Women's Human Rights & Global Immigration:
Towards a Contextualized Feminist Approach
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Introduction

Global migration continues unabated.[1] The transplantation of people from one country to another has created hotly contested questions about women's human rights. When Muslim women migrate to France from other countries, some may wear the veil to cover their bodies and faces. Many in France, however, view it as a symbol of inequality and France bans the full-face veil. On the other hand, some veil-wearers in France argue that it is emancipatory. Just because the practice of the veil in Saudi Arabia might reinforce women's inequality, does it have the same impact in France? Some Asian immigrants in the United States may abort fetuses due to their sex. While sex-selective abortion is thought to violate human rights in India, does it also contravene women's equality in the United States? Should sex-selective abortion, which is banned in some countries, also be prohibited in the United States?

I situate this work in feminist legal theory because one of the goals of feminist legal theory (like my goal here) is to evaluate the impact of existing or proposed laws and policies in terms of women's equality. Under traditional American feminist legal, if a practice contravenes women's rights in one country, it is thought to have the same impact in another country. The thrust of international human rights theory also reinforces this position. The dominant discourse among scholars and practioners alike views rights as "universal." In other words, if a practice violates a right (such as the freedom from gender discrimination) in one country, that same practice undertaken in another country is also deemed to violate human rights. In contrast, I argue that we recognize a new group of practices (which I call "contextual practices") that contravene gender equality in one country, but do not have that same impact in another country.

As a result of the dominant paradigm in both feminist theory and international human rights law, scholars, policymakers, judges and other important actors are not sensitive to context in analyzing whether or not a practice violates women's rights. I identify three ways in which context is ignored. Policymakers who are considering bans on certain migrant women's practices, often refer to the motives, behaviors and outcomes of those practices in the country of the origin of the immigrant rather than focusing only on situation in their own country.

Though focused only in the domestic setting, the work of many critical legal scholars and anti-essential feminists offers insights into why it is important not to de-contextual immigrant women's practices. I draw from emerging feminist theories and

[1] The UN Department of Economic and Social Affairs estimates that in 2013 the number of international migrants reached 232 million, up from 175 million in 2000. *See* Population Facts. No. 2013/2, Sept. 2013, *available at* http://esa.un.org/unmigration/documents/The_number_of_international_migrants.pdf.

critiques of feminist theory in developing a contexualized lens. This lens provides better insights into these practices than traditional feminist theories.

In Section 1, I examine traditional feminist legal theories to explain the (limited) role country context plays a role in assessing what practices contravene women's rights under those theories. In contrast, I describe emerging legal theories that work across multiple jurisdictions that do recognize that country context plays an important role in evaluating human rights consequences of practices. In Section 2, I articulate a contextualized feminist theory in evaluating prohibitions on the practices of immigrant women. I argue that policymakers should contextualize these practices in the country of destination of the immigrant rather than to refer only to the country of origin. I use the case study of French full face veil ban as an example of debates where the practice of veiling was not examined in context and failure to do so lead to an improper weighing of the costs and benefits of the bans. Finally, in Section 4, I define and describe "contextual practices."

I. Geographic Context in Feminist Theories

Traditional American feminist legal theories have not been sensitive to geographic context. This makes sense because they emerged to address inequalities in one domestic context—the United States. Liberal feminists promoted gender neutral laws in all situation without regard to their impact. While cultural feminists take into account social context, it was always fixed—women had certain shared traits (though they were different than men's traits). Anti-subordination legal theorists also emphasized the difference between men and women. Yet they believe that since men and women were not equal in society, then treating them the same in the law would not necessarily promote equality. But again for these feminists context is fixed and unchanging. Consequently, liberal feminists, cultural feminist and dominance feminists would all agree on one thing -- if they believe that a policy promotes women's equality in one country context, then it would have the same impact in a different country context.

But these theorists did not contend with a world where massive immigration has brought practices from one country to another. Muslim women in France, U.K. and other countries veil themselves. On the other hand, recent feminist scholarship has begun to address women's rights issues across multiple country contexts observes that country context is relevant to determining the human rights implications of practices. I discuss geographic context in traditional and emerging feminist legal theories below.

Context in Traditional Feminist Legal Theories

Contemporary legal feminism traces its roots to the 1970s when early feminist activists struggled against laws that were formally unequal and pushed for women to be able to engage in traditionally male-dominated activities. Prior to the 1970s, many laws contained sex-based distinctions. For example, only women could receive alimony, only

men could be drafted, and the age of majority was different for men and women.[2] Essentially, laws were motivated by the idea that a woman's appropriate role was in the private sphere of home and family. This form of feminism, which reacted against such laws, is often referred to as "liberal feminism."

In the 1970s, court victories erased many formal gender-based distinctions in the law. One prominent example is the case of *Reed v. Reed* where the U.S. Supreme Court found a statute that permitted only men to be executors of an estate unconstitutional.[3] It should be noted that proponents of this theory would advocate changing not only laws that seem to benefit only men, but also laws that benefit only women. For example, the "tender years rule" that gave women preference in child custody cases was eradicated.[4] These feminists emphasized women's similarity to men. Most liberal feminists would not push the law beyond formal equality with men.

In liberal feminism, context is nearly irrelevant. Making laws gender neutral and ensuring formal equality was assumed would promote women's equality regardless of the impact of those laws on society. That is, liberal feminists assumed that giving women the same rights as men would translate into women's equality. It was difficult for them to contend with biological differences between men and women such as pregnancy, in which case treating women exactly like men is disadvantageous to women.

Taking feminism in new directions, scholars emerging in the 1980s emphasized women's differences from men and proposed that any evaluation of laws and policies should take that fundamental notion into account. Taking their cue from Carol Gilligan's work, cultural feminists emphasized that women's different ways of behaving were tied to their sex.[5] Critics of cultural feminism contend that it "essentializes" women's behavior.[6] While these feminists took into account social context, it was always fixed—women had certain shared traits (though they were different than men's traits).

Anti-subordination legal theorists also emphasized the difference between men and women. Men and women had different roles and privileges in society that contributed to women's inequality. If men and women were not equal in society, then treating them the same in the law would not necessarily promote equality. These scholars believed that gender was socially constructed rather than fixed. According to a prominent anti-subordination theorist, Catherine Mackinnon, women's inequality in society was the result of oppression by men rather than biology. MacKinnon's approach rejects the idea that men and women should be treated identically. Instead, she believes that in some cases identical treatment can lead to subordination. These theorists would be willing to deviate from formally equal laws if they will benefit women in practice.

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[2] CHAMALLAS, *supra* note 48, at 25.
[3] Reed v. Reed, 404 U.S. 71 (1971).
[4] CHAMALLAS, *supra* note 48, at 32.
[5] *See, e.g.*, Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988).
[6] Verta Taylor & Leila J. Rupp, *Women's Culture and Lesbian Feminist Activism: A Reconsideration of Cultural Feminism*, 19 U. CHI. L. REV. 32, 42 (1993).

For MacKinnon, however, even though the impact of laws must be evaluated within context, the context is fixed and unchanging. Her theory is animated by the assumption that every society and all aspects of it are defined by male dominance over women. In her view, the legal system was principally designed to perpetuate male dominance over women. Sexual abuse and sexual relationships were the fundamental ways in which women's oppression was achieved.[7] Consequently, under dominancy theory, if a policy were found to promote women's equality in one country context, then it would be assumed to have the same impact in a different country context.[8] Thus, the mainline feminist legal theories were not sensitive to geographic context.

Context in Critiques of Governance Feminism

Janet Halley, Chantal Thomas, Hila Shamir, and Prabha Kotiswaran's main goal in their groundbreaking article in 2006 was to describe a trend in international and humanitarian law where a certain form of American feminism (primarily dominance theory) infuses international institutions, as well as the discussions and negotiations of international treaties. They label this type of feminism "governance feminism." Their critique does not explicitly argue that governance feminism is problematic because it is insensitive to country context, but the threads for this argument are present in their work. I develop those threads in support of my argument that country context matters to evaluating policies that impact women's rights.

The authors quote from Justice Louise Arbour to illustrate their point that domestic legal theories shape international law. Justice Arbour states that "[i]f you look at the definitions of sexual offenses that were provided in the Akayesu, Kovac, Furundzija and Foca cases, you can see that they were forming a definition of the actus reus and mens rea, bringing the international forum to the cutting edge of what is being done in most domestic departments."[9]

The authors further observe that international norms are then used to influence policy solutions in specific countries.[10] For example, Kotiswaran describes how national governance feminism (GF) in India was reinforced by international mechanisms. The

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[7] *See* MARTHA E. CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 20 (2003) at 45.

[8] It should be noted that context (though not geographic context) was very important to feminist legal methods. In describing the various feminist legal methods, Professor Bartlett discusses context in the following ways: the context of multiple identities, the social context, the factual context of a case, context of community norms, and the historical context. Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 848, 851, 854 (1990).

[9] Janet Halley et al., *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, 346 (2006).

[10] Halley et al., at 346.

National Commission for Women, an advisory body appointed by the government, viewed all sex workers as coerced.[11] This view prevailed despite dissent and was reinforced by the international protocol on trafficking, as well as by international feminist organizations that supported local NGOs seeking to further an abolitionist agenda.[12]

The mechanism through which GF operates is "NGO monitoring, pressure, and rule-drafting of a very intense and sustained kind."[13] Additionally, as Halley points out, GF works by getting people hired by governments where they participate in the "bureaucracy of power."[14] For example, one international criminal court created a "legal advisor for gender-related crimes."[15] This feminism relies on state mechanisms and power to rectify inequalities. In particular, Halley *et al.* argue that GF advocates for the criminalization of behaviors that are thought to harm women.[16]

These critiques do not necessarily oppose the influence of domestic feminism on the international realm; rather they appear to disapprove of the fact that only a certain form of feminism is elevated to the international realm. Their critique is important because it is the first to identify how feminism (and specifically a certain brand of it) has been exported from the United States to international institutions and transposed to the domestic level in other countries.

Although they do not expressly point to the importance of context in designing policy solutions on women's rights, it is clear that they view geographic context as important. First, Halley points out that it is problematic to use radical feminist understandings of rape, which were developed in a non-war context, and then apply them to war situations. She argues that the *Kunarac* case before the International Criminal Tribunal for the former Yugoslavia is an example of where this was done. The defendant in that case was convicted for the rape of a woman he transported out of detention. The court assumed that she did not consent to the sex, because of the war-like setting. Here Halley sees the imprint of radical feminists, who "have long argued that, in rape trials, force, resistance, and consent/non-consent are the wrong issues of coercive circumstances."[17] Imposing what she calls radical feminist views in the war context could lead to over-enforcement, because any sex in a war setting could be considered rape.

Second, Shamir's case study can also be read as articulating the importance of context. She notes that governance feminism, "well-intentioned as it may be—is pre-loaded with a strong tendency to overlook or underplay the costs it might cause to some and fix its gaze on the benefits gained by others."[18] She expands on this by arguing that it

[11] Halley et al., at 373.
[12] Halley et al., at 375.
[13] Halley et al., at 345.
[14] Halley et al., at 345.
[15] Halley et al., at 345.
[16] Halley et al., at 341.
[17] Halley et al., at 380.
[18] Halley et al., at 394.

is necessary to focus on the impact a policy has on many groups in determining whether or not to adopt it; she then analyzes the policies of several different countries on sex workers in those countries.[19] Shamir applies a cost/benefit analysis to evaluate policies concerning sex workers in three different countries. Engaging in this type of balancing test carries with it the assumption that policy solutions to women's equality issues are not fixed and can vary with the context.

Third, Thomas' case study of the negotiations of the international agreement on trafficking (Palermo Protocol) can be interpreted to illustrate the problems that ensue when feminist approaches to laws in one country context are transposed to another country context. Thomas describes the dominant strands of feminist thought on sex work and observes how they have manifested themselves in negotiations of Palermo Protocol.[20] These feminists, drawing inspiration from MacKinnon, argued that all sex work is trafficking because it enforces subordination of women by men. Thomas describes these views as follows:

> Women are prostituted precisely in order to be degraded and subjected to cruel and brutal treatment without human limits; it is the opportunity to do this that is exchanged when women are bought and sold for sex.... [L]iberty for men ... includes liberal access to women, including prostituted ones. So, while for men, liberty entails that women be prostituted, for women prostitution entails loss of all that liberty means. [21]

On the other end of the spectrum are the individualists who believe that sex workers frequently exercise choice in choosing to perform sex work and that not all sex work is trafficking. The individualists disfavored a definition of trafficking that failed to recognize that some sex work is undertaken by choice and thus is not trafficking.[22] Another, less vocal, camp framed sex work as simply the right to work, a form of wage labor.[23] The view pushed by the Clinton administration "conceptualized prostitution and trafficking as distinct; envisioned the possibility of non-coerced prostitution; it also emphasized the centrality of human rights."[24] This liberal framework emphasized autonomy.[25] Ultimately, Thomas notes that both the liberal and structuralist feminist views prevailed in the treaty language that was eventually adopted.[26]

MacKinnon's view, and that of those who are informed by it, is that prostitution is detrimental to women's equality and should be outlawed everywhere. The problem with

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[19] Halley et al., at 346.
[20] Halley et al., at 347–68.
[21] Halley et al., at 349 (*citing* Catharine A. MacKinnon, Prostitution and Civil Rights, 1 Mich. J. Gender & L. 13, 14 (1993)).
[22] Halley et al., at 350.
[23] Halley et al., at 350.
[24] Halley et al., at 356.
[25] Halley et al., at 356.
[26] Halley et al., at 358.

this theory is not that it is inherently wrong, but that it is problematic to export it to other countries. In some countries like India, there are many sex workers who would not be able to provide the basic necessities (food and shelter) for themselves and their children if they were not able to undertake sex work. There are few alternative jobs available to sex workers, particularly in a place like India where, when a woman has undertaken sex work, she is shunned from society. While there certainly are sex workers in the United States who engage in sex work just to have enough money to eat, most do not operate at that level.

In pushing for bans on sex work in other countries, Western feminists (inadvertently) have relied on policy solutions that have been designed by weighing of U.S.-specific costs and benefits. While the harms of sex work might be the same across countries (dignity harms, greater risk of violence, etc.), the costs of a ban in a place like India (which could result in the inability of many women to support themselves) are different from the costs of a ban in a more developed country (where the possibility of ostracism and inability to find other paid work is lower).

Although the scholars who coined the phrase "governance feminism" do not articulate their critique in this way, I think that one problem with GF is that it blindly pushes for policy solutions developed in one country context (usually more developed countries) to other country contexts (usually to less developed countries). This is similar to the critiques made of the law and development movement in the 1970s. During that time, Western lawyers and advocates embarked on reforming and strengthening regimes in emerging economies and one of their strategies was to reform laws such as contract law or other basic laws.[27]

The problem was that the models they proposed were always developed in Western countries and did not always work for the destination country, because they neglected to take into account the specific context of the destination country. [28] On the other hand, the problem I identify here is that advocates and policymakers in migrant-receiving countries pass laws that negatively impact women's rights on the basis (which is also often inaccurate) that the practices that they are prohibiting are harmful to women in the country that the migrants originate from.

Context in Karima Bennoune's work

In an article published in 2007, Professor Karima Bennoune, in opposition to the dominant thinking among human rights organizations, argues that whether or not veil bans are appropriate needs to be examined within context. Her proposal provides "an

[27] Francis G. Snyder, *The Failure of "Law and Development"*, 1982 WIS. L. REV. 373, 373 (1982) (reviewing JAMES A. GARDNER, LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA (1980)).
[28] Snyder, at 392.

innovative contextual approach to assessing the legality of bans in public schools on 'modest' garments claimed to be required by religious beliefs of Muslim women."[29]

She examines two court decisions—the European Court of Human Rights (ECHR) judgment in *Sahin v. Turkey* (2004)[30] and the British House of Lords judgment in *Begum v. Headteacher*. In *Sahin*, the ECHR found that Turkey's ban on the headscarf in universities did not violate the European Convention on Human Right's guarantee of religious expression. While in *Begum*, the House of Lords upheld a school's ban on the jilbab, which is a long cloak covering everything but the head, hands, and feet.[31] While she appears to be open to the possibility that veil bans are impermissible in some countries (but not in others), Bennoune finds the bans to be justified in Turkey and the U.K.[32]

She elaborates that a contextual analysis of bans on modest dress of Muslim women would involve examining the following range of factors:

> the impact of the garments on other women (or girls) in the same environment; coercion of women in the context, including activities of religious extremist organizations; gender discrimination; related violence against women in the location; the motivation of those imposing the restriction; Islamophobia, if relevant, or religious discrimination in the context; the alternatives to restrictions; the possible consequences for human rights both of restrictions and a lack thereof; and whether or not there has been consultation with impacted constituencies (both those impacted by restrictions and by a lack of restrictions on such garments), and, if so, what their views are.[33]

The issue before the ECHR was whether the Turkish ban violated a women's right to free expression under the European Convention of Human Rights (Convention).[34] Under the Convention, this right can be limited in order to protect the rights of others.[35]

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[29] Karima Bennoune, *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).
[30] Sahin v. Turk., App. No. 44774/98 (Eur. Ct. H.R. Fourth Section June 29, 2004), *available at* http://www.minorityrights.org/download.php@id=386 [hereinafter Sahin, Fourth Section]. The judgment was affirmed by the Grand Chamber in Sahin v. Turk., App. No. 44774/98 (Eur. Ct. H.R. Nov. 10, 2005), *available at* http://hudoc.echr.coe.int/eng?i=001-70956 [hereinafter Sahin, Grand Chamber].
[31] Bennoune, at 410.
[32] Bennoune, at 414.
[33] Bennoune, at 369.
[34] European Convention on Human Rights, Nov. 4, 1950, 213 U.N.T.S. 221.
[35] Sahin v. Turk., App. No. 44774/98 (Eur. Ct. H.R. Fourth Section June 29, 2004), *available at* http://www.minorityrights.org/download.php@id=386 [hereinafter Sahin, Fourth Section]. The judgment was affirmed by the Grand Chamber in Sahin v. Turk.,

Bennoune believes that the Turkish ban was appropriate because "[e]ven to the extent that for some women, the choice to wear a headscarf is their own, and is for them an expression of religious belief, this limitation on that choice is necessary in context to protect the rights of others."[36]

On the other hand, she argues that it would be inappropriate to ban it in the American law school where she teaches because so few women wear them.[37] Thus, the magnitude of the practice in the context is an important consideration. She also concludes that in *Begum* the ban on the more restrictive clothing was appropriate in a situation where a less restrictive headscarf was still available and where there was evidence that some girls would have felt coerced into wearing the restrictive dress if it were not banned.[38] Bennoune points out that her conclusion that the bans were appropriate in both the Turkey and U.K. cases has to do with the fact that they were in public educational institutions, which shape the identities of future generations and forge the public consensus about gender roles and equality.[39]

She briefly discusses France's 2004 law restricting religious dress in schools, but does not draw any conclusions about its legitimacy. She notes that the "the French law perches in between as a truly hard case."[40] Below I discuss France's full-face ban adopted in 2010 (after the publication of Bennoune's article) and argue that the ECHR inappropriately cited the *Sahin* case to find that France's ban was necessary to protect the rights of others.

II. Towards a Contextualized Theory of Migrant Women's Rights

In this section, I argue that the behavior, motives and harms of practices must be contextualized. However, in policy debates about practices of immigrant women, feminists, policymakers, and other stakeholders often look to the country of origin of the immigrant in evaluating policy decisions relating to the immigrant. First, in ascertaining the behavior of immigrants, policymakers sometimes assume that the immigrants are undertaking certain practices in great numbers (when they are actually not) just because women in the country of origin undertake those practices in great numbers. Second, policymakers sometimes conclude (assuming that the behavior is the same) that the motives for the behavior of immigrants are the same motives that guide the behavior of people from the country of origin of the immigrant. Third, in assessing harms of certain practices, often liberal reference is made to the harms caused by those practices in the country of origin of the immigrant.

App. No. 44774/98 (Eur. Ct. H.R. Nov. 10, 2005), *available at* http://hudoc.echr.coe.int/eng?i=001-70956 [hereinafter Sahin, Grand Chamber], Fourth Section, at ¶¶ 108-114.

[36] Bennoune, at 386.

[37] Bennoune, at 389–390.

[38] Bennoune, at 413.

[39] Bennoune, at 386.

[40] Bennoune, at 416.

Certainly culture in the country from which the immigrant came (particularly if she is a recent immigrant) or the culture of the family in which the second generation immigrant was raised (if she was born in the United States or grew up there) is relevantbut should not be overemphasized. A crude theory of assimilation would posit that the longer an immigrant has lived in another country, the less likely she is to share cultural characteristics with people from her country of origin.[41] Of course, there are exceptions to this rule. Amish people retain their distinctive traditions and language even though they have lived in the United States for generations.[42] They are able to do this because they remain geographically isolated, do not send their children to American public schools, and limit their interactions with the larger society.[43]

Traditional feminist legal theories assume that the harms of a practice do not change with context and hence, they do not provide tools to resist such de-contextualization. On the other hand, anti-essentialist feminist theory and critical race studies do provide insights for understanding why de-contextualization of motives and behavior is problematic.

Anti-essential theorists raised this similar critique against dominant strands of feminist thought in the 1990s. These theorists have argued that the dominant feminist understandings are shaped by the concerns and goals of a very specific class of women. Katherine Bartlett called this essentialism "false universalism," where the unstated norm is the white, middle class, heterosexual woman.[44] Angela Harris, for example, argued that Catherine MacKinnon's understanding of rape ignored the experiences of black women for whom rape is linked with issues of both gender and race.[45] She also argued that motherhood is experienced differently by women based on her race.[46] Other scholars have pointed out that mainstream feminist legal theories have largely ignored lesbian women and assumed that their experiences are the same as those of heterosexual

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[41] In Caroline Ware's study of Italian immigrants she finds that the new generation is more likely to reject patriarchial family structures than older generations of Italians, GREENWICH VILLAGE, 1920-1930, at 196 (1932). "Masculine authority continued to be accepted by a larger proportion than held to the ideal of a large family, but it was challenged by two thirds of the younger and a third of the older groups".

[42] DONALD B. KRAYBILL, KAREN M. JOHNSON-WEINER & STEVEN M. NOLT, THE AMISH,. 251–253, 269 (2013) ("Minister Joseph Stoll echoed Amish anxiety about the threat of cultural assimilation: 'How can we parents expect our children to grow up untainted by the world if we voluntarily send them into a worldly environment, where they associate with worldly companions, and are taught by men and women not of our faith six hours a day, five days a week, for the greater part of the year'").

[43] Id.

[44] KATHARINE T. BARTLETT, ANGELA HARRIS & DEBORAH RHODE, GENDER AND LAW: THEORY, DOCTRINE & COMMENTARY 1193–95 (3d ed. 2002).

[45] Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

[46] Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 598 (1990).

women.[47] These theorists' basic point is that women differ on the basis of race, sexuality, class and other things. To treat them the same is problematic for a host of reasons, including the fact that policies that were developed on the basis of white middle class women's experiences do not apply to all women. Although anti-essentialist feminists point out that women differ from each other on the basis of race, class, sexuality, and other characteristics, [48] this critique does not specifically address the situation of immigrants, but feminist scholarship around multiculturalism is useful to explain why the behavior and motives of immigrants are often not understood in context, but should be.

Behavior and Motives in Context

Legal scholar Leti Volpp's article published in 2000, "Blaming Culture for Bad Behavior," offers insights the why people in migrant-receiving countries fail to contextual behavior and motives – the belief that "culture" informs the behavior of immigrants and that culture is fixed and unchanging. To illustrate her point, she compares the dominant American discourse about underage marriage between Caucasian Americans and Mexican Americans. In the context of Caucasian Americans, underage marriage was generally viewed as outside of the norm, whereas underage marriage among Mexican Americans was attributed to culture.

Volpp's work explains why this disparate treatment occurs. First, Volpp explains that the dominant American paradigm assumes that immigrant culture is fixed while mainstream American culture is fluid:

> We sometimes assume culture to be static and insular, a fixed property of groups rather than an entity constantly created through relationships. This assumption is made much more frequently for outsider communities such as communities of color. Culture, for communities of color, is transformed into what Paul Gilroy calls a "pseudo-biological property of communal life." Under such a paradigm, culture for communities of color is a fixed, monolithic essence that directs the actions of community members. Racialized culture thus becomes an essence that is transmitted in an unchanging form from one generation to the next.
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> We can contrast this racialized culture to culture that is considered to be "hegemonic"--the culture established as the norm. Hegemonic culture is either experienced as invisible or is characterized by hybridity, fluidity, and complexity.[49]

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[47] Patricia Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L.J. 191 (1989-90).
[48] *See* MARTHA E. CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 20 (2003).
[49] Leti Volpp, *Blaming Culture for Bad Behavior*, 12 YALE J.L. & HUMAN. 89, 94–95 (2000).

Similarly, much of the discourse on practices of immigrants assumes that the culture of immigrants is fixed. It does not leave any room for the possibility that behavior changes with context as well as over time.

Second, practices of immigrants are assumed to be "rooted" in their culture while practices of Caucasian Americans are not. Volpp points out that "[t]hese visions of culture influence our perceptions of individual acts. For communities of color, a specific individual act is assumed to be the product of a group identity and further, is used to define the group."[50]

Third, by grounding the practices of immigrants in their culture, the practices are framed as misogynistic and contrasted with the practices of Caucasian Americans. Volpp points out that:

> Even while voluntary or forced adolescent marriages occur within white American communities, we do not conceptualize these practices as cultural phenomena characterizing white America. Rather, this undesirable behavior is projected beyond U.S. borders and characterized as an abhorrent practice imported by immigrants that undermines enlightened Western norms. This projection allows the United States to maintain a self-image as a progressive state with a progressive culture--especially in the arena of women's rights--by naming as "other" the source of backward behavior.[51]

Volpp further points out that contrasting immigrant culture with mainstream American culture "has the effect both of equating racialized immigrant culture with sex-subordination, and denying the reality of gendered subordination prevalent in mainstream white America."[52] Thus, in respect of immigrants, mainstream discourse more liberally makes assumptions that their behavior will replicate the behavior of people from their country of origin because of the role culture is seen to play in shaping behavior.

The debates that erupted in the early 1990s about the use of the "culture defense" in cases where Asian immigrants were being tried for criminal offenses provide useful example of how culture is treated in mainstream discourse. The core question in feminist legal literature on this topic was: against what standards should Asians be judged—the standards of the dominant American culture or the standards of the culture of people in Asia? For example, if a Hmong man kidnaps and rapes a woman as a way of marrying her - a practice undertaken in their country of origin - should he be able to refer to his culture in his criminal trial? Take another example – should a woman who attempted to kill herself and killed all her children to escape domestic violence be able to present evidence about the practice of parent-children suicide in the country she emigrated from when her defense was that she killed her children and attempted to kill herself to escape domestic violence?

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[50] Volpp, at 94–95.
[51] Volpp, at 108–109.
[52] Volpp, at 115.

Doriane Colman has argued against the introduction of culture in criminal trials. She contends that the behavior of immigrants in the United States should be judged against American standards and not by the standards of the immigrant's country of origin.[53] Leti Volpp, on the other hand, while acknowledging that it is a problem for feminists if men use "culture" as an excuse for causing physical or mental harm to women, notes that the cultural background of the defendant should play a limited role in a trial.[54]

If we understand culture and context to be separate, it gives us insight into both the debates over the culture defense in trials and the debates on bans of practices of immigrant women on the basis that they violate human rights. Rather than refuse to admit evidence of culture, courts should admit and consider information about culture (recognizing the problems inherent in attempting to identify what encompasses culture) of the country of origin of the immigrant (to the extent it was first determined that this culture actually influences their behavior), but the context of the United States should also be given weight.[55] This is because both culture and context shape behavior.

The culture of the country of origin might be more relevant for understanding the behavior and motives of first generation immigrants rather than second-generation immigration. A crude theory of assimilation would posit that the longer an immigrant has lived in another country, the less likely she is to share cultural characteristics with people from her country of origin.[56] Of course, there are exceptions to this rule. Amish people retain their distinctive traditions and language even though they have lived in the United States for generations.[57] They are able to do this because they remain geographically

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[53] Doriane Lambelet Coleman, *Individualizing Justice Through Multiculturalism: The Liberal's Dilemma*, 96 COLUM. L. REV. 1093 (1996).

[54] Leti Volpp, *(Mis)identifying Culture: Asian Women and the 'Cultural Defense*,' 17 HARV. WOMEN'S L.J. 57 (1994).

[55] Holly Maguigan also proposed a middle-ground solution to allow cultural evidence for purposes of evaluating *mens rea*. Holly Maguigan, *Cultural Evidence and Male Violence: Are Feminist and Multiculturalist Reformers on a Collision Course in Criminal Courts?*, 70 N.Y.U. L. REV. 36, 87 (1995) ("The starting point for achieving a balanced approach is the courts' application of existing precedents for the admissibility of cultural evidence, not to support a separate defense, but as part of a challenge to the sufficiency of the prosecution's proof of mens rea.").

[56] In Caroline Ware's study of Italian immigrants she finds that the new generation is more likely to reject patriarchial family structures than older generations of Italians, GREENWICH VILLAGE, 1920-1930, at 196 (1932). "Masculine authority continued to be accepted by a larger proportion than held to the ideal of a large family, but it was challenged by two thirds of the younger and a third of the older groups".

[57] DONALD B. KRAYBILL, KAREN M. JOHNSON-WEINER & STEVEN M. NOLT, THE AMISH,. 251–253, 269 (2013) ("Minister Joseph Stoll echoed Amish anxiety about the threat of cultural assimilation: 'How can we parents expect our children to grow up untainted by the world if we voluntarily send them into a worldly environment, where they associate

isolated, do not send their children to American public schools, and limit their interactions with the larger society.[58]

Debates on immigrant women's rights often assume that only culture and not context, drives behavior. While culture is something that immigrants bring with them, context is not something that follows them across borders. But too little weight is given to how context shapes the practices and behavior of immigrants. There could be situations where even if an immigrant manifests the same behavior (such as veiling) as a person in her country of origin, some may assume that she does so for the same reasons as a woman in her country of origin. This view assumes that culture shapes the motives for behavior rather than context. The reasons someone veils in France could be very different from than the reasons for veiling in Egypt (even if there is some overlap).

Consequences in Context

Another important way in which policy debates on immigrant women's practices should consider the context is in terms of evaluating the harms of certain practices. Policy debates inadvertently assume that the harm of certain practices of immigrants (for example, veiling or sex-selective abortion) will be the same in the country of destination of the immigrant as it is in the country of origin.

By failing to contextual practices, policy makers fail to accurately understand and weigh the competing rights at stake in banning women's practices. By emphasizing harms caused by a practice in another country, policymakers overestimate the benefits of banning it in their own country and as a result underestimate the costs of the ban. Additionally, by relying on de-contextualized explanations, policymakers fail to investigate the unique reasons and consequences of certain practices undertaken by immigrants. If policymakers examine the context in which the practice occurs and resist relying on the behavior and motives of people in other countries and the harms caused by practices in other countries, they will adopt fairer polices.

III. Failure to Contextulize in the Debates on Banning the Veil Bans in France

In this section, I describe how behavior, motives and harms were de-contextualized in the debates around the banning of the full-face veil in France and in the European Court of Human Rights (ECHR) judgment. The ECHR found that a woman's right to wear the veil in France was not protected by the European Convention on Human Rights. In both situations, de-contextualization led to an improper weighing of the competing women's rights in question.

In 2004, France prohibited girls from wearing headscarves in schools.[59] Then, in 2010, France banned women from covering their full faces in public spaces. The text of

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with worldly companions, and are taught by men and women not of our faith six hours a day, five days a week, for the greater part of the year'").

[58] Id.

the law did not specifically target Muslims, but it was clear that it was meant to address the veil. The law applies only to full-face coverings and states that "[n]o one may, in public places, wear clothing designed to conceal the face."[60] In 2014, the European Court of Human Rights in *S.A.S. v. France* using the doctrine of margin of appreciation refused to find that the veil ban violated women's right to religious liberty under the European Convention on Human Rights.

Some might argue that advocates of the veil ban are motivated primarily by an animus towards Muslims and that when they argue that the veil ban promotes women's equality, they do so as a pretext. On this account, they deploy equality arguments as a strategy to gain support for the ban. Even if that is true, the veil ban is also supported by people who are not primarily motivated by racial or anti-Muslim bias.

A. Context in the Debates in France on the Full-Face Veil Ban

Failure to Contextualize behavior and motives

During the discussions surrounding the veil ban, French policymakers assumed that the behavior of Muslim women in France (wearing the full-face veil) mirrored the behavior of women in other countries. In particular, they assumed that many more Muslim women in France wore the full-face veil than the actual numbers. In the challenge brought before the European Court of Human Rights, France argued that the ban was necessary to protect public safety.[61] The concern was that someone could commit identity fraud by covering her face.[62] France could only have been concerned about public safety if policymakers thought that people were veiling in great numbers. But the reality is that very few women wore the full-face veil in France. Indeed, a study cited by the European Court of Human Rights found that only 1900 women in France wore the full-face covering.[63] It seems that people who pushed for the law assumed that since the majority of women in some Muslim countries wear the veil, all or most Muslim women living in France must also be wearing the veil.

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[59] Law No. 2004-228 of Mar. 15, 2004, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Mar. 17, 2004, p. 5190. The English-language media has translated this law as follows: "in schools, junior high schools and high schools, signs and dress that conspicuously show the religious affiliation of students are forbidden." *French Lawmakers Overwhelmingly Back Veil Ban*, MSNBC, Feb. 10, 2004, http:// www.msnbc.msn.com/id/4231153/print/1/displaymode/1098/.

[60] Loi 2010-776 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public [law 2010-1192 of 11 October 2010 prohibiting the concealment of the face in public], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANCAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 12, 2010, p. 18344 (cited in the ECHR opinion, para 28).

[61] Case of S.A.S. v. France, Grand Chamber, European Court of Human Rights, July, 1, 2014, Application No. 43835/11, ¶ 82.

[62] S.A.S. v. France, E.C.H.R. no. 43835/11 ¶ 82 (2014).

[63] S.A.S. v. France ¶ 16.

Some proponents of the ban also de-contextualized motives -- they ascribed motives to women in France for wearing the veil based on their understanding of why women in foreign countries veil themselves. It is believed that women in foreign countries wear the veil because their religion forces them to wear it.

The narrative that Muslim women in foreign countries who wear the veil do so because they are coerced is then projected onto Muslim women living in France. According to Joan Scott's work, *The Politics of the Veil*, two investigative bodies that were appointed to look at the issue of headscarves in schools prior to adopting the 2005 ban found that wearing headscarves was "either a denial of freedom or a loss of reason."[64] She notes that in the French debate, the veil was never been seen as "reasonable choice."[65] While the investigative bodies admitted that "a few (*certain*) girls considered the veil a means of emancipation, the National Assembly study group insisted that many more (*beaucoup*) felt it oppressive."[66] According to psychoanalyst Elisabeth Roudinesco, the veil was thought to be a 'curtain' that shrouds young girls in silence.[67] Of course, as Scott points out, there was no actual data to support the claim.[68] The 2010 law itself contains a provision sanctioning people who force a person to conceal her face.[69] There may be women who wear the face veil due to overt or implicit coercion, but those situations are overstated in the debates.

The coercion narrative prevailed despite the fact that many scholars have shown that even the perception that women in Muslim-majority countries veil themselves because they are coerced to do so is inaccurate. Saba Mahmood, for example, has pointed out that wearing the veil is empowering to women even in countries where it is common practice.[70]

Moreover, the coercion narrative prevailed despite the fact that many Muslim women in France argued that they wore the veil because of individual choice and not community pressure. Women who wore the veil also pointed out that they wore it for a different reasons than women in Muslim-majority countries. In interviews, girls who wore veils said one of the reasons they wore them was as an expression of self-identity in a country where they are a minority.[71] Some women adopted it precisely because it was used to discriminate against Muslims in France.[72] By embracing a symbol that was used to discriminate against them, they lessened the power of its oppression. On the other hand, some French Muslim women's rights activist argued that the veil is a "a tool of

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[64] JOAN WALLACH SCOTT, THE POLITICS OF THE VEIL 129 (2010).
[65] SCOTT, at 129.
[66] SCOTT, at 129.
[67] SCOTT, at 132.
[68] SCOTT, at 129.
[69] Loi 2010-1192, art. 4.
[70] SABA MAHMOOD, POLITICS OF PIETY: THE ISLAMIC REVIVAL AND THE FEMINIST SUBJECT 16 (Princeton Univ. Press, 2d ed. 2011).
[71] SCOTT, at 137.
[72] SCOTT, at 138-39.

oppression, alienation, discrimination, and an instrument of men's power over women."[73] Contrary to widespread assumptions, empirical studies have found that the face veil is not worn by recent immigrants, but by women who were born in Europe, have lived there most of their lives, or were religious converts.[74]

But these nuanced and diverse views were simply ignored by many in France and, instead, the prevailing view held that women who wore the veil and claimed to do so without coercion were under a "false consciousness" or were duped by their own religion. The Belgian constitutional court's decision in upholding the veil ban in Belgium exemplifies this position:

> Even where the wearing of the full-face veil is the result of a *deliberate choice on the part of the woman*, the principle of gender equality, which the legislature has rightly regarded as a fundamental value of democratic society, justifies the opposition by the State, in the public sphere, to the manifestation of a religious conviction by conduct that cannot be reconciled with this principle of gender equality. … the wearing of a full-face veil deprives women – to whom this requirement is solely applicable – of a fundamental element of their individuality which is indispensable for living in society and for the establishment of social contacts.[75]

In addition, unlike countries where the veil is required by law or by social pressure, in France women are exposed to the view that the veil is contrary to gender equality. The only pressures to veil (if any) in a place like France, unlike a place like Saudi Arabia, do not come from society, but from family, relatives, and other friends with the same beliefs. Although this pressure can be significant, it is not the same as the pressure to conform to societal norms or the mandatory requirements of law. Some countries, such as Iran, require women to veil in public. To assume that women who are required by law to wear the veil, or who live in a country where there is immense societal pressure to wear the veil, have the same motives as women in France who veil reveals a failure to contextualize motives.

<u>Failure to contextualize consequences</u>

The failure to contextual the consequence of wearing a full face veil can also be seen in the French veil ban discussions. Some ban proponents were looking at the harms they perceived to be caused by the veil in other countries and argued that those same harms occur in France (when they do not). Since only around 1900 women veiled themselves in France, most people in France were in fact never exposed to a woman who

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[73] Bennoune, at 391 (citing FADELA AMARA, BREAKING THE SILENCE: FRENCH WOMEN'S VOICES FROM THE GHETTO 79 (Helen Chenut trans., 2003)).
[74] *See* Eva Brems, *Introduction to* THE EXPERIENCES OF FACE VEIL WEARERS IN EUROPE AND THE LAW 13 (Eva Brems ed., 2014).
[75] S.A.S. v. France ¶ 42 (emphasis added).

veiled herself.[76] Instead, French views were likely shaped by pictures of women across the continent in countries where the veil is more commonly worn. This is evident in the work of Caroline Fourest, a feminist who was a leading supporter of the headscarf ban in schools. Joan Scott notes that in her meeting with Caroline and her colleague "[t]hey insisted that Islamists were engaged in a political conspiracy, the aim of which was the oppression of women and the elimination of secularism—in short, the experience of Iran was about to be imported into France." [77] In other words, the harms that the veil caused or the ways it may be used to repress women in Iran were transposed into the French context.

During the public discussions about the full-face veil ban, proponents of the ban repeatedly argued that the veil was oppressive to women and the practice must be banned to promote women's equality with men. For example, in a resolution, the National Assembly in France stated that it "[c]onsiders that radical practices undermining dignity and equality between men and women, one of which is the wearing of the full veil, are incompatible with the values of the Republic."[78]

Consequences of a Failure to Contextualize

By failing to examine practices in context, miscalculate costs and benefits of prohibiting practices. Policymakers who look to the behavior, motives and consequences of practices in foreign countries (such as veiling and sex-selective abortion) may overestimate the benefits of banning such practices. While the practice of mandatory veiling may be contrary to women's equality in some contexts, it should not be assumed to have the same harms in a country like France. By overvaluing benefits of a ban, the costs (in this case, impinging on religious freedom) are devalued.

B. Context in the European Court of Human Rights Decision

After France adopted the full face veil ban, a French woman brought a petition to the ECHR claiming that France's veil ban violates a number of provisions of the Convention. As the in the *Sahin* case discussed above, the main claim adjudicated by the ECHR was whether the French veil ban violates a woman's right to express her religious views. Below I describe the ways in which the European Court of Human Rights has failed to contextualize the practice of veiling in its decision in the case.

Article 9 of the Convention states that everyone has, "[f]reedom to manifest one's religion or beliefs."[79] The court accepted that the petitioner was indeed exercising her religion when she chose to wear the veil (which she noted she only occasionally did). But this right is not without limit in the Convention. The exercise of one's religion can be limited by the state if "necessary in a democratic society in the interests of public safety,

[76] S.A.S. v. France ¶ 16.
[77] SCOTT, *supra* note 64, at 176.
[78] S.A.S. v. France ¶ 24.
[79] S.A.S. v. France ¶ 37.

for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."[80] France offered a number of reasons for the limitation, including a public safety rationale that allowing the covering of the face increases the risk of identity fraud. The court rejected the public safety rationale because they found that the state could simply require women to remove their coverings when needed to verify their identity, and there was no general public safety threat being caused by women wearing veils.[81]

The court also rejected gender equality as an appropriate reason to limit exercise of religious liberty because the petitioner who was asking for the right to veil was a woman.[82] The court noted that "[France] cannot invoke gender equality in order to ban a practice that is defined by women—such as the applicant."[83] In rejecting gender equality as a rationale, the court avoided the objectionable presumption that women who veil do so because they are duped or have a "false consciousness."

But the court did find one justification offered by France to be persuasive. It found that wearing the veil contravenes the notion of "living together." The court stated that:

> [It] takes into account the respondent State's point that the face plays an important role in social interaction. It can understand the view that individuals who are present in places open to all may not wish to see practices or attitudes developing there which would fundamentally call into question the possibility of open interpersonal relationships, which, by virtue of an established consensus, forms an indispensable element of community life within the society in question. The court is therefore able to accept that the barrier raised against others by a veil concealing the face is perceived by the respondent State as breaching the right of others to live in a space of socialisation which makes living together easier.[84]

The court further pointed out that:

> From that perspective, the respondent State is seeking to protect a principle of interaction between individuals, which in its view is essential for the expression not only of pluralism, but also of tolerance and broadmindedness without which there is no democratic society.[85]

The court reasoned that although wearing the face veil was a valid exercise of the freedom of religion guaranteed under the Convention, the veil prevented people in France

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[80] Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8(2), Nov. 4, 1950, 213 U.N.T.S. 222.
[81] S.A.S. v. France ¶ 139.
[82] S.A.S. v. France ¶ 119.
[83] S.A.S. v. France ¶ 119.
[84] S.A.S. v. France ¶ 122.
[85] S.A.S. v. France ¶ 153.

from living together. It further found that "living together" was an element of the "protection of the rights and freedom of others," (which is a valid reason under the Convention for a state to limit a person's exercise of their religion).[86] The court allowed for restrictions on religious freedom if, in exercising his or her religious freedom, a person infringes upon others' rights by creating barriers to interactions between people. It is a dubious conclusion that the Convention permits trumping someone's right to religion because an exercise of that right prevents others from living together with them.

Indeed, the dissent was quick to point out that "the very general concept of living together does not fall directly under any of the rights and guarantees within the Convention."[87] Upon finding that limiting the religious exercise of face veil wearers was permissible under the Convention, the court then essentially deferred to France's interpretation by using a doctrine called "margin of appreciation." This doctrine gives countries great discretion in adopting laws in "grey areas" where there is not a clear contravention of the Convention.[88] I believe the court found the very weak justification offered by France to be legitimate because it had actually been persuaded by the argument that the veil contravenes women's equality, but did not want to take the position that the petitioner was duped by her religion.

The court refused to follow the many authorities it cited that found that the veil ban contravened the Convention. For example, it rejected the Viewpoint of the Commissioner for Human Rights of the Council of Europe that "[p]rohibition of the burqa and the niqab will not liberate oppressed women, but might instead lead to their further exclusion and alienation in European societies".[89] They also refused to follow the Spanish Supreme court, which found a veil ban unconstitutional because of the voluntary nature of the full-face veil.[90] In that case, the court found that it was not possible to restrict a constitutional freedom based on the mere supposition that the women who wore it did so under duress.[91] It thus concluded that the limitations in question could not be regarded as necessary in a democratic society.[92] Lastly, the court paid no heed to academic legal writings that cautioned that a ban on the wearing of the full-face veil would result in isolating the same women it was meant to protect and it would thus be incompatible with the objective of ensuring the social integration of groups of immigrant origin.[93]

The ECHR was very careful not to de-contextualize behavior and motives. It referred to empirical evidence about the extent of the practice in France and found that very few Muslim women wore the full-face veil. It also refused to believe that all women

[86] S.A.S. v. France ¶ 157.
[87] S.A.S. v. France dissent ¶ 5.
[88] S.A.S. v. France ¶ 129.
[89] S.A.S. v. France ¶ 37.
[90] S.A.S. v. France ¶ 47.
[91] S.A.S. v. France ¶ 137.
[92] S.A.S. v. France ¶ 139.
[93] S.A.S. v. France ¶ 47.

are coerced into wearing the veil. Instead, it accepted the petitioner's claim at face-value that her decision to wear the veil was voluntary and that it was an expression of her religion.

However, the court failed to contextualize the consequences of a veil ban, although unintentionally. In justifying its decision, the court cited the case discussed above, *Sahin v. Turkey*, in which the ECHR found that Turkey's law banning headscarves in schools did not violate the Convention. Indeed, the court cited *Sahin* 17 times in its decision on the French veil ban.

Unlike many domestic courts, the ECHR is not bound by its prior decisions (i.e., they have no precedential value), but prior decisions still play a role in shaping the court's decisions. Indeed, in an empirical study of ECHR decisions, Yonatan Lupu and Erik Voeten argue that the court uses prior decisions much in the same way as domestic courts do.[94] It often cites prior decisions, but it does so without consideration of the country context.[95] Even though the court did not specifically state that it was relying on the *Sahin* case in making its decision and indeed pointed out that public expression of religious belief should be examined based on the domestic context,[96] the fact that it quoted from *Sahin* and referred to it so many times shows that it was influenced by that decision.

In adjudicating a veil ban case from France, it was inappropriate for the ECHR to rely on a case upholding a ban on headscarves in Turkey. In *Sahin*, the ECHR found that Turkey had legitimate aims in banning headscarves and in that case accepted the gender equality rationale even though it was a woman who was challenging the ban.[97] The court that adjudicated the French veil ban stated that Turkey had a legitimate interest in promoting secularism and suggested that equality of the sexes is one of those values that are consistent with secularism. It explained the justification for upholding Turkey's headscarf ban as follows:

> Having regard to the above background, it is the principle of secularism, as elucidated by the Constitutional Court, which is the paramount consideration underlying the ban on the wearing of religious symbols in universities. In such a context, where the values of pluralism, respect for the rights of others and, in particular, equality before the law of men and women are being taught and applied in practice, it is understandable that the relevant authorities should wish to preserve the secular nature of the institution concerned and so consider it contrary

[94] *See* Yonatan Lupu and Erik Voeten, *Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights*, 42 BRIT. J. POL. SCI. 413 (2012).
[95] Lupu & Voeten, *supra* note 94, at 433.
[96] S.A.S. v. France ¶ 130.
[97] S.A.S. v. France ¶ 115.

> to such values to allow religious attire, including, as in the present case, the Islamic headscarf, to be worn.[98]

In a Muslim-majority country like Turkey where veiling is more common than in France, it may very well be accurate to conclude that banning the headscarf promotes women's equality (or it may not). For example, if Saudi Arabia banned the veil in the interest of gender equality, most would agree that it was a step toward gender equality. But the ECHR, by relying on the *Sahin* decision in adjudicating a case arising from France, inaccurately tilted the equation towards upholding the ban. Too much emphasis is placed on the goal of gender equality and too little emphasis is placed on other motives a woman may have in country where she is a member of a minority religion.

It assumed that the impact of a ban in Turkey would have the same benefits (i.e., promoting women's equality with men) as a ban in France, and it also failed to recognize that a ban in France would have negative consequences (i.e., repressing minority immigrant women who wish to express their religion as distinct from the mainstream secular views), which would not be relevant in the Turkish context.

The contextualized lens proposed by Bennoune also suggests that the ECHR decision was misguided. First, the number of women or girls who wear the modest dress in the particular context is relevant to her analysis (as more people wear it, the more likely for it to negatively impact the rights of others). In France, it was estimated that 1900 women wear the full-face veil so it is not likely to impact others, which undermines the claim that the full-face veil prevents people from "living together." Second, the context of schools is relevant in Bennoune's analysis because children are less able to resist family and social pressure and where head covers or body coverings could obstruct learning. The French full-face veil ban is applied in all public spaces, not just schools, so it impacts adults not just girls. Finally, she listed "Islamophobia" as a factor to consider in assessing bans. In France the rising anti-Muslim trend could grow after the brutal terrorist attack in the offices of the satirical magazine, Charlie Hebdo[99] and the November 13, 2015 brutal killings in Paris.

I have demonstrated here how in evaluating whether or not to ban the full-face veil, the French discourse relied on understandings of the behaviors and motives of women who live in other countries and the harms that ensue from veiling in countries other than France. This failure to contextualize the practices within their own country, obscured the decision-making about the policy. Similarly, the European Court of Human Rights in finding that the ban did not violate the European Convention on Human Rights relied on decisions from Muslim-majority country. Thereby importing another context into the decision-making about the French full face veil ban. My point here is not to make a determination about whether or not the France veil ban is legitimate, but simply to demonstrate that policymakers, judges, feminists and other stakeholders often de-

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[98] S.A.S. v. France ¶ 116.

[99] *See* Mohamed Madi et al., *As it happened: Charlie Hedbo attack*, BBC, http://www.bbc.com/news/live/world-europe-30710777 (last visited Aug. 2, 2015).

contextualize in concluding that certain practices of immigrants violate human rights. This failure to contextualize obscures the weighing of the costs and benefits of policy decisions.

IV. What are Contextual Practices?

In Section I, I have explained that traditional feminist theories were not sensitive to geographic context in fashioning policy solutions. If a practice violates women's rights in one country, it was assumed that violate women's rights in every other country. While the language and theory are different, the thrust of international human rights discourse also leaves little room for practices that are human rights violations in one context, but do not violate human rights in another context. This feature of human rights law is "universality"—rights apply everywhere.

Universality is a bedrock principle in modern international human rights law. International human rights organizations are reluctant to deviate from the principle of universality because it gives their positions great moral authority. Additionally, they feel uncomfortable taking conflicting positions on the same practice (e.g., that veil bans are appropriate in one country, but not in another).

On the other side of universality, is "cultural relativism." Many scholars and advocates also resist deviating from universality. Doing so implies the acceptance of cultural relativism. The crude form of cultural relativism posits that rights are determined by culture. Indeed, culturally relativist arguments are being used by oppressive states to justify women's marginalization on the basis of culture and religion. I am not making an argument here in cultural relativism. Instead I am trying to create a conceptual space somewhere between universalism and cultural relativism for practices that should seen as violating human rights in one context but not in another context. Consequently, it would be appropriate to ban these practices in one country context, but not in another. I call these practices "contextual practices." Although this conceptual box is small, as migration continues, the practices that occupy this space will also grow.

But how does one determine whether a practice is contextual? I have argued that in evaluating bans on practices of women who trace their ancestry to another country, policymakers should resist relying on the way in which the practices are undertaken in the foreign country. In addition, they should resist relying on the consequences of those practices in the foreign country in determining whether or not to ban those practices. Instead, in evaluating these bans, policymakers should examine behavior, motives and consequences in their own country context. Finally, by comparing the behavior, motives and consequences of the practice in the two different country contexts, policymakers will be able to determine if the practice is "contextual." Thus, applying the contextual approach I have articulated here helps sort contextual practices from practices that are harmful to women's rights no matter where they occur.

The number of practices that are contextual is probably limited. I have argued here that veiling should be seen as one of those practices since the behavior and motives

of the practice in the country of designation of the immigrant (France) varies so greatly from the country of origin of the immigrants (various predominantly Muslim countries). I believe that another example of a contextual practice is sex-selective abortion. I discuss this in greater detail elsewhere.[100]

There may be additional practices that are contextual, but this can be determined only by undertaking the contextual analysis that I propose above. Even if practices are not viewed to be contextual, all immigrant women's practices for which bans are being considered (such as female genital cutting) should be viewed through this lens as it would ensure appropriate policy decisions in regard to such practices.

In no event should practices that physically harm women without their consent such as domestic violence or honor killings should not be seen as practices that are contextual—they banned regardless of where they occur. Additionally, a girl who is under 18 years of age should be presumed unable to consent.

Conclusion

In the name of promoting gender equality immigrant-receiving countries are adopting prohibitions that trample on other rights of immigrant women. This occurs because supporters of bans in migrant-receiving countries make assumptions about migrant's women's practices based on the context of the country of origin of the migrant. First, they assume that immigrants and their progeny replicate the same behaviors as people in the countries where the migrants originally came from. Second, they believe that the immigrant women are undertaking the practice for the same reasons as do people in the country of origin of the migrant. Third, they assume that the harm and consequences of the practice in the country of destination will be the same as they are in the country of origin.

Critical race theories and anti-essential feminist scholarships offer a lens to elucidate the problems with making assumptions about someone's behavior and motives based upon their racial or ethnic affiliation. Feminist legal theory, however, developed within the American context, has generally taken a universal understanding on practices. If a practice is viewed to harm women in one country context, it will also be harmful to women in another country context. Liberal feminists may disagree with anti-subordination feminists about what policies they believe enhance women's position, but they do not think that those policies could be dramatically different based on geographic context.

More recent feminist authors who fix their gaze on the global, however, have begun to point out that we must consider geographic context in evaluating the impact of

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[100] *See* Sital Kalantry, *Sex Selection in the United States and India: A Contextualist Feminist Approach*, 18 UCLA J. INT'L L. & FOREIGN AFF. 61 (2013). I also have a book forthcoming on sex-selective abortion in the United States and India where I further develop my arguments.

women's practices. This view animates some of the work on "governance feminism."[101] Scholars who critique governance feminism urge that in adopting laws that purport to enhance women's position, policymakers should consider the ability of the particular country to enforce and implement law, how actors in the country will may use laws in an unintended manner, and the impact of the laws on multiple constituencies. Karima Bennoune's work emphasizes context even more sharply. She argued for a contextual analysis of veiling in an article evaluating a decision by the European Court of Human Rights on the headscarf ban in schools in Turkey.[102]

Building on feminist works that recognize the importance of geographic context, I have pushed for a new conceptual space within feminist legal theory that recognizes that certain practices are detrimental to gender equality in one country context, but not in another country context. In this paper, I have examined how the debates on France's veil ban and the European Court of Human Rights decision finding that it doesn't violate the European Convention on Human Rights failed to contextualize the behavior, motives and consequences of the practice of veiling in France and instead referred to the context of foreign countries. Consequently, they were unable to recognize that just because veil may contravene women's rights in other countries, it does not mean that it has the same impact in France.

[101] Janet Halley et al., *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, 345 (2006).
[102] Karima Bennoune, *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).