, even if it were permitted to investigate alleged violations, it could not force state compliance.⁶⁴ Moreover, fewer than half of the member States have ratified it. Ultimately, the Optional Protocol still falls short of achieving full enforcement of the Convention.⁶⁵

In a previous article, I argued that CEDAW faces a particularly challenging barrier in the translation of a universal conception into different nations' sharply conflicting legal cultures.⁶⁶ Differentiation among legal cultures may lead to divergent internalizations of the same international norm.⁶⁷ One of CEDAW's weaknesses has been the underlying inability of states to agree to specific, enforceable remedies for gender inequality.⁶⁸ In that article, I showed how the differences between Brazilian and French gender constructions played out in

⁶¹ See *id.* at 678; see also Riddle, *supra* note 49; Keller, *supra* note 50, at 35.

⁶² See Keller, *supra* note 50, at 38.

⁶³ Another argument for CEDAW's ineffectiveness is its vague phrasing of the goals parties to the Convention must accomplish to meet their affirmative obligations. See Kathryn Christine Arnold, Note, *Are the Perpetrators of Honor Killings Getting Away with Murder? Article 340 of the Jordanian Penal Code Analyzed Under the Convention of the Elimination of all Forms of Discrimination Against Women*, 16 AM. U. INT'L L. REV. 1343, 1392-93 (2001).

⁶⁴ See Ritz, *supra* note 54, at 191, 210-14.

⁶⁵ See Hoq, *supra* note 50, at 678; see also Ritz, *supra* note 54, at 208-09.

⁶⁶ *Internalizing Gender*, *supra* note 8, at 807.

⁶⁷ *Id.*

⁶⁸ *Id.*

remedies adopted pursuant to CEDAW.⁶⁹ There I argued that cultural difference creates possibilities for new norms that do not simply project one cultural frame onto the world political stage.⁷⁰ Here, I go one step further: the centrality of the imprecise term “women” pretends to attain universality while inhibiting cultural variation.

In short, efforts towards implementing CEDAW face profound challenges, but CEDAW can and does influence national behavior. Central to its cross-cultural appeal and its profound limitations is the central subject of the treaty: women. The choice of “women” over “sex” reflects a deliberate attempt at universality in a legal instrument striving for legitimacy.

B. The Choice of “Women” over “Sex” and its Purpose

CEDAW’s enactment attempted to ensure women a place at the international law table, thereby serving the key second wave feminist goal of recognizing women as proper subjects of human rights.⁷¹ Yet, this focus also served broader legitimizing purposes for the nascent international feminist movement. “Sex” was the term used in the central document in human rights: the Universal Declaration of Human Rights (UDHR). But in 1946, the march toward “women” began with the Commission on the Status of Women (CSW), established as a commission of the Economic and Social Council of the United Nations (ECOSOC).⁷² Two decades later came the arrival of both the

⁶⁹ See generally *id.*

⁷⁰ *Id.* at 801. Comparative techniques elucidate the potential for integrating comparative and international legal scholarship. The comparative scholar will examine the construction and culture of international law, necessarily revealing its biases. Here, the political goals of CEDAW presume sociopolitical structures of firmly rooted democracies. The terminology of “sex” and “gender” ignores the potential for variation of gender across cultures. In certain countries, gender means the divide between men and women, while in others it may mean the fluidity of such identities, or even the ability to choose sex or marital partners without regard to gender. Comparative work reveals such cultural variations and their legal import. *Id.* at 807.

⁷¹ See Beijing Conference, *supra* note 4.

⁷² ECOSOC Res. 2/11, U.N. Doc. E/RES/2/11 (June 21, 1946).

ICCPR⁷³ in 1966 and the Declaration on the Elimination of Discrimination against Women (DEDAW) in 1967.⁷⁴ The ICCPR's language on this issue includes Article Two's reference to "sex" as one of the protected categories (after "race" and "colour") and Article Three's reference to ensuring "the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant."⁷⁵ By contrast, DEDAW contains much of the language that was adopted by CEDAW. The Convention's discussions reflected the weight of a strong historical precedent in the prior use of "women." CEDAW's drafters inherited a set of international institutional engagements that reflected some tension over the use of "women" (drawing on the Declaration) or "sex" (drawing on the ICCPR).⁷⁶

In discussions held in 1974 before the Commission on the Status of Women regarding the text of the potential Convention, the force of the international history of "women" battled an

⁷³ ICCPR, Adopted by the United Nations General Assembly on December 16, 1966, and in force on March 23, 1976. It is important to note that human rights treaties overlap—the International Covenant on Civil and Political Rights (ICCPR) provides protections also guaranteed by several other treaties, for instance. It is worth noting, then, that while CEDAW's emphasis on women raises problems, it is one treaty among several in the area of human rights. States that have signed multiple treaties must adhere to each; their multiple obligations require states to attend not only to CEDAW's requirements on "women" but also to ICCPR obligations related to "sex." My critique of CEDAW separates it from these other treaties to understand the relationship between identity and discrimination as CEDAW depicts it.

⁷⁴ Declaration on the Elimination of Discrimination Against Women, G.A. Res. 22/2263, U.N. Doc. A/RES/22/2263 (Nov. 7, 1967).

⁷⁵ International Covenant on Civil and Political Rights, G.A. Res. 2200A, arts. 2 & 3, U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316, 999 U.N.T.S. 171 (Mar. 23, 1976).

⁷⁶ The analysis of the Travaux in this Article is at best an incomplete one. Not all of the Travaux have been reviewed nor have any interviews of the participants been conducted to clarify both how negotiations transpired and what the parties intended by particular language. For that reason, at several points in this historical discussion, I will use more tentative language to describe my conclusions. It is also beyond the scope of this Article to detail the full history of the use of the terms "women" and "sex" in international law prior to the advent of CEDAW.

interest in the "equality of men and women":

Different views were expressed as to the name of the Commission on the Status of Women. Although some argued that its name should conform to that of the Promotion of Equality of Men and Women Branch, others felt that the question of a new name should be studied carefully. Some representatives believed that because the Commission had been known for twenty-six years as the Commission on the Status of Women, a change would only create confusion and that what was really important was the content of the program. It was suggested also that the title of the Convention of the Elimination of Discrimination against Women should be changed to "Convention on the Promotion of Equality between Men and Women."⁷⁷

As this quote reflects, several states expressed an interest in referencing equality between men and women. Such proposals to adopt a Convention name that would expressly include men ultimately failed.

Three years later, also during the course of CEDAW's drafting, several countries took a different route, but one that still sought to diverge from the focus on women. The countries argued that the convention should "deal not only with discrimination against women, but with discrimination on grounds of sex as a whole."⁷⁸ The response to this suggestion focused on the need for the Convention to address women's role in society and at home, particularly with reference to maternity.

The United Kingdom proposed to resolve this debate with

⁷⁷ U.N. Econ. & Soc. Council, Comm'n on the Status of Women, *Report on the Twenty-Fifth Session*, ¶ 267, U.N. DOC. E/5451 (Supp. No. 4) (Jan. 25, 1974).

⁷⁸ U.N. Econ. & Soc. Council, Comm'n on the Status of Women, *Report on the Twenty-Sixth and Resumed Twenty-Sixth Sessions*, U.N. DOC. E/5909 E/CN.6/608 (June 15, 1977).

an attempt both to preserve the focus on women and to provide those who supported the switch to "sex" with some inclusive language. Their solution was to include men specifically in the text of the Convention. Their proposal read:

For the purpose of the present Convention the term "discrimination against women" shall mean any distinction, exclusion, restriction or preference made on the basis of sex, which has the effect of, or the purpose of, nullifying the recognition, enjoyment or exercise by women, on a basis of equality with men, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.⁷⁹

Although the final language of the Convention varies slightly from the United Kingdom's proposal, it reflects the same language with regard to "women" and "men" and the absence of "sex." To the drafters, such language perhaps seemed like a fitting compromise to incorporate the concerns of those who wanted a Convention on sex discrimination without abandoning the centrality of women.

At least one other attempt to include references to "sex" failed. In 1977, the United States proposed that the words "based on sex" should replace the words "against women" in Article 2(e).⁸⁰ The final text reads instead: "[t]o take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise," omitting any reference to sex or "equality with men."

It is not surprising then that the conclusion of these discussions on including "sex" or even "men" yielded to the centrality of "women." In 1977, the Commission on the Status of Women determined, without a vote, "that the title of the Convention should be similar to that of the Declaration on the Elimination of Discrimination against Women."⁸¹

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ G.A. Res., 62d Sess., Supp. No. 3, U.N. Doc. E/5909 E/CN.6/608 (1977).

CEDAW reflected an historical need to focus on women and their experiences in order to define and address the harms of sexism. In the 1970s, women's rights activists asserted that international law needed to define the harms of sexism.⁸² The Convention reflected an "up with women"⁸³ answer to crucial international law questions. Political movements and academic scholarship from the 1970s concentrated on promoting women's empowerment—think "Sisterhood is Powerful."⁸⁴ At that time, universalist notions of sisterhood overpowered even the hint of gender's cultural contingency, which only began to shake the core of transnational feminism with the 1990s controversies over female genital cutting.⁸⁵ Now, in 2011, the role of the identity "women" in this enterprise merits attention as the lack of descriptive or critical analysis has become apparent.

⁸² Bridget J. Crawford, *Toward a Third-Wave Feminist Legal Theory: Young Women, Pornography and the Praxis of Pleasure*, 12 MICH. J. GENDER & L. 99, 101 (2007).

⁸³ *Id.*

⁸⁴ ROBIN MORGAN, *SISTERHOOD IS POWERFUL* (1970). Proto-movement transgenderism did not yet yield any women's movement introspection, as tensions between lesbian feminists and drag queens tore apart the lesbian and gay movement. This tension dates to early in the gay rights movement. During the 1973 Pride March in Washington Square Park in New York City, radical lesbian activist Jean O'Leary and the drag queens in attendance engaged in a dispute, in part over whether the transvestites' overly feminine dress mocked women. Only the performance by Bette Midler of "You've Got to Have Friends" soothed tensions. See STEPHAN L. COHEN, *THE GAY LIBERATION YOUTH MOVEMENT IN NEW YORK* 169 (2008).

⁸⁵ That controversy divided Western feminists, who decried the practice, from other feminists, including African and Middle Eastern feminists, who objected to the colonial tone of such reproaches. Western feminist efforts to eradicate FGC may have led to nationalist responses in certain contexts. Whereas the practice of FGC had been waning, once international actors entered national contexts to oppose it, FGC became a newly valued part of tribal or national tradition, a practice worth maintaining. See e.g., Hope Lewis, *Between Irua and "Female Genital Mutilation": Feminist Human Rights Discourse and the Cultural Divide*, 8 HARV. HUM. RTS. J. 1 (1995); Eugenie Anne Gifford, *"The Courage of Blasphemy": Confronting Barriers to Resisting Female Genital Mutilation*, 4 UCLA WOMEN'S L.J. 329 (1994); Leslye Amede Obiora, *Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign Against Female Circumcision*, 47 CASE W. RES. L. REV. 275 (1997); Isabelle R. Gunning, *Uneasy Alliances and Solid Sisterhood: A Response to Professor Obiora's Bridges and Barricades*, 47 CASE W. RES. L. REV. 445 (1997).

The Convention that was ultimately adopted, save for Section 5(a), centers on "women." CEDAW's women-centered approach initially served the goal of recognizing women as proper subjects of human rights and that human rights norms excluded many issues that affect women. However, while CEDAW contains many definitions, at no point does it attempt to define its central subject.⁸⁶ What "women" meant in the 1970's as CEDAW took shape can only be inferred given the lack of definition of the term in the text of the Convention or within the *Travaux*.⁸⁷ As with most silences, CEDAW's non-definition of "women" reveals more than any definition that CEDAW does contain. At the time of CEDAW's drafting, the

⁸⁶ The *Travaux* do not reveal any debate over whether to define "women" or what the term meant. See LARS ADAM REHOF, GUIDE TO THE *TRAVAUX PREPARATOIRES* OF THE UNITED NATIONS CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (1993).

⁸⁷ The first wave of feminism was characterized by nineteenth century advocacy for women's rights, primarily concerning attaining suffrage. Crawford, *supra* note 82, at 101. The second wave of the 1960's and 70's sought more political recognition of the rights and power of women as a group and was signified by a rejection of traditional gender roles and femininity. *Id.* The second wave was followed by the third wave in early 1990's. *Id.* at 107. "If first- and second-wave feminism sought an accretion of rights and power to women as a group, third-wave feminism seeks recognition for the individual. *Id.* at 117-18. "To date, third-wave feminist writing has focused primarily on non-legal (and non-theoretical) aspects of female sexuality, economic mobility and the multifaceted nature of racial, ethnic, class and gender identities. Third-wave feminist writers also acknowledge and emphasize the role of culture, media and technology in shaping those identities. These writers tend to take a broad view of 'women's issues' by connecting traditional feminist concerns such as reproductive freedom and discrimination in employment with broader justice movements for workers, immigrants, gays and lesbians and other disadvantaged groups." *Id.* at 102.

word "women" had not yet been interrogated.⁸⁸ The drafters appear to have used the term uncritically, without contemplating its effects on the Convention's utility.

Given CEDAW's lack of a definition for "women," a close examination of its Preamble reveals some of the logic for this focus.⁸⁹ The Preamble lists the bases in international law for the establishment of the Convention. Central among them is the guarantee in the UDHR that "everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex."⁹⁰ Yet, the rights established here are constructed around a protection from distinction based on sex, a framing that does not reference one particular sex. This reference to sex matches the non-identitarian references typical of the Universal Declaration.

⁸⁸ The very silence conveys a presumption of universality with an obvious meaning. By virtue of the seemingly harmless universalist and biological meaning, the *sotto voce* definition of women involving submission and subservience takes root. Perhaps CEDAW's failure to define women furthered the goal of widespread ratification, but at the cost of reifying popular, and implicitly sexist, understandings of "women." In 1976, the Concise Oxford Dictionary defined a woman as: 1) Adult human female; . . . 2) The average or typical woman, the female sex, any woman . . . 3) (colloq.) Charwoman; . . . 4) Man with feminine characteristics . . . 5) The feminine emotions . . . 6) attrib. Female . . . THE CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH 1341-42 (6th ed. 1976). Support for the fact that the term was uncontested at the time can only be drawn from the absence of discussion over the meaning of the term. See generally, REHOF, *supra* note 86 (referring to "women" and "men" without any nuance or definition.).

⁸⁹ In setting out why the Convention is necessary, the Preamble notes that:

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

CEDAW, *supra* note 3, at pmb1.

⁹⁰ *Id.*

From there, the paragraphs of the Preamble address “the equality of rights of men and women,” a principle established in other international conventions and resolutions. This shift from protecting against discrimination based on “sex” to ensuring the “equality of rights of men and women,” performs a crucial move from a universalist frame that could include different sexes to a binary one that asserts both the existence of only two sexes and the normative desirability of equality between them. Thus, CEDAW departs from the universalist norm of “sex,” which from a 2011 perspective includes people of all sexes—“men,” “women,” transgender, intersex and other differently sexed and gendered people. By specifying “men” and “women,” it began the transition to identity-centeredness. The Preamble’s last statement of norms does reference both men and social roles: “[a]ware that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women.” Despite this language, the Preamble creates the basis for a Convention that recognizes the male/female binary and places women at the center of remedies for sex inequality. The balance of the Convention references men only as an exception.

The Preamble achieves the establishment of both the sex binary and the equality norm. The transition to the focus on women in the Preamble is based on concerns that “extensive discrimination against women continues to exist.” Yet the foundational document, the UDHR is actually about “sex,” not “women,” and CEDAW makes a leap from that language to “women” because of this extensive discrimination against women. And while the continued need for international protection for women’s rights is patent, “women” cannot be the beginning, middle and end of the story on international sex discrimination law.

One may consider that, given the complexity of the meaning of “women,” CEDAW’s non-definition of women may have been an act of purposeful vagueness.⁹¹ Parties to a contract gloss over differences through imprecise language to conclude a

⁹¹ The relative paucity of historical documents relating to the drafting of CEDAW obscures whether the drafters considered the meaning of the term “women.”

deal.⁹² For example, in discussing CEDAW's provisions, at a certain point, the drafters decided that further detail should be avoided to permit flexibility for countries.⁹³ This decision may reflect the impetus for drafters of international treaties to avoid contested language that may undermine widespread ratification.⁹⁴ That vagueness served a political purpose at the time, unifying State Parties that may have disagreed on a definition. The use of the term "women," we could infer, avoided the minefields of possible alternatives. Defining women in CEDAW would have raised debates such as those that arose concerning the use of "gender" in the Rome Statute. Indeed, it could have derailed efforts at transnational unity, although it seems unlikely given the extent to which "women" functioned as a unitary category more broadly at the time of CEDAW's drafting than in the late 1990s as debate over the Rome Statute

⁹² See Omri Ben-Shahar, "Agreeing to Disagree": Filling Gaps in Deliberately Incomplete Contracts, 2004 WIS. L. REV. 389 (2004).

⁹³ As reflected in discussions in 1974:

The view was expressed that, subject to certain important but comparatively minor modifications and amendments, the Declaration on the Elimination of Discrimination against Women fulfilled the criteria for an acceptable convention. The temptation to add more detailed clauses to the Declaration should be resisted, so as to avoid difficulties for countries which wished to apply the general provisions in different ways. The opposite opinion was also expressed, however, that, though some of the provisions of the proposed draft convention might not be acceptable to all countries because of their existing legislations, the convention should be seen as a challenge and national legislations should in course of time be brought into conformity with those provisions.

U.N. Econ. & Soc. Council, Comm'n on the Status of Women, *Report on the Twenty-Fifth Session*, p. 30, U.N. DOC. E/5451 (Supplement No. 4), E/CN. 6/589 (Jan. 25, 1974).

⁹⁴ Here, David Kennedy points out the commonplace practice of watering down international human rights provisions to persuade more states to accede to the treaty in question. See KENNEDY, *supra* note 20, at 24–25; see also REHOF, *supra* note 86, at 2–3 (noting that countries worried that the Convention would have a detrimental impact on the cultural and social make-up of their societies, causing these real considerations to be "cloaked in vague concepts and terms").

began.⁹⁵ “Women” served a clear purpose in the positivist legal project of international women’s rights. The project’s purpose relies on the centrality of the term “women,” which advanced States Parties’ apprehension of the meaning of their international commitment.⁹⁶ “Women” both legitimized and narrowed international remedies. It served as an organizing concept around which this positivist project could arise.

CEDAW, to the extent it has succeeded, depends on “women,” both as a concept and as a group. “Women” as a group of people have played a central role as actors working toward the limited successes of the project. International women’s rights activists have dedicated their energies, and in some cases, their lives, toward establishing CEDAW’s legitimacy. An honest assessment of the costs and benefits of the centrality of “women” in CEDAW may help us recognize the limitations that result from certain political choices.

C. The False Universals and Certainties of “Women”

The term “women” created a cross-cultural site to resist fragmentation by other identity traits, such as nationality, class, race and religion.⁹⁷ The biological specificity of “women” served as the central category around which states could enter into precise agreements. The chief evidence for this universality is that the central term in the Convention, “women,” is not even

⁹⁵ See generally Valerie Oosterveld, *The Definition of “Gender” in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice*, 18 HARV. HUM. RTS. J. 55 (2005).

⁹⁶ Using Kenneth W. Abbott and Duncan Snidal’s definition, international law derives legitimacy from three elements of the relationship between states and international bodies: obligation, precision and delegation. Abbott & Snidal, *supra* note 55, at 38; see also Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT’L ORG. 421, 424 (2000). By each of these measures, the term “women” plays a crucial role. The then-perceived universality of the term created the conditions for parties to bind themselves to an international treaty that obligated them to report the status of women to the CEDAW Committee. *Id.* at 57–58. Although CEDAW, as a reporting convention, involves little delegation, the delegation by states to the international body also presupposes the use of an uncontested term that would serve as the subject of the Convention. *Id.* at 54.

⁹⁷ Otto, *supra* note 16, at 106.

defined: it is so clearly universal that it needs no definition. For those invested in the current structure of international law, fear of the fragmentation of this unitary and universalist identity⁹⁸ motivates continued reinvestment in the term. CEDAW legitimated the identity-based rights model for other women's rights efforts.⁹⁹

This unitary rhetoric confronts many critiques. Anti-essentialist theory questions the utility of a universal group called "women," targeting it as a reference to white women.¹⁰⁰ Comparative law theory exposes fundamental cultural differences and the limitations of internationalist universalities such as "women." The meaning of "women" varies from country to country.¹⁰¹ Biological commonalities may exist among women in different countries, but the experience of women varies not only along national and cultural lines, but also especially along class lines.¹⁰² Work and family roles vary along each of these axes, leading to vast disparities that undermine the concept of a universal "woman."¹⁰³ Socioeconomic factors construct the relationship between women and society, both in

⁹⁸ *Id.* at 105–06.

⁹⁹ At least part of the legitimacy of international feminist efforts relies on the "almost contradictory idea of international feminism that all violence against women all over the world is the same." Lama Abu Odeh, *Comparatively Speaking: The "Honor" of the "East" and the "Passion" of the "West"*, 1997 UTAH L. REV. 287, 290 (1997).

¹⁰⁰ For example, bell hooks and Kimberlé Crenshaw have emphasized the "white nature" of such concepts, asserting that race and gender are intertwined. See e.g., BELL HOOKS, *AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM* 1–13, 119–58 (1981); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and the Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

¹⁰¹ Sex, referring to biological difference, may vary minimally from country to country. Gender, in contrast, depends on culture and varies substantially across borders. Rosenblum, *Internalizing Gender*, *supra* note 8, at 801 (citing Katherine Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1 (1995)).

¹⁰² *Id.* at 804.

¹⁰³ *Id.*

its public and private iterations.¹⁰⁴ Family structures could consign women to the home or encourage them to work, perhaps even abroad.¹⁰⁵ Reproductive policy, daycare, public education, and healthcare each shift the nature of the identity of “women.”¹⁰⁶

Each of these socioeconomic factors defines the power relationship between men and women in different societies. Even the biological unity of “women” varies depending on the practice and availability of sex-related surgery, whether for ritual modification, cosmetic purposes or gender identity-related surgery.¹⁰⁷ CEDAW’s universalist language does not account for the impact of this contingency on international human rights law. Those who work with CEDAW may wish to avoid such contingency, fearing that it “softens” the already “soft” legal concepts in international women’s human rights law.¹⁰⁸ Such anti-essentialist arguments surface in comparative work on gender identity that reveals the extent to which universal norms ignore gender’s cultural construction. Cosmopolitan arguments can provide the theoretical framework for understanding work that details the complexity of “women” and other gender

¹⁰⁴ *Id.*

¹⁰⁵ LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* 104–12 (2006).

¹⁰⁶ *Internalizing Gender*, *supra* note 8, at 804.

¹⁰⁷ *Id.* at 801.

¹⁰⁸ See CHARLESWORTH & CHINKIN, *supra* note 11, at 66. Soft law generally refers to legal regimes with limited binding force. See *supra* note 55 and accompanying text.

identities.¹⁰⁹ These cultural explorations of gender differentials reflect the dynamic relationship among identities of sex, gender and sexuality.¹¹⁰

CEDAW may be viewed as proto-"Governance Feminism," a term Janet Halley and others use to describe feminist efforts towards occupying key positions in public regulatory efforts.¹¹¹

¹⁰⁹ Cosmopolitanism, a mingling of normative values throughout the world, revived first by Jeremy Waldron, *Minority Cultures and the Cosmopolitan Alternative*, in *THE RIGHTS OF MINORITY CULTURES* 93-119 (Will Kymlicka ed., 1995), and then in a different vein by Kwame Anthony Appiah, *COSMOPOLITANISM: ETHICS IN A WORLD OF STRANGERS* (2006), and Paul Schiff Berman in his work on legal pluralism, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155 (2007). Thai and Indian gender identities, as Sonia Katyal has demonstrated, incorporate both sharply divergent gender and sexual identities. Sonia Katyal, *Exporting Identity*, 14 YALE J.L. & FEMINISM 97, 136-41, 152-67 (2002). Larry Catá Backer has contrasted the constructions of gender and sexuality in Malaysia, Zimbabwe and the United States. Larry Catá Backer, *Emasculated Men, Effeminate Law in the United States, Zimbabwe and Malaysia*, 17 YALE J.L. & FEMINISM 101 (2007). And with regard to the issue of wearing a veil, several scholars have weighed in on the impact of cultural difference: Karima Bennouna, Mary Anne Case, Joan Wallach Scott, Madhavi Sunder and Adrien Wing, to name a few. Karima Bennouna, *Secularism and Human Rights: A Contextual Analysis of Headscarves, Religious Expression, and Women's Equality Under International Law*, 45 COLUM. J. TRANSNAT'L L. 367 (2007); Mary Anne Case, *Feminist Fundamentalism and the Constitutionalization of Marriage*, in *FEMINIST CONSTITUTIONALISM* (Beverly Baines ed., forthcoming 2011); JOAN WALLACH SCOTT, *THE POLITICS OF THE VEIL* (2007); Madhavi Sunder, *Piercing the Veil*, 112 YALE L.J. 1398 (2003); Adrien Katherine Wing & Monica Nigh Smith, *Critical Race Feminism Lifts the Veil?: Muslim Women, France, and the Headscarf Ban*, 39 U.C. DAVIS L. REV. 743 (2006).

¹¹⁰ Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CALIF. L. REV. 11 (1995).

¹¹¹ See SPLIT DECISIONS, *supra* note 17, at 6.

Beyond the sex trafficking context in which it first arose,¹¹² Halley references the concept of “Governance Feminism” in order to criticize interventions to shift international criminal law towards banning domestic violence practices, which some scholars have alleged constitutes a “global war against women.”¹¹³ Halley calls this structuralist feminist agenda “Feminist Universalism,” in which women exist not as a “particular group of humanity,” but rather as a distinct universe

¹¹² Feminists achieved success internationally through their efforts which led to the drafting of the 2000 United Nations Protocol on Trafficking as well as domestically when, during that same year, the United States congress passed the Victims of Trafficking and Violence Protection Act. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 25, Annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/45/49. (Vol. I) (2001); Victims of Trafficking and Violence Protection Act of 2000 (VTVPA), Pub. L. No. 106-386, § 106, 114 Stat. 1464. Both of these achievements had reverberatory effects on other national stages. See Janet Halley, Prabha Kotiswaran, Hila Shamir & Chantal Thomas, *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J. L. & GENDER 335, 348 (2006).

¹¹³ See SPLIT DECISIONS, *supra* note 17, at 2.

that deserves an international law conforming to its needs.¹¹⁴ Assuming that women's position as victim is ubiquitous, the Feminist Universalist vision seeks reforms far broader than those engaged by the early Governance Feminists' efforts to shape

¹¹⁴ *Id.* at 7. Feminist Universalism reflects some inspiration from Luce Irigaray, the French feminist philosopher. LUCE IRIGARAY, *THIS SEX WHICH IS NOT ONE* (Catherine Porter trans., Cornell Univ. Press 1985) (1977). Feminists have long debated theories of difference. Since the 1970's, French feminist theory, led by Hélène Cixous, Julia Kristeva and Luce Irigaray, has delved into issues of women's difference from men. Of the three, Irigaray developed the most explicitly political examination of women's position in society. In that sense, although no particular philosopher or political theorist has dominated the debate on Parity in France, Irigaray's philosophy most closely approaches the theories espoused by the Parity movement. Early on, her philosophy emphasized the fundamental difference between women and men. One of her most well known works, *THIS SEX WHICH IS NOT ONE*, explored the social meaning of women's biological difference from men. Irigaray argues that as men are unitary, women are multiple, even down to their genitalia. *Id.* at 23. Women's multiplicity puts them in the social position of focusing on relational behavior. Irigaray explored how women's language expressed this relationship-centered existence, in which women constantly relate to others, consistently referring to their interlocutors. With regard to women's political role in society, Irigaray has argued that women, as metaphysically distinct from men, have the right to citizenship, which reflects their own existence. See Luce Irigaray, *L'Identité Feminine: Biologie ou Conditionnement Social?*, in *FEMMES: MOITIÉ DE LA TERRE MOITIÉ DU POUVOIR [Female Identity: Biology or Social Conditioning?, in WOMEN: HALF OF THE EARTH HALF OF THE POWER]* 101 (Gisèle Halimi ed., 1994). A number of French feminists disagreed with this "difference" theory, espousing instead the theory that women have the right to "equal" treatment. See GILL ALLWOOD & KHURSHEED WADIA, *WOMEN AND POLITICS IN FRANCE 1958-2000*, 218-19 (2000).

international criminal law.¹¹⁵

My assertions related to CEDAW's reliance on "women" as a universal concept reflect how this Feminist Universalism grew from CEDAW. "Women" was so universal that it needed no definition, leading decades later to efforts related to other areas of international law that build on this presumption of universality. In this Feminist Universalism, as in CEDAW, men's role in gender is at worst invisible or at best secondary (as in MacKinnon's *Oncale* analogy in which men who are victims may be considered like women).¹¹⁶ Without the victim-centered subjectivity of women, Feminist Universalism would have no

¹¹⁵ See SPLIT DECISIONS, *supra* note 17, at 60. Halley explains that these early battles were relatively minor and that the feminist consensus was actually after something "more elusive, more structural." *Id.* at 59. The goal was to change "the very classificatory scheme of universal justice." *Id.* at 61-62. The Geneva Conventions provided a structure whereby the well being of women was part of an effort to maintain a "universal human integrity." *Id.* at 62. As Halley reveals, the Feminist Universalists believe that "the right of women to be secure from sexual assault was itself fundamental, central, and of universal scope," and that female suffering exists separately from that of a male. *Id.* Halley particularly criticizes the effort to link the everyday war against women, and all sexual violence, to war crimes. She points out the lack of a plausible "connection to armed conflict."¹¹⁵ *Id.* at 84. Halley writes: "unless you are a radical feminist, seeing it that way will take an effort of sympathetic imagination. If you can do it, you have entered into the consciousness of the FU." *Id.* at 83. FU goes further. Once the Balkan conflict is "untethered" from its ethnic dimensions it becomes part of the everyday war against women and if "every rape is an expression of male domination" then for Copelon all rape should be within the scope of international criminal law. *Id.* at 64. The feminists efforts in extending the subject matter jurisdiction of the ICC to peace time failed as the Rome Statute has express provisions limiting its reach to armed conflicts. *Id.* at 112. However, the ICC does classify persecution on the basis of gender alone as a crime against humanity and so the very framing of ethno-nationalist conflicts that Halley detests is now an available tool for a prosecutor in the ICC. *Id.* at 108. Halley expresses concern that this success is inattentive to "the possibility that women have been the instigators or perpetrators of conflict" and also that it permits a "chilling indifference to the suffering and death of men." *Id.* at 123. For that reason in part, Halley dismisses Feminist Universalism as "FU."

¹¹⁶ "Amici recognize that when women and men are sexually violated, verbally or physically, they are targeted and harmed as women and as men." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998). Brief for the Nat'l Org. on Male Sexual Victimization, Inc. et al. as Amici Curiae Supporting Petitioner, *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (No. 96-568), 1997 WL 471814 at *1 (brief authored by Catherine A. MacKinnon) [hereinafter MacKinnon Brief].

core meaning.

One might also argue that to the extent that the public policy-setting agenda of CEDAW did not succeed, it led activists to seek remedies in international criminal law where remedies promised stronger enforcement mechanisms. The communities that advocated for CEDAW's expansion have shifted their sights to rely on criminalization, which provides an opportunity for feminists to attain hard law results for some of the core CEDAW concerns.¹¹⁷

Feminist Universalists went further, arguing that they needed to address the gendered social constructs that bolster male domination.¹¹⁸ To understand the flaw in CEDAW's universalist "women," it is imperative we explore how "women" is not a discrete group and how dangerous CEDAW's reification of the male/female binary is.

1. "Women" is not a Discrete Category

The framing of CEDAW around "women" reinforces the binary between men and women in human rights legal discourse. The part of that binary addressed in CEDAW, "women," fails to serve as a universal descriptor. Its meaning as part of a binary with men lacks certainty.¹¹⁹ One's gender may defy simple categorization due to biology¹²⁰ or by intent to change

¹¹⁷ It is worth noting, though, that CEDAW does not directly address violence against women.

¹¹⁸ See SPLIT DECISIONS, *supra* note 17, at 83.

¹¹⁹ See Darren Rosenblum, "Trapped" in *Sing Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 MICH. J. GENDER & L. 499 (2000) [hereinafter *Trapped*].

¹²⁰ See e.g., Nancy Ehrenreich & Mark Barr, *Intersex Surgery, Female Genital Cutting, and the Selective Condemnation of 'Cultural Practices'*, 40 HARV. C.R.-C.L. L. REV. 71 (2005) (discussing the plight of intersex individuals and comparing legal arguments regarding corrective surgery for intersex people to those made related to female genital cutting).

identity.¹²¹ A clear divide between “men” and “women” does not exist.¹²² Although most people accept that there are two sexes, “male” and “female,” these categories actually contain a myriad of genders, formed genetically, biologically and culturally.¹²³ Through these criteria, sexedness is shown to be a continuum.¹²⁴ Scientists generally agree that there are seven gender traits that constitute one’s gender identity: 1) chromosomes; 2) gonads; 3) hormones; 4) internal reproductive organs; 5) external genitalia; 6) secondary sexual characteristics; and 7) self identity.¹²⁵

The sex binary has many negative effects on public policy.¹²⁶ The ubiquity of the categories “male” and “female” cannot prove their veracity as the irreducible essence of gender. Such categories truncate the diversity of gender identity.¹²⁷ The psychological component of “self identity” renders the simple

¹²¹ Many transgender people transition from one gender to another, with or without medical assistance, without the purpose of “passing” as the other gender. See generally KATE BORNSTEIN, *GENDER OUTLAW: ON MEN, WOMEN, AND THE REST OF US* 65–69 (1994).

¹²² AMERICAN HERITAGE DICTIONARY 1595 (4th ed. 2000) (defining sex as “either of the two divisions, designated female and male, of this classification”).

¹²³ See Ann Fausto-Sterling, *The Five Sexes: Why Male and Female are Not Enough*, SCIENCES, Mar./Apr. 1993, at 20–21; see also *Trapped*, *supra* note 119, at 503.

¹²⁴ JOHN STOLTENBERG, *REFUSING TO BE A MAN* 28 (1989).

¹²⁵ These factors are detailed by Douglas K. Smith in *Transsexualism, Sex Reassignment Surgery and the Law*, 56 CORNELL L. REV. 963, 972 (1971). See also *Trapped*, *supra* note 119, at 504. Fifteen years later, the Supreme Court of New York County used the exact formulation cited above in *Maffei v. Kolaeton Indus., Inc.*, 626 N.Y.S.2d 391 (Sup. Ct. 1995) (holding that a pre-operative transgender female is protected by New York City’s sex discrimination statute as a member of the class of males).

¹²⁶ See generally *Trapped*, *supra* note 119; David B. Cruz, *Disestablishing Sex and Gender*, 90 CALF. L. REV. 997 (1992).

¹²⁷ This Article will not directly address the relevance of my theory of gender binarism to feminist theory. Rather, the multiplicity of gender conforms quite closely to what I interpret as the spirit of contemporary anti-essentialist feminist theory. See Terry S. Kogan, *Transsexuals and Critical Gender Theory: The possibility of a Restroom Labeled “Other,”* 48 HASTINGS L.J. 1223 (1997).

male/female dichotomy useless, leaving the categories “male” and “female” wanting.¹²⁸

The contemporary evolution of medical technology, combined with the increasingly commonplace transgender identity, has further blurred the lines between “men” and “women.” The recent example of medical testing for South African runner Caster Semenya exposes the open-ended nature of sex definition.¹²⁹ “Women,” a term adopted for its clear biological reference, turns out not to be as clear as was widely thought. Thus, given the indefinite nature of the term, it is not a useful descriptor of a group subject to the protection of international law. “Women” simply fails to convey the specific group intended by CEDAW’s drafters.

2. CEDAW Supports the Male/Female Binary

Beyond this literal deconstruction of the biological meaning of “women,” the actual deployment of the term in women’s rights discourse exposes multiple socio-political meanings. As Dianne Otto argues, the emphasis on certain “female subjectivities” establishes the “otherness” of women in women’s rights discourse. Otto identifies three “female subjectivities” reproduced by human rights discourse,¹³⁰ each of

¹²⁸ *Trapped*, supra note 119, at 504.

¹²⁹ See Christopher Clancy & Gina Kolata, *Gold is Awarded, but Dispute Over Runner’s Sex Intensifies*, N.Y. TIMES, Aug. 20, 2009, at B9; Katie Thomas, *A Lab Is Set to Test the Gender of Some Female Athletes*, N.Y. TIMES, July 30, 2008, at D1. As has been widely reported, the diversity of physical gender has led to the testing of each Olympic athlete to ascertain his or her gender. *Id.* Previously, the Olympic committee asked women to perform a “nude parade” to ascertain their sexes. This proved unworkable as chromosomal tests revealed that athletes “appearing” as women were actually men. *See id.*

¹³⁰ Otto, supra note 16, at 106.

which is marginalized by a corresponding masculine subject.¹³¹ Each of these opposing visions of the masculine and feminine “organizes sex/gender as a hierarchy, with the masculine assuming the position of authority.”¹³² The basis for these subjectivities, I argue, is the identitarian choice of “women” as the centerpiece of international law on sex and gender.

In reproducing these hierarchical binaries, CEDAW’s potential for transforming women’s lives is compromised.¹³³ Most of the CEDAW provisions follow a formal equality yardstick, measuring success as the extent to which men have access to a particular social position. The imprecision of the term “women” becomes clearer once we consider the different contexts in which “women” exist—they are wives and mothers, persons equal to men, and victims. Each of these subjectivities arouses a legal response within CEDAW. Most important is the extent to which CEDAW renders invisible the individuals identified as women that do not fit into these three subjectivities. I will address these issues directly *infra*—the point now is to demonstrate that beyond the biological uncertainty of the term lies a socio-political imprecision.

D. The Term “Women” Resists Redefinition

Attempts have been made to remedy the shortcomings in the centrality of “women” so that it reflects the complex relationship among identity, gender and sexuality.¹³⁴ One notable

¹³¹ *Id.* First, the wife and mother requires protection and “is more an object than a subject of international law.” *Id.* Men, as heads of households, form the masculine component of this binary. *Id.* The second subjectivity is the ‘formally equal’ woman, whose role in public life is measured by the extent to which it matches the implicit “masculine standard of ‘equality’ against which her claims to equality are assessed” *Id.* This equality strategy presumes as normative the masculine standard, thereby fostering a harmful binary that places women in the inferior position. *Id.* Third is the female victim “produced by colonial narratives of gender” and women’s perceived “sexual vulnerability.” *Id.* The male homologue for this subjectivity is “the masculine bearer of ‘civilization’ and savior of ‘good’ women from ‘bad,’ often ‘native,’ men.” *Id.*

¹³² *Id.*

¹³³ *Id.* at 117.

¹³⁴ Valdes, *supra* note 110.

response by feminists has been to redefine “women” in a broader sense that recognizes such theoretical developments. Catharine MacKinnon’s work in particular does an admirable job of expanding and updating the category of “women,” but does not remedy the category’s central shortcomings.

MacKinnon has recognized the fact that men may deserve the protections from sexist power that she originally prescribed for women. In MacKinnon’s work, the alternating explicit and implicit subordination of women plays a driving role.¹³⁵ MacKinnon focuses on sexuality as the central source of women’s oppression at the hands of patriarchal power in the form of “male laws.”¹³⁶ In particular, her argument in the *Oncale* same-sex sexual harassment case before the U.S. Supreme Court reconstructs “women” as a category inclusive of men.

In the *Oncale* case, MacKinnon argued that when men suffer from other men’s sexual violence, they play the role of “women,” and therefore merit protection under sex

¹³⁵ Catharine MacKinnon’s scholarship attempts to demonstrate how the legal system is fundamentally opposed to women’s interests and designed to perpetuate male dominance. See CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987) [hereinafter *FEMINISM UNMODIFIED*]. Her “work centers on the domination of women in the sexual sphere, highlighting rape, sexual harassment, and pornography.” MARTHA CHAMALLAS, *INTRODUCTION TO FEMINIST LEGAL THEORY* 45 (2d ed. 2003) [hereinafter *INTRO*]. MacKinnon asserts that, “the sexual use and abuse of women is the principal mechanism by which women’s subordination is perpetuated.” *INTRO* at 45. During the 1990s, MacKinnon worked to mobilize people against the mass rapes of thousands of Muslim and Croatian girls and women by the Serbian military, who used rape as a tactic of “ethnic cleansing.” See Catharine A. MacKinnon, *Rape, Genocide, and Women’s Human Rights*, 17 *HARV. WOMEN’S L.J.* 5 (1994). “MacKinnon was enraged that the rapes were not recognized as violations of human rights, even though convincing legal arguments could be made that they constituted crimes against humanity, war crimes, and other violations of international law.” *INTRO* at 112. MacKinnon saw the rapes as “a sexual tactic designed to achieve political ends.” *Id.*

¹³⁶ It is important to note that critics have pointed out her reluctance to recognize the multiplicity of women’s experiences, including social, economic or historical forces such as colonialism or the church that affect class, cultural, religious, and racial differences. See RATNA KAPUR, *EROTIC JUSTICE: POSTCOLONIALISM, SUBJECTS AND RIGHTS* 101–02 (2005).

discrimination law.¹³⁷ "Men's rape of women is a hateful act designed to reinforce male supremacy. So is men's rape of men."¹³⁸ In *Oncale*, MacKinnon argues that men deserve Title VII protection for this type of abuse.¹³⁹ Victimized men are honorary women, "sisters in suffering."¹⁴⁰ In this analysis, the gender of men is only the subject of rights to the extent that it exists as analogous to the gender of women. Men only access protection from gender-based discrimination through their similarity to women. As some scholars argue, these tangential rights characterize a limitation of international women's rights more broadly.¹⁴¹

Access to rights, even via analogy, is certainly better than exclusion from rights—winning *Oncale* was an improvement over a Title VII jurisprudence that relied on biology as a dispositive element for claiming victimization. MacKinnon's argument lifts men out of this exclusion, but at a price. The cost is that the recognition comes through an analogy situating the recognition of men's rights as cognizable to the extent they mirror women's suffering.¹⁴² This analogy has faced criticism in the context of the attempt to redefine sexual assault as a crime of "gender," as opposed to "sexual," violence. This criticism is exemplified in a case in which feminists voiced concern over an incident because the castrated victim was rendered inferior and

¹³⁷ See MacKinnon Brief, *supra* note 116, at 13–14.

¹³⁸ Rus Ervin Funk, *Men Who Are Raped*, in *MALE ON MALE RAPE: THE HIDDEN TOLL OF STIGMA AND SHAME* 222 (Michael Scarce, ed. 1997).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ See generally *SPLIT DECISIONS*, *supra* note 17. Lara Stemple, *Male Rape and Human Rights*, 60 *HASTINGS L.J.* 605, 627–36 (2009).

¹⁴² It is worth considering Mary Coombs's focus on the potential plaintiffs in same-sex sexual harassment cases. She argues that straight men would take advantage of the right to sue other men for harassment as a sort of gay panic reaction, leaving gay men in the workplace vulnerable to suit. See Mary Coombs, *Title VII and Homosexual Harassment After Oncale: Was it a Victory?*, 6 *DUKE J. GENDER L. & POL'Y* 113 (1999) (arguing that the expansion of sexual harassment law to include same-sex sexual harassment would likely lead to the use of sexual harassment law as a tool of straight men against gay men).

“like a woman.”¹⁴³ Halley argues that this argument fosters a “chilling indifference to the suffering and death of men,”¹⁴⁴ and that it “reproduces in reverse the blind-spotted moral vision that it contests.”¹⁴⁵ Indeed, it seems like a perverse reification of women’s victim status to argue that men’s victimhood can only be recognized insofar as it is analogous to that of women.

The MacKinnon theory does important work in recognizing that sexist oppression targets something broader than biological women. The theory nonetheless retains an identitarian focus that impedes the goal of unsexing. Here, men (for MacKinnon) deserve protection insofar as they may be defined as having some bit of womanhood.

Finding in men a substitute for “woman” that broadens the category begins to respond to identity criticisms. Martha Fineman goes one step further than MacKinnon; in her recent work, she attempts to redefine victimhood away from gender toward the position of the vulnerable.¹⁴⁶ Fineman views vulnerability as the core measure of inequality—a universal constant that comprises the harms to which humans are vulnerable.¹⁴⁷ A vulnerability approach, she argues, escapes the rigidity of the suspect class groupings of an equal protection analysis.¹⁴⁸ Fineman’s vulnerability theory introduces a new

¹⁴³ See *Rape at Rome*, *supra* note 17, at 123.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ See Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 1 (2008).

¹⁴⁷ *Id.* Fineman suggests that a vulnerability analysis should replace an equal protection analysis to shift the focus from discrimination against defined groups toward inequitable structures. *Id.* at 1. At the same time, she criticizes liberal notions of equality as weak in the face of subordination and domination. A liberal model fails to reform institutional arrangements that privilege some and disadvantage others. *Id.* at 3. Fineman’s core criticism is that the identity categorized in the equal protection analysis is both over and under inclusive, as they fail to reflect “lack of opportunity categories” that transcend group boundaries. *Id.* at 4.

¹⁴⁸ *Id.* at 12.

approach to remedying inequality beyond traditional identity categories.¹⁴⁹ Fineman's work could potentially redefine an identity-driven construct to an inclusivity and fluidity that would reflect the reality of human identity. It is possible, however, that vulnerability as a concept still retains some referent to identity markers,¹⁵⁰ and that it would be reified into an identity that absorbs the disadvantages of the term "women."

Women's ordeals do hold a central place in sex and gender inequality, but this centrality does not necessitate or justify their placement as the sole identity meriting protection from discrimination. Ignoring others and the broader power disparities related to sex can only serve to marginalize CEDAW. Even if other international instruments such as the ICCPR deal with sex in a more even-handed fashion, the breadth and depth of CEDAW's prescriptions reflect a deeper attempt to ignore the complexity of sex discrimination. Remedies for inequality solely based on group identity will not rectify sexist policies. Inclusion of men would lead to greater resources devoted by States Parties and by the international community. By addressing gender inequality in all of its manifestations, international law would be better positioned to accomplish feminist goals. Focusing on women blinds CEDAW to a broader view of gender equality.

"Women" reflects a crucial shortcoming in CEDAW's text as viewed from 2011. It is the core term, the identity around which the entire treaty is constructed. "Women" does not serve CEDAW's purpose—its use misdiagnoses broader issues of sex

¹⁴⁹ *Id.* at 23. As Fineman suggests, vulnerability analysis focuses on the structures our society has and will establish to manage our common vulnerabilities. *Id.* at 2. A more active and responsive state would serve to monitor social equality in a way that the market cannot achieve. *Id.* at 5. For this vulnerability analysis to succeed, the state must empower vulnerable subjects, through redistributive remedies if necessary. Where the state can identify clearly advantaged and disadvantaged parties, the state must either justify the disparity or remedy it. *Id.* at 22.

¹⁵⁰ For an eloquent anti-essentialist argument in favor of the use of quotas and other identity-related remedies, see Jane Mansbridge, *The Descriptive Political Representation of Gender: An Anti-Essentialist Argument*, in HAS LIBERALISM FAILED WOMEN? ASSURING EQUAL REPRESENTATION IN EUROPE AND THE UNITED STATES 19, 30 (Jytte Klausen & Charles S. Maier eds., 2001). Janet Halley also has an extensive anti-identitarian argument in her "break" from feminism. See generally SPLIT DECISIONS, *supra* note 17.

and gender. As a consequence, it errs in imagining potential solutions.

II. Identity-Based Discrimination as CEDAW's *Raison d'Être*

CEDAW's focus on a universalized notion of "women" implicitly sought to harmonize the world's different gender systems into a universal one.¹⁵¹ In this Part, I first contrast CEDAW with the Convention for the Elimination of Racial Discrimination (CERD) to demonstrate the greater consistencies in human rights claims made in the context of a non-identity based treaty construction. Given the advantages of a non-identity based treaty, I then discuss how a category reference such as "sex" or "gender" would better address the concerns raised by CEDAW. The establishment of "women's human rights" may serve to isolate women's rights rather than make sex discrimination a central consideration in human rights discourse. Finally, I point to the Yogyakarta Principles, a non-binding agreement by international law experts on sexuality and gender-related rights, as an example of how a non-identity centered sex or gender treaty could deal with identity.

A. International Law Beyond Identity

Legal theory, as useful as it may be, is not the only source for this anti-identitarian critique of CEDAW. Other international treaties that target inequality deal with identity in more nuanced ways than CEDAW. A key example is the Convention on the Elimination of Racial Discrimination. CERD entered into force in 1969, predating CEDAW by twelve years. Both CEDAW and CERD implement two crucial U.N. covenants: the International Covenant on Economic, Social and Cultural Rights, and the

¹⁵¹ Although this is true, further analysis is required to assess the way in which other treaties' references to "sex" may counter CEDAW's universalization effort.

International Covenant on Civil and Political Rights.¹⁵² The Covenants state that the “rights set forth therein are applicable to all persons 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.”¹⁵³ Both these Covenants address rights at the universal level. It is beyond the scope of this Article to examine and contrast the effectiveness of

¹⁵² Theoretical limitations include the challenge of understanding the intersection of a group-based rights system, such as CEDAW, and a rights-based system, such as the International Covenant on Civil and Political Rights (ICCPR). Indeed, some cite the ICCPR as a strong basis for sexuality rights. In his argument that the ICCPR better serves as a legal basis upon which to ground the rights of gays and lesbians to procreate than on the basis of the right to privacy, Professor Alcardo Zanghellini cites the Principles as an example of an increasing international awareness of the right of sexual minorities to create a family. Alcardo Zanghellini, *To What Extent Does the ICCPR Support Procreation and Parenting by Lesbian and Gay Men?*, 9 MELB. J. INT’L L. 125 (2008). Practical limitations isolate women’s issues from “human rights,” encouraging human rights professionals to relegate gender inequality concerns to the province of “women’s issues.”

¹⁵³ World Conference on Human Rights, June 25, 1993, *Fact Sheet 22: Discrimination Against Women: The Convention and the Committee*, A/CONF. 157/24, available at <http://www.ohchr.org/Documents/Publications/FactSheet22en.pdf>.

these two treaties fully.¹⁵⁴ Rather, my goal is to attend to how each treaty frames the inequality question before it. Unlike other human rights treaties of its era, CEDAW focuses on discrimination suffered by a particular group, as opposed to grievances that extend beyond an individual identity.¹⁵⁵ Through

¹⁵⁴ There is some scholarship indicating CERD's efficacy. One significant difference between CERD and CEDAW is the manner in which they deal with reservations. Riddle, *supra* note 49, at 635. Section 2 of Article 20 CERD provides that:

A reservation incompatible with the object and purpose of this Convention shall not be permitted, nor shall a reservation the effect of which would inhibit the operation of any of the bodies established by the Convention be allowed. A reservation shall be considered incompatible or inhibitive if at least two-thirds of the States Parties to this Convention object to it.

CERD, *supra* note 25, at art. 20 § 2. The drafters of CEDAW contemplated restricting reservations by way subjecting them to the veto of member states, but chose a far more liberal and permissive reservation scheme. Riddle, *supra* note 49, at 635. In light of the large number of broadly termed reservations under the women's convention, some argue that had the CEDAW drafters included more stringent provision like those found in CERD, CEDAW might have yielded more impressive results. *Id.*

One scholar argues that the CERD committee has fostered effective relationships with state parties that have been an integral part of the Treaty's utility. Ivan Garvalov, *The United Nations International Convention on the Elimination of All Forms of Racial Discrimination in Synergies*, in *MINORITY PROTECTION: EUROPEAN AND INTERNATIONAL LAW PERSPECTIVES* 249 (Kristen Henrad & Robert Dunbar eds., 2008). Through Article 9(1), CERD's central mechanism for checking state compliance, state reports must reference the law, regulations and judicial mandates that have given force to CERD. *Id.* It has been argued that CERD is responsible for a number of meaningful changes in member state practices affecting treatment of particular minorities. *Id.* at 270. While the Treaty's text does not directly reference any minority group specifically, its application has been broad and flexible and has significant implications for them. *Id.* at 277. The CERD committee has had success influencing states' domestic legislation. *Id.* at 269; NATAN LERNER, *GROUP RIGHTS AND DISCRIMINATION IN INTERNATIONAL LAW* 70 (2d ed. 2003). Garvalov notes, for example, that certain state parties have even chosen to amend their constitutions and laws to closely conform with CERD's Article 1 and drafted provisions that expressly prohibit racial discrimination. *Id.* at 270.

¹⁵⁵ It is arguable that the Convention for the Rights of the Child is another example. One can distinguish CEDAW from the CRC: Although at a particular moment only a subset of humanity benefits directly from the CRC, because every human at some point is a child, the CRC is not identity-driven.

the group status of "women," CEDAW situates women's issues outside of universal human rights discussions.¹⁵⁶ A category frame, such as "sex" or "gender" would encompass all people and therefore fit neatly into universalist legal frameworks.

CERD prohibits all discrimination on the basis of race, but does not limit the range of victims who can be subject to discrimination or consequent protections.¹⁵⁷ Whereas approximately half of all humans are women, all individuals may be construed as having a racialized identity.¹⁵⁸ Thus, race is a category, not an identity. If CERD were about identity in the way that CEDAW is, it would specify a particular race, such as "black" or "of African descent." It does not; any race, defined in a broad or narrow fashion, can benefit from CERD's protections. "White" could be construed as a race and "white" individuals in certain contexts could be protected by CERD. CERD has been subject to many debates over the recognition of particular identities, ranging from the non-citizen to the Roma to women. Although the CERD Committee applies the treaty to racialized groups, neither the Convention nor the Committee decides which groups merit international legal protection. For example, with regard to indigenous communities, one recommendation points to continued discrimination against those people by "colonists, commercial companies and State enterprises," and notes that their culture and historical identity are in jeopardy.¹⁵⁹ Another recommendation encourages State Parties to adopt measures to protect the Roma people from a wide array of

¹⁵⁶ Otto, *supra* note 16.

¹⁵⁷ One might argue that in fact CERD does not protect all races. It may be an impossible feat to protect all races but this does not undermine my point with regard to CEDAW. If CERD cannot provide a remedy for discrimination against all races, how would a revised CEDAW protect all genders? CERD, both in its text and in its record, makes a markedly better attempt at representing the issues of a diverse range of races than CEDAW does with regard to sex.

¹⁵⁸ I have not surveyed the anthropological literature, so perhaps there is a racially homogenous and entirely isolated group of people somewhere in the world that would disprove this point.

¹⁵⁹ Convention to End all forms of Racial Discrimination, U.N. Comm. on the Elimination of Racial Discrimination, *General Recommendation No. 23: Indigenous Peoples*, U.N. Doc. A/52/18, Annex V (Aug. 18, 1997).

discriminatory practices.¹⁶⁰ The CERD Committee interprets the Convention broadly, addressing the protection of refugees, displaced persons and non-citizens, a group that sometimes may be racialized but is not necessarily defined by race.¹⁶¹ The CERD Committee even took steps to recognize the intersectionality of discrimination with a resolution on the racial

¹⁶⁰ Convention to End all forms of Racial Discrimination, U.N. Comm. on the Elimination of Racial Discrimination, *General Recommendation No. 27: Discrimination against Roma*, U.N. DOC. A/55/18, Annex V (Aug. 16, 2000). For example, at the CERD meeting titled "Thematic Discussion on the Question of Discrimination Against Roma," one speaker argued that "[t]he situation of the Roma was not merely characterized by racial discrimination. It appeared to result from a systematic oppression of the Roma people. That oppression was structural, political and systemic. It was about power and control. To reduce that situation to a discussion of discrimination would not do it justice." Convention to End all forms of Racial Discrimination, U.N. Comm. on the Elimination of Racial Discrimination, *General Recommendation No. 27: Discrimination against Roma*, 1423rd mtg. U.N. DOC. CERD/C/SR.1423. (Sept. 11, 2000). This point suggests that certain forms of discrimination may be too deeply entrenched to find a remedy in other anti-discriminatory norms.

¹⁶¹ See Convention to End all forms of Racial Discrimination, U.N. Comm. on the Elimination of Racial Discrimination, *General Recommendation No. 30: Discrimination Against Non Citizens*, U.N. DOC. CERD/C/64/Misc.11/rev.3 (Jan. 1, 2004); see also Convention to End all forms of Racial Discrimination, U.N. Comm. on the Elimination of Racial Discrimination, *General Recommendation No. 22: Article 5 and Refugees and Displaced Persons*, U.N. DOC. A/51/18 (Aug. 24, 1996). General Recommendation No. 22 emphasizes in this respect that:

- (a) All such refugees and displaced persons have the right freely to return to their homes of origin under conditions of safety; (b) States parties are obliged to ensure that the return of such refugees and displaced persons is voluntary and to observe the principle of non-refoulement and non-expulsion of refugees; (c) All such refugees and displaced persons have, after their return to their homes of origin, the right to have restored to them property of which they were deprived in the course of the conflict and to be compensated appropriately for any such property that cannot be restored to them. Any commitments or statements relating to such property made under duress are null and void; (d) All such refugees and displaced persons have, after their return to their homes of origin, the right to participate fully and equally in public affairs at all levels and to have equal access to public services and to receive rehabilitation assistance.

discrimination targeted toward women.¹⁶²

CERD's very title reveals its proper focus on systems of oppression rather than fixed identities, whereas CEDAW is about women as a group. CERD's text, in addressing a category of discrimination rather than the identity of its victims, presents a marked contrast to CEDAW's identitarianism. CERD prohibits discrimination on the basis of race but does not limit the range of victims who can be subject to discrimination. CERD's methodology enables it to retain a focus on the oppression in all its iterations without regard to a particular, racialized group. This assessment demonstrates how CEDAW's exclusive focus on women both isolates gender disparities from core human rights concerns and leads to marginalization and non-enforcement, while forestalling real solutions to appalling human rights dilemmas. This contrast reveals the import of a critical examination of the choices made by the CEDAW drafters.

CERD and CEDAW reflect an attempt to translate these rights into the arena of specific forms of oppression—racialized and sexist oppression. Both conventions stem from one of the

¹⁶² Intersectionality postulates that social categories of discrimination, such as race, sex, religion, nationality and sexual orientation, relate to each other to form a system of oppression. Kimberlé Crenshaw notes that “[b]y tracing the categories to their intersections, I hope to suggest a methodology that will ultimately disrupt the tendencies to see race and gender as exclusive or separable.” Crenshaw, *supra* note 100, at 1244 n.9 (“By tracing the categories to their intersections, I hope to suggest a methodology that will ultimately disrupt the tendencies to see race and gender as exclusive or separable.”); see generally Darren Rosenblum, *Queer Intersectionality and the Failure of Lesbian and Gay “Victories,”* 4 LAW & SEXUALITY 83 (1995); Convention to End all forms of Racial Discrimination, U.N. Comm. on Racial Discrimination, *General Recommendation No. 25: Gender Related Dimensions of Racial Discrimination*, U.N. Doc. A/55/18, Annex V (Mar. 20, 2000). Certain forms of racial discrimination may be directed towards women specifically because of their gender, such as sexual violence committed against women members of particular racial or ethnic groups in detention or during armed conflict; the coerced sterilization of indigenous women; abuse of women workers in the informal sector or domestic workers employed abroad by their employers. Racial discrimination may have consequences that affect primarily or only women, such as pregnancy resulting from racial bias-motivated rape; in some societies women victims of such rape may also be ostracized. Women may also be further hindered by a lack of access to remedies and complaint mechanisms for racial discrimination because of gender-related impediments, such as gender bias in the legal system and discrimination against women in private spheres of life.

purposes of the United Nations—to achieve international cooperation in promoting and encouraging respect for human rights and fundamental freedoms for all people “without distinction as to race, sex, language or religion.”

Yet here is where CERD and CEDAW diverge. Article I of CERD begins with a definition:

In this Convention, the term “racial discrimination” shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.¹⁶³

CERD centers on racial discrimination but does not single out any group of victims.

CEDAW mimics CERD’s initial definition but veers from the model by focusing on a group rather than oppressive categorizations. Article I of CEDAW begins with:

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.¹⁶⁴

CEDAW’s definition, unlike CERD’s, constantly references a

¹⁶³ *Id.*

¹⁶⁴ CERD, *supra* note 25.

specific group. It looks to the equality of men and women as a basis for the goal of eliminating discrimination against women. One can argue that CERD's choice of non-identitarian language naturally surfaces given the multiplicity of racial discrimination, whereas throughout the globe, it is women who consistently face measurable economic and social harms. Although this is true, CERD arose at a time of anti-colonialist and "Third-World" discourse in which advocates of racial equality pointed directly at the subjugation of the "brown people" by the "white people."¹⁶⁵ Yet CERD refrained from references to specific racial groups, while CEDAW put identity at its core.

Some may argue that CERD could not reference a specific group because of the multi-racial nature of discrimination: one could not simply present one group, say "black," as requiring protection from "white" the way that CEDAW can seek to protect "women" from "men." Race involves an undeniably complex set of phenomena. Even the most basic understanding recognizes multiple races.¹⁶⁶ However, the multiplicity of "sex" and "gender," while not exactly parallel to "race," does contain a complex amalgam of many factors, biological, cultural, and social. In comparing CERD and CEDAW, we need not compare race against sex or gender discrimination. What is relevant is that sex and gender, like race, are categories that involve multiple, perhaps innumerable, identities, all of which are subject to social construction. At the time of CEDAW's drafting, the discrete categories of "men" and "women" seemed legitimate representations of all of humanity. Subsequently, it

¹⁶⁵ HAIR: THE AMERICAN TRIBAL LOVE-ROCK MUSICAL (1967), available at http://www.script-o-rama.com/movie_scripts/h/hair-script-transcript-play.html (last visited Mar. 1, 2011). Hair's references to subjugation include the following line: "The draft is white people sending black people to make war on the yellow people to defend land they stole from the red people!" *Id.* The flippant references to various races points to the essentialism of that era's racial justice movements.

¹⁶⁶ As quoted in the U.S. Supreme Court case *Loving v. Virginia*: "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents." 388 U.S. 1, 3 (1967). More persuasive is the recent argument that individuals do not belong to a race but are "racialized," that is to say that sociopolitical structures categorize certain phenotypes into groups. See generally RACHEL MORAN, *INTERRACIAL INTIMACY: THE REGULATION OF RACE AND ROMANCE* (2001); TANIA DAS GUPTA, *RACE AND RACIALIZATION: ESSENTIAL READINGS* (2007).

has become clear that sex and gender diversity reaches far beyond the male/female binary. CERD's formulation reveals the weakness of that used in CEDAW.

B. The Categories of "Sex" and "Gender"

Because the problem with "women" is its identity-centered focus, either "sex" or "gender" would escape the identitarian problems with "women."¹⁶⁷ As Part I detailed, "women" is an inaccurate term for what CEDAW seeks to achieve.¹⁶⁸

¹⁶⁷ Kathleen Sullivan debates whether the constitution should attend specifically to sex or women, or rather merely to general principles of non-discrimination. See generally Kathleen Sullivan, *Constitutionalizing Women's Equality*, 90 CALF. L. REV. 735 (2002). The United States Constitution is unique in that it is the only written constitution with a bill of rights that does not explicitly mandate equality of the sexes. France, Germany, Canada, South Africa and India all have constitutions that specifically declare that equal protection means sexual equality. *Id.* at 735. With the exception of the 19th Amendment prohibition on sex-based discrimination with respect to voting rights, the American constitution makes no specific declaration on sexual equality, as such. *Id.* at 737. Instead, with only the general provisions of the equal protection clause to guide, the Supreme Court has inferred sexual equality. *Id.* at 739 (noting the "inventiveness and strategic brilliance" of Justice Ruth Bader Ginsburg). Sullivan then details a few of the courts landmark decision and some of the challenges the court faced as it looked for sexual equality in equal protection. The Equal Protection Clause was a product of slavery and deep-seated racial inequality. Thus, convincing courts that such a broad provision could specifically remedy sexual inequality called for some analogy. *Id.* at 742. Like race, "sex is a visible and generally immutable characteristic." *Id.* at 744. However, while race is considered a social construct, the courts have often described sex as a biological construct. *Id.* That is, there are inherent differences between the sexes, or in the Court's terms, "real differences." Sullivan, also compares the history of female and African American oppression—a comparison of "romantic paternalism" versus "the fear and loathing that characterized the era of American apartheid," a pedestal versus an auction block. *Id.*

¹⁶⁸ That is not to say that the women's movement lacked any gender consciousness. To take one example, *FREE TO BE YOU AND ME*, a revolutionary mid-1970's educational film about sex differences, touted men who cry, boys who want dolls, and girls who wanted to be doctors and lawyers, while mocking boyish boys and girly girls. *FREE TO BE YOU AND ME* (Bell Records 1972). Featured songs include *IT'S ALRIGHT TO CRY* sung by football star Rosic Greer, and *WILLIAM'S DOLL*, performed by Alan Alda and Marlo Thomas. The film targeted secondary sex traits with the scene of two babies trying to figure out who was a boy and who was a girl. Even this progressive film stood on the presumption of a real biological difference between men and women, even as it tried to tear social meaning from the male/female binary.

CEDAW's focus stands apart from many other human rights instruments. Framing issues as about "women," implicitly in contrast to "men" reifies an oppositional binary that preordains "women" as losers in this counterproductive relationship. CEDAW's focus on the class of women as opposed to the classification of sex or gender debilitates the Convention's ability to imagine potential solutions to gender inequality.¹⁶⁹ CEDAW should instead deploy one or both of two category terms: "sex" and "gender." Either term moves past binarist constructs toward understanding relationships that concern not just one group of people.

"Sex," in contrast to "gender," refers generally to a biological difference. Although feminist theory has largely and rightly run from biological essentialism, references to biological categories may be useful, particularly given how mutable they are. "Sex" as a term had a more formally neutral meaning at the time of CEDAW's adoption, a meaning that has shifted with technology. Today, the increasingly common transition between "sexes" comes with a realization that for many, "sex" (manifested in changeable bodies) is more fluid than "gender" (embodied in a less mutable self-identity).

Although some deploy "gender" as a synonym for women, it is not—men have gender as well. Gender, in contrast to "sex," is commonly understood to reflect social and cultural traits typically associated with sex. As Joan Wallach Scott explains, "gender is the social organization of sexual difference. But this does not mean that gender reflects or implements fixed and

¹⁶⁹ See Sullivan, *supra* note 168, at 747. Sullivan engages in a thought experiment of interest from a United States constitutional perspective. In the context of a discussion on what jurisprudential decisions a "hypothetical set of feminist drafters [would] face if they were to constitutionalize women's equality," this article lays out five axes of choice, a few of which may be helpful in thinking about the CEDAW argument. *Id.* They are: (1) between a general provision favoring equality or a specific provision favoring sex equality, (2) between limiting classifications based on sex or protecting the class of women, (3) between reaching only state discrimination or reaching private discrimination as well, (4) between protecting women from discrimination or also guaranteeing affirmative rights to the material preconditions for equality, and (5) between setting forth only judicially enforceable or also broadly aspirational equality norms. *Id.* Sullivan contrasts general equality provisions with those that reference either "sex" or "women."

natural physical differences between men and women; rather, gender is the knowledge that establishes meaning for bodily differences."¹⁷⁰ The key contribution of "gender," Scott argues, is its "rejection of the biological determinism implicit in the use of such terms as 'sex' or 'sexual difference'."¹⁷¹ Gender conveys the broader context in which meaning is assigned to certain social traits, some of which may have some biological connection, but many of which do not.

Gender's meaning is the subject of intense contestation at the international level, as Valerie Oosterveld has argued. Conservative forces, such as the Vatican, advocate the usage of a limited definition that leaves no room for sexuality or fluidity in gender identity.

The international legal use of the term "gender," much like the term "women," has acquired wide currency without a clearly used definition. Oosterveld describes the United Nations approach on defining "gender" as "minimalist,"¹⁷² in which it does not really define the term at all.¹⁷³ The term was included in the Beijing Platform without being defined, although the President of the Conference was pressured by opposing states into making a statement which declared that the term was "intended to be interpreted . . . in its ordinarily, generally accepted usage."¹⁷⁴

Three sites for international debate on the term "gender" reveal the political sensitivity that greets this debate. First, at the Fourth World Conference on Women in Beijing, certain

¹⁷⁰ JOAN WALLACH SCOTT, GENDER AND THE POLITICS OF HISTORY 2 (1988). Scott continues by stating "[w]e cannot see sexual difference except as a function of our knowledge about the body and that knowledge is not 'pure,' cannot be isolated from its implication in a broad range of discourse contexts." *Id.*

¹⁷¹ *Id.* at 29.

¹⁷² Oosterveld, *supra* note 95, at 66.

¹⁷³ The term has appeared in United Nations' documents without any overt or implicit explanation of its meaning for over a decade. *Id.*

¹⁷⁴ *Id.* at 67.

conservative states strongly opposed the inclusion of the word "gender," fearing the "term might sanction rights based on sexual orientation."¹⁷⁵ Second, the term aroused substantial and overt debate in the negotiations over the Rome Statute of the International Criminal Court (ICC) in 1998.¹⁷⁶ As in Beijing, states that sought to retain the term "gender" were "committed to ensuring that any definition adopted would reflect that 'gender' refers to socially constructed understandings of what it means to be male or female."¹⁷⁷ The states that opposed the term "insisted on reference to 'two sexes' and agreed on the inclusion of a reference to the broadly-phrased 'society'."¹⁷⁸

Third, more recent uses have involved a clearer definition, one whose meaning emphasizes that it is a social construction, influenced by culture and that "the content of 'gender' can vary within and among cultures, and over time."¹⁷⁹ The World Bank and the International Monetary Fund have adopted and currently

¹⁷⁵ *Id.* at 62.

¹⁷⁶ Many feminists engaged in the debate around the passage of the Rome Statute and the creation of the International Criminal Court sought broader use of the term "gender," an effort that became the subject of extensive maneuvering. *Id.*

¹⁷⁷ *Id.* at 64.

¹⁷⁸ Oosterveld, *supra* note 95, at 64. Oosterveld correctly recognizes that it is important to predict how the ICC will interpret the term because their interpretation will "have a direct impact on the kinds of cases of persecution that the court may be able to prosecute, as well as on the law applied . . . and on the protection and participation of victims and witnesses." *Id.* at 57. She points out that United Nations interagency definitions may favor women's rights more clearly, but they have been eclipsed by the minimalist approach at the multilateral level precisely because states disagree on the definition with great conviction. Obviously, the Rome Statute departs from the minimalist trend at the multilateral level, as it contains an explicit definition of the term. Nevertheless, the definition ultimately adopted in the Statute is far removed from the detailed United Nations' approach. *Id.*

¹⁷⁹ *Id.*

enforce explicit gender equality norms.¹⁸⁰ Gender mainstreaming has become a widespread practice in international institutions to incorporate gender perspectives into contexts not necessarily related to sex or gender, including increasing gender diversity in these international institutions.¹⁸¹ It includes the public policy of assessing the ramifications of policies on different genders, and its efforts to facilitate the inclusion of women and gender issues in all United Nations' efforts.¹⁸²

Although "gender" arouses the opposition of conservative

¹⁸⁰ See Darren Rosenblum, *Feminizing Capital: The Economic Imperative for Women's Corporate Leadership*, 61 BERKELEY BUS. L. J. 55 (2010) [hereinafter *Feminizing Capital*]. In this article I discuss the implications of the adoption of gender equality norms in both directions—in advancing these norms, but also in defining them in ways that benefit international financial institutions. My argument, that this interaction reflects a symbiosis between public and private sectors, builds on Kerry Rittich's work. Kerry Rittich, *Engendering Development/Marketing Equality*, 67 ALB. L. REV. 575 (2003) (analyzing a World Bank report that proposes a strategy that rests on the use of market incentives to discourage gender discrimination, rather than the international law approach of holding the state responsible for gender equality); Kerry Rittich, *The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social*, 26 MICH. J. INT'L L. 199, 200 (2004) (emphasizing market-centered types of social equality and inclusion, social justice is framed in market terms, which focuses on changes that yield economic results).

¹⁸¹ CHRISTINE CHINKIN & FLORENCE BUTEGWA, GENDER MAINSTREAMING IN LEGAL AND CONSTITUTIONAL AFFAIRS 25–32 (2001).

¹⁸² *Id.* Critics of gender mainstreaming argue that the use of "gender" in "gender mainstreaming" simply reifies the male/female binary. Johanna Bond argues that gender mainstreaming cannot truly implement change because it does not rise to the level of inclusiveness that intersectionality does. According to Bond, intersectionality requires more than "adding women to the mix," yet gender mainstreaming "merely requires that both men and women be included as analytical subjects" and "tends to be essentialist" in that it "treats women as a monolithic group." Johanna E. Bond, *International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations*, 52 EMORY L.J. 71, 140 (2003). Bond criticizes the top-down approach of gender mainstreaming as ignoring the extent to which other systems of oppression work in tandem with sex discrimination.

states, it does not necessarily contain a particular perspective.¹⁸³ Joan Scott argues that “gender” does not incorporate some particular normative stance as to how it exists or what should be changed: “[a]lthough gender in this usage asserts that relationships between the sexes are social, it says nothing about why these relationships are constructed as they are, how they work, or how they change.”¹⁸⁴ In this sense, conservative states that oppose the use of “gender” may be mistaken. Although the content of the meaning of “gender” as I use it runs counter to certain conservative norms, “gender” does not necessarily

¹⁸³ Opponents of “gender” may rely on the potential of a return to the clearer time when feminists sought rights for “women.” Women, whose issues could be divorced from that of humans. Women, whose issues could be handled as an afterthought by largely male-run states. Unsexing CEDAW could place women’s issues back into the orbit of human rights by focusing on “gender,” a reality that affects everyone’s lives.

¹⁸⁴ SCOTT, *supra* note 171, at 32–33.

involve fluidity in sexual norms.¹⁸⁵ It may be argued that the women/gender dichotomy is a false one, or that “gender” is a

¹⁸⁵ That said, it is unsurprising that conservative states oppose attention to gender. Even though the current text of CEDAW does not reference gender, CEDAW opposition groups in the U.S. are concerned that the document already seeks to legalize same-sex marriage. Harold Hongju Koh, *Why America Should Ratify the Women's Rights Treaty (CEDAW)*, 34 CASE W. RES. J. INT'L L. 263, 273–74 (2002). Opposition groups point to actions by CEDAW's Committee that suggested that state laws against lesbianism be abolished and that “lesbianism be reconceptualized as a sexual orientation.” Laurel MacLeod & Catherine Hurlburt, *Concerned Women for America Strongly Oppose CEDAW*, CONCERNED WOMEN FOR AMERICA (2000), available at <http://www.cwfa.org/printerfriendly.asp?id=1971&department=cwa&%20categoryid=nation>. If the text was changed to “gender,” the outcry from conservative groups against CEDAW because of fear of homosexual and transgender rights would likely be louder. The Yogyakarta Principles, which directly deal with issues of gender and sexuality, enshrine much of what conservative states fear about a revised interpretation of CEDAW. See The Yogyakarta Principles, *supra* note 23. Opposition to using “gender” has already surfaced during the negotiation of other international treaties. While negotiating the Rome Treaty, conservative nongovernmental organizations distributed lobby papers calling for the deletion of both “gender balance” and the reference to judicial expertise in sexual and gender violence. Oosterveld, *supra* note 95, at 61. Such groups believed that using the term “gender sensitivity” would “undermine traditional moral, cultural[,] and traditional values.” DAVID M. KENNEDY, CTR. FOR INT'L STUD., IMPARTIALITY IN THE ELECTION OF JUDGES (2005), available at http://www.worldfamilypolicycenter.org/wfpc/About_the_WFPC/papers/icc_report.html#AppH1. Groups opposed to the use of the term “gender” wanted a definition that only referred to “the two sexes, male and female.” See Oosterveld, *supra* note 95, at 65. Certain conservative groups also made their views on the term “gender” known at the 1995 Beijing Declaration and Platform for Action and the 1996 Habitat World Conference. *Id.* at 65–66.

luxury suited to developed countries.¹⁸⁶ As referenced above, controversy greeted the debate over whether the Beijing Conference was about “sex” or “gender.”¹⁸⁷

My goal here is not to resolve the “sex”/“gender” dispute in favor of one term or the other—each term has advantages and disadvantages. Rather, my point is that either term deploys a category reference that leaps past the identitarian focus of “women.” Sometimes these terms flip as people deploy social constructivist arguments “when convenient, and biologically essentialist ones at other times.”¹⁸⁸ Policy arguments follow “sex” and/or “gender” used in “contradictory ways.”¹⁸⁹ Regardless of this imprecision, in the context of CEDAW, either term performs a radical shift in international law when contrasted with “women.” “Gender” and “sex” each avoid referencing a specific group identity, and either succeeds in bringing us away from group-based constructions of rights that impede the goals of gender equality. It is beyond the scope of

¹⁸⁶ Others may argue that the use of the term “gender” is a luxury, available and useful in the more gender-balanced nations of the developed world. See RHONDA COPELON, WRITING GENDER INTO INTERNATIONAL CRIMINAL LAW: THE INTERNATIONAL CRIMINAL COURT STATUTE (2000). Substantial resistance to the use of “gender” in the place of “women” that surfaced at the Fourth World Conference on Women in Beijing focused on the fear of a shift away from women’s oppression. Some asserted that “gender” watered down their efforts: “the focus on gender, rather than women, had become counter-productive in that it had allowed the discussion to shift from a focus on women, to women and men, and finally, back to men.” Sally Baden & Anne Marie Goetz, *Who Needs [Sex] When You Can Have [Gender]?: Conflicting discourses on gender at Beijing*, in FEMINIST VISIONS OF DEVELOPMENT: GENDER ANALYSIS AND POLICY 19, 21 (Cecile Jackson & Ruth Pearson ed., 1998) (paraphrasing Nighat Khan of Pakistan).

¹⁸⁷ *Id.* at 25–26. The conservative reaction to “gender” “highlighted inconsistencies and areas of neglect in contemporary feminist approaches to the constitution of gender identity and political subjectivity” *Id.* In one conservative essay distributed at the NGO Forum, author Dale O’Leary translates the feminist code words of “free choice in reproduction” as limitless abortions and “lifestyle” as homosexuality. *Id.*

¹⁸⁸ *Id.* at 31.

¹⁸⁹ *Id.* at 21. For instance, the rejection of gender in the conference document was believed to signify homophobia, but one lesbian woman stated she was “born a lesbian.” *Id.* at 31.

this Article to assert whether one of these terms surpasses the other in some fashion; what does matter is that either moves beyond the identitarianism of "women."

C. Anti-Women Discrimination or Human Rights?

CEDAW relies on an anti-discrimination model that places "women" in a central position as the only current and potential victims. Discrimination implies an identity-related focus, particularly when paired with a specific group identity. Although CERD's framework utilizes non-identitarian language, it permits remedies that account for specific iterations of discrimination that do not presume a fixed identity. Article 1 clearly defines discrimination: "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."¹⁹⁰ CEDAW's definition is broader than this, but, at least in the Convention's title, it identifies "women's" suffering as discrimination, rather than a pervasive set of oppressive social relations, discrimination that surpasses the confines of any specific group of victims.¹⁹¹ With this identity-driven core, CEDAW focuses on women as if they were a discrete group, akin to a minority in the level of protections accorded. This discrimination model constructs an oppositional world of discriminators and their victims. CEDAW's urge to "eliminate all forms of discrimination against women" frames women as victims of discrimination by an unspecified person or group, impliedly men.

Critiques of international human rights law focus on the extent to which its purported universality falls short by virtue of the exclusion of the private sphere in which much oppression occurs.¹⁹² This exclusion of the private sphere, CEDAW's

¹⁹⁰ CEDAW, *supra* note 3, at art. 1.

¹⁹¹ To the extent that CEDAW reflects this continued emphasis on a discrimination model over a human rights model, it may also reflect United States feminists' predominance at the time of CEDAW's drafting.

¹⁹² Engle, *supra* note 15, at 143.

advocates urged, harmed women disproportionately. Even before CEDAW's adoption, the debate arose as to whether women should be included more vigorously in broader international human rights norms or whether identifying "international women's human rights" would be the best way to both get human rights to take notice of women and to get women a place at the international law table.¹⁹³

Advocates sought to delineate separate rights for women because they viewed already-established human rights norms as focusing on the public context and thereby excluding women's concerns.¹⁹⁴ The women's-rights-are-human-rights strategy aimed at forcing the international recognition that female-specific human rights violations are universal human rights violations, and at instituting gender mainstreaming.¹⁹⁵ Some, notably Karen Engle, have attempted to move beyond the

¹⁹³ *Id.* at 144.

¹⁹⁴ Hilary Charlesworth, *What are "Women's International Human Rights"?*, in *HUMAN RIGHTS OF WOMEN* 58, 63 (Rebecca J. Cook ed., 1994). Charlesworth notes that "as in all areas of international law, women have been almost entirely excluded from the important human rights fora where standards are defined, monitored, and implemented." *Id.* See also Otto, *supra* note 16, at 121.

¹⁹⁵ *Id.* at 121-22. The success of the first goal is manifested in the Declaration on the Elimination of Violence Against Women (DEVAW). G.A. Res. 48/104, U.N. Doc. A/RES/48/104 (Feb. 23, 1994). However, Otto notes that DEVAW does not state that violence against women is a violation of human rights generally. Furthermore, focusing on violence against women replicates the passive, vulnerable female subjectivity. The condemnation of cultural violent practices also replicates the "native victim" subject. *Id.* at 122. The gender mainstreaming goal has also been "met with considerable success," as demonstrated through "the adoption of General Comments or General Recommendations that provide authoritative interpretations of the coverage of women's rights by the treaty texts." *Id.* at 123. Although Otto recognizes that "the extensive cataloging of women's injuries and disadvantages [is] . . . clearly necessary for making women's human rights abuses legally cognisable," she also asserts that the mainstreaming approach "continues to affirm the masculinity of the universal subject who needs no special enumeration of his gender-specific injuries." *Id.* Because of this "dynamic," Otto believes that it may be "impossible" to disrupt "gender hierarchies through human rights law." *Id.* at 124. See also Engle, *supra* note 15, at 144.

distinction,¹⁹⁶ in part by arguing that women should take advantage of both sides of the public/private divide.¹⁹⁷

Mainstream “human rights” law may remove gender justice projects from its scope because of CEDAW’s separate focus on “women.” Efforts to remedy women’s suffering from sex discrimination need not exclude remedies for other effects of sex discrimination. Yet the implementation of CEDAW requires national governments to report on, and therefore emphasize, women’s suffering from sex discrimination. It is in this sense that CEDAW, by no ill-intent, serves to create a focus for domestic compliance with international sex discrimination law. National governments, by virtue of CEDAW, can comply with international law solely by considering women’s issues.¹⁹⁸

In this way, concentrating exclusively on women both isolates gender disparities from core human rights concerns and forestalls real solutions to appalling human rights dilemmas. Reassessing the discrimination model reveals the importance of reinserting “women” into human rights considerations. Catharine MacKinnon, referencing an old debate in international law circles, recently asked “[a]re women human?”¹⁹⁹ CEDAW’s position outside of much human rights discourse suggests that

¹⁹⁶ “Not only does such a focus often omit those parts of women’s lives that figure into ‘public,’ however that gets defined, it also assumes that ‘private’ is bad for women. It fails to recognize that the ‘private’ is a place where many have tried to be (such as those involved in the market), and that it might ultimately afford protection to (at least some) women.” Engle, *supra* note 15, at 146.

¹⁹⁷ Engle argues that “women should be more like market actors, using the protection and the promise of the public and private, depending on their particular perceived needs.” *Id.* at 151.

¹⁹⁸ Further research could demonstrate whether national governments indeed systematically address women’s issues to the exclusion of other forms of sex discrimination. Selected examples of national reports to the CEDAW Committee reveal a focus, largely exclusive, on women’s issues. See e.g., France, *Sixth periodic report on implementation of the Convention on the Elimination of All Forms of Discrimination against Women*, U.N. DOC. CEDAW/C/FRA/6 (April 6, 2006); Brazil, *Sixth Brazilian Report to the Convention on the Elimination of All Forms of Discrimination against Women*, U.N. DOC. CEDAW/C/BRA/6 (Aug. 29, 2005).

¹⁹⁹ See ARE WOMEN HUMAN?, *supra* note 58.

they are not.

The women-centered human rights strategy not only reified the sex binary, but it also moved women's rights further from the human rights agenda.²⁰⁰ To correct this unintended effect of CEDAW, advocates began discussing women's rights-as-human rights.²⁰¹ This approach sought to demonstrate that women-specific rights violations are also human rights violations.²⁰² The other goal of this approach is the "mainstreaming" of women's issues into the general human rights discourse, an effort less fraught with identitarian offenses but still one that "continues to affirm the masculinity of the universal subject who needs no special enumeration of his gender-specific injuries."²⁰³

Dianne Otto argues that the most promising solution to the aforementioned dilemmas of women's identity and the relationship between women's rights and human rights would be the creation of human rights law that recognizes gender identity as a "hybrid result of choices and desire, rather than either male or female."²⁰⁴ In this re-emphasis of the human rights model's relevance regarding gender issues, sexuality-related rights must figure at the core of the construction of gender-based rights.

Gender, with its explicit focus on social and cultural relations, could bring sexuality into the architectural center of international human rights law. Conservative states feared precisely the implied meaning of "gender" as "sexual

²⁰⁰ *Id.* at 120. Charlesworth and Chinkin have argued that the creation of a women's branch of human rights law has facilitated its marginalization. CHARLESWORTH & CHINKIN, *supra* note 11, at 218. They note that mainstream human rights institutions have "tended to ignore the application of human rights norms to women." *Id.*

²⁰¹ *Id.*

²⁰² *Id.* at 122. One of its main achievements was the recognition of gendered violence as a human rights violation, however, a considerable amount of energy was expended on detailing the practices of non-Western cultures—giving "new credence to the 'native victim' subject." *Id.* at 123.

²⁰³ *Id.*

²⁰⁴ *Id.* at 126.

orientation.” The absence of this consideration under CEDAW is one crucial casualty of its emphasis on “women.”²⁰⁵ Decisions regarding sexual and reproductive freedom, prevention and care for HIV-related illness and other sexuality-related rights belong at the core of an international treaty. The existence of many culturally different constructions of gender reveals the limitation of CEDAW’s emphasis on the category “women.” Given the interaction of these categories, an international convention on “women” should also be a convention on gender and sexuality. Gender differentials reflect the dynamic relationship among identities of sex, gender and sexuality, as Frank Valdes has explored.²⁰⁶ These relations necessarily vary across cultures.²⁰⁷

An example of a potential source for such a radical change in human rights discourse is the Yogyakarta Principles (the “Principles”), a non-binding statement by international law experts from twenty-five countries.²⁰⁸ Responding to the “need for a more comprehensive articulation of [sexual orientation and gender identity] rights in international law”²⁰⁹ and to the desire for a “more consistent terminology to address issues of sexual orientation and gender identity,” each of the twenty-nine Principles articulate how international human rights law should

²⁰⁵ It is worth noting that conservative states might attempt to increase their reservations in a treaty based on gender rather than “women.”

²⁰⁶ See generally Valdes, *supra* note 110.

²⁰⁷ See generally Darren Rosenblum, *Loving Gender Balance: Reframing Identity-Based Equality Remedies*, 76 FORDHAM L. REV. 101 (2008) [hereinafter *Loving Gender Balance*].

²⁰⁸ The experts met from November 6–9, 2006, at Gadjah Mada University in Yogyakarta, Indonesia to draft a document articulating principles of international human rights law in relation to gender identity and to sexual orientation, the so-called Yogyakarta Principles (“the Principles”). Michael O’Flaherty & John Fisher, *Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles*, 8 HUM. RTS. L. REV. 207, 232–34 (2008). O’Flaherty served as Rapporteur for the development of the Principles.

²⁰⁹ *Id.* at 232; Louise Arbour, U.N. High Comm’r for Hum. Rts., Address to the International Conference on Lesbian, Gay, Bisexual and Transgender Human Rights (July 26, 2006) (transcript available at <http://www.unhchr.ch/huricane/huricane.nsf/view01/B91AE52651D33F0DC12571BE002F172C?opendocument>).

protect gender and sexuality rights.²¹⁰ Although the Principles suggest how states should implement such legal obligations, they have not yet attained any formal legal status at the international level and have only been used as an advocacy tool.²¹¹ The Principles have been translated into the six languages of the United Nations and have become the subject of substantial international attention and debate by legislative bodies, NGOs and groups advocating sexual and gender minority rights.²¹² The Principles convey a core value in the “freedom to express oneself, one’s identity and one’s sexuality, without state interference based on sexual orientation or gender

²¹⁰ See O’Flaherty & Fisher, *supra* note 209, at 232–34.

²¹¹ See *id.* According to the Rapporteur for the Principles, the conclave intended the principles to serve a tripartite function: (1) “constitute a ‘mapping’ of the experiences of human rights violations experienced by people of diverse sexual orientations and gender identities”; (2) clear and precise application of international human rights law to such experiences; and (3) a detailed list of the obligations on States for “effective implementation of each of the human rights obligations.” Yogyakarta Principles, *supra* note 23.

²¹² O’Flaherty & Fisher, *supra* note 209, at 237–47; Piero A. Tozzi, CATHOLIC FAMILY AND HUMAN RIGHTS INST., *Six Problems with the “Yogyakarta Principles”* (2002), available at http://www.c-fam.org/docLib/20080610_Yogyakarta_Principles.pdf.

identity.”²¹³ Although such rights efforts may fail to achieve

²¹³ The Yogyakarta Principles, *supra* note 23, at art. 19. The drafters organized the Principles as follows: Principles 1 to 3 address “the universality of human rights and their application to all persons without discrimination, as well as the right of all people to recognition before the law”; Principles 4 to 11 address “fundamental rights to life, freedom from violence and torture, privacy, access to justice and freedom from arbitrary detention”; Principles 12 to 18 address “non-discrimination in the enjoyment of economic, social and cultural rights, including employment, accommodation, social security, education and health”; Principles 19 to 21 address “the freedom to express oneself, one’s identity and one’s sexuality, without State interference based on sexual orientation or gender identity, including the rights to participate peaceably in public assemblies and events and otherwise associate in community with others”; Principles 22 to 23 address “the rights of persons to seek asylum from persecution based on sexual orientation or gender identity;” Principles 24 to 26 address “the rights of persons to participate in family life, public affairs and the cultural life of their community, without discrimination based on sexual orientation or gender identity”; Principle 27 addresses “the right to defend and promote human rights without discrimination based on sexual orientation or gender identity, and the obligation of States to ensure the protection of human rights defenders working in these areas”; Principle 28 to 29 affirm “the importance of holding rights violators accountable, and ensuring appropriate redress for those who face rights violations.” O’Flaherty & Fisher, *supra* note 209, at 234–35.

more than the backlash they provoke,²¹⁴ or may fail to garner substantial international support, the Principles do reflect a potential solution to the bind in which CEDAW sits, where the centrality of “women” may hamper progress on issues of gender and sexuality rights.²¹⁵

In sum, the establishment of “discrimination” and “women’s human rights” confronts substantial theoretical and practical challenges in the centrality of group identity. Expansion to include both “gender” and “sex” would improve the debate by shifting away from thinking about these issues as

²¹⁴ Emma Mittelstaedt, Comment, *Safeguarding the Rights of Sexual Minorities: The Incremental and Legal Approaches to Enforcing International Human Rights Obligations*, 9 CHI. J. INT’L L. 353, 365–66, 384. (2008). According to Mittelstaedt, holding signatories accountable to uphold their obligations under treaties onto which they have signed actually results in anti-LGBT legislation in some signatory States. *Id.* at 384–85. The author cites Ghana, South Africa, Nigeria, South Korea and Guatemala as examples of countries that have signed on to some international agreement that theoretically protects the rights of sexual minorities. The author advocates “an incremental approach to human rights” by the international community, which “would better serve the aims of improving LGBT rights worldwide.” *Id.* at 385. Because the Principles have not yet been adopted by any State, Mittelstaedt offers no hypothesis as to how the Principles might be received by any of the countries she includes as scenarios where the international community pushed too hard for the rights of sexual minorities. *See id.* The author does correctly point out, though, that the Principles emphasize not only the responsibilities of States, but also the responsibilities of the media, human rights institutions, NGOs and financial supporters. *Id.* at 366. Although she includes no particular examples, Mittelstaedt states that “[t]he Principles . . . reveal a *trend* toward utilizing nonstate actors to impose international law and norms upon *unwilling, or at least resistant, nations.*” *Id.* (emphasis added).

²¹⁵ It is worth noting that this raises compliance issues. For that reason, the Yogyakarta Principles recognize the value of transnational networks in focusing on non-state actors. The drafters deployed broad definitions of sexual orientation, gender and gender identity. Although the drafters note that the Principles “must rely on the current state of international human rights law” and thus will require international law revision to reflect legal developments, it is worth noting that the recommended actions are not only addressed to States, but also to NGOs, the media, and other non-state actors. O’Flaherty & Fisher, *supra* note 209, at 237. According to O’Flaherty and Fisher, the drafters believed they should recommend action points to other relevant actors who may protect and promote the rights of sexual minorities. There are some sixteen recommendations directed at international governmental and non-governmental organizations as well as international rights and treaty bodies, human rights institutions and commercial organizations.

solely affecting the group known as “women,” who are positioned as “victims” of “discrimination.” One answer may involve shifting from an identity-centered treaty toward a rights-based treaty, as embodied in CERD or the Yogyakarta Principles.

III. Include all Sexes

CEDAW fails on its own terms of equality between men and women. Women cannot become equal to men unless men are part of the solution. Women’s ordeals still matter, but ignoring men and broader gendered power disparities cannot further CEDAW’s goal of equality between men and women. CEDAW’s premise is that women are the victims, leaving those who are not women—i.e., men—as the perpetrators of the discrimination. This binarist construction of gender excludes men from both the diagnosis of, and the remedy to gender oppression.

This Part will demonstrate the critical importance of upending the gender binarism inherent in CEDAW. First, to understand how CEDAW constructs/excludes other sexes, we must understand CEDAW’s framing of women themselves. Second, transgender people emerge as the most clearly excluded individuals. Transgender people are no “third sex,”²¹⁶ but deserve to be subjects and expose the fallacy of the sex binarism itself. Third, men do not appear in CEDAW, except as shadow comparators for women’s equality and implicit perpetrators of their inequality. Instead, because men also face substantial harm due to sex discrimination, men should be placed alongside other sexes in international sex discrimination law.

A. Recognize Women’s Agency

It may seem senseless to say that CEDAW excludes women when “women” are its sole focus. The Convention purportedly represents them, but only in the circumscribed subjectivities it establishes. CEDAW essentializes what “women” means in part by overlooking the many forms of

²¹⁶ William Eskridge, *Law and the Construction of the Closet: American Regulation of Same-Sex Intimacy*, 82 IOWA L. REV 1007, 1079 (1997) (referencing discussions of a “third sex” as a trope to describe gender and sexual non-conformists).

intersectionality. Some scholars in this area have commented on the limited framing of “women” within international women’s human rights. This Subpart will give some theoretical cohesion to a myriad of critiques, with a focus on Janet Halley’s Injury Triad and Third Wave feminist theory.

CEDAW relies on the depiction of women as the victim-subject. Dianne Otto articulates this critique most adroitly with her three “female subjectivities” that frame women as “others,”²¹⁷ which this Article addressed in Part I. These constructions of women’s subjectivities reflect a pre-third wave feminist perspective that ignores the centrality of agency to contemporary understandings of gender.²¹⁸ Otto ultimately concludes that to dismantle the hierarchical binary of gender, gender must be reconceived as fluid and formulated as a hybrid.²¹⁹ Otto draws the curtain on women’s identity to reveal its complexity. The basis for these subjectivities, I argue, is the identitarian choice of “women” as the centerpiece of international law on sex and gender.

Otto’s work draws on cultural critiques and intersectional realities of CEDAW’s framing of women. Positing that women are victims relies on the currency of essentialist notions of both sex and culture in the international women’s human rights arena.²²⁰ This essentialist understanding presumes a coherent group identity even among different cultures and overlooks multi-layered experiences that take into account perspectives of

²¹⁷ Otto, *supra* note 16, at 106.

²¹⁸ See generally Crawford, *supra* note 82; Engle, *supra* note 15; Ratna Kapur, *The Tragedy of Victimization Rhetoric: Resurrecting the “Native” Subject in International/Post-Colonial Feminist Legal Politics*, 15 HARV. HUM. RTS. J. 1, 2 (2002) (discussing the extent to which victim narratives encase women in restrictive understandings of their position in society).

²¹⁹ Otto, *supra* note 16, at 106.

²²⁰ Kapur, *supra* note 218, at 2. Essentialism is the fixing of certain attributes to women that are assumed to be shared by all of them. *Id.* at 7. Experiences of gender oppression cannot be extricated from experiences of racial oppression because they simultaneously occur. *Id.* at 8.

class, race, religion, ethnicity and/or sexual orientation.²²¹ The universalist “women” serves to reinforce the depiction of women in developing countries as perpetually marginalized,²²² an issue that Lama Abu Odeh has targeted. She notes that a crime of “passion” bears far more similarities to “honor” killings than Westerners care to admit.²²³ The creation and reinforcement of a victim-subject has not empowered women and may be a setback to the broader recognition of women’s human rights.²²⁴ Kapur proposes recognition of the intersectionality of gender and the multiplicity of historically and culturally contingent identities.²²⁵

The dispute around female genital cutting (FGC),²²⁶ alongside the realities of widespread violence against women, led to an increasing emphasis on violence as a new, less controversial universalist discourse. CEDAW does not reference violence against women, so I will not linger on this point, but it is worth noting that CEDAW’s universalist tendencies continue

²²¹ *Id.*

²²² Culture has been used as a way to explain the different violence against women in the post-colonial Third World. Kapur, *supra* note 219, at 13. But cultural explanations reproduce the native subject of colonial discourse. Cultural explanations neither challenge nor take control of the problem and they deflect attention from the broader and more prevalent crime of domestic violence and the other reasons that women are abused or killed. Instead of cultural explanations, there is a need for economic, social, and institutional analysis in order to create better strategies. *Id.* at 16.

²²³ Abu Odeh uses a comparative method to critique “the legally sanctioned violence against women (for intimate or sexual reasons), of both the Arab legal system and that of the American, which,” she argues, “reveals the fallacy of both the orientalist construction that the East is different from the West.” Odeh, *supra* note 99. Odeh further exposes the “deep similarities between the internal tensions within each legal system as to what constitutes a killing of women that is legally tolerated (either fully or partially), and that these tensions, although sometimes defined differently, have been surprisingly resolved in the same way.” In the international arena, the victim subject may foster racist perceptions of non-Western women. The victim subject disempowers women, encouraging nation states to take on protectionist roles and morally regulate women. Kapur, *supra* note 218 at 5–6.

²²⁴ *Id.* at 36.

²²⁵ *Id.*

²²⁶ See *supra* notes 85 and 120.

to drive other conversations about international women's human rights.²²⁷ This agenda in some ways reifies cultural and religious presumptions, both of non-Western cultures as primitive and of non-Western women as needing to be saved by outsiders.²²⁸ Viewing these women as victims creates an opposition to the Western subject.²²⁹ This construction of the victim-subject risks denying women the agency that they demonstrate throughout their lives,²³⁰ and reinforces imperialist responses towards

²²⁷ Kapur notes, as others have, that such feminist interventions echo "imperial intervention in the lives of 'backward' native subjects." KAPUR, *supra* note 136, at 2. Violence served as the centerpiece of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women of Belem do Pará, uniting countries with disparate norms around this goal.

²²⁸ *Id.* This has reinforced the representation of Third World women as disempowered, brutalized, and victimized. The image of the Third World woman is reminiscent of the colonial construction of the Eastern woman who is sexually constrained, tradition-bound, incarcerated in the home, illiterate and poor. *Id.*

²²⁹ Ratna Kapur, *Un-Veiling Women's Rights in the 'War on Terrorism'*, 9 DUKE J. GENDER L. & POL'Y 211, 219–20 (2002). For another thought-provoking take on the Western victimization of women, see Hilary Charlesworth & Christine Chinkin, *Sex, Gender, and September 11*, 96 AM. J. INT'L L. 600 (2002). Charlesworth and Chinkin note that the major players of the 9/11 attacks, including the terrorists, White House leaders and the majority of firemen and policemen in New York City, were men. *Id.* at 600–01. Women were, by and large, portrayed as victim by the media—widows of 9/11 victims, victims themselves, and subjects of Afghani male oppression. *Id.* at 601–04.

²³⁰ KAPUR, *supra* note 136, at 2.

women in the developing world.²³¹ Violence against women thus serves as a site for an alliance between Western and non-Western feminists, each of which use the construction for legitimizing their goals in their pursuit of the recognition of human rights.²³²

We can understand the preeminence of victimhood in the construction of women's rights better by reconsidering what Janet Halley calls the Injury Triad. Women are not innocent in the construction of a sex-based hierarchy. The Injury Triad, Halley tells us, is "female injury + female innocence + male immunity."²³³ This combination of a self-perception of constitutional innocence with a presumption of guilt on men's part leads to presumptions about what the state should do to "protect" women from men.

The anti-violence agenda and the emphasis on the victim-subject both prove the accuracy of Otto's enunciation of international law's female subjectivities. Women require agency, not just protection. Karen Engle stands out as a pioneer in rethinking international women's human rights with their agency

²³¹ *Id.* at 17; Vasuki Nesiah, *Toward a Feminist Internationality: A Critique of U.S. Feminist Legal Scholarship*, 16 HARV. WOMEN'S L.J. 189 (1993) (critiquing an approach that describes women as an oppressed category and assumes the existence of a "transnational community of 'women' as victims of, and resisters against, male oppression"). Vasuki argues that universalizing women's oppression and its imprecise characterization of women's lives does not attend to the "global contradictions" in women's lives all over the world. *Id.* at 192. By way of illustration, she contends that American feminist's victim-centered narrative in the context of women working in Sri Lankan factories operated by transnational corporations ignores the "multiplicity of social relations that situate women's lives along axes such as gender, class, race and sexual orientation." *Id.* at 192. More specifically, American feminists have not accounted for the effects wage labor has had on liberating some women from the traditionally gender agrarian economy. *Id.* at 207. Nesiah does not underestimate the harsh treatment women face in these factories but wants to give proper recognition to the greater independence these workers have living in hostels on the periphery of free trade zones. *Id.* Complexities like these are left unexamined by approaches that homogenize the experiences of first and third world women. *Id.* at 210.

²³² *Id.* at 29.

²³³ SPLIT DECISIONS, *supra* note 17, at 324.

in mind.²³⁴ Agency would require a shift from, not toward, state paternalism, exemplified by the once widespread restrictions on women working at night²³⁵ or restrictions on women's movement without male guardians.²³⁶ Third Wave Feminist theory has explored how feminism must champion women's

²³⁴ Karen Engle's work on criticizing the presumption that the private is harmful to women is critical here – she first enunciated, within an international context, the ways in which women may benefit from certain constructions of the "private." See generally Karen Engle, *After the Collapse of the Public/Private Distinction: Strategizing Women's Rights*, in RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW 146 (Dorinda G. Dallmeyer ed., 1993).

²³⁵ Article L.213-1 of the French Labor Code banned women's working at night in any night work of almost any nature. See PROMOTING HEALTH FOR WORKING WOMEN 65 (Athena Linos & Wilhelm Kirch eds., 2008). The European Community Directive 76/207 of February 9, 1976 sets forth a general principle of equal treatment for men and women workers with respect to working conditions. Directive 76/207, of the European Parliament and Council of 9 February 1976 on the Implementation of the Principle of Equal Treatment for Men and Women as Regards Access to Employment, Training and Promotion, and Working Conditions 76/207/EEC, 1976 O.J. (L 039) 40–42.

The European Court of Justice overruled this French law and condemned the French Government for failing to eliminate this rule from its labor laws. Eventually, the French government adapted its laws to comply with European Community Law. See *France's Labor Code*, EQUALITY NOW, http://www.equalitynow.org/english/wan/beijing5/beijing5_economic_cn.html (last visited June 19, 2011). French and European court cases illustrate the limited policy shift in individual rights as a result of the Europeanization of gender rights. In a domestic case, decided in La Rochelle, a police court ruled that Article L.213-1 violated the European Equal Treatment Directive (ETD). See MARIA GREEN COWLES ET AL., TRANSFORMING EUROPE: EUROPEANIZATION AND DOMESTIC CHANGE 35 (2001). On the other hand, the case of *Levy*, ruled on by the European Court of Justice (ECJ), acknowledged that while the French Labor Code had to comply with the ETD, an exception existed because the code implemented a prior international agreement. See *id.* at 35–36. See also PAUL P. CRAIG & GRÁINNE DE BÚRCA, EU LAW: TEXT, CASES, AND MATERIALS 919, 926 (2007) (illustrating the limited policy transition through ECJ cases).

²³⁶ Renu Mandhanc, *The Use of Human Rights Discourse to Secure Women's Interests: Critical Analysis of the Implications*, 10 MICH J. GENDER & L. 275 (2004).

agency to remain relevant.²³⁷ Such theories have explored how women can choose to occupy subject positions in which they not only may use sexual power to alter sex-power dynamics, but also may proactively choose to engage in sexuality viewed as retrograde by second-wave feminists, such as a “woman’s right to be spanked.”²³⁸

This critique also requires upending earlier presumptions about sexual agency and subjugation. CEDAW’s reference to prostitution is the perfect example of how CEDAW divests women of agency and creates a victim-subject. The CEDAW provision calling for the “suppression . . . of the exploitation of prostitution of women” exemplifies the victimization of females in the document.²³⁹ By not acknowledging women’s “right” to work as prostitutes, CEDAW characterizes “all prostitution as ‘exploitation,’” and all sex workers as apparently in need of protection from those who exploit them.²⁴⁰

A related element is women’s role as perpetrator of sex discrimination. Women are not simply, always, and irreducibly victims. Again, think of FGC, much of which is committed by women on their daughters. Think of mothers arranging daughter’s marriages or their plastic surgery to prepare them for the marriage market. In these and many more subtle ways, in domains public and private, women are complicit in our world

²³⁷ Third-Wave Feminism may be defined generationally as the brand of feminism created by those who developed their political conscience in the 1980s and 1990s but also thematically as a movement characterized by: (1) dissatisfaction with earlier feminists; (2) the multiple nature of personal identity; (3) the joy of embracing traditional feminine appearance and attributes; (4) the centrality of sexual pleasure and sexual self-awareness; (5) the obstacles to economic empowerment; and (6) the social and cultural impact of media and technology.” Crawford, *supra* note 82.

²³⁸ Ummni Khan, *A Woman’s Right to be Spanked: Testing the Limits of Tolerance of S/M in the Socio-Legal Imaginary*, 18 TUL. J.L. & SEXUALITY 79 (2008).

²³⁹ Otto, *supra* note 16, at 118–19.

²⁴⁰ *Id.* at 119. See also Janet Halley, Prabha Kotiswaran, Hila Shamir & Chantal Thomas, *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J. L. & GENDER 335 (2006).

of sex and gender inequality. CEDAW's focus on women presumes women's innocence in the perpetuation of sex inequality, when of course the reality of subjugation is far more complex.²⁴¹

One final explanation for how CEDAW's portrait of women limits their agency is to think about the complexity of gender identity. Carl Jung argued that every human mind has elements of "rational, logical capacities," reflecting the male and "an intuitive, feeling side which functions most often on an unstructured, subconscious level," reflecting the female. These elements reflect masculine and feminine aspects of each individual.²⁴² Constructing "women" as a unitary sex made up of victims fails to account for blurriness between male and female modes of thinking, and a parallel complexity between perpetrators and victims. Thinking about Jung reminds us of the fallacy of the sex binary, as exposed by some transgender work.

B. Trans-ing International Law

As Part II conveys, CEDAW's reliance on "women" supports the construction of humanity as a binary of two sexes. However, one's gender identity may defy simple categorization due to biology—there are many biological factors that constitute

²⁴¹ Adrienne Davis has eloquently explored the complexity of such actions as she examines the erotics of subjugation. Adrienne Dale Davis, *But It Feels So Good to Be Bad: Abjection, Power, & Sexuality Exceptionalism in (Kara Walker's) Art and (Janet Halley's) Law*, YALE J.L. & FEMINISM (forthcoming 2011). These complex understandings of the self, as reflected in Freud's work on masochism, reveals that in a sense, CEDAW's focus on women presumes the women are rational selves who would not knowingly engage in the perpetuation of female suffering.

²⁴² Sam Joyner, *A Planetary Survey of Feminist Jurisprudence: If Men Are From Mars and Women Are From Venus, Where Do Lawyers Come From?*, 33 TULSA L.J. 1019, 1021 (1998); see also CARL G. JUNG, PSYCHOLOGICAL TYPES (1971).

“sex”²⁴³—or by intent to change one’s identity.²⁴⁴ Some would even argue that there are as many genders as there are people.²⁴⁵

Beyond the blurred divide between “men” and “women,”²⁴⁶ and the reality that sex exists on a continuum,²⁴⁷ both transgender rights advocates and intersex advocates point to the need for legal recognition of the multiplicity of gender

²⁴³ See *Trapped*, *supra* note 119, at 504; see e.g., Ehrenreich & Barr, *supra* note 120. In the mid-1990s the modern intersex rights movement began to form. See *What’s the History Behind the Intersex Movement*, INTERSEX SOCIETY OF NORTH AMERICA, <http://www.isna.org/faq/history> (last visited May 29, 2011). Taking inspiration from the successes of feminists and gay rights activists, the intersex movement sought similar reforms and an open discussion of the issues that intersex people confront in a world where gender identity exists as a binary. *Id.* A central concern of the movement is its effort to transform the method of treatment for babies born intersex. *Id.* Intersex comes in a multitude of shapes and forms, both visible and non-visible, but throughout the twentieth century, the treatment and surgical techniques were devised with the goal of maintaining a world with two separate sexes—male and female. *Id.* The medicalization of the intersex condition made it easy for parents and doctors to avoid grappling with the much more challenging issue of the child’s gender identity. *Id.* Today, the movement calls on doctors and parents to deal with the health concerns that some intersex babies face at birth while postponing ‘genital normalizing’ surgery until the patient is older. This allows patients to consent before performing a surgery that may be at odds with their gender identity. *Id.* The movement wants people to be aware of and understand the intersex condition so that society stops trying to “make it disappear” and instead starts trying to ensure that these individuals may live prosperous lives with a stable gender identity. *Id.*

²⁴⁴ See BORNSTEIN, *supra* note 121 and accompanying text.

²⁴⁵ See STOLTENBERG, *supra* note 124, at 28. The failure to recognize this diversity is a particular failing of this culture. Cultures from Ancient Greece to India, as well as various others around the world, recognized the existence of hermaphrodite, or inter-sex, individuals and cross-gender identified individuals without forcing them into either of the male or female genders. See LESLIE FEINBERG, *TRANSGENDER WARRIORS* 39–47 (1996).

²⁴⁶ AMERICAN HERITAGE DICTIONARY, *supra* note 122 and accompanying text.

²⁴⁷ See sources cited and accompanying text, *supra* note 125.

identity.²⁴⁸ Transgender rights advocates assert an absolute right to gender identity, in which individuals can choose an identity that reflects that individual's understanding of self, including gender identity.²⁴⁹

The focus on "women" in CEDAW leaves transgender individuals in the difficult position of questionable international law subjectivity. As with all juridical constructs, the sex binary legitimizes certain acts and identities while delegitimizing others. CEDAW's exclusion of multiple sexes has serious consequences. Transgender individuals lack the social position ascribed to "men" in the sex binary and lack recourse to the remedies promulgated for "women" by CEDAW. Intersex people face the violence of having their bodies surgically transformed at birth to conform them to one sex or the other.²⁵⁰ CEDAW's adherence to the gender binarism perpetuates this violence by ascribing legal importance to one's sex, when that identity should be left to the individual to determine. It seems strange to think that a transgender individual, born as a man who becomes a woman (whether by virtue of surgery or even just self-identity) suddenly also is transformed into the bearer of rights under CEDAW. Equally strange is the reality that a woman who becomes a man loses that set of rights. Finally, it is worth remembering that there are many people with mixed sex traits,

²⁴⁸ In August of 1992, the International Conference on Transgender Law and Employment Policy (ICTLEP) set out to draft a "Gender Bill of Rights." Phyllis Randolph Fryc, *The International Bill of Gender Rights*, in *TRANSGENDER LAW* 327 (Paisley Currah, Richard M. Juang & Shannon Price Minter eds., 2006). The following August, the Conference presented a first draft that they proceeded to revise and amend at three subsequent annual meetings. *Id.* The product purports to enumerate a set of universal civil and human rights that, if honored, will to all persons' gender identity without regard to "chromosomal sex, genitalia, assigned birth sex, or initial gender role." *Id.* On its own the Bill is without the force of law, recently however, local governments peppered across the United States have begun to recognize some of the rights as have foreign governments including Canada, South Africa, Australia, Great Britain, and other Western European countries.

²⁴⁹ *Id.*

²⁵⁰ The drama of intersex individuals is most humanly depicted in the recent novel *Middlesex*, in which the main character acquires secondary traits in puberty that reveal her mixed-sex identity. JEFFREY EUGENIDES, *MIDDLESEX* (2003).

such as South African runner Caster Semenya, who was the subject of a humiliating debate as to whether she is the bearer of rights. In short, CEDAW's insistence on "women" creates a farce, a tragic one for many, in a world full of many sexes and genders.

As transnational law advocates push for thinking about international law in more complex ways, CEDAW should be "trans-ed,"²⁵¹ which is to say that it should no longer reflect a sex binary to the exclusion of other genders. I recognize that many transgender rights efforts simply attempt to establish rights by extending an identitarian formulation to transgender individuals, through which individuals would be protected for their choice of sex. Many within transgender movements assert that the entire gender binarism should be upended to expose the multiplicity of sexes and genders not only in society, but also within each of us. To say that international law should be trans-ed means that it should include all sexes, even those who fall

²⁵¹ Transnational law is distinct from international law. *International law* reflects agreements and responsibilities between states, whereas *transnational law* reflects a broader set of legal interactions, involving states, non-state actors and the interaction between domestic legal structures and international ones; it reflects a cosmopolitan goal of fostering interactions and even harmonization among legal systems. Transnational law represents a hybrid of domestic and international law. See Harold Hongju Koh, *Why Transnational Law Matters*, 24 PENN ST. INT'L L. REV. 745, 745 (2006). In 1956, Judge Philip Jessup famously defined transnational law in his Storrs Lectures at Yale as "all law which regulates actions or events that transcend national frontiers . . . [including] [b]oth public and private international law . . . [plus] other rules which do not wholly fit into such standard categories." *Id.* (quoting PHILIP C. JESSUP, TRANSNATIONAL LAW 2 (1956)). While the definition is still applicable today, Harold Koh has expounded on the term in his analyses on transnational legal process. According to Koh, transnational law encompasses all laws that are not purely domestic or purely international law. See *id.* His operational definition consists of: (1) laws that are "downloaded" from international to domestic law; (2) laws that are "uploaded" from domestic to international law, then "downloaded" back to domestic law; and (3) laws that are borrowed or "horizontally transplanted" from one national system to another. See *id.* at 745–46. Not surprisingly, transnational law has become increasingly significant to our lives given the globalized nature of law and legal studies. *Id.* at 746. This prominence is reflected in transnational legal process, in which public and private actors, including nation states, corporations, international organizations, non-governmental organizations, and individuals, interact in a variety of fora to interpret, enforce, and ultimately internalize, rules of international law. See Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 183 (1996). The key elements of this approach are interaction, interpretation and internalization. *Id.*

outside of the sex binary. Numerically, however, the largest sex identity excluded by CEDAW is men. .

C. Include Men

CEDAW should reference all sexes. And if CEDAW's focus on women is mistaken, a large part of its error is the exclusion of men. During the 1989 bicentennial of France's Declaration of the Rights of Man, feminists questioned the textual exclusion from the Declaration of women by covering posters around France with the words "and woman." As we should unsex the universal "man" in the "the rights of man," it is equally appropriate to question the focus on women when gender inequality afflicts people of all genders.²⁵² Although men benefit in terms of wealth and power from their "insider" status, men also suffer from gender inequality by the constraints of rigid gender normativity.²⁵³ To eliminate discrimination against women, men must be included in the central defining language alongside women so that the design and implementation of remedies reflects the fuller nature of sex discrimination. Men must be allies in a battle on gender inequality; without men, broader goals for gender equality will remain unrealized.²⁵⁴ This Subpart will first describe the presence of men in CEDAW, and then address how men are also victims, in part due to masculinity's harm to men. Finally this Subpart will consider the essential contributions men can bring to gender equality efforts.

1. Men in CEDAW

Men are a part of CEDAW: as the yardstick for equality, as

²⁵² Here I build on two works regarding men's relationship to feminism. Nancy Levit, *Feminism For Men: Legal Ideology and the Construction of Maleness*, 43 UCLA L. REV. 1037, 1038 (1996); PAUL NATHANSON & KATHERINE K. YOUNG, *LEGALIZING MISANDRY: FROM PUBLIC SHAME TO SYSTEMIC DISCRIMINATION AGAINST MEN* (2006).

²⁵³ An example of this, discussed at Part III.C.2. *infra*, is parental leave. Societal norms suggest to men that they are inferior to women in family care giving, and belong in the workforce while women stay home to care for children. This plays out in states that allow for more parental leave for women after childbirth than for men.

²⁵⁴ See *infra* Part III.C.3.

the implicit perpetrator of discrimination and as the potential protector in the form of the state. Given CEDAW's focus on equality, men largely serve as a reference point for the ideal of equality between men and women. Article 1 defines equality between men and women as a basis for its antidiscrimination norms.²⁵⁵ Article 7 guarantees access to participate in political life "on equal terms with men."²⁵⁶ Article 8 uses the same language.²⁵⁷ Article 9 guarantees women "equal rights with men" to self-determination over nationality.²⁵⁸ The language of Article 10 typifies CEDAW's use of language: "States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women . . ."²⁵⁹ Men here serve as a benchmark, as CEDAW establishes "equal rights with men" and "on a basis of equality of men and women" as a measurement of its success. The core, formal equality sections of CEDAW urge states to promote women's progress with men as the comparator.²⁶⁰ CEDAW's language reminds one of "Men are from Mars, Women are from Venus,"—a portrait of stark differences.²⁶¹ CEDAW's emphasis on women, to the exclusion of men, reifies the gendered nature of power, leaving men out of the equation both as a subject of analysis and as a subject of rights, except insofar as their socio-economic position can measure law's (and, since CEDAW is the law, "women's") success at combating sexism.

Second, if women are the victims of discrimination, implicitly there is a perpetrator of this discrimination. Paul Nathanson and Katherine Young argue that ideological

²⁵⁵ See CEDAW, *supra* note 3, at art. 1.

²⁵⁶ *Id.* art. 7.

²⁵⁷ *Id.* art. 8.

²⁵⁸ *Id.* art. 9.

²⁵⁹ *Id.* art. 10.

²⁶⁰ Otto, *supra* note 16.

²⁶¹ JOHN GRAY, MEN ARE FROM MARS, WOMEN ARE FROM VENUS (1992).

feminist²⁶² efforts have succeeded in replacing a male-dominated legal structure with one that favors women at men's expense, replacing discrimination against women with a legislated double standard against men.²⁶³ They describe this force as misandry, "the idea that men can be classified only as evil or inadequate, or as honorary women."²⁶⁴ In this gynocentric worldview, women's membership in a victim class situates men as "collectively guilty."²⁶⁵ CEDAW's silent reference to men as the perpetrator

²⁶² As Nathanson and Young use the term, "ideological feminism" means the dualistic world-view that characterizes woman as victims and men as oppressors. The authors also list the following as characteristic features of ideological feminism: essentialism—the emphasis on the unique qualities of women; hierarchy—indirect or direct suggestion that women are superior to men; collectivism—the communal goals of women outweigh the rights of individual men; utopianism—establishing an ideal social order in history; selective cynicism—systematic suspicion directed only toward men; revolutionism—political agenda that supersedes reform; consequentialism—the idea that the ends justify the means; and quasi-religiosity—a secular religion created. NATHANSON & YOUNG, *supra* note 253.

²⁶³ *Id.* at 264. Nathanson and Young state that "[d]iscrimination against men is by now so pervasively institutionalized that it is best described as systemic and characteristic of the legal system as a whole. *Id.* Nathanson and Young argue that the legal system, through the participation of the media, has fostered a radical shift in the perception of men. The authors argue that the media has placed men on public trial by its coverage of heinous male-on-female violent crimes, of sexual harassment cases, and of male-child sexual abuse cases. In discussing public incidents of male sexual violence, Nathanson and Young argue that the accused in each case were portrayed to represent the entire class of men and that even where courts had decided otherwise, the verdict against these men—against all men—was guilty. *Id.* at 315. For these authors, CEDAW, as well as the Beijing Platform for Action and a special annex to the Declaration and the Platform most clearly exemplify legalized misandry. Nathanson and Young point to the elision of human rights into women's rights. *Id.* at 393–94. Interestingly, the authors point to the dominance of Western feminists as a key factor in the support for these ideological feminist assertions. Nathanson and Young also note the lack of participation in the debate by non-Western delegates. The authors suggest that these non-Western feminists view Western ideological feminism as the "newest form of Western imperialism." *Id.* at 395. They take the argument further, writing that ideological feminism is a secular religion, functioning as a rival to traditional religions. As Nathanson and Young see it, one of the ideological feminists' ultimate goals is to eliminate all traditional religions, which would also lead to disappearance of the cultures associated with those religions. *Id.* at 395.

²⁶⁴ *Id.* at xiii.

²⁶⁵ *Id.* at xi.

of discrimination does imply their guilt. The presumption of men's responsibility has real consequences in blinding the impact of sex discrimination on men, but I disagree with Nathanson and Young over the power of women's rights to determine international law outcomes. Even if international law's women's identitarianism is objectionable, its principal effect is not to subjugate men (as they argue), but rather to weaken the impact of women's rights and other equality efforts, as Lara Stemple has demonstrated with her work on HIV prevention campaigns that erroneously focus solely on women.²⁶⁶

In thinking about men as perpetrators and not victims of sex discrimination, prior drafts of CEDAW reflect tension over how men are referenced. For example, in the debate over the Preamble, the World Health Organization (WHO) suggested that the "human dignity" of men should be emphasized as well as that of women.²⁶⁷ The final wording does not reflect this suggestion. One debate over Article 11 on employment discrimination reflects the tone of the considerations of CEDAW's language. The United States, which it should be noted again has not ratified the Convention, proposed a change in the language to note that "existing laws on health and safety, though originally designed for the protection of women, in practice often prevented women from getting better or higher paid jobs."²⁶⁸ The Soviet Union disagreed. It argued that since the Convention sought to eliminate discrimination against women, "references to men, who—so far as [the representative was aware]—were not particularly disadvantaged in the matter of employment, were therefore out of place."²⁶⁹ Ultimately, the language adopted does not reference men.

Third, men also play a role since nearly all CEDAW

²⁶⁶ Dean Peacock, Lara Stemple, Sharif Sawires & Thomas Coates, *Men, HIV/AIDS, and Human Rights*, 51 J. ACQUIRED IMMUNE DEFICIENCY SYNDROME 119 (2009).

²⁶⁷ REHOF, *supra* note 86, at 34.

²⁶⁸ *Id.* at 137.

²⁶⁹ *Id.*

signatories are led by men. As I have explored extensively in other work, men play a dominant role in political positions in most countries in the world, with the exception of some Scandinavian countries and Rwanda. To the extent CEDAW references a state, it is implicitly a male-run state.

These debates over the drafting of CEDAW reflect several truths about the Convention. First, they confirm the presumption of the binarist nature of sex by the parties to the Convention. Second, the Soviet Union's reference to men reflects a presumption that men do not suffer from sexism and that only women are victims of employment discrimination. However, debate over Article 5 reflects that some parties to the Convention were aware of the possibility that men may be victims of sex-based discrimination. Sweden proposed that the language related to "the elimination of prejudices based on ideas of inferiority and superiority" be altered to reference the "inferiority or superiority of either sex."²⁷⁰ Sweden's intervention on behalf of language that references "either sex" marks the potential that existed for the Convention. It too supports the understanding that the Parties presumed the existence of two distinct sexes.

One element of CEDAW stands out from this obsessively identitarian text. Article 5(a) appears to reference men toward a different end—"'[t]o modify the social and cultural patterns of conduct of men and women'."²⁷¹ Article 5(a) seeks to shift men's and women's cultural patterns that lead to the dominance of one sex by another based on stereotyped roles for men and women.²⁷² Article 5(a) uniquely references both men and women, and focuses on battling stereotypes. In this sense, it serves both as a substantive provision and as a lens through which to interpret the balance of CEDAW's substantive

²⁷⁰ *Id.* at 80.

²⁷¹ Elizabeth Sepper, *Confronting the "Sacred and Unchangeable": The Obligation to Modify Cultural Patterns Under the Women's Discrimination Treaty*, 30 U. PA. J. INT'L. L. 585 (2008).

²⁷² Andra Vesa, *International and Regional Standards For Protecting Victims of Domestic Violence*, 12 AM. U. J. GENDER SOC. POL'Y & L. 309, 328 (2004).

provisions.²⁷³ Article 5(a) incorporates the Convention's aspirational norms into all other sections, as interpreted by the CEDAW Committee.²⁷⁴

This Section plays an important role: "Article 5(a)'s first role is as an interpretive tool, that is, as a standard by which to measure compliance with the more substantive articles of CEDAW."²⁷⁵ It recognizes that men and women play a role in the practices that perpetuate gender discrimination. Thus, in Article 5(a), the drafters of CEDAW seemed to have expanded the scope of the treaty language to include practices by both genders. The utility of the Article is to provide the opportunity for the identification of broader cultural practices that hamper gender equality.²⁷⁶ Some suggest that Article 5(a) has begun to acquire more interpretive force within the CEDAW Committee, and to permit the Committee to voice its concerns with regard to men and women as well as to social stereotypes.

²⁷³ Sepper, *supra* note 272, at 596.

²⁷⁴ *Id.* at 601.

²⁷⁵ *Id.* at 597 (assessing the CEDAW Committee's comments and recommendations to ascertain the meaning of Article 5(a), particularly in the context of Western countries).

²⁷⁶ *Id.* at 598. For example, as Elizabeth Sepper notes: "If there is an overarching theme to the Committee's questioning it is probably Article 5's obligation to take steps to discourage stereotyped attitudes about the roles of men and women It has been extremely critical of general policy statements or particular social arrangements which give primacy to motherhood, to the neglect of women's other roles and of men's responsibilities as fathers." *Id.* at 613. In response to the Committee's Article 5(a) admonitions, states have restructured parental leave policies to give father's greater access to child rearing and mothers to the workplace. *Id.* at 624 (2008). Liechtenstein enacted a policy that "involved a four-day program in which high school-age boys and girls "'engaged in a consistent exchange of roles where 'the girls did craftsmen's work and technical tasks, while the boys worked in social and domestic areas'." *Id.* at 625. When it comes to realizing the aspirations of Article 5(a), gender matters. To undo social stereotypes, states must undo them for both men and women. Indeed, in the United States, to the extent that female equality was advanced through the equal protection clause, most of those cases were brought by men. Similarly, this article offers evidence of how, through Article 5(a), the Committee has advanced women's rights through deconstructing the entrenched "gendered stereotypes" that limit both sexes. *Id.* at 638.

CEDAW's problem is that the reference to men in Article 5(a) is an isolated one, suggesting that the drafters chose to include men in this one section, but not elsewhere, thus assuaging countries that advocated for a Convention whose title and substance would directly reference equality between men and women.²⁷⁷ The exclusion of "men" elsewhere raises the question of whether it was consistent to include them in this one section. Seeking solutions involving only women fails to account for the complex issues that go well beyond group identity—issues that deal with the fundamental set of power relations that define all societies and states in the international system, in which subordination based on gender constitutes the norm for political, economic and familial institutions. Given that CEDAW's reference in Article 5(a) stands as a limited intervention toward thinking about gender beyond "women," we can safely conclude that CEDAW is largely silent on how international law should govern gender issues as they relate to men, except insofar as it seeks to limit men's dominance in public power.

CEDAW's flawed discussion of men is echoed in subsequent international efforts that reflect an even deeper ambivalence toward the recognition of male suffering from gender imbalances. Other international law dealing with gender questions largely follows CEDAW's lead in shunting men's issues to the side, including rape-related interventions into

²⁷⁷ CEDAW, *supra* note 3, at art. 5(a).

international criminal law²⁷⁸ and gender mainstreaming efforts.

2. Masculinity's Harm to Men

If CEDAW reflects the vision that presumes women are victims of discrimination, it equally supposes that men benefit

²⁷⁸ Recent feminist international interventions place men's issues as secondary to women's issues. For example, with regard to the categorization of rape as a war crime, Janet Halley has argued that these efforts represented not a middle ground between conservative and leftist feminist ideologies but rather a firmly structuralist approach that conceived international criminal law in terms of male domination and female subordination. See SPLIT DECISIONS, *supra* note 17, at 3. One consequence for men was the attempt to remove consent as a defense to rape charges. Halley recognizes some value in the recognition of rape as a war crime in certain contexts, but questions whether the intervention was a salutary one. Her critique centers of the use of criminalization as a tool of gender normativity. *Id.* at 4. For example, feminist negotiators did not settle for the Geneva Convention's classification of rape as a crime against humanity: they "did not want women's physical integrity to be a subset of universal human integrity." *Id.* at 67. Instead, they believed that a woman's right to be free from sexual assault was "universal in scope," and that this right should not be shared with men, but established as a separate protection. *Id.* at 167. They argued that sexual assault should sit alongside the worst international criminal law violations of crimes against humanity and genocide. *Id.* at 123 (citing Samantha I. Ryan, *From the Furies of Nanking to the Eumenides of the International Criminal Court: The Evolution of Sexual Assaults as International Crime*, 11 PACE INT'L L. REV. 447, 450 (1999)). The Rome statute adopted this idea: persecution based on gender, including rape, is a crime against humanity. One advocate conveys this idea: "every rape is an expression of male domination and female subordination and thus a persecution on the basis of gender." *Id.* (quoting Rhonda Copelon, *Surfacing Gender: Reconceptualizing Crimes Against Women in Times of War*, in MASS RAPE: THE WAR AGAINST WOMEN IN BOSNIA-HERZGOVINA 212-13 (Alexandra Stiglmeier ed., Marion Faber trans., 1994)). Halley vehemently disagrees with these attempts to frame an armed conflict like the war in the Balkans as a "war-against-women." *Id.* These feminist advocates attempted, but failed, to include gender violence, including the gendered social constructs that support male dominance, in the list of sexual offenses. See SPLIT DECISIONS, *supra* note 17, at 83. This reform was yet another effort to regulate everyday sexism even when not related to armed conflict. *Id.* at 84.

from inequality—and in certain material senses, they do.²⁷⁹ Yet, men too suffer from gender inequality, including heightened workplace danger, reduced life spans and reduced family and leisure time.²⁸⁰ In certain vocations, men are exposed to danger by being placed on the frontlines in battle or underground in mines.²⁸¹ Moreover, men are increasingly less educated than women throughout developed economies.

It is beyond the scope of this Article to catalogue the full range of harms to men that occur due to sex and gender inequality and stereotyping. However, a few examples from social science literature reveal some of the extent to which men suffer real harms because they are men.

First, in the workplace, it is customary to think of women

²⁷⁹ Men, it is widely reported, possess ninety-nine percent of private property. See e.g., NANCY LORBER, PARADOXES OF GENDER 288 (1995). In addition, far more leaders are men than women, in both the public and private sectors, in most countries of the world. My own work has focused on women's leadership and how quotas may remedy their exclusion from political and corporate power. See *Internalizing Gender*, *supra* note 8, at 787–99 (analyzing how CEDAW has influenced Brazil and France in establishing quotas for women's political representation); *Loving Gender Balance*, *supra* note 207, at 2873, 2885 (arguing that Norway's Corporate Board quota, which sets a forty percent floor for both sexes, works not only by promoting women but also by protecting men from becoming voiceless in leadership); *Feminizing Capital*, *supra* note 180 (asserting that Norway's Corporate Board quota fosters a productive symbiosis between the public and private spheres); *Parity/Disparity*, *supra* note 27 (examining Brazil and France's parity laws and the role they play in constructing and sustaining subordination among identity or interest groups).

²⁸⁰ See Kari Palazzari, *The Daddy Double-Bind: How the Family and Medical Leave Act Perpetuates Sex Inequality Across All Levels*, 16 COLUM. J. GENDER & L. 429, 430 (2007) (addressing the difficulty dads in America face as they attempt to strike a balance between their work and their families); Nancy Gibbs, *Viewpoint: Bring on the Daddy Wars*, TIME, Feb. 27, 2006, available at <http://www.time.com/time/nation/article/0,8599,1168125,00.html> (reporting on the need for greater recognition of the plight of fathers in the national work family debate).

²⁸¹ See e.g., BUREAU OF LABOR STATISTICS, CENSUS OF FATAL OCCUPATIONAL INJURIES BY SELECTED WORKER CHARACTERISTICS AND SELECTED EVENT OR EXPOSURE, 2007, available at <http://www.bls.gov/news.release/cfoi.t04.htm> [hereinafter CENSUS OF FATAL OCCUPATIONAL INJURIES] (Showing that men account for ninety-two percent of occupational fatalities).

as the primary, even the sole, victims of discrimination. Indeed, given the extent to which women receive lower compensation for many jobs and less frequently obtain leadership positions, one can understand this focus. CEDAW's text reflects this understanding, stating that "States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights."²⁸² Men consistently take on riskier employment. Men work in the most dangerous positions, resulting in ninety-three percent of all fatal occupational injuries compared to just seven percent for women.²⁸³ Much of the pay gap between men and women hinges on the fact that men take more dangerous jobs, as those working in hazardous industries receive higher compensation.²⁸⁴ Child labor has a gender disparity as well—while female youth were nearly as likely as male youth to be working, the work performed by male youth was twice as likely to be illegal work, often in dangerous industries (particularly construction) with

²⁸² See CEDAW, *supra* note 3, at art. 11.

²⁸³ See e.g., BUREAU OF LABOR STATISTICS, *supra* note 281. Women tend to choose work in safer industries than men, perhaps because of differences in preferences, or even employer discrimination. See Thomas DeLiere & Helen Levy, *Worker Sorting and the Risk of Death on the Job*, 22 J. LAB. ECON. 925, 926 (2004). Family structures seem to play a dominant role in the choice of a high-risk job. Single parents are the most averse to high-risk occupations. *Id.* Women's contributions to child rearing are often viewed as more difficult to replace than men's contributions. *Id.* Other studies argue that women select themselves into more secure jobs and the effects on the gender wage gap. See Jochen Kluge & Sandra Schaffner, *Gender Wage Differentials and the Occupational Injury Risk*, 28 RUHR ECON. PAPERS 1, 4 (2007).

²⁸⁴ *Id.* at 21.

excessive hours.²⁸⁵

In short, CEDAW's focus on employment discrimination mistakenly frames the problem as one solely affecting women, when the harms are distributed disproportionately by sex, to generalize in employment, with higher pay and greater danger for men and lower pay and less danger for women. CEDAW's focus on guaranteeing women's rights by "ensur[ing] on a basis of equality of men and women, the same rights"²⁸⁶ overlooks the extent to which a solution depends on shifting sex distribution in work.

Like employment, education inequality is far more complicated than CEDAW presents. Article 10 states: "States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women."²⁸⁷ In the United States, for example, one female graduated college for every 1.60 males in 1960, a statistic that almost flipped by 2003

²⁸⁵ Douglas Kruse, *Illegal Child Labor in the United States: Prevalence and Characteristics*, 50 INDUS. & LAB. REL. REV. 17, 27 (2000). Likewise, most of the many child soldiers deployed throughout the world are boys. In a separate vein, Halley argues that feminist advocates' reasoning for objecting to child soldiers is that trauma to boys ratifies patriarchal values, and thus harms women. See SPLIT DECISIONS, *supra* note 17, at 85. Feminist Universalism (FU) does not recognize masculinity in itself as a "site of harm." *Id.* at 86. Halley explains why such a concession would be antithetical to the FU vision as it would "relinquish not the commitment to seeing domination in sexuality and gender, but the commitment to seeing that domination as structurally committed to male domination and female subordination." *Id.* Halley points out that this reasoning fosters an indifference to the suffering of men. In this example, men's harms do not even appear to be secondary to those of women; rather, the pain dealt to child soldiers is only seen through the pain caused by them on women. *Id.*

²⁸⁶ See CEDAW, *supra* note 3, at art. 11.

²⁸⁷ *Id.* art. 10.

with one male for every 1.35 females.²⁸⁸ The picture is different in developing and poor countries, in which girls' education lags behind boys' education. These disparities expose the overly simple identitarian focus of CEDAW's prescription: bringing women to men's level in the developing world only led to a disparity in the other direction. Rather, the focus should be on seeking equal access without regard to sex or gender, a provision that might profitably apply to developed, developing and poor countries. Here, as in the context of employment, a greater focus on stereotype reduction or elimination would lead to a more effective legal regime.

Another example surfaces in recent social science literature as crucial to gender equality efforts: parental leave. CEDAW's provision here blatantly preferences women's parenting. Article 11 states:

In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures: (a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status; (b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances²⁸⁹

This text, unlike the text for employment and education, does

²⁸⁸ Claudia Goldin et al., *The Homecoming of American College Women: The Reversal of the College Gender Gap*, 20 J. ECON. PERSP. 133, 133 (2006). Almost all OECD countries follow this trend. *Id.* at 154. Part of this dramatic shift lies in greater preparation for college as women expect higher earnings in a more open labor market. *Id.* However, one study also found that non-cognitive behavioral differences between boys and girls explain almost the entire shift toward females in higher education, adjusting for family background, test scores, and high school achievement. *Id.* at 154. Teenage males' higher likelihood to be arrested, suspended from school, and placed in special educational programs led to some of this differential. *Id.*

²⁸⁹ See CEDAW, *supra* note 3, at art. 11.

not even reference equality between men and women, but rather focuses solely on women's parenting. Of course women uniquely serve the function of childbirth and of breast-feeding, but beyond those two functions, men are equally capable of parenting. Here, CEDAW's framing fosters continued stereotypes of women as caretakers and men as unsuited to family and caretaking roles.²⁹⁰ This harmful male stereotype impairs women as well as men, by acting as an "impediment to the equal division of childcare responsibilities."²⁹¹

Even where policies, such as those adopted by the United States, provide parental leave for parents of either sex, women are far more likely to take such leave, reflecting one of the purposes of the Family Medical Leave Act (FMLA).²⁹² Here, CEDAW's identitarian remedy aggravates inequalities: many

²⁹⁰ These stereotypes come to life in the marketplace—women can and do take parental leave more readily than men, and men are often discounted from receiving custody of their children. Levit, *supra* note 253, at 1073.

²⁹¹ *Id.* at 1074. This is the subject of a subsequent project that focuses on the need to unsex parenting.

²⁹² Chuck Halverson, *From Here to Paternity: Why Men Are Not Taking Paternity Leave Under the Family and Medical Leave Act*, 18 WIS. WOMEN'S L.J. 257, 258 (2003). Although the statute employed gender-neutral language, men take far less advantage of the parental leave benefits because they assume it does not apply to them, that society will judge them adversely for taking such leave and because their earning expectations require them to forego leave. The basic premise of the stigma in taking paternity leave is because society views men as breadwinners and women as caregivers and that "men are less attached to their children." *Id.* at 262. Hence, "parenthood remains a highly gendered concept in our culture." *Id.* at 261. These gender stereotypes attribute to the low number of male leave takers despite the Act's gender-neutral language. For newborn child care "men receive subtle messages from employers that their place is at the office and their wives' responsibility is child care." *Id.* at 262. In fact, many law firms require that male employees meet the "primarily caregiver" benchmark prior to taking a *paid* paternity leave. *Id.* In sum, there is a double standard because successful, working, women are perceived as bad mothers, while men are successful fathers only if they are successful at work. *Id.* at 263. Halverson lays out five points to explain men's exclusion from FMLA: (1) paternity leave is still stigmatizing in the workplace, (2) most men cannot afford to take twelve weeks of unpaid leave, (3) many men do not realize that the FMLA covers paternity leave, (4) the FMLA places an administrative burden on employers, hence creating obstacles for men taking FMLA paternity leave, and (5) the Act was not created to further the cause of fathers who want to bond with their newborns. *Id.* at 258.

economists point out that maternity leave policies, or even sex-neutral policies that favor women, lead to the hiring of fewer women and the reinforcement of sexist norms of work and income.²⁹³ A sex and gender-neutral model can reflect women's biological realities in child-bearing, but still provide for men's equal participation in parenting.²⁹⁴

These examples briefly illustrate the potential for a gender or sex-related international treaty.²⁹⁵ CEDAW could be a powerful instrument if it acted as a catalyst for internalizing international norms that protect both men and women.

3. Men's Potential Contribution toward Gender

²⁹³ To the extent that women are more likely to take maternity leave, employers view them as more expensive employees. In this sense, the stereotypes reinforce men's financial advantage over women. Their benefit from this stereotype does not, however, ameliorate the cost of not having time with their families.

²⁹⁴ Indeed, Scandinavian models reflect the importance of shared parenting for greater economic equality as well as more evenly shared familial responsibilities. Michelle Ashamalla, *A Swedish Lesson in Parental Leave Policy*, 10 B.U. INT'L L.J. 241, 243 (1993). Two employed parents are entitled to a combined eighteen months of parental leave. Either parent may use this benefit in its entirety or apportion it. To encourage paternal involvement in child rearing, Sweden has a rule requiring three months of that time allowance to be used by the father. As such, the Swedish gender-neutral system does not penalize women who desire both a career and children. *Id.* Perhaps more remarkable is that parents have the option to return to work on a part-time basis until the child reaches the age of eight. *Id.* As the parental leave example demonstrates, laws that seek to ameliorate women's situation by focusing on women actually reinforce gender disparities. Laws that address issues with attention to both men and women achieve more success in improving women's lives and decreasing gender disparities.

²⁹⁵ It is worth mentioning one last example, female genital cutting (FGC). FGC has proven to be one of most critical and divisive issues in the international women's movement. See Ehrenreich & Barr, *supra* note 120; see also Obiora, *supra* note 44. Often overlooked in this debate is the extent to which discussion of the issue as a women's issue is self-defeating because it leaves men out of the solution. Here, it is worth noting the example of the former Egyptian First Lady, Suzanne Mubarak, who has pursued a public campaign to raise awareness of the dangers of female genital circumcision, including the importance of convincing men to accept a wife who has not undergone the procedure. See ELIZABETH HEGER BOYLE, *FEMALE GENITAL CUTTING: CULTURAL CONFLICT IN THE GLOBAL COMMUNITY* 105 (2005). Eliminating the practice involves finding ways to resist the practice or reduce the harms resulting from the practice.

Equality

Men do perpetuate gender inequality, but they are by no means the only actors, nor are women the only victims. Sexism also oppresses men, and to eliminate discrimination, men must be included in the design and implementation of remedies. CEDAW's title and text should utilize language that includes all genders.

Eliminating inequality based on sex depends at least as much on freeing men from binding socialization roles as it does on freeing women.²⁹⁶ In terms of freeing women, laws that provide special treatment for women can also serve to trap them—Justice Brennan described these laws as a “pedestal” that can act also as a “cage.”²⁹⁷ Kathleen Sullivan agrees, pointing out that “[w]omen’s freedom from stereotypes of fragility and dependence, on this view, requires men’s freedom from stereotypes of aggressor and paterfamilias. Equality functions as a preference for fluid over fixed identity, which requires disaggregating the biology of sex from the culture of gender.”²⁹⁸ This understanding of sex and gender further reveals the limited vision behind a women-centered treaty.

Within U.S. feminist circles, the most persuasive theorist

²⁹⁶ See Sullivan, *supra* note 168, at 752 (paraphrasing Justice Ruth Bader Ginsburg).

²⁹⁷ *Id.* at 744. For an example of such a “pedestal” in international law, consider the Convention Concerning Night Work of Women Employed in Industry, July 9, 1948, 81 U.N.T.S. 147. The convention provided that “[w]omen without distinction of age shall not be employed during the night in any public or private industrial undertaking, or in any branch thereof, other than an undertaking in which only members of the same family are employed.” *Id.*, at art. III. The International Labor Organization adopted this special protection, believing that without it women would not be able to perform their domestic roles as wife and caregiver. Kamala Sankaran, *Night Work by Women: How Should Special Protective Measures for Women be Defined*, 9 NEW ENG. J. INT’L & COMP. L. ANN. 417, 419–20 (2003). Several parties to CEDAW, including Austria and New Zealand, ratified subject to a reservation permitting them to exclude women from night work and honor their obligation under the Night Work Convention. See Rebecca J. Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 30 VA. J. INT’L L. 643, 697–98 (1990).

²⁹⁸ Sullivan, *supra* note 168, at 752.

on these issues is Nancy Levit, who articulated a role for men in feminism in a positive fashion. Legal scholars, largely in an incidental fashion, have addressed the extent to which men suffer from male stereotypes. Feminist legal theory has omitted men “as participants in the reconstructive project.”²⁹⁹

Exploring how patriarchy harms men, Levit hopes “to enlist men in the feminist fight against it.”³⁰⁰ Legal doctrine perpetuates harmful stereotypes of men,³⁰¹ such as the requirement that they suffer in silence and reserve their emotions. This silencing of male victims isolates men who suffer from sexual violence and harassment.³⁰²

The radical feminist method of consciousness-raising, Levit argues, should be put to use to “test the ways in which society has relegated men to stereotypically male roles,” although the groups should be composed of both genders.³⁰³ Feminists must pay heed to society’s treatment of men: “stereotyping harms to one gender also rigidify role expectations of the other gender.”³⁰⁴ Men should be “invited into the discourse.”³⁰⁵ Levit’s argument, framed largely in the context of

²⁹⁹ Levit, *supra* note 253, at 1038. These arguments have played a large role in public debates over gender equality in Scandinavia, both within feminist circles and in government policies. *See generally* SCANDINAVIAN CRITIQUE OF ANGLO-AMERICAN FEMINIST THEOLOGY (Hanna Stenstrom et al. eds., 2007).

³⁰⁰ Levit, *supra* note 253, at 1040. After a lengthy survey of several strands of feminist theory (liberal, cultural, radical and postmodern), and how they have all either vilified or omitted men from their discourses, Levit expresses her concern that “men have no history as gendered selves” because “no work describes historical events in terms of what these events meant to the men who participated in them as men.” Within legal theory, there is also a severe dearth of scholarship exploring legal conceptions of masculinity and how they affect both genders. *Id.*

³⁰¹ *Id.*

³⁰² *Id.* at 1063.

³⁰³ *Id.*

³⁰⁴ *Id.* at 1112.

³⁰⁵ *Id.*

the United States, applies to international law directly. CEDAW's silence about men and apparent ignorance of the extent to which men suffer from sexism exposes a key blind spot—CEDAW cannot succeed in fulfilling its drafters' goals without men in conversation and on board with the project of gender equality.

CONCLUSION

In this Article, I have argued that CEDAW is neither accurate nor effective. It is not accurate because the real sex and gender engagements must include men, women who are not victims, and transgender people. It may also include the panoply of gender-related issues that surface in the Yogyakarta Principles. It is also not effective—CEDAW has been effective at many things, but it has not achieved the broad transformation promised. It cannot achieve that equality as long as the harms it addresses focus solely on “women” as a group.

With contemporary understandings of sex, gender and sexuality serving as the foundation for a new treaty, international law might come closer to reflecting reality, thereby fostering greater equality. Putting “sex” or “gender” in the place of “women” has more than semiotic value. As a category, either term moves beyond the limits of essentialist notions of womanhood toward reducing gender inequality and guaranteeing universal human rights. This radical proposal may strike those who fought for the enactment of CEDAW and implemented it over nearly thirty years as apostasy. Yet were they, along with all others interested in human rights, to redraft the Convention *tabula rasa*, they would recognize the primacy of gender as a fundamental element of progress on these issues.

Although CEDAW has played an important role in certain contexts regarding such issues, a sex or gender-focused treaty would reach more deeply into the inequalities that plague humanity. Today, the Convention and its “women’s” approach serves as the pinnacle of gender-based rights. Underneath it lays gender mainstreaming efforts and other attempts to reference gender. Unsexing CEDAW would flip the architecture of international women’s human rights to focus on gender, with women included under that rights umbrella.

I realize that it would be a monumental, perhaps unachievable task to revise such a widely subscribed treaty. Even so, recognizing its flaws permits thinking about the importance of moving forward in other ways. Reinterpreting Article 5(a) as a dominant method of interpreting CEDAW's Articles could be one way to achieve such progress. Another would be to focus efforts on the broader adoption of the Yogyakarta Principles and even the recognition by States Parties and the CEDAW Committee that the Principles enact a crucial part of the Convention's goals.

CEDAW's problem is a problem for women's rights as well. Although such a broad argument is beyond the scope of this Article, the international women's rights context reflects the extent to which the focus on women as a group will fail as long as it ignores the extent to which men are excluded from any serious consideration. Gender inequalities box us all into a preordained set of advantages and disadvantages. Unsexing CEDAW is not just a remedy to a shortcoming in international law, but a model for thinking about gender issues as a human rights question for all people.