

THE UNIVERSITY OF BALTIMORE LAW FORUM

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LETTER FROM THE EDITOR-IN-CHIEF

To the Law Forum Legal Community:

The *University of Baltimore Law Forum's* Volume 39 editorial board presents our second issue of the 2008-2009 academic year. Volume 39.2 represents the second half of the 2008 Feminism Legal Theory and Feminisms Conference.

This volume showcases five articles presented during the Conference's four panel discussions. One article is an empirical study of gender in law school. The other four articles discuss feminist theory through an international lens. This is an ever-relevant dialog essential to advocate a multi-national sense of gender equality while facilitating an understanding of cultural paradigms, pertinent to achieving feminism goals.

The recent development pieces examine eleven of this past year's most interesting and controversial cases decided by the Court of Appeals of Maryland. These pieces cover the legal gamut, including: factors allowing a mid-cycle property tax re-evaluation, the scope of a party's attack on the credibility of a hearsay declarant, and the effect filing a pendent federal claim has on state statute of limitations.

Publishing Volume 39 was an exhaustive task, impossible without the dedicated work of the Journal's executive board. Hae Min, my Managing Editor, and I wish to thank our Articles Editors, Lydia Hu and Shantay Clarke, for their tireless work editing, proofing, and cite-checking the articles. We also wish to thank Teresa Marino and Craig Bannon who, as Recent Development Editors, revised the RD process to be more equitable and produce a higher quality submission through competition. Kathleen McGinley, Business Editor, and Robert Braun, Production Editor, both ensured the Journal's smooth function and timetable throughout the production year. Finally, we wish to thank Matthew Hartman, our Manuscripts Editor, whose attention to detail (and patience in applying changes) created the final vision of this year's volume. Their skills and knowledge made an insurmountable task truly rewarding.

Sincerely,

George A. Perry
Editor-in-Chief

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ARTICLE

NOT OUR MOTHER'S LAW SCHOOL?: A THIRD-WAVE FEMINIST STUDY OF WOMEN'S EXPERIENCES IN LAW SCHOOL¹

By: Felice Batlan, PhD, Kelly Hradsky, Kristen Jeschke, LaVonne Meyer, Jill Roberts²

I. INTRODUCTION

This article is about a journey and a process as much as it is about a product. In spring 2007, as part of our Gender and the Law class at Chicago-Kent College of Law, we read portions of Lani Guinier's *Becoming Gentlemen: Women, Law School, and Institutional Change*, as well as more recent studies regarding women's experiences in law school.³ Guinier's book generated strong reactions. Of the twenty-two women in the class, about three-quarters of them deeply related to the sense of alienation that the women law students at the University of Pennsylvania Law School spoke of in Guinier's work. Many of the Chicago-Kent students commented that they wished they had read the article earlier in their law school careers, as they had assumed their own feelings of alienation, depression, and sinking confidence were individual problems. Importantly, Guinier blamed women law students' problems on the law school as an institution rather than on personal pathologies. Yet, about a quarter of the class strongly felt that they had not experienced discrimination or feelings of alienation in law school and that the sentiments that dissatisfied women law students experienced were shared by all students — men *and* women.

This prompted a number of questions: Had women's experiences in law school changed since Guinier and her colleagues first undertook their study in 1994? Were women's experiences at Chicago-Kent different than those at more prestigious schools, especially since

1 The title refers to ASTRID HENRY, *NOT MY MOTHER'S SISTER: GENERATIONAL CONFLICT AND THIRD-WAVE FEMINISM* (2004).

2 The authors are a professor and, at the time the article was written, four third-year students at Chicago-Kent College of Law. We want to thank all the students who participated in our survey and provided us with comments. We also appreciate the support of Dean Harold Krent, Assistant Dean Steven Sowle, and Nicole Vilches. Special thanks to Margaret Johnson and the University of Baltimore Law School for organizing an extraordinary conference.

3 See, e.g., LANI GUINIER, MICHELLE FINE, & JANE BALIN, *BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE* (Beacon Press 1997) (1994).

Chicago-Kent had admitted women since the 1890s? As we began contemplating conducting our own survey of student experiences at Chicago-Kent and its correlation to gender, a number of issues emerged. We wondered how we could employ a feminist methodology in conducting our work and how the survey might be animated by feminist theory. Conscious of our own roles and motives, we understood that we, in many ways, were both the subjects and the beneficiaries of our own experiment. By working cooperatively in a close group composed of four women students and a professor on issues concerning our own lived experiences, we were enacting many of the suggestions that a variety of gender studies had made for creating a more amiable environment for women law students. Thus, as we sought to examine other students' gendered experiences during law school, we were exploring and transforming our own.

This Article proceeds as follows: Part II discusses how we attempted to define and use a third-wave feminist methodology in creating our gender survey. Deeply cognizant of the importance of autobiography to third-wave feminism, Part III includes our own stories about our experiences in law school. Part IV presents the results of our study and Part V sets forth a series of recommendations for improving men and women's experiences in law school. The Conclusion sums up what we have learned from our study and its broader implications.

II. THIRD-WAVE METHODOLOGIES

In the course of our work, we became intrigued by the question of whether there is a third-wave feminist methodology and how the substance of third-wave feminism might inflect our work. If the *substance* of third-wave feminism poses significant difficulties, whether a third-wave methodology exists is even more complex, and few third-wave authors address this issue.⁴ Furthermore, where third-wave feminism's emphasis on cultural production, sex, pleasure, and desire might readily provide an analysis of the legal treatment of pornography, sexual identity, or even depictions of lawyers in contemporary culture, it is more difficult to understand how it might inform a study of students' gendered experiences at law school — a

⁴ Bridget Crawford attempts to address issues of methodology in third-wave feminism. She identifies personal storytelling, coalition building, and the use of media and technology. Bridget Crawford, *Toward A Third-Wave Feminist Legal Theory: Young Women, Pornography and the Praxis of Pleasure*, 14 MICH. J. GENDER & L. 99, 125 (2007).

decidedly “non-hip” institution.⁵ Indeed, a Westlaw search of “third-wave feminism” returned only twenty-two results, indicating that third-wave feminism has not made great inroads into legal scholarship. Accordingly, as we crafted our gender study, we found ourselves drawing upon second-wave feminist methodology while also improvising and creating a third-wave feminist methodology.

On the most simplistic level, third-wave feminism is generational, referring to feminists born too late to participate in the women’s liberation movement of the 1960’s and 1970’s. Third-wave feminists are instead the beneficiaries of the incomplete inroads into the process of the women’s movement’s dismantling of patriarchy. In other words, third-wave feminists came of age in a world in which formal *de jure* gender equality was close to being realized, even though *de facto* gender equality remains elusive.⁶ If we simply define the third-wave as marked by generations, then all of the authors of this work are third-wave feminists. However, identifying third-wave feminism in this way is too simplistic and provides little help in fleshing out either the methodology or substance of third-wave feminism.

What is evident is that much of third-wave feminist writing is autobiographical and our project is informed by autobiography.⁷ It grew out of our own law school experiences and we specifically write in a deeply personal way of how we experienced law school as women. As feminist legal theorists know, autobiography is especially important in writing about law. The personal disrupts the law’s claim to neutrality and corrects for conventional legal discourse, which erases a situated and gendered person in favor of an abstract, rights-bearing individual. Personal narratives further emphasize how the author is multiply situated and challenges legal argumentation that privileges seemingly objective knowledge rather than personal experience.⁸ Autobiography, however, can be limiting, which leads us to wonder why it has been third-wave feminism’s preferred form. Perhaps this gestures towards third-wave feminists’ aversion to

5 Third-wave feminists have analyzed topics such as girl power, female action heroes, and cyborgs. See STACY GILLIS ET AL., *THIRD-WAVE FEMINISM: A CRITICAL EXPLORATION* (Palgrave Macmillan 2004).

6 See Ednie Kaeh Garrison, *Contests for the Meaning of Third-wave Feminism: Feminism and Popular Consciousness*, in GILLIS, *supra* note 5, at 24 (on defining the third-wave feminist age cohort).

7 See, e.g., HENRY, *supra* note 1, at 43 (remarking upon the importance of autobiography to third-wave feminism); see also Crawford, *supra* note 4, at 126 (stating that third-wave’s use of autobiography is one of “its greatest strengths and its greatest weaknesses.”).

8 See Martha Minow, *Perspectives on our Progress: Twenty Years of Feminist Thought: The Young Adulthood of a Women’s Law Journal*, 20 HARV. WOMEN’S L. J. 1 (discussing importance of personal narrative in legal texts).

essentializing women's experiences — that is, imagining that all women are the same and failing to take into account race, class, sexual orientation, and a myriad of other characteristics and identities. If taken to the extreme, anti-essentialism demands that we speak for no one but ourselves.⁹ It potentially ends in radical individualism and the authorial voice can therefore only be directed inward.¹⁰

Such focus on the individual prompts the question of how third-wave feminism's autobiographical bend intersects with second-wave feminism's fundamental premise that the personal is political. The essence of autobiography is the singular self. In contrast, politics requires a collective.¹¹ The methodology employed in our study mediates these competing tensions as we elucidate our own experiences and then encourage others to articulate their own. It thereby bridges individual and collective experiences. Ideally, we claim to speak for no one but rather strive to create a forum in which people — at least in a limited way — can speak for themselves.¹² At its heart, our survey interrogates the fundamental question of whether we can even speak of a common law school experience for women — something that other studies about this topic have often presumed.

Like much of third-wave feminist theory, we recognize that an analysis of gender must include masculinity and how it too is a social construction. By neglecting masculinity, other studies have inadvertently re-enshrined men as the neutral yardstick by which to measure women's achievements. In contrast to other studies, we are as interested in how men at Chicago-Kent responded to our survey as how women responded. Although other gender studies have consistently found that men are more comfortable than women in law school, all of the studies have also found consistently high levels of discontent among men.¹³ Does this point to how even male law students feel that they cannot adequately perform the traditionally masculine role of the confident, assertive, and combative male law student?

9 There is a great deal of literature on essentialism and third-wave feminism. See, e.g., NAOMI ZACK, *INCLUSIVE FEMINISM: A THIRD-WAVE THEORY OF WOMEN'S COMMONALITY* 6, 14 (Rowman & Littlefield 2005).

10 See HENRY, *supra* note 1, at 41-43 (claiming that third-wave feminism embraces radical individualism).

11 See ZACK, *supra* note 9, at 141 (discussing relationship between women's commonality and political change).

12 *Id.* at 141 (arguing that privileged white women cannot speak for women as a whole but urging that women listen to one another).

13 Morrison Torrey, *Yet Another Gender Study? A Critique of the Harvard Study and a Proposal for Change*, 13 WM. & MARY J. WOMEN & L. 795, 797 (2007) (calling for a study that emphasizes the large number of men and women who suffer in the current law school environment).

In addition, our survey attempted to take into account how people are situated by race, class, sexual orientation, age, family background, family relationships, political affiliations, and religion. This recognition of the multitude of ways in which people are positioned and how they self-identify is one of the hallmarks of third-wave feminism. Furthermore — and akin to autobiography, which starts with the self — third-wave feminism often privileges the geography of the local and the grassroots. We embrace this as we explore our own community. Some third-wave feminist works suggest that, in order to avoid any attempt to speak for all women, women located in academia should begin their studies by examining their own positions within the university.¹⁴ Our study has taken this to heart.

Questions of power and where and how it can be located (and even subverted) are deeply important to third-wave feminists. Here we understand ourselves as possessing power — power which is derived from our whiteness, our socioeconomic class, and our advanced level of education. As an institution, however, the law school exerts tremendous power over us which is exercised in complex ways. We thus become interpolated, at least in part, by the law school. Yet the very process of conducting our survey and discussing our work allows us in turn to interpolate the law school. Accordingly, we recognize our own partial agency while acknowledging our partial *lack* of agency.

Praxis is another significant methodological similarity between first and second-wave feminism. Praxis is the creation of theory relevant to the world and nurtured by action in it.¹⁵ It has guided our work as we strive to produce knowledge that can be put to practical use in creating a better law school experience for men and women. Furthermore, our greatest desire is to create dialogues — dialogues about gender between students, faculty, and the administration.

III. LITERATURE REVIEW

We reviewed nineteen works, spanning from 1987 to 2006, which studied women's experiences in law school. Generally, such works have concluded that women are much less satisfied with their law school experience than men and often experience deep feelings of alienation while in law school. Equally alarming is that at some schools pedagogical changes implemented by law schools in an attempt to ease the gender gap had little effect on women's dissatisfaction. On an extraordinarily positive note, however, disparities in academic

¹⁴ ZACK, *supra* note 9, at 15.

¹⁵ PATTI LATHER, *GETTING SMART: FEMINIST RESEARCH AND PEDAGOGY WITH/IN THE POSTMODERN* 11-12 (Routledge 1991).

success between male and female law students as measured by objective criteria such as grades has decreased at many schools, with women, at times, even outperforming men.

Lani Guinier's *Becoming Gentlemen* (1994) explored the experiences of women law students at the University of Pennsylvania Law School.¹⁶ Based on survey questions, qualitative data, and quantitative data, the study found significant academic differences between men and women. Although they entered law school with practically identical academic qualifications, men received better grades in law school.¹⁷ Additionally, the study found other significant disparities between men and women such as men participating more during class and receiving greater attention from faculty.¹⁸

Richard Neumann also addressed gender-based differentials in grades earned by first-year law students at elite schools such as Yale, Harvard, and Stanford.¹⁹ He found that as a group, women get *better* grades than men as undergraduates but *worse* grades than men in law school.²⁰ A study of the University of Texas School of Law found that having a high percentage of women in a law school class surprisingly did not positively affect women's overall academic performance.²¹ Instead, all success indicators (GPA, top ten percent, Order of the Coif, and *Law Review*) evidenced significant gender performance gaps.²² A recent Harvard survey showed that from 1997 to 2003, male graduates were seventy percent more likely than females to receive *magna cum laude* honors.²³

In addition to gaps in academic performance, studies have consistently indicated that women do not participate in classroom discussion to the same extent as men. In one of the earliest studies, *Gender Bias in the Classroom*, Taunya Lovell Banks explored the persistence of subtle sexism in law schools left over from the more overt sexism that existed prior to the 1970's.²⁴ Her study indicated that women volunteer in class at statistically lower rates than men: 32.1% of the women reported voluntary participation on a weekly

16 GUINIER, *supra* note 3.

17 *Id.* at 37.

18 *Id.* at 32-33.

19 Richard K. Neumann Jr., *Women in Legal Education: What the Statistics Show*, 50 J. LEGAL EDUC. 313 (2000).

20 *Id.* at 321.

21 Allison L. Bowers, *Women at the University of Texas School of Law: A Call for Action*, 9 TEX. J. WOMEN & L. 117, 160 (2000).

22 *Id.* at 160.

23 *Id.* at 540.

24 Taunya Lovell Banks, *Gender Bias in the Classroom*, 38 J. LEGAL EDUC. 137, 137 (1988).

basis, compared to 44.3% of men.²⁵ Banks writes that women often remain silent in class due to the belief that they are ignored or invisible in law school and that their views carry no weight.²⁶

A study of Boalt Hall Law School revealed that a majority of women and people of color never volunteered in class.²⁷ The authors hypothesized that such silence reflects a conscious decision by such students not to compromise the integrity of their beliefs, and a refusal to conform to law school's narrow analytical perspective.²⁸ Deeply troubling, more than fifty-one percent of women at Boalt felt more intelligent before attending law school.²⁹ Women of color may feel even more alienated than white women. The Boalt study found that forty-one percent of women of color, compared to seventeen percent of white men, considered dropping out of school.³⁰ The authors theorized that factors such as social context surrounding the law and personal conviction were especially important to women law students' ways of reasoning and learning. When they are ignored or openly criticized by professors as not sufficiently legal, it may contribute to women's alienation from law school.³¹ An Ohio study found that the ways in which women were treated in the classroom had such a negative effect that they impeded women's educational progress.³²

At Columbia University Law School, women were more than five times more likely than men to express dissatisfaction with law school.³³ Likewise, "first year women were nearly three times more likely than men to report that they 'never' or 'rarely' volunteered in class."³⁴ They were also six and a half times more likely to report in their 1L year that they felt "less intelligent" than they had prior to attending law school.³⁵ Large numbers of women also characterized

²⁵ *Id.* at 141.

²⁶ *Id.* at 139.

²⁷ Suzanne Homer & Lois Schwartz, *Admitted but Not Accepted: Outsiders Take an Inside Look at Law School*, 5 BERKELEY WOMEN'S L.J. 1, 29 (1990) [hereinafter "Berkeley Study"]. Note that the *Harvard Study* cited in footnote 46, *infra*, found that forty-three percent of female students never volunteered during the twelve monitored classes.

²⁸ See Berkeley Study, *supra* note 27, at 37.

²⁹ *Id.* at 33.

³⁰ *Id.* at 34.

³¹ *Id.* at 10.

³² Joan M. Krauskopf, *Touching the Elephant: Perceptions of Gender Issues in Nine Law Schools*, 44 J. LEGAL EDUC. 311, 313 (1994) [hereinafter "Ohio Study"].

³³ Claire G. Schwab, *A Shifting Gender Divide: The Impact of Gender on Education at Columbia Law School in the New Millennium*, 36 COLUM. J.L. & SOC. PROBS. 229, 325 (2003) [hereinafter "Columbia Study"].

³⁴ See Columbia Study, *supra* note 33, at 320-21.

³⁵ *Id.* at 325.

classes as "male dominated."³⁶ Moreover women were twice as likely as men to report that they had never or rarely contacted a professor outside of class.³⁷

Women face hostility not only in the classroom but also in the larger law school environment. As multiple studies have indicated, women law students are often subject to sexual harassment in law schools. In a study of Ohio schools, close to twenty percent of women self-reported that they had been subjected to sexual harassment while in law school.³⁸ Morrison Torrey writes that "statistics leave little doubt that sexual harassment in legal education is rampant."³⁹ She continues that being the victim of sexual harassment results in loss of confidence, difficulty concentrating, anxiety, loss of sleep, and a host of other emotional and physical symptoms that severely impact the ability of victims to succeed in law school.⁴⁰

As law schools sought to implement Guinier's and others recommendations, including smaller class size, greater feedback, and an increase in female faculty members, they tracked the effects of such reforms.⁴¹ Studies conducted of Chapman University,⁴² Brooklyn,⁴³ and Wisconsin law⁴⁴ schools reveal that new curricula and pedagogies may decrease academic disparities among male and female students, but they do not entirely ease women's overall discomfort with their law school experiences.⁴⁵

For example, Brooklyn increased its number of female faculty members and restructured its first-year curriculum to include smaller classes.⁴⁶ A subsequent gender study which attempted to measure the results of such changes found that "Brooklyn women's academic performance was comparable to that of men."⁴⁷ Men and women graduated from Brooklyn Law School with similar grades, honors, and

36 *Id.* at 321.

37 *Id.* at 324.

38 See Ohio Study, *supra* note 32, at 325.

39 See Torrey, *supra* note 13, at 799.

40 *Id.* at 802.

41 See generally Guinier, *supra* note 3.

42 Judith Fischer, *Portia Unbound: The Effects of a Supportive Law School Environment on Women and Minority Students*, 7 UCLA WOMEN'S L.J. 81, 82-96 (1996-1997) [hereinafter "Chapman Study"].

43 Marsha Garrison, Brian Tomko & Ivan Yip, *Succeeding in Law School: A Comparison of Women's Experiences at Brooklyn Law School and the University of Pennsylvania*, 3 MICH. J. GENDER & L. 515, 516-18 (1995-96) [hereinafter "Brooklyn Study"].

44 Jean C. Love, *Twenty Questions on the Status of Women Students in Your Law School*, 11 WIS. WOMEN'S L.J. 405 (1997).

45 *Id.* at 406, 410.

46 See Brooklyn Study, *supra* note 43, at 518.

47 *Id.* at 520.

credentials.⁴⁸ Yet female students at Brooklyn Law School still reported significantly higher rates of anxiety, depression, crying, and sleeping difficulties throughout their entire law school career.⁴⁹ The researchers concluded that females' higher rates of self-reported emotional symptoms were significantly related to their behavior in and perceptions of the classroom.⁵⁰ A recent study of Gonzaga Law School found similar results. Women were academically outperforming men but continued to express dissatisfaction with their law school experience.⁵¹

Judith Fischer's study of Chapman University School of Law (2003) is especially insightful. Before initiating the study, Chapman had put into effect numerous programs to improve women law students' experiences. It implemented open door policies for professors, practice examinations, faculty mentorship programs, and increased the number of women and minority professors.⁵² Fischer compared her results directly to the gender study of Ohio law schools, and found twice as many first-year women asked questions in class at Chapman.⁵³ As measured by grades, women now slightly outperformed men during their first year.⁵⁴ The study is significant because it demonstrates that programs can be implemented to benefit women's legal educations. Actually, Chapman's programs positively affected *both* male and female satisfaction.⁵⁵

As most of the studies demonstrate, women have made strides in closing the gender gap in terms of academic performance, especially in non-Ivy League schools. Indeed at some of these schools women are outperforming men. Yet, even with such gains, women continue to report deep feelings of insecurity, alienation, and depression. What statistics cannot fully reveal are the often gut-wrenching experiences that women law students report in open-ended survey questions or in focus groups. In the next section, we offer some of our own experiences in law school.

48 *Id.* at 522.

49 *Id.* at 530.

50 See Brooklyn Study, *supra* note 43, at 532.

51 See Cara L. Nord, 'What is' and 'what should be' an Empirical Study of Gender Issues at Gonzaga University School of Law, 10 CARDOZO WOMEN'S L.J. 60 (Fall 2003) [hereinafter "Gonzaga Study"].

52 See Chapman Study, *supra* note 42, at 82-96, 114.

53 *Id.* at 99.

54 *Id.* at 105.

55 *Id.* at 99.

IV. ANECDOTES⁵⁶

We do not want to essentialize our experiences in law school as representative of our peers but we want to tell our own stories. Each of us had extraordinarily successful undergraduate careers, as manifested in our passion for learning and external markers of success. After our first year of law school, some of us lost our GPA-based academic scholarships, but all of us lost our confidence and pride. Here we share our experiences of law school in an effort to begin multiple dialogues.

Anecdote 1:

Coming to law school directly from a small women's liberal arts college, I had been warned that law school would be a "different" experience. My undergraduate professors recommended that I fully explore the atmosphere of the law schools I might attend, in order to see whether they were "women-friendly." With these warnings in the back of my mind, I came to Chicago-Kent during a fall open house fully prepared to explore this issue. During a tour of the school with a female Chicago-Kent student, I waited until I was alone with the student in order to ask her how she felt about the atmosphere for women at the school. Her response to my question was a look of confusion and a redirected question, "What do you mean?"

After more carefully explaining the concerns my professors had relayed to me and rephrasing the question, the student still did not seem to grasp the kind of answers I might be looking for. She cursorily answered that the atmosphere was great and the women all felt fine at Chicago-Kent. She indicated that it was pretty much equal between the sexes and she didn't notice any big divide. Frankly, it seemed to me that she simply wanted to answer as quickly as possible because the question made her slightly uncomfortable.

Rather than reassure me, her answers simply re-awoke the realization that I had lived in a female utopia for the past four years at my small, all-women's college; a utopia that I would soon be forced to leave. However, after reading about Chicago-Kent's progressive history and female-to-male student ratio, I chose to attend Chicago-Kent with optimism.

During my first year, I was too caught up in the intensity of "cold calling" and studying for classes graded on a mandatory curve to even

⁵⁶ Due to space constraints these anecdotes have been abbreviated. To read all of the full length version go to <http://law.ubalt.edu/template.cfm?page=656>.

notice how different my experience in law school was from my undergraduate experience. However, when I enrolled in Gender and the Law during my second year, my feelings of nostalgia for being an undergraduate returned in full force. Finally, here was a course where I felt completely comfortable. I began to realize that the feelings I had about law school were not mine alone — rather, they were the feelings of numerous other female law students. It was not until I took this course that I realized how different I had become from my undergraduate self. Unfortunately, even knowledge that law school would be “different” and “more masculine” had not been enough for me to keep my feelings of frustration with my law school experience separate from my overall concept of self-worth.

Anecdote 2:

I too entered law school after a successful undergraduate career at a small liberal arts college. When I came to law school, I sincerely believed that I was fulfilling my academic destiny. Within the first week of arriving, I began to regret my decision. My professors’ methods of instruction were completely alien to the cooperative learning environment to which I was accustomed. As my first year unfolded, I grew increasingly distressed. I lost all confidence in my ability to speak in class and began to seriously doubt my own intelligence. I recall nights of crying myself to sleep, remembering the academic successes I once had and the self-assuredness I once possessed.

My few attempts to volunteer an answer in class were interrupted by the professor. One professor, whom I still have difficulty facing, would use the Socratic Method repeatedly on two rows during each class — the two rows comprised entirely of women. Once, before he could call on me, I volunteered an argument about the broader theme of the cases we had read, finally feeling confident in my thoughts. Mystified by my observation, he required me to recite each minute fact of each case, one by one. I soon vowed never to volunteer an answer in class again. Although I was committing an injustice to myself, I felt I could obtain empowerment in the 1L classroom only by remaining silent.

After learning that my experiences were not unique, and after participating in a more engaging and encouraging learning environment during my second year, I have “come to terms” with law school. I no longer regret my decision to attend; it has challenged my emotional strength, increased my analytical and public speaking abilities, and introduced me to many fascinating scholarly and societal debates. I have deliberately chosen to make my law school experience a positive

one, but the means that I used to accomplish this task are illustrative: I was forced to seek out classes that would nurture my intellectual curiosities and goals. Women have to strategize, whether consciously or not, a means to succeed in law school.

Anecdote 3:

The findings from the numerous law review articles we read to lay the foundation for our survey have resonated with me on a number of levels, and I sorely regret that I didn't read such materials earlier. I recall bursting into tears in a subway station while reading interviews of female law students in *Becoming Gentlemen* because they so succinctly articulated my sense of inadequacy and ineptitude fueled by the past two years of law school. The common refrain expressed by women in so many of the articles — "I felt more articulate and intelligent prior to arriving at law school" — couldn't hold any truer for me. My previous academic successes merely fed the nagging feeling during my 1L year that there was something wrong with me. I wasn't equipped to study the law, and Chicago-Kent made a genuine mistake in accepting me.

It is impossible to gauge precisely how much of my isolation, self-loathing, and chronic discontent in law school can be directly attributed to my being a woman, or characterized as a "gendered" experience. That being said, I adamantly believe that law schools punish students who exhibit stereotypically "feminine" characteristics — such as empathy, sensitivity, and cultivating interpersonal relationships, even though such qualities are invaluable in "real world" legal practice. Thus, the very traits our culture inculcates in girls and young women become detrimental when they enroll in law school, where adversarial (and even aggressive) approaches are rewarded, at the expense of thoughtful, contemplative analysis.

I researched various law schools, and women's law school experiences in particular, for more than a year prior to enrolling at Chicago-Kent. My research led me to believe that this school would provide a friendlier, more gender-neutral environment than I experienced upon my arrival. I naïvely thought that attending each class without fail, reading and briefing every single case assigned, and spending seven days a week at the library diligently doing my homework — at the expense of *all* non-school activities — would be enough to succeed. I was wrong.

I came to law school intending to earn a degree that would enable me to defend reproductive rights. But within days, my focus switched from presenting myself as a self-avowed feminist eager to promote social justice, to flying under the radar as much as possible, for fear

that my professors and classmates would discover I had no idea what they were saying, what was expected of me, or how to learn the law in what I perceived as a foreign, and often hostile, environment. Much to my chagrin, I unwittingly developed a reputation for being crippled by a lack of confidence, which, once brought to my attention, exacerbated the rampant anxiety and self-doubt I already grappled with on a daily basis.

My unyielding sense of near-panic manifested itself in numerous ways: insomnia, nightmares, anxiety attacks, and dramatic weight loss (since I was literally too sick with fear to eat unless I was in the company of friends). But these physical manifestations were insignificant compared to the emotional burdens I endured as a 1L, and which have continued, to varying degrees, during my 2L and 3L years as well. Like many female students, I internalized what I perceived as my academic shortcomings. I was baffled by how many of my male classmates seemed to embrace the challenges of law school with utter enthusiasm. It is fair to assume that this can be attributed to the greater number of male role models at Chicago-Kent. This surely contributed to my male classmates' ability to bond with such professors quickly and easily. The dearth of female professors, particularly during my first year, unquestionably had a detrimental effect on both how I view law school in general and how I have gauged my ability to successfully navigate its demands.

Anecdote 4:

After attending a women's college and studying sociology, I usually look at situations with a gendered eye, meaning that I tend to notice gender issues where other people might not. By the end of my first year of law school, I felt completely defeated. After four years of being in an educational environment which provided a forum for gender discussions, it was difficult to enter an environment that avoids talking about gender and is structured by patriarchy.

I remember a few instances where my law school professors would make sexual comments and the class would laugh while I sat there thinking it was highly inappropriate. I was called on in contracts class to discuss a case about prenuptial agreements. I can't remember exactly what happened, but I made some comment that was pro-women, and there was laughter from the male professor and my classmates.

The thing that stands out to me the most about my experiences in law school is my level of confidence, and its deterioration. Before coming to law school, I would say that I had a high level of confidence. I was at the top of my class in high school, in charge of school clubs, and was co-captain of the cheerleading squad. In college I

was very active in student groups and again graduated at the top of my class. I was known by professors and was part of student government and a resident advisor. Basically, I had always been "someone" and people knew who I was. I was confident that I could do a good job at whatever it was that I was doing. Chicago-Kent even offered me an academic merit scholarship.

But that was the last positive thing that happened in regard to my confidence in law school. I soon realized that I was in an environment where I was just another one of the crowd and felt like a "nobody." I started to realize that I didn't really know much of anything and was definitely not as smart as the majority of my classmates. Throughout the first year, we received little feedback in our substantive classes. Legal writing was the only class to measure our success or ability in law school. This tore me down the most. The letter-grade feedback wasn't very damaging, but rather the manner of the feedback and the general indication that I did not know what I was doing.

I internalized this feedback, and subsequent semester grades, as my not being good enough and being more or less a failure. I didn't take it as law school being difficult, but rather that I wasn't smart enough to succeed. The confidence that I had coming into law school was chipped away little by little, and then it was gone. To make matters worse, I lost my scholarship because my first-year grades weren't good enough, meaning I wasn't good enough. I didn't just lose confidence in my academic ability, but in all aspects of my life. I became quieter in social settings and had zero confidence with dating. I have noticed that my posture has become more reserved, more hunched, and less prominent, like I just need to blend in instead of stand out. I certainly feel that law school has "ruined" me. I don't know if I will ever recover all of my confidence. If it ever happens, I am sure it will take a while, because the damage is deep.

V. CREATING, ADMINISTERING, ANALYZING

Creating the survey for our study was an exercise in collaboration and overcoming challenges. Many weeks were spent pouring over potential survey questions. This process was time consuming, because we were committed to giving each other's ideas a full hearing. Collaboration like this is not usually part of the law school curriculum and it provided a valuable lesson in teamwork.

Once we designed the survey, the next challenge was administering it. For a number of reasons, we decided to use an internet-based survey

which could also tabulate results.⁵⁷ We then had to grapple with how to reach the largest number of students. We chose to market the survey as a general “Student Experience Survey” so as to not skew results if students were aware that it was a gender study. We were fortunate that the Student Bar Association, along with many other student organizations, were willing to send an email to each student with the electronic link to our survey. Numerous professors also sent e-mails to their classes informing them of the survey and the Assistant Dean of Student Affairs put notices in his weekly bulletin. Thus in true third-wave feminist mode, we made use of cyberspace and community.

This approach resulted in 446 anonymous responses at a school with approximately 974 J.D. students. Using our program’s filter applications, we were able to splice our data in multiple ways. For example, we implemented a simple survey filter that separated responses given by women as a group and men as a group. We thus were able to analyze the similarities and differences between men’s and women’s responses to the same questions. We also implemented more complex filters; for example, we created a filter which calculated responses based on both parent’s income and student’s GPA. Other filters we created included breaking down responses by race, gender, class year, parents’ income, the existence of a lawyer relative, age, and type of undergraduate institution attended. In total, we created more than 150 different filters. After receiving and analyzing our results, we discussed them with a variety of student groups and students provided immensely helpful comments, anecdotes, and recommendations.

VI. RESULTS

In this section, we discuss the results of our survey. Women comprised 53.5% of the respondents and men comprised 46.5% of the respondents.⁵⁸ Thus women were overrepresented in proportion to their percentage of class size. For the most part, the results of our survey mirrored those of other gender studies. As we reported in our literature review, surveys have found that women participate less in class, feel more alienated, have lower confidence levels, report higher levels of offensive humor in the classroom, and are less satisfied with their law school experience than men.

Demographics and Academics

⁵⁷ We used the internet-based survey tool, Survey Monkey. See www.surveymonkey.com.

⁵⁸ Two-hundred-forty-four women responded and 212 men responded to our survey.

Surprisingly, significantly more men apply for admittance to Chicago-Kent than women. This may be the result of Chicago-Kent being part of the Illinois Institute of Technology, which focuses on science and engineering and which has a much higher percentage of male students.⁵⁹ Due to such disparities, for the past five years, women have made up less than fifty percent of the student body. The average LSAT score of men attending Chicago-Kent was slightly higher than that of women. Women, however, had higher undergraduate GPAs than men.⁶⁰

School statistics for the past three years indicate that of the general student body, in most years, women have slightly lower law school GPAs than men. An analysis of law review membership, however, indicates that women for the past three years have been over-represented in proportion to their class size. In connection with Chicago-Kent's elite moot court team, men and women participate equally, meaning women are overrepresented relative to class size. In addition, in the past five years, twenty-five students have won inter-school moot court competitions. Twenty-two of these students were women. Kent women also seem to hold leadership positions at slightly higher rates than men. Thus, most of our hard data, in contrast to the findings of gender studies at Harvard, Columbia, and Yale, indicate that women are succeeding at rates similar to men, although a small disparity in GPA remains a concern.

Class Participation

Our survey asked students to self-report their class participation. Men had higher rates of self reported daily participation in class.⁶¹ Additionally, men and women differed greatly in their reasons for not participating. Women were more likely than men to report that they were silent in class due to "timidity/fear,"⁶² while men were more likely to report that they did not participate because they were "unprepared"⁶³ or had a "lack of interest."⁶⁴

59 For example, in Fall 2006, there were 1940 applications from men and 1570 from women.

60 Men's average LSAT scores over a five year period ranged between 158 and 160, women's were between 157 and 159. Men's average GPAs, over a five year period, ranged between 3.20 and 3.37, women's between 3.31 and 3.54.

61 Twenty-four percent of men and sixteen percent of women reported that they participate in class on a daily basis.

62 Thirty-two percent of women and sixteen percent of men said they were silent in class due to "timidity/fear."

63 Fourteen and two tenths percent of men and 7.8% of women reported that they were silent in class because they were "unprepared."

A much greater number of women than men indicated that they participated in class more during their second and third-year than during their first-year.⁶⁵ In fact, a greater number of men indicated that they participated less in their second and third year than they did during their first year.⁶⁶ Thus over the course of law school, women's participation increased and men's class participation declined. This perhaps indicates that men began to self-censor while women became more comfortable participating in the smaller classes offered to second and third year students. It may also demonstrate that second and third year men became more relaxed and no longer felt that they had to prove themselves aggressively. Questions regarding the Socratic Method also brought out large differences. More men than women were "extremely comfortable"⁶⁷ or "reasonably comfortable"⁶⁸ with the Socratic Method, while women were more likely to report that they were "only somewhat comfortable"⁶⁹ or "not comfortable at all"⁷⁰ with the Socratic Method.

Ironically, in informal conversations, female students, when given the opportunity to address their tendency to remain silent in the classroom, provided a wealth of feedback. One issue raised was whether women under participate or whether men over participate. Women expressed the common sentiment that they only spoke in class when they felt their comments would add to the general class discussion. Men, some of these women believed, often made comments that were not on point or did not otherwise add to class conversation. One woman stated that during her first year, there were about ten "gunners" in her class, nine who were men. Although she found such students annoying and rude, she began to believe that she was an inferior law student because she chose to learn by listening rather than speaking. In part, she explained this as a personal learning

64 Nineteen percent of men and twelve percent of women reported that they were silent in class because they had a "lack of interest."

65 Fifty percent of 2L and 3L women indicated that they currently participate more now than their first year, while only 33.1% of men said they participate more now than first year.

66 Sixteen and nine tenths percent of 2L and 3L men report participating less now than their first year, while only 8.1% of 2L and 3L women gave the same response.

67 Twenty-two and two tenths percent of men reported they were "extremely comfortable" with the Socratic Method, while only 11.1% of women reported feeling this way.

68 Fifty-one and nine tenths percent of men reported feeling "reasonably comfortable" with the method, while only 39.3% of women felt "reasonably comfortable."

69 Thirty-two percent of women were "somewhat comfortable" with the Socratic Method, while 18.9% of men were "somewhat comfortable."

70 Seventeen and six tenths percent of women and 7.1% of men were "not comfortable at all" with the Socratic Method.

style but also because she did not want to interrupt the flow of the class. Yet some women indicated that when called upon by a professor, anxiety caused them to “freeze,” even though they knew the answer. Other women commented that the thought of speaking in class and potentially being embarrassed caused tremendous fear and worry.

Related to frequency of class participation, is the question of whether speakers feel that their audience is listening. Not surprisingly, men were more likely than women to report that their audience was receptive when they spoke in class.⁷¹ In terms of professorial classroom attention, men were more likely than women to believe that female professors gave more attention to female students.⁷² In contrast, women were more likely than men to believe that female professors gave more attention to male students.⁷³ We also found that slightly over seven percent of women had chosen to take a class based on the professor's sex.⁷⁴

Interactions with Professors

Interactions with professors outside the classroom are important to a law student's overall success. Such interactions are a time when students can ask substantive questions, and further build relationships with professors that can lead to letters of recommendation, career opportunities, and mentorships. As our survey shows, men and women sought help from professors outside of class at relatively equal rates, but reported different levels of comfort in doing so. A larger percentage of men than women reported feeling “very comfortable” approaching professors.⁷⁵ Most women reported that they felt “somewhat comfortable” approaching professors outside of class, while most men reported that they felt “comfortable.”⁷⁶ These results

71 Sixty-five and two tenths percent of women “agreed” that when they speak in class, their audience is receptive, while 71.7% of men reported feeling this way. Similarly, 7.4% of women indicated they “strongly agreed” that their audience was receptive when they spoke in class, while 11.3% of men did. Additionally, while 24.6% of women disagreed that their audience was receptive, only 15.1% of men reported feeling this way.

72 Seven and one-half percent of men, compared to 1.2% of women, thought that female professors gave more attention to female students.

73 Three and seven tenths percent of women and 0.5% of men thought that female professors give more attention to male students.

74 One-half percent of men and 0.8% of women chose to take a class based on professor's race.

75 Twenty-eight percent of men and fourteen percent women reported feeling “very comfortable” approaching professors.

76 Forty percent of women reported that they felt “somewhat comfortable” approaching professors outside of class, while thirty-eight percent of men reported they felt “comfortable.”

are somewhat different than those discussed in our literature review, where multiple studies found that women were less likely to approach professors outside of class. In contrast, women at Chicago-Kent do approach professors but often with more trepidation than men.

Although women were much more likely than men to report that they feel more comfortable approaching female professors, a small percentage of men also felt more comfortable interacting with female professors.⁷⁷ Very few men or women indicated that they felt more comfortable approaching male professors than female professors.⁷⁸ When asked whether they felt more comfortable approaching professors who shared their same race or ethnicity, men and women responded affirmatively in equal numbers.⁷⁹

In informal conversations, a number of women admitted to feeling intimidated by professors, whom they characterized as “disinterested” in talking to students or whom they felt were “too busy” to answer student questions. One woman said she felt that she could not visit a professor during office hours without having a prepared list of questions, so as to not waste the professor’s time. Another woman said she had difficulty asking a professor for help understanding course materials or requesting letters of recommendation because as a female, she felt compelled to conform to the traditionally feminine role of giving to, instead of taking from, others. Perhaps these responses are not surprising, given women’s socially reinforced (and rewarded) penchant for being sensitive to others’ needs.

Confidence & Self Perception

Almost all previous studies indicate that women law students have less confidence than male law students and our results were no exception. Men were slightly more likely than women to report that they felt “very well prepared” for law school prior to beginning their first year.⁸⁰ But most men and women reported, in similar numbers, that they felt “somewhat prepared” for law school.⁸¹ However, there were much larger discrepancies between men and women regarding

⁷⁷ Seventeen and two tenths percent of women reported that they felt more comfortable approaching female professors, while 6.6% of men indicated they felt more comfortable approaching female professors.

⁷⁸ Three and three tenths percent of women reported feeling more comfortable approaching male professors while 2.4% of men reported the same.

⁷⁹ Nine and four tenths percent of women reported feeling more comfortable approaching professors of their same race or ethnicity, while 9.9% of men reported the same.

⁸⁰ Seven percent of women reported that they felt “very well prepared” for law school prior to beginning their first year, while 10.4% of men gave the same response.

⁸¹ Fifty-three and seven tenths percent of women said they felt “somewhat prepared” prior to beginning law school, while 50.9% of men reported the same.

how they felt about their intelligence since entering law school. A much larger percentage of women (30.7%) than men (17%) indicated they felt less intelligent now than they did prior to attending law school. Men likewise were more likely than women to feel "more intelligent"⁸² or "equally as intelligent"⁸³ as they did prior to attending law school.

Men were also much more likely than women to report that they "always" feel as academically qualified as other students in their classes.⁸⁴ While men and women expressed that they have felt that law school has "met their expectations" in similar numbers, women were much more likely to indicate that they were "less pleased than expected" with law school.⁸⁵ Men also reported slightly higher levels of feeling that they were "more pleased than expected"⁸⁶ and that law school had "met their expectations."⁸⁷

Offensive Humor and Derogatory Comments in the Classroom

Women were more likely to report finding gender issues in the classroom. Many more women than men reported that a professor had used a hypothetical that portrayed women in a sexually demeaning manner.⁸⁸ There were similar differences between men's and women's responses regarding whether professors made derogatory comments about women in class. Women were more than twice as likely as men to report hearing a professor make a derogatory comment about women as a group.⁸⁹

Perceived demeaning comments about women may very well make women feel uncomfortable in the classroom and in law school more generally. The discrepancies between male and female responses when asked whether Chicago-Kent was a comfortable environment for a man and for a woman were telling. While men and women reported in

82 Forty-four and three tenths percent of men felt "more intelligent" and 38.1% of women felt "more intelligent."

83 Thirty-eight and seven tenths percent of men felt "equally as intelligent," while 31.1% of women felt "equally as intelligent."

84 Forty percent of men "always" feel as academically qualified as other students in their classes, only 19% of women reported the same.

85 Thirty-nine and three tenths percent of women were less pleased than expected since entering law school, only 30.2% of men reported feeling this way.

86 Twenty-two and two tenths percent of men were "more pleased than expected," while 16.8% of women were "more pleased than expected" with law school.

87 Forty-seven and six tenths percent of men reported law school has "met their expectations," while 43.9% of women reported in kind.

88 Over eighteen percent of women reported that a professor has used a hypothetical that portrayed women in a sexually demeaning manner, while only seven percent of men reported in kind.

89 Almost twenty percent of women reported hearing a professor make a derogatory comment about women as a group, while only six percent of men reported hearing the same.

equal percentages that Chicago-Kent is a comfortable environment for a man,⁹⁰ results were extremely different when students were asked whether they thought that Chicago-Kent was a comfortable environment for a woman. Forty-two percent of men “strongly agreed” that Chicago-Kent was a comfortable environment for a woman whereas only twenty-seven percent of women “strongly agreed” that it was a comfortable place for a women. Overall, 63.1% of women “agreed” that Kent was a comfortable environment for a woman, seven percent “disagreed” that it was a comfortable environment for a woman, and 2.5% “strongly disagreed” that it was a comfortable environment for a woman.

Student reported rates of sexual harassment in the survey were extremely low in comparison to other surveys. In a study of nine Ohio schools that we discussed in our literature review, close to twenty percent of women self-reported that they had been subjected to sexual harassment while in law school.⁹¹ Yet at Chicago-Kent, only slightly above three percent of students reported that they believed they had experienced sexual harassment at the law school.

Relationships

A higher number of male than female students reported having a spouse or domestic partner.⁹² We were surprised to find that such men were much more likely to believe that their relationship with their partner had negatively affected their legal studies.⁹³ We had expected that more women than men would respond that their relationship with their partner had interfered with their legal studies because women have traditionally acted in “caretaker” roles and performed domestic chores for their families. We mistakenly believed that the burden of domestic responsibilities, when added to the law school workload, would lead more women than men to respond that their relationship with their partner negatively affected their legal studies. However, our results indicated exactly the opposite. In informal conversations about these results, married women or women with partners stated that their husbands/partners were very supportive of their law studies and often

90 Ninety-seven percent of men and ninety-seven percent of women reported that Kent was a comfortable environment for a man.

91 See Krauskopf, *supra* note 32, at 313.

92 Thirty-one and six tenths percent of women and 40.6% of men reported having a spouse or domestic partner.

93 Fifty-seven percent of men reported that their relationship with their spouse/domestic partner interrupted their legal studies, while only thirty-eight percent of women felt the same way. Twenty-nine and nine tenths of a percent of women reported that their relationship with their spouse/domestic partner facilitated their legal studies, only 20.9% of men reported the same.

took over chores and housework. This may reflect shifting gender roles in the household and men's willingness to take on greater domestic responsibility.

*Race*⁹⁴

In addition to gender, our survey attempted to take race into account. When asked if students had ever witnessed faculty or student hostility toward male minority professors because of their race, not one African-American student reported that he or she had. However, when asked if they had ever witnessed faculty or student hostility toward female minority professors because of their race, over seventeen percent reported that they had witnessed student hostility and almost nine percent reported that they had witnessed student *and* faculty hostility. This differs greatly from Caucasian students' responses which indicated that only 1.7% had witnessed student hostility toward female minority professors. Not surprisingly, African-American students were much more likely than the general student body to report that they felt more comfortable approaching professors of the same race and ethnicity.⁹⁵ But not one African-American student reported that he or she believed that he or she had experienced sexual harassment.

There was also a large difference in the level of preparedness for law school that African-American students felt when compared to the general student body. No African-American student reported feeling "very well prepared" for law school; in contrast, 8.6% of all students reported feeling this way. Most African-American students reported feeling "somewhat prepared" for law school but 26.1% of African-American students reported feeling "badly prepared."⁹⁶

In addition to differences between results from our general student body and results from African-American students, we also found strong differences in responses from African-American men and African-American women. A much larger percentage of male African-American respondents (sixty percent) reported that they felt more intelligent now than they did prior to attending law school. In

94 Please note that our sample size for African-American students is very small. Eighteen African-American women and five African-American men responded.

95 Thirty and four tenths percent of African-American students reported feeling more comfortable approaching professors of their same race and ethnicity, while only 9.7% of all students who took the survey reported the same.

96 Sixty-two and one-half percent of African-American students reported feeling "somewhat prepared" for law school.

contrast only sixteen percent of African-American women felt more intelligent.

There were also interesting discrepancies in the way African-American men and women viewed the receptiveness of their classmates. Forty percent of African-American men did not believe the audience was receptive when they spoke in class, while not one African-American woman reported feeling this way. A final and perplexing difference between African-American men and women is that forty percent of African-American men strongly agreed that they felt uncomfortable when speaking in class, while only 5.6% of African-American women strongly agreed with this statement. One comment from a male African-American student explains his sentiments, "I think one of the greatest challenges I have faced as an African-American male is the expectation that I will be a louder individual than I am. I am introverted and law school does not by any means cater to these types of people." Since our pool of African-American respondents was relatively small, we hesitate to make any generalizations and suggest that further studies need to be conducted that take into account both race and gender.

Parents

Fifty-one of the students who took our survey indicated that they are parents of a child under the age of eighteen. Twenty-five of these students were female and twenty-six were male. Most of these parents indicated that they had a spouse or domestic partner.⁹⁷ Over half of these parents had considered quitting law school at some point in their law school careers.⁹⁸ In spite of this, an overwhelming number, 88.2%, did not regret attending law school. Over seventy-four percent of parents believed that their parental responsibilities interrupted their legal studies and men and women indicated this in nearly equal numbers.⁹⁹ Again, this points to shifting household responsibilities with men sharing in parenting duties. Students with children who took our survey had lower GPAs than students without children with 23.5%

⁹⁷ Eighty-eight and two tenths percent of parents who responded to the survey indicated they had a spouse or domestic partner.

⁹⁸ Fifty-one percent of parents who responded to the survey indicated they had considered quitting law school.

⁹⁹ Seventy-six percent of female parents believed their parental responsibilities interrupted their legal studies, while 73.1% of men felt the same.

having a GPA between 2.5 and 2.99. Interestingly, most mothers had higher GPAs than fathers.¹⁰⁰

Comments

The last question on our survey asked students to comment on any of their responses to the multiple choice questions or to voice other concerns. To our surprise, very few students chose to write about gender or race, even though many of our survey questions clearly asked about such issues. Rather the majority of responses discussed financial issues: how students would pay back loans and the high cost of tuition. Most of the other responses were related to career services and thus, indirectly, to financial concerns. We are left to wonder what this indicates. Perhaps because we already asked about gender and race in the survey's multiple-choice questions, respondents did not feel compelled to delve further into these issues. Alternatively perhaps the dearth of gender related responses reflect a lack of gender consciousness among the student body as a whole. Do students believe that sexism in the legal academy is not a valid concern or does it mean that feminism has attained its goal of eradicating many gender disparities that earlier generations of female law students have struggled against?

VII. RECOMMENDATIONS

Although our recommendations to further eliminate gender disparities in law school are derived from the results of our own study, they probably are applicable to most law schools as our results essentially align with those of other gender studies. Furthermore, as demonstrated by law schools such as Chapman, schools can make changes to eliminate existing gender disparities and enhance all law students' experiences.

We recommend that law schools provide more female mentors for the student body. This can be accomplished in a number of ways. First, more female professors should be hired, particularly for core first-year subjects. At Chicago-Kent, more than half (50.3%) of the school's student body had only one female professor teach a class outside of legal writing during their first year, while sixteen percent had no female professors teaching a 1L core subject. Data from 2007 and 2008 reveals that twenty-six male professors are tenured, while only eight female professors are tenured. The female:male faculty

¹⁰⁰ Twenty-four percent of mothers had a GPA of 3.4 and 3.59, 26.9% of men had a GPA between 2.5 and 2.99.

ratio is important because law students, especially women law students, report that they are more comfortable participating in classes taught by women, and that they are more at ease approaching women professors.

Second, the school should implement mentorship programs for female students or even all law students. The administration could enlist alumnae to mentor current female students, allowing women to shape a space in which to recognize that their feelings of distress are neither isolated nor unusual. Mentors could also discuss with female students the continued difficulties that they may experience upon entering the legal profession as well as the many non-gendered issues mentioned in survey responses. For example, mentors could explain their own strategies for paying off loans and balancing work and family.

In addition to providing informal mentors, the administration could assign professors to act as advisers to individual students. As one Chicago-Kent student explained, the only available advisor is the dean of students and many students may feel reluctant to approach him with seemingly nominal questions. As our results reveal, more than double the number of women (16.4% of women, compared to 7.6% of men) reported feeling uncomfortable when approaching a professor. Furthermore, in informal discussions with students, some men understood that they were entitled to approach professors outside of class. In contrast, some women believed that they were intruding upon professors' time when approaching them. We suggest that assigned faculty advisors may ease students' hesitations and enhance communication between faculty and students.

Law schools should also foster the development of strong women's law societies. Such organizations, comprised of members who are conscious and/or receptive to gendered issues, are most likely to enable consciousness-raising among the student body. Consciousness-raising enables each student to realize the significance of her own experience. While recognizing that law school anxieties are not just personal, students will be able to see the gendered and political roots of student alienation. Faculty advisors should be assigned to women's organizations in order to provide an institutional memory and offer guidance. Like the connections between second and third-wave feminism, faculty advisors for such organizations can ensure that women understand the past.

In addition to school-sponsored activities, students should develop their own pragmatic groups on campus, such as parenting and support groups. As we have learned from the feminist movement and our own experiences, consciousness-raising can be very powerful. In our group of five, for example, we were empowered by sharing stories of

common angst and strategies to enhance our own understanding and contentment. Soon, our stories spread into a larger dialogue, one that included the voices of those who completed our survey, read our results, or listened to our presentations. In responding to our work, these new voices reinforced the powerful axiom, "We are not alone." Student groups will allow the dialogue to broaden even further.

As stated, law schools must strive for greater gender parity among its faculty. They must also encourage classes with greater gender parity. Our data on students from the Spring 2007 semester reveal that men continue to outnumber women, as women comprised less than forty-five percent (44.26%) of the graduating class. Prior studies have suggested that women's hesitancy to participate in class is exacerbated when they are without female role models and peers. As long as women are outnumbered by men, they may be less likely to resist conformity to the norms of legal education. At Chicago-Kent, for example, almost a quarter (23.7%) of the 3L class has felt pressure to adopt more stereotypical male qualities, such as assertiveness and uncompromising speech. We believe that the learning environment will improve when dialogue includes voices that stray from the stereotypical white, male law student's. One woman explained the dissonance between her personal and academic life: "As a single mother I have to keep a very large part of my life silent in order to fit in at law school. It is viewed and treated as a deficit that I have small children and household responsibilities. Too bad for everybody [because] it could be so much richer."

Next, we advise that the first year curriculum and structure of classes be re-examined. Although we recognize the difficulty of doing this, women's increased participation over their three years at Chicago-Kent stems, at least in part, from the self-determinacy available after the first year of law school, when students are able to choose a course's subject matter, class size, and professor. We suggest, therefore, that law schools employ smaller first-year classes so students are more comfortable volunteering their perspectives. Smaller class sizes are likely to encourage greater participation from students who feel too intimidated to ask questions or raise observations in front of scores of their peers. Classes with fewer students also lend themselves to more opportunities for collaboration among students, such as small-group discussions and in-class activities that deviate from the typical format. Furthermore, professors' ability to become acquainted with students as individuals inevitably inures to the benefit of students and professors. One student recommended that large classes have discussion groups led by student teaching assistants. As she wrote, "[n]ot only would this connect all students to the material, but it would provide leadership opportunities for upper-level students." The law school

should also permit students to choose an elective course during the first year. If students are able to pursue subjects of interest, they may feel less alienated from an education that often employs foreign pedagogy.

Ultimately, we encourage all members of law school communities to engage in a dialogue. We are offering our survey to students and law schools, and encourage them to conduct their own studies.¹⁰¹ We also hope that our own school continues to conduct this survey over time to test the effectiveness of any recommendations that have been instituted.

VIII. CONCLUSION

This project has involved multiple iterations. On the most intimate level, it has allowed the five of us to create a unique and intimate feminist space in the law school and made us acutely aware of how difficult but ultimately rewarding it is to find a collective feminist voice. In the process, we have consistently re-examined the question of what feminism means and how we can enact it on the ground.

When we began our study, we wanted to produce a comprehensive overview of the student body at Chicago-Kent by taking into account traits and identities such as race, class, and sexual orientation. What we did not anticipate is that our attempts to recognize these multiple issues and to avoid essentializing any particular experience would cause us to lose sight of the collective. Our well-meaning intentions to analyze our data in order to give credence to every respondent's voice and identity eventually led to a disintegration of the whole and one from which we could not draw any conclusions. We thus faced one of the most consistent criticisms of third-wave feminism for we found ourselves in a position in which gender essentially disappeared, allowing us only to speak of individual respondents. In the end we made the collective decision to return to gender as our primary mode of analysis and explanation.

Although the results of our study were in line with almost all of the other studies conducted over the past decade and a half, we were surprised by a number of findings. As discussed above, students seemed quite unaware of gender and may not have the analytical tools to see their own law school experiences as gendered. This indicates that despite the inroads that feminism has made in the legal academy, issues of gender and how to think about it in terms of its personal implications have not been internalized by students. We hesitantly conclude that third-wave feminism may not be as widespread or as

¹⁰¹ The survey can be obtained on Felice Batlan's homepage at www.Kentlaw.edu/faculty/fbatlan.

popular as many would like to believe. This perhaps should not be particularly surprising as this generation of law students have come of age during a period of feminist backlash while also benefiting from the tremendous gains of second-wave feminists.

Furthermore, the fact that scholars had studied women's experiences in law schools was not widely known in the Chicago-Kent community. This leads us to conclude that feminists cannot be passive but must share their knowledge, thoughts, and concerns with colleagues. Such dialogues must be generated from the top down and the bottom up. Silence and complacency must be broken by noise. In other words, as comfortable as it might be for feminists to talk among ourselves, we must not forget that second-wave feminism's victories were due to unrelenting activism. As we feminists look to the future we must also remember the past.

A PROFESSOR'S POST-SCRIPT

When our article was submitted in April 2008, we thought that our most gratifying work had already been completed. We could not have been more wrong. In April, we arranged to present our study to a series of student groups, some informal and some more formal, and to the faculty and administration. We also made this article available to anyone who wanted it within our law school community.

All of our presentations were extremely well attended. The students, both men and women, deeply related to the experiences of the law students that we described and many for the first time learned that not only were they not alone in their reactions to law school but that scholars had studied the phenomena. After each presentation, we had discussion sessions and asked the students for recommendations.

Our presentation to the faculty and administration was equally well attended. In stark contrast to the resistance that I feared we might face, many faculty, like students, were unaware of previous gender studies. Discussion legitimately focused on whether what we describe as women's law school experiences were really the experiences of all law students with women more able to express their discontent, whether the Socratic method, to the extent it was used, provided some benefit, and what our duties were as a law school to prepare students for the "real world" and what "real world" even meant. It is fair to say that at least some on the faculty were energized by the survey. One faculty member, shocked by our results, devoted one of his classes to discussing the results of the survey. Other faculty began to share their own experiences of law school with their students and with each other.

Following these presentations, our group met with the Assistant Dean for Student Affairs and senior faculty to brainstorm about possible reforms and a number of changes were enacted. This year all

first-year students, as part of their orientation, attended a panel on diversity. A group of student leaders discussed their own first-year experiences and the strategies that they employed for coping with law school. The results of our study were also presented and students were urged to speak with faculty, administrators, and other students about what they were experiencing. We tried to send a loud and clear message that they were not alone. The faculty and administration also instituted a faculty advisor program in which students were given the option of having a faculty mentor. Over half of the students opted into the program and faculty volunteered to serve as mentors in significant numbers. Further, students working with the administration are in the process of creating a parents' society which will include an on-line bulletin and chat room. Faculty are also collaborating with the Women in Law Society to make it an even stronger organization. Finally, I am now working with a new group of students to generate material about women in law school that could be provided to all first-year students. It remains to be seen what impact these initiatives will have and whether the momentum that the study generated can be sustained.

ARTICLE

EMPOWERMENT OR ESTRANGEMENT?: LIBERAL FEMINISM'S VISIONS OF THE "PROGRESS" OF MUSLIM WOMEN

By: Cyra Akila Choudhury*

*[I]sn't it imperative and a little bit obvious that when we speak of Afghan women and their rights, we must listen carefully to what they themselves have to say about it? As the admirable struggles of women of color, particularly in the Global South, come to the knowledge of the West, we must remind ourselves of the validity of **their** views and hopes, over **our** perceptions of what they should say and do, how they should dress and whether or not their oppression stems from being able to have an orgasm.¹*

The last decade and a half has seen a burgeoning of transnational activism on behalf of women in the global South. With the continuing wars on terror and in Iraq, Muslim women's oppression and the role of Islam in that oppression remain in the limelight. Academically, it has become a subject of much interest and a recurrent theme in the discourse has been how to "help" Muslim women progress towards greater liberty and rights. The debate has included calls for "multiculturalism" and tolerance for Muslims in the West, for monetary aid, and also for diplomatic and sometimes armed intervention. Though the concern may be well-intentioned, there is an expectation that Muslims, particularly women, will eventually value the same rights and social orderings as those of their benefactors in the West. Yet when Muslim women consistently articulate a different

* Assistant Professor of Law, Florida International University. This article has benefited greatly from the rich conversations with and insights of Aya Gruber and Lama Abu-Odeh as well as the continuing support of Robin West. Special thanks are due to the organizers and participants of the "Can You Hear Us Now" conference at the University of Baltimore, held on March 7, 2008.

¹ Sonia Kolhatkar, "Saving" Afghan Women in ZNET, May 09, 2002, available at <http://www.rawa.org/znet.htm>. To extend this quote, I would also add "having an orgasm, wearing hijab or not being able to drive a car," which also seem to preoccupy Western feminists.

vision for themselves, it is a source of concern and puzzlement that can only be resolved through judgments about the “progress” of their consciousness, education, and/or experience relative to “Western” women. This article seeks to challenge those judgments. To do so, I examine the liberal theoretical underpinnings of these scholarly and activist projects to reveal how they advance a particular idea of human flourishing that seeks to ultimately “reform” or extinguish those life forms (including traditional Islam) that do not comport with it.

In the first section of the article, I examine how liberalism’s justification for colonialism has become sublimated in liberal (legal) feminism, which subconsciously continues traditional liberal political theory’s judgments about the “East.” I suggest that most liberal feminists also have a specific idea of women’s flourishing that prevents it from fully comprehending Muslim women who choose to adhere to Islam, which is, in their view, a hopelessly patriarchal and gender oppressive religion.² Liberal notions of flourishing require progress towards a liberal society. As such, “reform” is used to further this vision. I argue that liberal feminism also shares this “narrative

2 Some definitions are required at this stage: when I refer to liberal feminist theorists, I am referring primarily to second-wave feminists who share liberalism’s political agenda of individual autonomy, equal rights, and a commitment to liberal democracy as well as a particular view of human flourishing and progress that I discuss in the paper. To some extent, the definition is broad enough to capture elements of the third-wave but for the most part, I am speaking of the second-wave. Further, I am not constraining this definition to women located in the “West” but to all women who share this particular agenda. Second, “Muslim women” is a rather broad category and the use of it could be taken as a reduction or essentialism born of identity politics. However, I use the term more for simplicity than out of a belief that all Muslim women share some essential characteristic. In my discussion of Muslim women’s groups, I include secularist groups like Revolutionary Afghan Women’s Association (“RAWA”) as well as the religious pietist women because what I am trying to get at is a world view that exists outside of Liberalism. Even though secularism itself is a product of Liberal thought, Muslim women’s secularist groups live in contexts where secularism coexists and is shaped by culture and religion in ways that, to some extent, place them outside of Liberalism. Finally, when I refer to International Human Rights (IHR), I am referring to the universal norms that underlie IHR law and the pressure to reform local norms to reflect them. However, I do not mean to suggest that there is no overlap or that the human rights conventions do not reflect the aims of women in the third world. What I will suggest is that what is understood by inequality or discrimination, the rights that are struggled for are heavily mediated by local considerations including culture and religion, neither of which are essential or monolithic. I would suggest that because culture is not monolithic, claims that certain cultures clash with human rights because of some essential incompatibility ought to be examined very critically.

I should also make clear that I do not subscribe to the notion of a discreet East/West or North/South. It is clear that the West contains a large population that could be considered “Eastern” and that the global South is no longer “people over there” but often live side by side with their affluent “Northern” neighbors in urban ghettos and banlieues. As such my references to third-world women, women of the global South and women in the East should be read not geographically but politically and economically.

progress” that reduces non-liberal societies to “developing” and, consequently, global southern women to victims.

Yet, many women in the global South reject this characterization of their existence. In the second part of the article, I offer some examples of Muslim women’s visions of flourishing that show both overlap with liberal values and, more importantly, divergence. I propose that Muslim women’s adherence to religion must be accepted as legitimate expressions of flourishing even if we, as Western feminists, are skeptical about the freedom of their choice. I urge feminists who have continued to be extremely incredulous about Muslim women’s choices to live according to Islam, to re-evaluate and see these women as exerting power in their own lives.³

Unfortunately, such reconsideration is complicated by the fact that there are strategic benefits to ignoring Muslim women’s agency. Both women’s organizations in the Muslim world and Western organizations capitalize on women’s suffering, the former to gain support from resource-rich first world organizations and the latter to mobilize their constituents. Yet the costs of such strategic representations remained under-examined. In the third part of the article, I use the interaction of the Revolutionary Afghan Women’s Association (“RAWA”) and the Feminist Majority Foundation (“FMF”) to highlight how representations of powerlessness of Muslim women and the reinforcement of liberal expectations about Muslim women resulted in the estrangement between these two organizations.

Finally, the article considers some of the side-effects of liberal feminist transnational work: the alliances with the state as an apparatus to pressure the global South to progress and the alliance with international law and calls for intervention in the south on behalf of women. I argue that liberal second-wave feminists and human rights hawk feminists should carefully consider how seemingly benign armed intervention can be linked with and traced from the liberal “imperative to progress” and the therapeutic violence of colonial interventions. Given that liberal theory has justified colonial subordination through a discourse of progress, feminism ought to be

3 Indeed, we ought to be skeptical about the freedom of our own choices despite the fact that we “feel” free. Skepticism about Muslim women’s choices, particularly when they choose modes of being that seem to constrain freedom, prevents us from a relativist extreme that makes all choices of equal value. On the other hand, skepticism about our own choices and modes of being prevents us from mistaking our position as objective or somehow inherently superior. Resolving the dilemma between agency and victimization is no easy task, and this article does not explore it in depth. See Robin West, *Law’s Nobility*, 17 YALE J.L. & FEMINISM 385, 392 (2005).

wary of any liberal legal system that seeks to perpetuate that subordination. For most women in the South, liberation through interventions that have adverse impacts on their social arrangements and their families may not be worth the price.

I. LIBERAL CONTINUITIES: THE LIBERALISM OF FEMINIST THOUGHT AND THE NARRATIVE OF PROGRESS

The purpose of this section of the article is not simply to claim that imperial feminism is, in a tautology, colonial. Rather, it is to examine why liberal feminisms, even those that claim to be anti-imperial, might in reality be more imperial than they admit. I argue that historically liberalism has justified the subordination of those whose lives and values, social arrangements and institutions were utterly alien. Liberal feminism, which can claim at least a partial ancestry from theorists like Mill and Locke, therefore, are prone to the same critique as liberalism when it comes to alien women. The result is a theory that in some measure supports the “progress” of these other “developing” women towards values and arrangements that reflect liberal society.

First, it is worthwhile to consider liberalism’s relationship to empire. In his work, *Liberalism and Empire*, Uday Singh Mehta raises the question: What happened when a political thought, self-consciously universal in its scope, was confronted with the unfamiliarity of the life forms in the British Empire?⁴ A summary answer to this question, at the risk of oversimplifying a complex historical interaction and process, is that liberalism understood the unfamiliar as the underdeveloped or the infantile. Putting all the cultures on a single evolutionary trajectory, liberalism in its colonial period understood the colonized to be progressing towards civilization defined by Europe. One responsibility of the conscientious imperialist then was to advance that progress, although it seems unlikely that any of the colonized societies would ever progress enough to reach the point of civilization that would allow them self-rule.⁵ In any event, while the *telos* was a liberal society with the necessary social arrangements, the technique that was then used to achieve it was both social and legal reform. In India, during British rule, this led to the codification of the laws and to the import of British liberal legal norms and laws to replace the domestic systems that were in effect. British

4 See UDAY SINGH MEHTA, *LIBERALISM AND EMPIRE: A STUDY IN NINETEENTH-CENTURY BRITISH LIBERAL THOUGHT* 82-87, 90-94 (1999).

5 See *id.*

law was more efficient and more just in the eyes of the colonial administrators while native laws were hopelessly arbitrary and confusing. Certainly the view was that the imported laws were more progressive for many minorities and women despite the fact that these improvements were resisted by a large number of Indians.⁶ As Mehta notes:

History and progress are an unremitting preoccupation of nineteenth-century British Liberalism. Yet the political vision that governed that liberalism was, as it were, already firmly universal. Philosophically there is a dilemma here. Either the validity of that political vision could not be swayed by historical considerations or the liberal agenda was in some central way directed at the “reform” and modification of the various histories it encountered, so as to make them conform to the universalistic vision. Because if the particularities and trajectories of the histories and lives to which the empire exposed liberals did not somehow already align themselves with that vision, then either that vision had to be acknowledged as limited in its reach or those recalcitrant and deviant histories had to be realigned to comport with it. Liberals consistently opted for the latter—that is to say, “reform” was indeed central to the liberal agenda and mind-set. To that end they deployed a particular conception of what really constituted history along with a particular conception of what counted as progress.⁷

To what extent then is this also the account of liberal feminism with regard to women in the global South? Are the liberal women’s rights activists that seek to rearrange the “deviant histories” of Asian, African and Islamic peoples engaged in the same project as the liberal scholars who provided the philosophical justification for colonial empires? After all, is not the end to which liberal feminism aspires a society that resembles and has all the hallmarks of their own societies? Insofar as liberal feminists desire other women to have a society that affords women equal rights (that we now understand go beyond formal equality), that allow women equal opportunities, and representation in government, and that free them from gender violence. These are laudable goals that are imagined to be shared by women all over the world.⁸ But in order for that goal to be reached, progress must be made by reconfiguring not just the relationship between men and women and between women and the state but to reform culture or religion in a way that comports with liberal notions of history and progress. For most liberal feminists whose view of women’s lives in

6 See generally Cyra Akila Choudhury, *(Mis)Appropriated Liberty: Identity, Gender Justice, and Muslim Personal Law Reform in India*, 17 COLUM. J. GENDER & L. 1 (2008).

7 Mehta, *supra* note 4, at 77.

8 See, e.g., SUSAN MOLLER OKIN, IS MULTICULTURALISM BAD FOR WOMEN? (Joshua Cohen, Matthew Howard & Martha C. Nussbaum eds., 1999).

the global South as thoroughly interwoven with violence justified by culture, this is an unmitigated good. Judged from the Archimedean point of liberal feminism, how can change towards liberalism be anything but good when women are merely subjects of a patriarchal religion or culture and live in abject misery? The following quote illustrates the point:

It is by no means clear, then from a feminist point of view, that minority group rights are part of the solution. They may well exacerbate the problem. In the case of a more patriarchal minority culture in the context of a less patriarchal majority culture, no argument can be made on the basis of self-respect or freedom that the female members of the culture have a clear interest in its preservation. Indeed, *they might be much better off if the culture into which they were born were either to become extinct...or, preferably, to be encouraged to alter itself* so as to reinforce the equality of women—at least to the degree to which this value is upheld in the majority culture.⁹

Although the author's sentiment is expressed in the context of minority cultures in a liberal majority society, the assimilationist view and indeed the very explicit comfort with the alteration or extinction of another culture, that in her judgment does not measure up, is an example of the kind of imperative to progress Mehta interrogates. Here the yardstick that is used to judge the relative value of "other" cultures is both liberal and feminist.

Another example of liberal feminism's "imperative to progress" is the same author's response to the assertion that the veil does not have a singular significance for Muslim women: "[S]urely to be unable to go out and practice one's profession without being enshrouded from head to toe is not, on the whole, an empowering situation in which to live, *unless it is a temporary transition to greater freedom.*"¹⁰ In one sentence, she makes explicit liberalism's judgments and the progress it seeks. Living without the veil is greater freedom. A veiled woman is by the very fact that she wears a veil oppressed. In order to be free, the veiled woman must *progress* out of the veil. Such reductionism

9 *Id.* at 22-23 (emphasis added).

10 *Id.* at 124 (emphasis added). I am certain that the charge that my critique encourages "cultural relativism" will be leveled as a defense of Liberalism. I have two thoughts about this. First, that cultural relativism as a reason not to consider the internal views of those who differ presupposes that "our" view is fixed and correct. If all views are co-evolving and no culture is essential, then the charge of relativism seems to lose traction. Second, if we take cultures to be inessential and evolving as well as interacting with other cultures, then we can find internal critiques and dissents that are grounds for coalitions in an ever-shrinking world without the need to hegemonically export liberal norms under the guise of universal truth through the vehicle of international law because we consider them to be superior—even if and when we do consider them to be superior.

imagines veiled Muslim women as being nothing more than victims of their circumstances. For the author, it seems impossible that veiling could have a religious significance other than sexual control or that it could be “chosen.”

II. OUTSIDE LIBERAL PROGRESS: MUSLIM WOMEN’S DESIRES

In the post 9/11 United States, images of oppressed Muslim women are a commonplace. It would not be overstating it to say that Muslim women are considered some of the most oppressed women in the world by most Americans. Typically, references to the veil, female circumcision, honor killings, gang rape, and restrictions on movement all bear the hallmarks of a singular “Islamic culture.” Religion rather than liberating women, or helping them actualize themselves, is used to justify such subordination and compounds their oppression at the hands of Muslim men. In general, neither culture nor religion is seen as internally heterogeneous, contested and fluid.¹¹ Interestingly, this view of religion (and culture) as being largely unchanging is shared by both highly traditional Muslims who argue that no part of Islamic law is contingent on interpretation and location as well as traditional liberal feminists who construe religions as unchangingly patriarchal — both views essentialize some part of religion to make their arguments for or against it.¹²

In her article, *Piercing the Veil*, Madhavi Sunder argues the problem with this construction of religion is not with religion itself but with liberalism, which places religion in the private sphere and prefers to leave it alone rather than engaging it as have many Muslims.¹³ By not engaging in the internal debates about religion in liberal societies and ignoring the debates in non-liberal societies, liberals maintain the fiction that the interiority of religion is a fixed landscape. By not sufficiently accounting for the changes in religion that would become apparent through such engagement and by casting the debates as being about civil liberty issues such as freedom of religion or separation

11 See, e.g., Susan Moller Okin, *Feminism, Women’s Human Rights and Cultural Difference*, in *DECENTERING THE CENTER: PHILOSOPHY FOR A MULTICULTURAL, POSTCOLONIAL, AND FEMINIST WORLD* 26 (Uma Narayan & Sandra Harding eds., 2000). In her article, Okin seems not to appreciate that the women in the third world who are the subjects of her concern are also participants in culture and religion not just victims of it. She notes that there are feminists who are working on oppression but they are rarely internal to the society when they are their work is only seen as resistance to, but never participation in, culture or religion. See *id.* at 40-41.

12 See, e.g., *supra* note 6.

13 Madhavi Sunder, *Piercing the Veil*, 112 *YALE L. J.* 1399, 1402-05 (2003).

issues, that is, the separation of religion from the public/state, the fiction that religion's place is in the private or indeed that it keeps to such a private sphere is similarly maintained. I agree with Sunder that limiting one's view in this manner prevents one from understanding the importance of religion in the everyday public life of those living in non-liberal societies.¹⁴

Liberalism cannot do the work of explaining why women value religion except through judgments about these women as being either ignorant or having a sense of false consciousness.¹⁵ Neither of these is appealing from the point of view of many Muslim women. After centuries of interaction with the "West" and the ongoing attempts to reform "developing" societies into liberal ones, the tenaciousness of religion must be quite a puzzle. I suggest that in order to fully understand why women value religion, one must set aside liberal judgments. Muslim women's priorities and their commitments to religion ought to be considered seriously and not simply as a pre-modern remnant that will eventually fall away or be relegated to a private sphere. This is important because the reality of women's lives in Islamic societies indicates that no such development is occurring and in fact a rise in religiosity, as Olivier Roy argues, is a result of modernity and not at all a vestige of pre-modernity.¹⁶

Roy's point is underscored by a survey of Muslim women done in 2005 by The Gallup Organization. The survey revealed that Muslim women did not view themselves as particularly oppressed, that they did not feel conditioned to accept second-class status evidenced by the belief that they ought to have an unfettered right to vote, to work outside the home and to serve in the highest levels of government.¹⁷ Yet, they also did not share typically liberal feminist concerns about gender arrangements; they did not see sex issues as a priority and placed violent extremism, economic and political corruption and lack of unity among Muslim nations over concerns about the hijab, which was never even mentioned by the respondents.¹⁸ When asked to identify the best aspect of their own societies, an overwhelming majority of women cited attachment to their spiritual and moral

14 *Id.* at 1402-04.

15 *See generally* Mehta, *supra* note 4.

16 *See* OLIVIER ROY, GLOBALIZED ISLAM: THE SEARCH FOR A NEW UMMAH 148-97 (2004).

17 Dalia Mogahed, *Perspectives of Women in the Muslim World*, GALLUP WORLD POLL SPECIAL REPORT: THE MUSLIM WORLD 1 (2006), available at http://media.gallup.com/WorldPoll/PDF/GALLUP+MUSLIM+STUDIES_Perspectives+of+Women_11.10.06_FINAL.pdf.

18 *Id.* at 3.

values.¹⁹ What is remarkable about this data is that women clearly articulate the desire for certain (liberal?) rights while valuing their own (non-liberal) religions and cultures.

Examples of this very “modern” hybrid sensibility can be found among even rural women. In an interview published in *Islamica* magazine, Mukhtar Mai, the now famous Pakistani survivor of a tribally-sanctioned gang rape, repeatedly asserts the value of her religion and its role in providing the strength to stand up for justice.²⁰ She challenges the view that Islam supported the violence done to her and discusses the way she was treated at the hands of the state. At the same time, she levels a class critique of her treatment at the hands of the state and it is clear that she considers herself to have the right to redress.²¹ Indeed, Islam is being contested but also lived in ways that are more fluid and controversial than we see in most representations or expectations.²² For instance, Muslim women in Egypt are divided in their support for secularism and their adherence to Islamic norms. The mosque movement in Egypt and the increasing number of women who are attempting to learn about Islam and live its norms faithfully are challenging and are challenged by domestic secular feminisms.²³ Yet Islamic women’s activism has taken root and is gaining ground, as Margot Badran claims:

It is important to note that Islamic feminism is the creation of women and men for whom religion is important in their daily lives and who are troubled by inequalities and injustices perpetrated in the name of religion. Islamic feminism continues to spread because it is relevant. It is engaged and enlightened. It is also controversial and unsettling.²⁴

¹⁹ *Id.* at 2.

²⁰ Fareeha Khan, *Interview with Mukhtaran Mai*, 15 ISLAMICA MAGAZINE (2006), available at <http://www.islamicamagazine.com/issue-15/interview-with-mukhtaran-mai.html>.

²¹ *See id.*

²² *See id.*

²³ *See* SABA MAHMOOD, POLITICS OF PIETY: THE ISLAMIC REVIVAL AND THE FEMINIST SUBJECT 2-6, 15-16 (2005).

²⁴ Margot Badran, *Islamic Feminism Revisited*, COUNTERCURRENTS.ORG, Feb. 10, 2006, <http://www.countercurrents.org/gen-badran100206.htm>. While I would be wary of collapsing all Muslim women’s activism under the rubric of “feminism,” which has historical and philosophical particularities that may not translate to certain Muslim women’s activism, this quote can be read broadly to apply to all women’s gender activism except perhaps those that simply reinforce the dominant patriarchal norms. *See also* Elizabeth Warnock Fernea, *Islamic Feminism Finds a Different Voice: The Muslim Women’s Movement is Discovering its Roots in Islam, Not in Imitating Western Feminists*, 77 FOREIGN SERVICE JOURNAL 24, 29-31 (2000) (arguing that by women giving Koranic texts new interpretations, women are gaining greater gender justice). *But cf.* Val Moghadam, *Islamic Feminism and Its Discontents: Notes on a Debate*, MIDDLE EAST FORUM, available at http://www.iran-bulletin.org/women/Islamic_feminism_IB.html (last visited Mar. 5, 2008) (arguing what has been achieved

The fact that women continue to value religion and culture cannot be reductively explained as a product of ignorance or brainwashing.²⁵ These examples do not signify a simple story of oppression and resistance or blind adherence to religion, but a complex reality in which religion plays a much more multifaceted role, where it coexists with the demand for rights that overlap with liberalism but may not come from a liberal understanding of self or society. To acknowledge this alternative view is not to say that Muslim women do not live in systemic patriarchy, that Islam is not patriarchal, and that gender subordination sometimes reflected in “traditional” arrangements ought not to be challenged. Rather, it is to say that opinions about how it is challenged, by whom, and what priorities are established can legitimately differ among women and are mediated by local contexts. It is also to acknowledge that Islam is not fixed and can be interpreted in a number of ways and that religion must be engaged by feminists if they seriously seek to support the full liberation and flourishing of women in the Muslim world.²⁶

III. REPRESENTING MUSLIM WOMEN: REAPING ESTRANGEMENT FROM DISEMPOWERMENT

The co-presence of these seemingly conflicting commitments to religion and to rights may tempt scholars to reconcile them through liberal notions of progress towards modernity. Certainly, that has been the dominant interpretation. However, to do so misapprehends the project of women’s groups in Islamic societies, which do not follow such a linear temporal progression from religion to “liberty from religion.” Muslim women who want both the vote and the hijab do not see a conflict between the two or the desire for the latter as less “evolved.” However, this double consciousness is little understood by well-intentioned women’s groups in the West.

Partnerships that are based on such different visions of women’s flourishing, then may lead to estrangement and disempowerment for women’s organization in the Muslim societies. Yet, Muslim women’s groups have themselves sometimes strategically deployed constructions of victimization expected by liberals to garner much needed support. In other words, Muslim women’s organizations may

through the interpretation of Islamic texts is limited in content and consequence, because interpretation of the texts is ultimately left to the ruling religious elites, which may dismiss the feminist interpretations).

25 See MAHMOOD, *supra* note 23, at 1-2.

26 See Sunder, *supra* note 13, at 1433-34, 1456-57, 1463.

cater to the expectation of victimization externally while internally focusing on the strength of local women. This suggests that they do not see themselves as victims but as agents in shaping their realities. On the other hand, the exportation of a victim narrative can give rise to a one-dimensional view on the part of Western partner organizations that is then disseminated within Western societies. A case that illustrates the pitfalls of such coalitional work based on differing views of the “victim” would be the RAWA’s experience with the FMF. While both sides came together in good faith, their interaction highlights the difficulties that attend transnational projects.

RAWA has become very well known in the recent decade for its work to advance women’s rights and in bringing attention to the atrocities committed by the warring factions in Afghanistan. During the 1980s, RAWA’s main strategy to gain global support for its projects was disseminating visual representations of the oppression of Afghan women.²⁷ These images were exported to the world, printed in newspapers and shown on television, as part of a campaign to raise awareness and get monetary support. While it is clear that Afghan women were indeed living under brutal conditions, these representations standing alone deeply reinscribed the prevailing stereotype of powerlessness and victimization that the world had come to accept about most Muslim women. The strategy worked because it shocked most viewers and gave first world feminists a transnational cause with a palpable urgency to support.

While RAWA exported an account of oppression externally, its internal strategy was markedly different. They published a newsletter *Payam-e-Zan* that contained editorials and commentary and inspirational materials encouraging women to redress their own problems. RAWA built schools and hospitals and instituted social programs combating fundamentalism even as they were pushed to the borders of Pakistan during a decade of increasing violence within the state. Thus, on one hand, RAWA was attempting to help women in Afghanistan through reinforcing a self-perception of empowerment and self-help, a self-perception that RAWA shared as an organization. While on the other hand, the external picture that brought them support from the West was one of abject powerlessness and brutal oppression.²⁸

27 See Amy Farrell & Patrice McDermott, *Claiming Afghan Women: The Challenge of Human Rights Discourse for Transnational Feminism*, in JUST ADVOCACY? WOMEN’S HUMAN RIGHTS, TRANSNATIONAL FEMINISMS, AND THE POLITICS OF REPRESENTATION 33, 37-39 (Wendy S. Hesford & Wendy Kozol eds., 2005).

28 See *id.* at 39-40.

In 1997, RAWA partnered with the FMF in its *Campaign to End Gender Apartheid*. This was seen as a positive development by RAWA. Undoubtedly, it benefited FMF and the women's movement in the United States; some scholars have suggested that such a project reinvigorated the lagging support for feminist organizations by domestic women. Part of the reason for that decrease in domestic support is the achievement of substantial legal and social victories for feminists leading to greater access to education and the workplace and, therefore, greater economic freedom. There was no urgency to the other battles being fought in the United States, but helpless "sisters" in other countries were languishing in their cultural prisons. Where that prison became a torture chamber like in Afghanistan, domestic United States feminists quickly mobilized on their behalf, just as many citizens mobilize around disasters. Unfortunately, FMF's own representations of Afghan women soon put them at odds with RAWA. FMF used the same strategy of showing powerlessness and oppression to gain public support but without adequately recognizing or acknowledging the long and hard-fought struggle that RAWA had engaged in, which presented quite the opposite picture.²⁹

For instance, the shocking video clip of the burqa clad woman being executed that was filmed by RAWA in the late 1990s, but did not appear in Western media until after 9/11, was shown over and over again to underscore the helplessness of Afghan women. Sonia Kolhatkar, the vice president of the Afghan Women's Mission, underscores this point:

Far more interested in portraying Afghan women as mute creatures covered from head to toe, the Feminist Majority aggressively promotes itself and its [sic] campaign by selling small squares of mesh cloth, similar to the mesh through which Afghan women can look outside when wearing the traditional Afghan burqa. The post card on which the swatch of mesh is sold says, "Wear a symbol of remembrance for Afghan women," as if they are already extinct. An alternative could have been "Celebrate the Resistance of Afghan Women" with a pin of a hand folded into a fist, to acknowledge the very real struggle that Afghan women wage every day, particularly the women of the Revolutionary Association of the Women of Afghanistan (RAWA), who are at the forefront of that struggle. Interestingly enough, 50% of all proceeds go toward helping Feminist Majority in promoting their campaign on "Gender Apartheid" in Afghanistan.

On almost every image of Afghan women in the Western mainstream and even alternative media, images of shapeless blue clad forms of Afghan

29 See ZILLAH EISENSTEIN, AGAINST EMPIRE: FEMINISMS, RACISM, AND THE WEST 167 (2004).

women covered with the burqa We all know and understand the reactions which the image of the burqa brings, particularly to Western women and feminists. That horror mixed with fear and ugly fascination like knowing the site of a bloody car wreck will make you want to retch but you do it anyway. Whose purpose does this serve? How “effective” would the Feminist Majority’s campaign be if they made it known that Afghan women were actively fighting back and simply needed money and moral support, not instructions?³⁰

In a letter to *Ms. Magazine*, RAWA challenged FMF’s representation of Afghan women and accused it of being a hegemonic, corporate feminist group that failed to acknowledge the twenty-five years of work done by RAWA in Afghanistan and also to account for its support of groups like the Northern Alliance that had actively oppressed women while in power.³¹

In substantial part, these images and this representation were co-opted for political use. Indeed, just as RAWA’s representations were easily put to work to mobilize women in the United States, FMF’s advocacy and rhetoric did similar double duty by providing the Bush administration a ready source of material to justify intervention in Afghanistan. RAWA’s accusation that FMF was a collaborator with the administration was not altogether unjust: one of FMF’s achievements in its campaign was its involvement in shaping U.S. foreign policy in Afghanistan and its acquiescence to the support for the Northern Alliance by the administration. Although, the support of a misogynistic political group and the involvement in foreign policy by a partner organization angered RAWA, it is clear that RAWA’s chief resentment was the cooptation of its work and its authority to represent Afghan women.³²

Both RAWA and FMF’s representational strategies had undesired and unintended consequences and resulted in their ultimate estrangement. This interaction evidences the dangers that arise when women’s organizations from the West and South enter into a partnership based on a very narrow understanding of women’s agency and women’s flourishing. Clearly, RAWA exported the images that were “expected” from a place like Afghanistan. To turn Kolhatkar’s question around: What would have happened had RAWA begun with a campaign that highlighted the agency of Afghan women and clearly stated that they only needed monetary support? By performing the roles that liberalism assigned them, RAWA perhaps inadvertently

30 *SEE* KOLHATKAR, *SUPRA* NOTE 1.

31 *See* Farrell & McDermott, *supra* note 27, at 43.

32 *See id.* at 42-43.

reinforced the narrative of progress. It is not surprising that FMF, being a liberal feminist organization, strategically used the dominant images of victimization of Afghan women as proof of the necessity to reform the society. It is likely that RAWA's images provided the very evidence needed by the telos of a society arranged according to liberal values and was the only way to secure the liberation of millions of otherwise oppressed women.

RAWA and FMF each spoke the language of women's human rights but it seems as though neither fully comprehended each other's aims. The bitter parting of ways that resulted did not lead FMF to abandon its work on behalf of Afghan women. Rather, in the 1990s and 2000s, women's groups including FMF began to work on a number of transnational projects expanding their international scope. One of the consequences of greater engagement in transnational work was the engagement with the state and with international law as partners in exporting progress.

IV. FEMINIST ALLIANCES WITH THE STATE AND INTERNATIONAL LAW: LIBERAL IMPERATIVE TO PROGRESS AND THERAPEUTIC (COLONIAL) VIOLENCE

The FMF's alliance with RAWA was well intentioned, though perhaps, ultimately it led to estrangement. Yet, the work that FMF engaged in on the foreign policy level with the Bush administration points to another set of troubling developments in Liberal Feminist practice — partnering with Western state powers to achieve liberal feminist ends internationally³³ and eroding the sovereignty of “rogue”

33 See Feminist.com, Talking Points for Your Call, <http://www.feminist.com/violence/campaign6.html> (last visited October 7, 2008) for an explanation of talking points that are given to volunteers urged to call their state representative in support of the International Violence Against Women Act. The taking points were developed by Amnesty International and disseminated by women's groups. *Id.*

TALKING POINTS FOR YOUR CALL

- The International Violence Against Women Act (I-VAWA) *would coordinate and improve U.S. government efforts to stop the global crisis of violence against women and girls, if it becomes law.*
- Violence against women destabilizes countries and impedes economic *progress* and stability.
- Violence against women is a tremendous human rights problem around the world. It includes rape, domestic violence, acid burning, dowry deaths, “honor killings,” human trafficking, female genital cutting and more. Experts estimate that up to one in three women will be beaten, coerced into sex, or otherwise abused in their lifetimes, with rates reaching 70 percent in some countries.

states.³⁴ It is the latter which I am concerned with in this section because it is most likely to be considered a welcomed change in the international order.

Until recently, the obligations of International Human Rights law and consequences of infractions devolved to governments. Individuals and social organizations petitioned to their governments for redress but had little standing in international institutions. Increasingly, human rights instruments have begun to bypass state-level actors to give standing to internal non-governmental actors and individuals.³⁵ The rationale for this development was the number of states in the global South that either failed to protect their own citizens from abuses or were actively engaged in abuse themselves. Such states could not be relied on to report or comply with international legal obligations. Thus, it was considered necessary to give voice to those who were otherwise kept silent by their own states. Although, this sort of standing has given expression to a number of constituencies that would otherwise be at the mercy of their state, the erosion of state sovereignty in favor of more internationalism comes with costs.

- *I-VAWA is designed to give victims of violence more assistance, hold perpetrators accountable, and support new efforts to change social norms that support or condone violence.*

- *The legislation would create a five-year strategy and funding to support the rule of law and prevent and respond to violence against women in 10-20 poor to middle income countries. It will expand the U.S. Government's ability to address gender-based violence issues with foreign governments as part of its diplomatic relations.*

- *I-VAWA integrates efforts to end violence against women and girls into existing, appropriate U.S. foreign assistance programs with a special emphasis on supporting the overseas women's groups that work each day to stop violence.*

- *I-VAWA enables the U.S. Government to develop a faster and more effective response to violence against women in armed conflicts and humanitarian emergencies.*

- *Passing I-AWA is essential if the U.S. is to take a more coordinated and effective stand against violence that harms so many women and girls worldwide and will help support economic progress and stability in 10-20 poor and middle income countries. Id. (emphasis added).*

The emphasis here is clearly to enable the U.S. to take action on a state level to improve the lives of women in "10-20 poor to middle income countries." *Id.* This raises the question of what the purported "beneficiaries" of the country feel about the U.S. government's actions and the linking of foreign assistance to progress.

34 See, e.g., Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741 (2007) (describing the use of state police power to "crack down" on domestic violence perpetrators and the resulting adverse consequences born largely by the women who are their partners, including homelessness and financial immiseration).

35 See, e.g., Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 54/4, art. 2, U.N. Doc. A/RES/54/4 (Oct. 15, 1999).

First, armed with the ability to access the international arena for themselves and using the language of human rights, second-wave feminists in both the West and the South have tried to get societies that they consider particularly oppressive towards women further along in the progress towards “freedom.”³⁶ In that effort, they have partnered with organizations in the global South. As has been argued above, what women’s groups believe to be progress in the first world and what it is considered to be in the third world may not be equivalent. Aside from the basic agreements that violence against women is a bad thing, that certain rights are required for human life and dignity to be preserved, it is unclear that all constituencies agree about what initially causes the conditions in which violence occurs in a society (Western feminists often cite “culture”) or what the society ought to look like at the end of “progress.”

If we continue to promote progress along the liberal trajectory, it is quite clear that we may be supporting the end/annihilation/extinction of certain ways of life that might enrich those who live them. For some, the end of Islam, the end of any culture that does not abide by the values of liberalism, is no great loss. These illiberal religions and cultures may be “reformed” or made extinct through “forced” progress if necessary. Yet, for many women who live communal lives, made meaningful by their culture and its values, this progress cuts against their own visions of progress.

Second, a commitment to international human rights has evolved into an emerging consensus that human rights violations are grounds for military intervention. Progress through humanitarian intervention has been supported by some liberal feminists who question why such intervention has not come sooner.³⁷ Indeed, humanitarian armed intervention is increasingly seen as a necessity and not a last measure for preventing violence towards women and children; however, the devastating therapeutic violence of intervention itself is obscured and decoupled from human rights activism on behalf of third-world women. While liberal feminists largely rejected the administration’s justifications for the Iraq war, they have been vociferous about intervention in Darfur. It is an odd contradiction that armed intervention that overthrows a despot in one country is decried for causing chaos and violence while similar actions are encouraged in another as a solution to chaos and violence. It might be argued that

36 See Feminist.com, *supra* note 32.

37 See, e.g., CATHARINE MACKINNON, ARE WOMEN HUMAN?: AND OTHER INTERNATIONAL DIALOGUES 38-43 (2006).

peacekeepers can hardly be equated with an invading army. This is true, but it should be noted that the U.S. military in Iraq is hardly fighting the conventional war of invasion and peacekeepers attempting to settle conflict may be drawn into warfare, as the conflict in the former Yugoslavia evidences.³⁸ Further, there is other violence that attend intervention. In recent reports, peacekeepers deployed to war-torn areas have come under scrutiny for sexual exploitation and abuse of women and children under their care.³⁹ This is not to say that intervention is always, necessarily wrong and that it should never be undertaken on behalf of those who stand to lose their lives. I can make no such categorical judgments. However, I do suggest that the costs of intervention borne by the people that are supposed to be helped by it require greater examination.

One part of that examination must include the complicity of Western states in a global system that exempt themselves from the consequences of violating international law; that support violence in the South; and prop up regimes that are illegitimate in the eyes of their subjects. Indeed, as Zillah Eisenstein observes, “[m]any Afghan women activists wonder why U.S. women, even progressive ones . . . are more interested in ‘why Afghan men treat women like dirt’ rather than why Western male-dominated governments foster ‘misogynist religious extremism at the expense of women’s rights.’”⁴⁰

First world states’ willingness to use force in any guise is a dangerous development for women from the global South who stand to lose their lives, their children, their brothers and sisters, their mothers and fathers, and their husbands and loved ones in wars and detention camps for what might be a fantasy vision of freedom. That first world women are willing to collaborate with the very “patriarchy” that they claim to be oppressed by, deploy its weapons, and while decrying the cooptation of women’s rights rhetoric ought to be regarded as an inconsistency that demands redress.

As Amy Farrell and Patrice McDermott argue:

Whenever Americans position themselves as saviors, their rhetorical devices can then be wielded by conservative forces to legitimate whatever kind of horrific policies they choose to enact, particularly when those

38 See Michael H. Hoffman, *Peace-Enforcement Actions and Humanitarian Law: Emerging Rules for “Interventional Armed Conflict,”* 837 INTERNATIONAL REVIEW OF THE RED CROSS 193 (2000), available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/57JQCY>.

39 See *Peacekeepers Abusing Children*, BBC, May 27, 2008, <http://news.bbc.co.uk/2/hi/7420798.stm>; *Peacekeepers Sell Arms to Somalis*, BBC, May 23, 2008, <http://news.bbc.co.uk/2/hi/africa/7417435.stm>.

40 See EISENSTEIN, *supra* note 29, at 166.

policies are wielded against Arab and African countries which we “know” to be backward because we have been working to liberate them. These are powerful discursive quandaries that progressive feminist organizations in the United States face, even if their intentions are good, and even if they are run by Third World or Muslim women.⁴¹

Rather than continuing to mouth hollow pieties about “women’s rights as human rights,” it is imperative now more than ever for first world feminists to critically theorize the local and discover how their own agendas have been used to further what can only be considered imperial power dynamics in the international sphere. I suggest that liberal feminists think particularly carefully about the calls for use of international intervention to further women’s human rights, decoupled from local contexts and understood as liberal rights. Such uses of power as a means of progress resuscitate a colonial dynamic that is fraught with the peril of subjugation and violence towards the very people it seeks to liberate.

Instead, more support for local practices of human rights and liberation that are being engaged in by ordinary Muslim women and men in the global South in general might be a better way to improve lives, even if we disagree with their definitions of liberation and human flourishing. This would require us to accept these women as fully capable humans and their commitments to their religion and culture as valid expressions of “freedom.” Critical approaches that find agency in various locations and understand power to be exercised even by those who have traditionally been considered powerless gives us one avenue to do this kind of revising and expanding of our understanding of Muslim women.

The ultimate goal for such acceptance and contextualization is to prevent the narrative of progress from dictating a course of action that “pressures” illiberal societies towards liberal arrangements because that is what “we” want. Further, it calls us to take care that the “pressure” that is exerted on behalf of women’s rights does not include therapeutic violence. This is not to say that intervention will never be justified or required; it is to merely warn that intervention *in the service of Liberal progress* ought to be regarded as the first step in a resurgence of the tutelary relationship that characterized colonialism.

41 See Farrell & McDermott, *supra* note 27, at 51.

CONCLUSION: POSSIBLE FUTURE ALLIANCES

Liberal (legal) feminism as a theoretical enterprise suffers from a dubious past insofar as it encompasses and pursues progress along the lines of its liberal ancestors. Its future depends upon whether it will continue to support the same agenda along a predetermined trajectory that will lead all women to a singular end. This view admits only a singular progression in history in which the worlds of many underdeveloped dystopias have yet to arrive at the Promised Land. On the other hand, it can theorize a new vision that does not require such a judgment from the “outside.” Indeed, whether it creates a space for such alternative visions of flourishing, Muslim women and many societies in the global South are living such alternatives. There is a co-presence of all these competing views of what it means to live a good life. If liberal feminists are to understand religious Muslim women’s activism that seeks both liberal and illiberal rights, this co-presence has to be allowed to disrupt the meta-narrative of progress. In other words, the predicament for liberal feminism, which is by self-definition a theory and praxis of liberation, is whether to reconcile itself with its peculiarly anti-liberation genealogy which informs it currently (affirm liberal universalism) or radically reevaluate this ancestry to try and reformulate itself in a way that reflects a true liberation theory and praxis (takes a break from liberalism).⁴²

If liberal feminists were able to take such a break, at least from universalizing their values and goals, they might be rewarded with a greater comprehension of the motivations and values of Muslim women who insist on holding on to their religion and culture while demanding rights. As I have argued above, Muslims do indeed have similar desires but that these desires for a better life, for those who believe, include their commitment and adherence to religion and represent a very different view of human flourishing. Rather than reforming these alternative histories and visions, an approach that accepts this plurality would find a valuable and meaningful expression of human progress and liberation and impose or require no “reform,” except those undertaken voluntarily.

While I think it unnecessary to abandon second-wave feminism’s many contributions, including the understanding that women in every culture live in a gender unequal system, critical theorists can give us a more nuanced approach that reveals how even within that system,

42 See generally JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* (2006) (borrowing the idea and the term “taking a break”).

women can maneuver and exert power and make choices. It can also give us the ability to recognize similar projects undertaken by women living in Muslim societies but not mistake these as projects that are the same as our own undertaken in our contexts. Moreover, it can make obvious the complex and contested nature of the global system particularly the role of economic disparity and increasingly environmental disparity and the way in which privileged women wield power — sometimes to the benefit and sometimes to the detriment of other women. Most importantly, it can underscore how the inequality in the global system cannot be ignored when engaging state power internationally or engaging international institutions for seemingly benevolent purposes. Such critical contributions are becoming increasingly important as women seek to do transnational work in alliances with organizations across the globe. Without taking into account both the differing values of women in these locations and the nature of the international system, alliances between first and third world women may never be made on grounds that seek what is best for women in their local context and with respect to alternative visions of human flourishing. They will continue to suffer from the hegemonic, imperialistic tendencies that are part of the history and philosophy of liberalism. It is a sign of hope, then, that some strains of feminists are interrogating these tendencies and reinventing a more equal gender liberation theory.

ARTICLE

FEMINIST LEGAL THEORY IN THE CONTEXT OF INTERNATIONAL CONFLICT

By: Teresa Godwin Phelps*

Certainly one of the characteristics of third wave feminism is its internationalization and struggle to adapt some tools used successfully by second wave feminism in the United States while inventing new methods to address problems that may have been unimagined domestically. One focus has been on the war time rape of women and how it should be addressed under international law. Women have always been targeted in times of war: primarily as “spoils,” as ways of humiliating enemy men, of destroying their “honor” by violating their women. The sexual conquest of women is the universal visible symbol of victory, and few victorious armies have been immune from using it to demonstrate their superiority over the vanquished. Ancient stories about war, such as the *Iliad*, make clear that while women may not have been combatants, the horrors of war fall heavily upon them, and sexual violence against women has always been a by-product of war.¹ Thus, it was seen not as a crime, but business-as-usual in times of war. Unfortunate perhaps, but inevitable. In recent years, however, women have been targeted in even more ways. Sexual violence and oppression of women, while certainly still opportunistic, has increasingly become a technology of war with rape used as a means of ethnic cleansing and women and girls conscripted to act as wives, fulfilling sexual and housekeeping duties, to facilitate the conflict. Thus, rape in war takes at least three forms, sometimes, if not often, overlapping: 1. opportunistic, 2. practical, and 3. symbolic. In other words, in times of conflict, men rape because they can, it furthers or facilitates the conflict, and it communicates victory.

Recently, feminists and human rights activists have joined forces to change the international legal landscape so that these acts of violence against women are seen for what they are — criminal acts of violence

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1 See HOMER, THE ILIAD 81 (Bernard Knox ed., Robert Fagles trans., Penguin Books 1991) (1990) (Chryseis was offered by her father, Chryses, as a war prize to Agamemnon, supreme commander of Achaea’s armies. Chryseis was valued for her ability to reproduce).

— and suitably punished.² After centuries of silence, including near silence about rape during the Nuremberg trials and in the Geneva Conventions, with the advent of the *ad hoc* international tribunals for the former Yugoslavia, Rwanda, and the International Criminal Court (ICC), the international legal community is at last prosecuting rape as a crime.³ While feminists in general applaud this development, they differ on some issues involved and raise important questions. Should wartime rape be seen as different from rape committed in peacetime? If wartime rape is seen as different, should it be treated differently in the international tribunals? What is the relationship between the general oppression and violence towards women in most societies and the treatment of women in times of conflict? Can these two harms be severed for purposes of international trials? Should rape committed during times of armed conflict be treated as other acts of violence in conflict or is the crime categorically different and be so prosecuted?

In the pressure cooker of international tribunals, in which issues of the legitimacy and credibility of the courts themselves are at stake, feminist theories strain to accommodate competing interests. Among the tensions is the role of the international tribunals, the main purpose of which, many argue, is to try and convict the perpetrators. Is it fair or reasonable to expect them to do more than this, to operate in some larger symbolic way?

A liberal feminist approach, justifiably concerned about the legitimacy of the courts and due process rights of the accused, tends to equate wartime rape with other acts of violence against citizens in war. Any embrace of difference can buttress long-held conceptions of rape as a violation of men's honor, or even a somewhat more enlightened but still problematic view seen in the Geneva Conventions as a crime against a woman's honor.⁴ When rape is viewed as a crime involving honor, the woman's status is necessarily diminished following the rape — she is "dishonored." Insisting, however, that rape is a crime of violence just like other crimes of violence, the honor element is eliminated and a woman is no more dishonored after a rape than a man is after torture. The stigma of the crime lands where it belongs — on the perpetrator, not the victim. In practical terms, the liberal approach

2 See, e.g., Rhonda Copelon, *Surfacing Gender: Reconceptualizing Crimes Against Women in Time of War*, in *MASS RAPE: THE WAR AGAINST WOMEN IN BOSNIA-HERZEGOVINA* 197, 213-14 (Alexandra Stiglmeier ed., Marion Faber trans., University of Nebraska Press 1994).

3 See KELLY DAWN ASKIN, *WAR CRIMES AGAINST WOMEN: PROSECUTION IN INTERNATIONAL WAR CRIMES TRIBUNALS* (Martin Nijhoff Publishers 1997).

4 Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 ("[W]omen shall be especially protected against any attack on their honor, in particular, against rape, enforced prostitution, or any form of indecent assault.").

regards women victims and witnesses just like other victims and witnesses — no special treatment. The liberal feminist approach rightly recognizes that special treatment comes with great costs.

A more radical feminist approach recognizes that the use of rape in war is closely related to women's subordinate status in society.⁵ Its power as a weapon stems from the fact that women are subordinate in the patriarchal hierarchy and thus are made dependent on men's opinions and good will. If women are "dishonored" by rape, the men to whom they "belong" are also dishonored. The dishonoring of women stains the community, and in making these women no longer acceptable to men in the community, undermines the community's ability to replicate itself. It is women's subordinate status that makes rape so prevalent in war because it is more than opportunistic or a random act of violence — it is a powerful technology of war. It has historically been and continues to be a powerful way to communicate victory.⁶ This approach, I think, would also like to erase the differences while acknowledging women's present subordinate status. It looks for ways to eliminate the stigma of rape, or better, to place the stigma where it belongs — on the perpetrator, not the victim.

A *difference* approach takes into account the fact that women are essentially different from men in that they become pregnant and bear children — the children of men with whom they have had intercourse, forcible or not. This biological difference enables rape to be used as a technology of ethnic cleansing. A difference approach also allows for differences in response — a woman who has been the victim of rape may feel different about testifying than a man who has been the victim of torture. The act of rape, although in many theoretical respects is an act of violence for which the woman is in no way responsible, may be experienced as much more personal than another act of violence. As an added complication in some cases, a woman may feel attachment to a child even if its birth resulted from rape by the enemy.

One thing that emerges as we run the crime of wartime rape through the spectrum of feminist approaches is that it may be inaccurate to discuss wartime rape as if it were a single kind of act. Perhaps we need more nuanced language, and more nuanced international criminal law, to capture what we mean when we speak of an instance of rape.

I want to focus on some procedural aspects of the rape trials at the International Criminal Tribunal for the Former Yugoslavia (ICTY) to

⁵ RADHIKA COOMARARASWAMY, *Sexual Violence during Wartime*, in *LISTENING TO THE SILENCES: WOMEN AND WAR*, 53, 53-4 (Helen Durham & Tracey Gurd eds., 2005).

⁶ See generally SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* (1975).

tease out the various outcomes that can result from different approaches both to the problem and to the solutions. The willingness to identify rape and prosecute it, separately, as a crime against humanity, is one of the promising features that emerged in the ICTY and the International Criminal Tribunal for Rwanda (ICTR).⁷ At the same time, problems have come up. Perhaps this should not be surprising. Trials in general are embedded in certain structures that may be contrary to the methodologies and goals of feminism: the victim is a means by which the perpetrator may be punished; trials are adversarial, pitting individual against individual, rights against competing rights; trials buttress individual rights rather than community cohesion or reconciliation. So, there is a paradox: the prosecution of rape is a good thing but the execution of the prosecutions can be problematic. A critical goal for feminists and human rights activists is to maximize the benefits while minimizing the harm to women. It also must be recognized that all legal actors communicate important cultural information — the way the police, the prosecutor, or the judge handles rape says something and what is communicated helps define how a culture sees women, how women behave, and how women see themselves. Thus, the international tribunals do not do “justice-work” in a vacuum — they respond to and in turn affect the culture.

One of the harms to women that has emerged in the international tribunals is the inscribing of the woman/victim’s story on outworn yet still powerful patriarchal narratives. In both the Čelebići Camp trial⁸ and the Furundzija trial at the ICTY,⁹ we witnessed the use of patriarchal narratives all too familiar from centuries of rape trials — the lying, undependable woman rape “victim,” and the crazy woman rape victim. In the Furundzija trial, which took place in 1997-98, for example, the defense moved to strike all of Witness A’s testimony because she had been diagnosed with post traumatic stress syndrome — thus her memory was too flawed to make her testimony credible.¹⁰

7 See *Prosecutor v. Zelenović*, Case No. IT-96-23/2-A, Judgment on Sentencing Appeal, ¶ 4 (Oct. 31, 2007); *Prosecutor v. Kunarac et al.*, Case No. IT-96-23 & IT-96-23/1, Judgment, ¶¶ 2-3, 6-9 (June 12, 2002); *Prosecutor v. Delalic et al.*, Case No. IT-96-21-A, Judgment, ¶¶ 488, 500 (Feb. 20, 2001).

8 *Delalic*, Case No. IT-96-21-A, Judgment, ¶¶ 488, 500 (marking the first conviction of rape as torture and setting an important precedent for holding a superior responsible for rapes committed by those under his authority or control. The Defense argued that because the witnesses’ testimonies contained some inconsistencies, there was insufficient evidence to convict. The Trial Chamber rejected this argument.).

9 *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment (Dec. 10, 1998), available at <http://www.un.org/icty/furundzija/trialc2/judgement/index.htm>.

10 *Id.* at ¶¶ 91-92, 94-95, 98, 102-03, 106.

The defense also wanted disclosure of all her counseling records.¹¹ The Trial Chamber did not grant these motions, but it did issue a troubling and ambiguous statement that evidence from the counseling was clearly relevant and should have been disclosed to the defense:

Witness A is the survivor of deeply traumatising events, part of which form the subject matter of the charges against the accused. Her testimony has been pivotal to the Prosecution's case. In the course of the proceedings leading up to and including the trial, it has been obvious that she received either counseling or treatment as a result of the events which she endured. The accused's defence has been conducted on the basis that Witness A's memory was flawed. Any evidence relating to the medical, psychiatric or psychological treatment or counseling that this witness may have received is therefore clearly relevant and should have been disclosed to the Defence.¹²

The tragedy for Witness A, who had dared both to submit to counseling and to testify at a trial far away from her home, was that her story, what happened to her, became elided by the competitive playing field of the trial. Therefore, something meant to benefit her, counseling, was ruptured from context and became contested trial "material."

Anton Furundzija was found guilty and sentenced in 1998 to ten years, both of which withstood appeal.¹³ That outcome is certainly a victory for the international community of women — for women like me. But, for Witness A, the unabashed victory is less certain. Punishment serves as a kind of acknowledgment of what befell her. But she had to navigate the rocky shoals of accusations of lying and craziness to get there. In a final stroke of irony, Furundzija was granted early release from a Finnish prison on August 17, 2004.¹⁴ His application for early release was granted by Theodor Meron, President of the ICTY, upon application from the government of Finland.¹⁵ In issuing the grant, Meron said "Furundzija has accepted the judgment he received and has expressed remorse for the suffering of victims."¹⁶ This acceptance of Furundzija's remorse seemed to overlook significant

¹¹ *Id.* at ¶¶ 23, 26, 28.

¹² *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment, ¶ 18 (July 16, 1998), available at [http://sim.law.uu.nl/sim/caselaw/tribunalen.nsf/41bcf2c89e69d10bc12571b500329d64/965c4bb5a8788fecc12571fe004be5b5/\\$FILE/Furundzija%20TCD%2016-07-1998.pdf](http://sim.law.uu.nl/sim/caselaw/tribunalen.nsf/41bcf2c89e69d10bc12571b500329d64/965c4bb5a8788fecc12571fe004be5b5/$FILE/Furundzija%20TCD%2016-07-1998.pdf).

¹³ *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Trial Judgment at ¶ 270 (Dec. 10, 1998), available at <http://www.unhcr.org/refworld/docid/40276a8a4.html>; *Prosecutor v. Furundzija*, Case No. IT-95-17/1-A, Appeal Judgment (July 21, 2000), available at <http://www.unhcr.org/refworld/docid/402768fc4.html>.

¹⁴ *Prosecutor v. Furundzija*, Case No. IT-95-17/1, Order of the President on the Application for the Early Release of Anto Furundzija, ¶ 4 (July 29, 2004), available at <http://www.icty.org/x/cases/furundzija/tord/en/040729.htm>.

¹⁵ *Id.*

¹⁶ *Id.*

allegations that came out during the trial: that while Witness A was being sexually assaulted, Furundzija interrogated Witness A about her children, and issued threats against them. Torture and rape were used to extract information from her about her family, her connection to the Bosnian army, and her relationship with Croatian soldiers.

Witness A did indeed suffer deeply traumatizing events as have many, many victims during conflict — men and women, rape victims and other torture victims. As a result she received psychological counseling and had trouble sleeping. “Understandably, she ‘did not wish to think about these events and suppressed them.’” Beyond the inevitable trauma, rape victims, for a variety of cultural, social, and religious reasons, often blame themselves, saying “I was in the wrong place, I should have fought harder, I should have” This self-blame even occurs when women, like Witness A, are prisoners in a conflict. It is, of course, not rational. However, until the patriarchal culture is so reformed that rape is seen not as *sui generis* but as any other violent crime, some women will continue to blame themselves for rape. That such sexual shame has been traditionally heaped upon women is a sad historical truth, one on which combatants rely when using rape to achieve military ends. It should not also be one of which the defense may reap benefits in a criminal trial.

In a much more recent development, Dragan Zelenović (Foča trial) pled guilty, on January 17, 2007, to a horrendous series of rapes that took place over several months, in at least four different locations, with multiple victims.¹⁷ His was the first guilty plea in the massive rapes that occurred in Foča.¹⁸ He was found guilty of personally committing nine rapes, eight of which qualify as both torture and rape, among other things.¹⁹ In one case, he was an aider of a gang rape “by at least ten soldiers, which was so violent that the victim lost consciousness.”²⁰ He received a fifteen-year sentence. During the proceedings his defense counsel had an expert testify about the “benefit” he had done to his victims by pleading guilty by sparing them the psychological damage that would have occurred had they had to travel to the Hague to testify in a trial.²¹ On appeal of the sentence, the defense argued that the sentence should have been mitigated

17 *Prosecutor v. Zelenović*, Case No. IT-96-23/2, Judgment on Sentencing Appeal, ¶ 5 (October 31, 2007).

18 *Id.* at ¶ 13.

19 *Id.* at ¶ 5.

20 *Id.*

21 *Id.* at ¶ 13.

because of this benefit and that the Trial Chamber did not give proper weight to his admission of guilt.²²

The Appeals Chamber wrote in its Judgement:

In his Reply Brief, the Appellant restates his views on the weight that should be given to his guilty plea and submits that ‘precisely because of the nature of the crime the guilty plea has special importance in terms that victims will be relieved of the obligation to testify’. . . . He further argues that the Trial Chamber did not attribute adequate importance to the Expert Report relating to the psychological benefit for the victims from their non-appearance before the Court and that this should be given more weight in the present case than in other cases where an accused pleaded guilty since ‘it needs to be particularly viewed in the light of the nature of the emotional sufferings that victims of the rape would experience when testifying’. . . . The parties agree on the fact that the guilty plea and the subsequent relieving effect on victims who will not have to testify before the International Tribunal have been considered as a mitigating factor by the Trial Chamber in the Sentencing Judgement.”²³

The Appeals Chamber further wrote that these factors were given “significant weight.”

Nearly twenty years ago, Carol Smart described a rape trial as “Kafkaesque.”²⁴ Her point was that a woman who has experienced violence, terror, and humiliation is treated as a bystander to events she willed on herself and she is seen as seeking revenge: “It [the rape trial] constructs a category of Woman as if it was a unity. The individual woman who has been raped is subsumed into this single category of Woman which is known to be capricious and mendacious.”²⁵ (*Feminism and the Power of Law*, 34-43). In some ways, the rape trials at the ICTY have out-Kafka-ed Kafka. While struggling not to enscribe “difference” on rape victims, the actors at the ICTY ignore the consequences of their decisions. The treatment of Witness A in the Furundzija trial, in which her testimony was challenged in stereotypical ways traditionally used in rape trials as opposed to male victims of torture, in which her confidences to a counselor were seen as relevant to the defense and thus misappropriated as trial material, had to serve to frighten and discourage future testimony from rape victims. Thus, frightened and discouraged, the Foča victims did indeed “benefit” from Zelenović’s guilty plea. Who would want to walk in Witness A’s footsteps at the Hague? The worse someone like Furundzija or Zelenović treats his

22 *Id.* at ¶ 12.

23 *Id.* at ¶¶ 15, 17.

24 CAROL SMART, *FEMINISM AND THE POWER OF LAW* 34 (Maureen Cain & Carol Smart eds., Routledge 1989).

25 *Id.* at 34-43.

victims, the more traumatized they are, the less likely they are to be believed if they dare to testify, and the more traumatizing it will be for them to testify. Thus, the benefit of a guilty plea for the victims serves to mitigate the perpetrator's sentence. The more credence the Trial Chambers give to this kind of Kafkaesque reasoning, the less beneficial are the rape trials for women.

So, what is to be done? First, the international legal community should not separate wartime rape from the general context of women's oppression and consequent special vulnerabilities. It is precisely this special vulnerability that makes rape such a powerful technology of war. The Trial Chamber should take cognizance of this connection and not allow the trial process to provide a venue in which women's special vulnerability may be further used against them. Second, while some of the international tribunals are somewhat isolated geographically by their presence in the Hague, they should not operate as if they were isolated from the larger cultural context in which these crimes emerge. They are part of and important actors in a cultural context — past, present, and future — concerning women. The tribunals should be backward looking — that is, taking into account the condition of women in the country in which the crime occurred. This context shapes the ways in which the rape victims should be protected and treated. Though acting in the present, the tribunals can be more transformative concerning the future. While rape victims need special protections because of the past, because of their oppression and consequent special vulnerabilities, the cultural reasons for those special vulnerabilities should not be reinforced by the tribunals. The tribunals, in all their acts and pronouncements, communicate a potent message about women and wartime rape. While the very act of prosecuting wartime rape communicates a critical part of the message, some of the tribunals' pronouncements undercut the progress.

The meaning of rape and what it signifies must change. The meaning of rape is currently on a continuum with rape as a crime of honor, resulting in dishonor, something to be silent about and ashamed of, on one end of the continuum. On the other end is the meaning desired by feminists, that rape be seen as a crime of violence that is treated as any other crime of violence, resulting neither in shame nor dishonor for the victim. Unfortunately, we are not there yet, and the international tribunals will inevitably play an important role in transforming the meaning of rape, thereby ultimately changing its force in war.

ARTICLE

CREATING LAW AND POLICY WITH WOMEN'S VOICES: FEMINISM IN ACTION¹

By: Alicia C. Carra

Many different international organizations, politicians, and lawyers have tried to address the oppression that women face by promoting the rule of law through creating policies and drafting legislative reforms.² Yet, until recently, most of the people drafting conventions and legislation to promote women's rights were powerful, educated, and politically-connected men. In the last few decades, the United Nations and its member nations have increased their focus on women's rights. With the Beijing women's conference³ and the conferences following it,⁴ women are starting to have more influence on the international policies and laws that are applied to them, laws and policies often drafted by others to "protect" women. After years of struggle,⁵ women's leadership and participation led to the creation and reauthorization of the Violence Against Women Act (VAWA).⁶

1 The first draft of this paper was written for a class at the University of Michigan Law School in the Fall of 2006; I owe many thanks to Professors MacKinnon and Chinkin, Ngan Tran, Leslye Orloff and the staff of Legal Momentum, and Khashayar Ghashghai for their input and support for this work.

2 See Alexandra Abound, *The Rule of Law Provides Foundation for Democracy*, Jan. 18, 2006, <http://www.america.gov/st/washfile-english/2006/January/20060118165638maduobbA8.491153e-02.html> (The U.S. Department of State defines the rule of law as: "The rule of law is a fundamental component of democratic society and is defined broadly as the principle that all members of society — both citizens and —rulers — are bound by a set of clearly defined and universally accepted laws.").

3 The Fourth World Conference on Women, Beijing, China, Sept. 4-5, 1995. This conference was preceded by three other conferences; however, the outcome of this conference focused on "empowerment" and included even more women than previous conferences from around the world. For more information see <http://www.un.org/womenwatch/daw/Beijing/platform/>.

4 See generally, U.N. Department of Economic and Social Affairs, Division for the Advancement of Women, *Women 2000: Gender Equality, Development and Peace for the Twenty-First Century* [hereinafter "Beijing +5"], New York, June 5-9, 2000, available at <http://www.un.org/womenwatch/daw/followup/beijing+5.htm>; U.N. Economic Commission for Africa, *Beijing+10 in Africa* [hereinafter "Beijing +10"], Oct. 6-14, 2004, available at <http://www.uneca.org/beijingplus10/> (last visited Mar. 30, 2009).

5 Congressional hearings discussing issues later addressed by the Violence Against Women Act occurred as early as 1990. See History of VAWA, Faith Trust Institute, at 1, available at <http://www.ncdsv.org/images/HistoryofVAWA.pdf> (last visited Mar. 20, 2009).

6 Violence Against Women Act of 1994 (VAWA 1994), Pub. L. No. 103-322, 108 Stat. 1796, reauthorized in 2000 as Victims of Violence and Trafficking Protection Act of 2000 (VAWA 2000), Pub. L. No. 106-386, 114 Stat. § 1464, reauthorized in 2005 as part of the Department of Justice Appropriations Act (VAWA 2005), Pub. L. No. 109-108, § 631, 119

The rise of women's participation in the drafting of declarations and conventions addressing discrimination against women has begun to address the power imbalance in the history of who creates legal instruments and what those legal instruments do. Such participation is the first step in applying an empowerment/sustainable development model to the creation of rule of law instruments that promote women's human rights. This is a model adapted both from principles used in crisis lines to work with survivors of gender-based violence and from the concept of 'sustainable development' when applied to the creation of laws and policies promoting women's rights.

Who sits at the table when problems in a society are evaluated? Who decides which laws or policy initiatives will effectively respond to the problems that have been identified? How are those instruments or programs developed? What is the goal of those instruments? Are they based on protection or empowerment? Who has the ability to enforce the laws, treaties, or policies responding to societal problems? Having women's human rights addressed in legal instruments and policies has been a huge step forward. Now that there is a growing acknowledgement in international law of the need to address women's rights in any system of laws, we must evaluate how those laws work, and who decides what those laws should be. If we want to create laws and legal systems that promote equality and also redress past oppression and violence, we have to ask the same questions of communities that we ask of individual survivors of domestic violence and sexual assault: what would you like to happen, and how would you like what you propose to become reality?

Basis for the Framework

World Health Organization (WHO) data shows that "violence against women is widespread;" women around the world are the survivors of violence.⁷ Applying a rubric that is designed to empower survivors of violence is therefore vital when drafting laws, conventions, and policies to respond to the violence and discrimination women face internationally and domestically. Crisis lines and response teams have used this theory in responding to survivors of domestic violence and sexual assault as the best way to truly help each

Stat. 2290, 2344 (2005) (codified in scattered sections of the United States Code including 8, 16, 18, 28, and 42.).

⁷ World Health Organization, *WHO Multi-country Study on Women's Health and Domestic Violence Against Women: Initial Results on Prevalence, Health Outcomes and Women's Responses*, http://www.who.int/gender/violence/who_multicountry_study/en/index.html (last visited Feb. 28, 2009).

survivor do the right thing for herself.⁸ ‘Empowerment’ in a crisis line setting means ensuring that survivors have a chance to control their own destiny.⁹ It is not about protecting survivors; it is about recognizing the rights of survivors to decide what happens next.

Sustainable Development Defined

Common use of the phrase “sustainable development” comes from the 1987 Brundtland Report to the United Nations:¹⁰

Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs.¹¹

This means that development in a given community is steered by that community while they can evaluate all the internal and external factors that affect, and may affect, that community. Since the concept was first created in the 1980’s, it has been expanded by the UN and some US based agencies from a focus on environmental concerns to encompass human and community development.¹² It can be described as a form of empowerment.¹³ The concept of empowerment also underlies the popular framework for crisis response agencies supporting survivors of gender based violence in the United States.¹⁴

8 Alice Twining, *Beyond Victim Blaming: Feminist Therapy and Battered Women*, IN OUR VISION (Virginians Against Domestic Violence) at 1, 4 (1991); Loretta M. Frederick, Effective Advocacy on Behalf of Battered Women, available at http://data.ipharos.com/bwjp/documents/effective_advocacy.pdf

9 Twining, *supra* note 8; Frederick, *supra* note 8.

10 World Comm’n on Env’t and Dev., *Our Common Future*, U.N. Doc. A/42/427 (G.H. Brundtland ed., 1987), available at <http://www.un-documents.net/wced-ocf.htm> [hereinafter *Our Common Future*]. There was an earlier use of the term in 1980 by the International Union for the Conservation of Nature and Natural Resources (IUCN). See International Union for the Conservation of Nature and Natural Resources, *World Conservation Strategy, Living Resource Conservation for Sustainable Development* (1980).

11 *Our Common Future*, *supra* note 10, at 43.

12 See U.N. Dep’t of Econ. & Soc. Affairs, Div. for Sustainable Dev., <http://www.un.org/esa/sustdev/index.html> (last visited Mar. 20, 2009); USAID: PROGRAM DEVELOPMENT AND STRATEGIC PLANNING, PROGRAM DATA SHEET 940-001, available at http://www.usaid.gov/pubs/cbj2003/cent_prog/egat/940-001.html (USAID/Peace Corps Small Project Assistance (SPA) program as means of promoting community participation and training of host country nationals in technical skills for long term development describing “sustainable development,” also paralleled to “self-help”).

13 U.S. Peace Corps, <http://www.peacecorps.gov> (last visited Mar. 10, 2009).

14 Safe House Center Mission Statement and Guiding Principles, <http://www.safehousecenter.org/index-additionalinfo.html> (last visited Mar. 10, 2009); Sexual Assault Prevention and Awareness Center (SAPAC) Mission Statement and Vision, <http://www.umich.edu/~sapac/> (last visited Mar. 10, 2009).

Crisis Line Model

There is an established list of actions a crisis line operator follows for every crisis call in order to ensure that empathy is exercised and a survivor finds her own plan for her future:

1. Assess for Danger
 - a. Is there an immediate threat to safety that needs to be addressed before discussing anything else?
2. Use Empathy
 - a. Listen and reflect a survivor's feeling back to her.
3. Crisis Intervention
 - a. Walk through a survivor's specific environment and thoughts.
4. Problem Solving
 - a. Asking what a survivor wants to happen and how they think they want to get to that end.

*SAPAC*¹⁵

All of these steps are in response to what the survivor says and wants to happen, and they can take a few seconds or an hour. The survivor is in control, and the professional on the other end of the line is responding to her and supporting her as she travels through the process.¹⁶ This set of interactions is in place to ensure that a survivor is in charge of the process, and that whatever happens is the result of the choices she makes, even though that may mean she chooses to return to her abuser.¹⁷ In addition, this protocol is also in place to ensure that anything done will more likely work for the survivor because it evolves from the survivor's ideas of what will work in her world and not the crisis line worker's idea of what she should do.¹⁸ This process respects an individual's right to make her own decisions, and it also respects her own unparalleled expertise on the details of her own life and future. A survivor, not an outsider on the crisis line, is the best person to try to anticipate what might happen after any actions taken and what she needs to feel safe.

Empowerment

"Empowerment" has become something of a buzz word in the non-profit/nongovernmental organization world. However, when used by crisis response teams in gender-based violence cases there is a specific protocol that is applied to assisting survivors. This gender-based

15 LaTresa Wiley, *SAPAC 2000-01 Crisis Line Manual*, SEXUAL ASSAULT PREVENTION AND AWARENESS CENTER, (U. Mich., 2000).

16 *Id.*

17 Although men are also survivors of violence, in this paper I will use the female pronoun because the majority of survivors are women and the focus of this paper is on laws and policies for women by women.

18 Wiley, *supra* note 15, at 13.

violence response was designed to empower survivors to make their own choices and to cope in their own way with the discrimination and violence they faced and often still face. The theory behind this process is the exercise of empathy.¹⁹ In this context, “empathy is a tool to help individuals help themselves.”²⁰ It requires that the professional refrain from instant analysis, from applying the professional’s own feelings and biases, from passing a judgment, and from focusing on the professional’s own opinions regarding what a caller is experiencing and has experienced.²¹ The responding professional listens, respects the survivor who has contacted them, and supports the survivor while she decides first what happens next, and then how she is going to make that happen.²²

Empathy also means not giving advice or sympathy.²³ It requires the crisis line operator to respect and reflect back the feelings and opinions of the survivor as she works through her feelings and also moves forward to deal with what she has been through and what she would like to happen next.²⁴

This system prevents “saving” survivors and instead ensures they are empowered to solve their own problems. Playing rescuer only reinforces a sense of helplessness in survivors.²⁵ Early international law addressing the oppression of women (and many other traditionally oppressed groups) was framed in this same rescuer role, using protective language and “granting” often unenforceable rights.²⁶ Although well-intentioned, the problem is that there is a difference between having been granted a right by others, implying it can be taken away and was not one’s own originally, and gaining legal recourse to exercise rights that are inherent.²⁷ Empathy and empowerment in a process designed to be under the control of survivors ensures that the results of that process address a survivor’s real needs in a way she is able to implement. She is in control and decides what she wants to and can do to assert her rights. Empathy, sustainable development, and empowerment ensure that women are

19 *SAPAC Volunteer Manual, Empowerment in the 21st Century*, SEXUAL ASSAULT PREVENTION AND AWARENESS CENTER (U. Mich. 1999).

20 *Id.* at sec. IV.

21 *Id.* at sec. IV.

22 Wiley, *supra* note 15, at 1-5.

23 *Id.* at sec. IV.

24 *Id.*

25 *Id.*

26 MAGGIE BLACK, *THE NO-NONSENSE GUIDE TO INTERNATIONAL DEVELOPMENT* 123-25 (2002).

27 *Id.*

supported as they claim their right of equality in their own way, rather than being granted something by others.

Sustainable Development Process

The process of sustainable empowerment envisions a shift in power and control from educated political elites to the large numbers of women actually experiencing oppression. It involves trusting that women are capable beings and have a right to choose their own destiny. The international women's movement has begun this shift, through conferences such as Beijing, involving more and more women in the bodies that create international law and policies. However, more is needed than involvement; true empowerment, and hence sustainable women's rights development, also requires that women are able to design and put into practice procedures to ensure they can actually gain access to and exercise their rights. They need to be able to design procedures to meet their needs, needs on which they, not academics, lawyers, or politicians, are the experts.

The role in this process for lawyers is analogous to the role of trained respondents to survivors of gender based violence: it is a support role. The lawyers who are a part of the process can serve as a resource for women as they create the actual law. They can use empathy and respect as a crisis line operator would. They can also provide information and resources to aid communities of women in crafting laws that can function within the existing international law framework, while still shifting the power within that framework.

Transparency

Part of support, empathy, and empowerment is transparency regarding the ideologies that lawyers and politicians represent in participating in the process. Support does not mean ignoring one's own viewpoint, within reason. A gender-based violence responder supports and respects a survivor's ability to control her own destiny, and does not impose their own beliefs.²⁸ However, the responder also represents the idea that women have the right to make their own decisions, and that gender-based violence is always wrong.²⁹ Although a responder supports a survivor in coming to her own solutions and processing how she feels, part of the responder's work is also to explain and state her/his stance on violence against women and women's rights.³⁰

²⁸ Wiley, *supra* note 15, at 35.

²⁹ *Id.*

³⁰ *Id.*

This is necessary because survivors may have internalized some form of societal misogyny and do not understand that gender-based violence is always wrong and that no one deserves to be abused or assaulted. A responder can disagree if the survivor has internalized misogyny and makes statements of misogyny. A responder can also explain the dynamics of sexism and gender-based violence, and in particular, the responder can stress that no one, ever, deserves violence. An operator can refuse to support any act of violence or any acts that would harm a survivor or others.³¹ Transparency on these issues is a sign of respect for survivors, who have a right to know the position from which someone working with them and supporting them comes. It is a sign of respect that operators and survivors are working together and that survivors are not expected to blindly trust others or be “guided.”

Lawyers working with women in drafting laws would also be expected to be transparent regarding their beliefs and motives. Again, this does not mean “rescuing” others or imposing outside solutions. It means openly adding a voice to the conversation.

APPLICATION TO WOMEN’S HUMAN RIGHTS LAW

These three concepts, empowerment, sustainable development, and transparency, can be combined to form a method for creating and evaluating law addressing women’s needs. Empowerment translates into the process that ensures that the law developed for and by women can be applied in a way that gives women the ability to implement it. Empowerment becomes sustainable because the most informed people to evaluate the oppression women face in any specific environment are the women who are themselves in that environment. They are the most likely to know how to address oppression women face in that environment in a way that would work for themselves. They are also often the most interested parties in ensuring that a law redressing women’s oppression is implemented. To create law, or promote the rule of law, in a way that respects and empowers women, the process must be transparent and attempt to build consensus among women of diverse background, including women most affected by the proposed rule of law change. This is not necessarily a majority rule or rules imposed by those in power; it must be a process that empowers instead of dominates. Therefore, the roots of this process are in consensus models of creation rather than majority rule.

The concept of sustainable development, in addition to empowerment and transparency, is what ensures that the process

31 *Id.*

cannot be subverted in a way that could harm women in the affected community in the long run. For example, a powerful faction might dominate the process and decide that in order to address a rise in random acts of violence against women, a curfew should be implemented for women only. A powerful enough group might occasionally be able to dominate the process and promote this kind of solution. Throughout the process, ideas must be tested against sustainable development ideas, for example:

- What will this change in the long term?
- Is this a workable solution for all women?
- What kind of impact will this have on our community versus others?

Through this testing process, ideas that could cause harm to various groups of women, rather than help, can be weeded out.

Although the process of creating law should be composed of women who will be addressed by that law, outsiders do not have to be excluded. Similar to the experts in environmental sustainable development and crisis line responders focusing on empowerment, there are many ways in which outsiders and professionals can support the process. Outsiders can provide information, expertise, and support throughout the process. Of particular use would be lawyers and public policy professionals who can ensure that legal drafting is in line with legal standards and who can provide examples of what other communities have done and what has happened when a given law or concept was applied.

Professionals, from either within or outside of community, can support the process by following steps similar to those followed by crisis line responders. The format provided above for crisis line workers can be adapted to the group drafting process for a community meeting of women who want to draft a law or policy addressing oppression:

1. Assess for Danger becomes Ripeness: Is this process appropriate now or is a physical intervention needed for safety before even addressing a document or policy? Is this a time and place where an adequate enough representation of affected populations can assemble?
2. Use Empathy stays the same: How does the community feel about the oppression women are facing and how do they feel about their community?
3. Crisis Intervention becomes Problem Discussion and Selection: What issues would the group like to address and how do those issues play out within the community?
4. Problem Solving is expanded into Problem Solving and Drafting: How does the group want to address these issues? How do they

think each of these ideas would play out? How would they like to implement their ideas? Which method do they choose?

These stages retain the ideas behind the progression for a crisis intervention meant to empower a single survivor but may now be used by a group. Using this process to create laws or policies to promote women's rights will help ensure that whatever is created addresses the real needs of women and does so in a way that women actually want to happen. It also ensures that any steps taken are under the control of women themselves. The questions and procedures of the crisis line model can thus be applied to the creation of laws and policies which affect women as a form of analysis for their applicability to real women and to evaluate whether they truly empower women or reinforce the power of others to protect/rule women.

DEVELOPMENT OF SUSTAINABLE AND EMPOWERING LAWS AND POLICIES FOR WOMEN

Beijing

Beijing was the site of the fourth World Conference on Women in 1995.³² The goal of that conference was to adopt a "Platform for Action," and in doing so, to discuss issues women face and to raise global awareness of those issues.³³ This conference gave women the chance to get together and discuss some of what they face and how they feel. They also had the chance to abstractly discuss what they would like to happen and to draft a declaration.³⁴ It was also a chance for women from around the world to respond to the Convention to End Discrimination Against Women (CEDAW) and the impact it has had on their lives and the impact they would like it to have. When the conference participants stated that: "Women's rights are human rights,"³⁵ they described a relatively new, even revolutionary, perspective for evaluating and protecting human rights. This reframed the relationship between human rights and women's rights and showed

32 There were three previous conferences that also made great strides and contributed to the outcomes at Beijing and subsequent conferences. However, for the sake of space here, the focus is on Beijing and its predecessors.

33 Fourth World Conference on Women, Beijing, China, Sept. 4-15, 1995, *Action for Equality, Development and Peace*, available at <http://www.un.org/womenwatch/daw/beijing/dpibrochure.html> (last visited Mar. 20, 2009).

34 Fourth World Conference on Women, Sept. 4-15, 1995, *Report of the Fourth World Conference on Women*, Beijing, China, U.N. Doc. A/CONF.177/20 (Oct. 17, 1995), available at <http://ih.stanford.edu/rosenfield/resources/FWCW%20Beijing%20Report%201995.pdf> (last visited Mar. 20, 2009).

35 *Id.* at 14; see also Professor Christine Chinkin, Discussion during Women's Human Rights Seminar, University of Michigan School of Law (Fall 2006).

that this community viewed them as the same, instead of women's rights as a subset of human rights.

Although under a sustainable and empowering model of creation there is much more to be done to promote women's rights, this conference accomplished a great deal and was closely in line with the principles of sustainable empowerment:

1. Ripeness
2. Empathy
3. Problem Discussion and Selection
4. Problem Solving and Drafting

As to Ripeness, the Conference was organized over a long period of time to include as many women as possible from around the world. To evaluate the use of Empathy, there are two considerations: the demographics/identities of people included and an understanding of differences within the group. It was the "largest-ever gathering of government and Non-Governmental Organizations (NGO) representatives at a United Nations Conference."³⁶ The focus was on government and NGO representatives, so there were some differences between the representatives and the communities for which they stood. However, in any gathering of this sort there will be questions of how to choose an adequately representative population, and who gets to do the choosing. The Conference was organized for women to discuss issues, and the differences between them in issues, in order to gain perspectives from each other.

Controversy and Consensus Part of Step 3: Evaluation

When evaluating Step Three's Problem Discussion and Selection of issues addressed, we can look at the specific issues that were addressed in the resulting Platform for Action.³⁷ Issues over which there was not and is not consensus, most notably a right to abortion, were not included in the guiding policy that resulted from the conference. Despite the conflict over a right to abortion, there was consensus over the problems related to unsafe abortion and a desire to eliminate the need for abortion.³⁸ In this way, conflicting ideologies

36 Assistant Secretary-General, Special Adviser on Gender Issues and Advancement of Women, Division for the Advancement of Women, Department of Economic and Social Affairs, Pre-Session Briefing for Journalists (June 2000), *available at* <http://www.un.org/womenwatch/daw/followup/akbriefing.html> (last visited Mar. 20, 2009).

37 Fourth World Conference on Women, Beijing, China, Sept. 4-15, 1995, Division for the Advancement of Women, Department of Economic and Social Affairs, Beijing, China, Sept. 4-15, 1995, *Action for Equality, Development and Peace; Platform for Action*, *available at* <http://www.un.org/womenwatch/daw/beijing/platform/index.html>.

38 *Id.* at "Women and Health" §§ C.93, C.97, 106(j), 106(k), 109(i), *available at* <http://www.un.org/womenwatch/daw/beijing/platform/health.htm>.

were consciously avoided so as to build consensus on issues which could be agreed upon, including the promotion of contraceptives and health education. While some feminists insist on the need for abortion rights, others see it as in direct conflict with their feminist beliefs.³⁹ When creating as close to a consensus document as possible in a large scale forum, if the divisiveness of the issue is such that both sides will feel subjugated by the other, the document cannot include a statement regarding one side or the other.⁴⁰ The consensus document can only contain statements on which all factions can agree. In this case it was the danger and violence of unsafe abortions and the absolute right of women to contraceptives, family planning, and all possible information about reproductive health.⁴¹ What results may not be the most effective document for any given individual cause or movement, but it is a sustainable document because no one group is subjugated by the other. The limitation of a consensus document when it comes to such a controversial topic reinforces the need for advocacy groups and education by specialized NGOs.⁴² The Platform was not pro-choice, but it was also not pro-life; it did create a stance on health education, reproductive choice, and reproductive safety for women. Step three was as successful as possible; it built consensus instead of imposing majority rule or alienating a sizeable portion of participants. In areas where a consensus was reached, sustainable progress was made and continues based on that document, such as in the growth of health education programs world-wide.⁴³

Step Four, Problem Solving and Drafting, can be evaluated as partially successful and partially unsuccessful. As a declaration does not have the power of a convention, women were empowered to speak

39 Compare National Organization for Women, <http://www.now.org/issues/abortion> (last visited Mar. 20, 2009) (pro-choice), and Feminist Majority, <http://www.feminist.org/rrights> (last visited Mar. 20, 2009) (pro-choice), with Feminists for Life, <http://www.feministsforlife.org/taf/1997/fall/despkill.htm> (last visited Mar. 20, 2009) (pro-life quote from Elizabeth Cady Stanton), and Amnesty International, <http://www.amnesty.org/en/library/asset/POL30/019/2007/en/dom-POL300192007en.html> (last visited Mar. 20, 2009) (for an example of a Human Rights organization compromising both sides).

40 Majority rule systems create winners and losers and promote conflict. See Seeds for Change, Consensus Decision Making, <http://seedsforchange.org.uk/free/consens#wrong> (last visited Mar. 1, 2009). Ideally, in a consensus based system, there are no winners and losers, because decisions belong to the entire group. See also Earlham College, Comparison of Robert's Rules of Order and Quaker-based Consensus, <http://www.earlham.edu/~consense/rrocomp.shtml> (last visited Mar. 3, 2009).

41 Report of the Fourth World Conference on Women, *supra* note 34, at ¶¶ 94-95, 97.

42 In the United States, this need is fulfilled by the Planned Parenthood Federation of America and NARAL.

43 E.g., CAREN GROWN, GEETA RAO GUPTA & ASLIHAN KES, U.N. MILLENNIUM PROJECT, TASK FORCE ON EDUCATION AND GENDER EQUALITY, TAKING ACTION: ACHIEVING GENDER EQUALITY AND EMPOWERING WOMEN 64-5 (2005), available at <http://www.unmillenniumproject.org/documents/Gender-complete.pdf>.

and plan, but not to take specific action from this conference. Although the women at the conference were not able to create any specific laws or enforceable rights, the Declaration and Platform for Action that came out of the conference shaped future women's rights work and was considered a huge stride forward.⁴⁴ It has been adopted by 189 countries.⁴⁵ It met the needs of sustainable development in that it was created by women for women and did not cause any harm to future development in women's rights. However, it did not put any concrete measures or procedures in place, and it did not quite empower women as much as would be possible under a sustainable empowerment process.

Beijing +5

Beijing +5 was a follow up to Beijing and was a chance to review progress following Beijing and the other previous UN conferences on women.⁴⁶ The conference was focused on an evaluation framework, requiring reports on progress from participating countries and NGOs.⁴⁷ It evaluated progress, reaffirmed dedication to the goals of Beijing, and listed achievements and obstacles facing women in several areas.⁴⁸ In the conference's *Report from the Ad Hoc Committee*, the section focusing on "Actions to be Taken at the National Level" called for the ratification of existing conventions on women's rights as well as the development and implementation of several plans to advance women's rights within each participating nation. Further, in recommending that countries ratify existing conventions, they were able to aim at more enforceable requirements. This conference and the report that resulted included more action-oriented goals but were still without an enforcement mechanism or specific procedures for ensuring women's enforcement of their rights. However, a lack of enforcement is also part of any declaration, as opposed to a convention with stronger obligations and enforcement mechanisms.

When tested against the model of empowerment and sustainable development promoting women's rights, this conference does not do as well as the original Beijing. As to Ripeness and Empathy, this

44 Christine Chinkin, Professor, University of Michigan School of Law, Discussion during Women's Human Rights Seminar (Fall 2006).

45 Assistant Secretary-General, Special Adviser on Gender Issues and Advancement of Women, Division for the Advancement of Women, Department of Economic and Social Affairs, *Pre-Session Briefing for Journalists* (June 2000).

46 *Beijing +5*, *supra* note 4 at *Process and Beyond*(2000) available at www.un.org/womenwatch/daw/followup/bfbeyond.htm.

47 *Id.*

48 Ad Hoc Comm. of the Whole, *Report of the Ad Hoc Committee of the Whole of the twenty-third special session of the General Assembly*, U.N. Doc.(Supp. No. 3) A/S-23/10/Rev.1 (June 10, 2000).

conference was organized in a hierarchical fashion without the diverse participation present at the original Beijing conference.⁴⁹ On the other hand, organizers sought reports and input from NGOs and communities around the world to better inform the meeting.⁵⁰ For Step Three, there was discussion of opinions, issues, as well as problem solving. Sustainable development can be seen in the overall consciousness of an impact on the future. However, as with Beijing, women themselves were not empowered to ensure these changes were put into effect. The appeals were to governments, and those in charge of the status quo; there was nothing reinforcing the power of women in their communities to effect change. The smaller group of participants was also from more powerful positions than women generally, or even the women who participated in Beijing. The evaluative instead of creative nature of this conference meant that it was not as empowering as Beijing for participation and consultation. Finally, as to Step Three, it also did not allow for problem solving by communities of women or the creation plans of action, only review of and expansion upon those already in place. On the other hand, despite the concentration upon expansion and evaluation, many new concepts and positions were incorporated into the review and a stronger stance on women's human rights was promoted by the meeting.

Beijing +10

Beijing +10, in February and March of 2005, was a review of the Beijing platform by the Commission on the Status of Women (CSW). It was more similar to Beijing +5 than the original Beijing. It was a smaller group reviewing the goals and implementation progress since the original Beijing Conference.⁵¹ While formulated as a review, the meeting also moved forward in promoting gender equality by evaluating progress and areas needing more work around the world.⁵² The time may have been ripe for a review of the Beijing platform, since ten years had passed from Beijing. However, the small group of participants and the focus upon a review of previous work, instead of the creation of new developments, meant less empathy and a more limited and/or constrained discussion of problems and solving (steps 2,

49 United Nations Women Watch, *About Beijing +5*, <http://www.un.org.womenwatch/confer/beijing5/about.htm>.

50 *Id.*

51 *Review and Appraisal of the Beijing Declaration and Platform for Action and the Outcome Document of the Twenty-Third Special Session of the General Assembly*; 28 Feb. to 11 Mar. 2005; Division for the Advancement of Women, Department of Economic and Social Affairs, Draft submitted by Chairperson.

52 U.N. Econ. & Soc. Council [ESOSOC], Comm'n on the Status of Women, *Report on the forty-ninth session*, U.N. Doc. E/CN.6/2005/11 (Mar. 22, 2005).

3, and 4). This meant that the conference was further away from the process envisioned in a sustainable development and empowerment model than Beijing or even Beijing +5.

There was not an opportunity for very many participants with life experiences with the issues being evaluation to formulate their own solutions or programs to problems such as trafficking, HIV/AIDS, etc. Instead, there were calls to governments (dominated by men) to address these issues and formulate strategies in response to the needs stated by the conference. While these overall calls can, and have been, effective to some extent, there is not anything that women in a given community can do with these resolutions beyond pressuring their governments. In this way, it was similar to the previous conferences, but without the same scale of participation of women as seen previously. On the other hand, throughout this process, there has been an increasing effort to involve more women and NGOs in the "brainstorming" phase of evaluating effectiveness and the process.⁵³ In attempting to reach out to more women and include them in the process, these reviews, despite the smaller scale of the conference, in some ways came closer to empowering women and communities of women to affect the results of evaluations and programs in the future.

Possibilities for Future Conferences

Participants can design a functioning framework for grassroots input on a given issue, taking into account the pressures each participant has experienced in her own community. Similar to the format of an empowering crisis call, the women participants themselves can decide what a workable framework might be and what tools they need coming out of a conference to effect change at home. It might be a framework, it might be a model law, it might be documentation of and dissemination of best practices for a given issue, or it might be an international agency. The women participants themselves will know the best solution for what they face. The latter two Beijing reviews were just that: reviews. They came out with resolutions and evaluations but not binding treaties or even dynamic new platforms. However, the Beijing conferences did build upon and reference the Convention for the Elimination of Discrimination Against Women (CEDAW), a previous legal tool drafted to give women avenues through a convention to address discrimination.⁵⁴

⁵³ *Beijing +5 Process and Beyond*; <http://www.un.org/womenwatch/daw/followup/bfbeyond.htm>.

⁵⁴ Convention on the Elimination of All Forms of Discrimination Against Women, G.A.Res. 34/180, U.N. Doc. A/Res/34/180 (1980).

*Convention on the Elimination of Discrimination Against Women
(CEDAW)*

CEDAW came out of a Committee appointed by the Commission on the Status of Women (CSW).⁵⁵ The Commission has been dominated by women since its inception in 1947.⁵⁶ This means that the majority of drafters of CEDAW were women.⁵⁷ However, they were selected from within a group of elite, politically-connected women. The areas selected and studied were chosen by women working for the Commission or Committee, and they chose how to address the areas they focused on in the Convention.⁵⁸ They also adopted the Optional Protocol to CEDAW, which provided a right to women to petition the Committee on the Elimination of Discrimination Against Women (the Committee).⁵⁹ In this way, women around the world living in countries that have ratified the optional protocol have the right to seek aid on an international stage. This empowers women to address the problems they face and shows that they have allies in seeking gender equality.

Despite the right to petition created by the Optional Protocol, there is not much bite in the original CEDAW,⁶⁰ or in actions of the Commission in response to a petition. The main force behind any finding is that of publicity and public opinion, not damages or penalties related to the violations of women's rights.⁶¹ Further, the Committee meetings on a petition are closed resulting in a report and possible recommendations.⁶² On the other hand, the global community can be made aware of what is going on through this process, and women are at least able to draw attention to some of the rights violations they are facing. By the creation of CEDAW, and its ability to raise publicity and global notice, women empowered themselves as well as women in many countries around the world.

⁵⁵ G.A. Res. 2 (II), U.N. Doc. E/2 (June 21, 1946). Cf. G.A. Res. 3010 (XXVII), at 66, U.N. Doc. A/3010 (Dec. 18, 1972).

⁵⁶ SHORT HISTORY OF THE COMMISSION ON THE STATUS OF WOMEN (2006), <http://www.un.org/womenwatch/daw/CSW60YRS/CSWbriefhistory.pdf>.

⁵⁷ SHORT HISTORY OF THE COMMISSION ON THE STATUS OF WOMEN 2 (2006), <http://www.un.org/womenwatch/daw/CSW60YRS/CSWbriefhistory.pdf>.

⁵⁸ SHORT HISTORY OF THE COMMISSION ON THE STATUS OF WOMEN 7 (2006), <http://www.un.org/womenwatch/daw/CSW60YRS/CSWbriefhistory.pdf>.

⁵⁹ Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 54/4, U.N. Doc. A/Res/54/4 (Oct. 15, 1999).

⁶⁰ Charlotte Bunch, *Women's Rights as Human Rights: Towards a Re-Vision of Human Rights*, 12 HUM. RTS. 486, 496 (1990).

⁶¹ Christine Chinkin, Professor, University of Michigan School of Law, Discussion during Women's Human Rights Seminar (Fall 2006).

⁶² G.A. Res. 54/4, *supra* note 57, article 7(2)(3).

In evaluating CEDAW under a sustainable development and empowerment rubric, it generally passes the ripeness step in that the UN and the global community started working on it while working on the rights of all oppressed peoples. Despite the timely beginning to CEDAW, it could be argued that it was overdue in coming and that some countries, such as the U.S., are overdue in ratifying it. Related to ripeness, the safety of those implementing the treaty is similar to any efforts to address violence against women: it is only as safe as is possible given the violence women around the world face every day. For Steps Two and Three: the Commission and the processes surrounding CEDAW have created and supported many opportunities for women to discuss what they face and what they would like to do about it, despite its inception and continued enforcement by many women of political privilege.⁶³ CEDAW, and work on CEDAW, has contributed to conferences around the world, such as Beijing, and continues to be a focus of work on women's rights done by women at the UN.⁶⁴

Despite the many positives that have come out of CEDAW, involvement in the creation of CEDAW was limited to political elites⁶⁵ and has been continued largely under the control of women powerful enough to be appointed to the Commission at the United Nations or to be involved in international politics.⁶⁶ This means that most women have to rely on a small body of representatives to evaluate and find workable solutions for the discrimination they face in their various communities. Any meeting that can functionally draft a document will have to rely on representatives, but the degree of representation can be expanded. The Committee on the Status of Women (CSW) has made many efforts to increase the involvement of as many women as possible, including organizing Beijing for new input on the problems with CEDAW and issues women face.⁶⁷ Although after initial drafting, CEDAW was reviewed by the General Assembly and not communities of women, NGOs have had increasing involvement in the

63 See generally *Short History of the Commission on the Status of Women*, UN Women Watch (2006) (providing a historical context to the creation of CEDAW), available at <http://www.un.org/womenwatch/daw/CSW60YRS/CSWbriefhistory.pdf> (last visited Mar. 22, 2009).

64 *Id.*

65 *Id.*

66 PAST AND PRESENT MEMBERS OF THE COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN 1982-PRESENT (2007), available at <http://www.un.org/womenwatch/daw/cedaw/members.PDF> (last visited Mar. 22, 2009).

67 See *Short History*, *supra* note 63.

creation and review of documents coming out of CSW including the Optional Protocol.⁶⁸

Is CEDAW's increasing involvement of NGOs, and more and more women around the world, enough to meet the second and third steps requiring community evaluation and discussion? Is it enough to allow for true perspectives on how communities of women want to address these problems? Globally, the opportunity for women to comment on what was discussed by the committees drafting CEDAW was and is relatively limited. Through CEDAW's processes there was and is some opportunity for women to participate, and it must be recognized that at some point there are diminishing returns from the cost of increasing involvement and drafting; only so many people can participate and still finish the task. It can be evaluated by questioning how effective the solutions offered by CEDAW and the Optional Protocol have been in empowering women to challenge and change the oppression they face daily.

Step Four of a sustainable empowerment evaluation asks, "Did the process behind CEDAW lead to effective problem solving and drafting of those solutions?" The reporting process is a step towards empowering women to address discrimination and oppression on their own, but as yet there is not much that can be done after a report is made. It is not known if this is the process that women across the world would have chosen as the best way to address the need for gender equality in their day-to-day lives. It is a step towards being able to address these issues, but it does not do much for the average woman. A global process that is this complex and distant from a given community may not be able to truly empower women to fight oppression.

*Contrast with Convention on the Elimination of All Forms of Racial Discrimination*⁶⁹

Generally, conventions addressing discrimination against women are weaker than those addressing human rights abuses also faced by men, such as on the basis of race or related to genocide.⁷⁰ The Convention on the Elimination of All Forms of Racial Discrimination

68 The Secretary-General, *Report of the Secretary-General on Monitoring the Implementation of the Nairobi Forward-Looking Strategies for the Advancement of Women: Other Issues, delivered to the Commission on the Status of Women*, U.N. Doc. E/CN.6/1996/10 (Mar. 1996).

69 Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195 (Mar. 7, 1966).

70 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, 243-46 (1994).

(CERD) empowers those suffering from racial discrimination in ways that CEDAW does not. It contains specific goals for the elimination of racial discrimination, it sets standards countries MUST meet, countries must report on their progress towards those standards, and the right for an individual to petition was included in the original text of CERD.⁷¹ The CERD body was created early on to monitor these requirements.⁷² This is in contrast to the ability of an individual to petition, which was added later in an Optional Protocol as in CEDAW, with *optional* being the operative word in the comparison between the two conventions.⁷³ It also requires countries to take ongoing steps through active legislation, not simply urging to work on policies.⁷⁴ Countries drafting and signing onto CERD and CEDAW were more comfortable strongly condemning racism, at least against men, in ways they were not comfortable confronting gender-based discrimination.⁷⁵ This may be related to the relative power of the men who drafted versus the women, or the male-dominated political structures in the countries which signed and drafted, or public comfort condemning racism versus sexism.

Regardless of the reasons for the power dynamics and differentials, CERD seems to empower individuals and communities more than the convention or conferences on women, meeting the fourth step of a sustainable empowerment evaluation. However, similar to the declarations and convention for women, there was not widespread participation by oppressed peoples in the drafting process, not quite meeting the second and third prongs of the sustainable empowerment test.

The Violence Against Women Act; a Domestic Example

The National Task Force to End Sexual and Domestic Violence Against Women came together to work with Congress to create the first VAWA in 1994, after years of effort and outreach.⁷⁶ These efforts began by including a diverse range of advocates from across the nation, including victim advocates, attorneys, and community-based organizations, labor advocates, religious groups, etc., which crossed racial, ethnic, sexual identity, religious, and socioeconomic

71 Comm. on the Elimination of Racial Discrimination, *Fact Sheet No. 12* (May 1991), <http://www.unhchr.ch/html/menu6/2/fs12.htm>.

72 *Fact Sheet No. 12*, *supra* note 71.

73 See *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*, *supra* note 59; *Fact Sheet No. 12*, *supra* note 71.

74 *Fact Sheet No. 12*, *supra* note 71.

75 See Donner, *supra* note 70, at 241-43, 251-52.

76 The Family Violence Prevention Fund, *History of the Violence Against Women Act*, <http://www.endabuse.org/vawa/display.php?DocID=34005> (last visited Nov. 25, 2008).

lines. This diversified supported has continued to grow over the years.⁷⁷

When this model is applied to VAWA, as to Step One, Ripeness, VAWA came more than twenty years after the second wave of the feminist movement gained national prominence. However, unlike the movement's most publicized foray into policy making, the Equal Rights Amendment (ERA),⁷⁸ VAWA was able to pass through Congress and become law. On the other hand, key portions of the law were struck down by the Supreme Court of the United States in *U.S. v. Morrison*.⁷⁹

As to Step Two, Empathy and Consensus, VAWA has gained more input and has become more inclusive in each reiteration. VAWA was initially created by, and its reauthorizations have been driven by, the National Task Force of domestic violence, sexual assault, stalking, and harassment organizations, which represent grassroots participation in every state, and participation across racial, ethnic, class, religious, and sexuality identities.⁸⁰ The organizations, who are members of those networks, have grown over the years and continue to have input in the reauthorization of and funding related to VAWA.⁸¹ VAWA 2005 was even more inclusive, building consensus, and overall making VAWA an even more sustainable law.⁸² The most recent VAWA, 2005, passed the Senate by unanimous consent and the House by a vote of 415-4.⁸³ These votes demonstrated broad-based support, a form of consensus, among legislators for the law.

77 *Id.* See also Garrine P. Laney, *Violence Against Women Act: History and Federal Funding* (2005), available at <http://holt.house.gov/pdf/CRSonVAWADec2005.pdf>; Kristin J. Roe, *The Violence Against Women Act and Its Impact on Sexual Violence Public Policy: Looking Back and Looking Forward* (2004), available at <http://www.nrcdv.org/docs/Mailings/2004/NRCDEVNovVAWA.pdf>; see also comments from Leslye Orloff, one of the participants in drafting VAWA in each iteration, on file with the author.

78 See National Organization for Women, <http://www.now.org/issues/economics/cea/history.html> (last visited Mar. 1, 2009) (outlining the full history of the Equal Rights Amendment).

79 529 U.S. 598, 601-02 (2000) (striking down the federal civil remedy for victims of gender based violence created by VAWA 1994).

80 The Family Violence Prevention Fund, "History of the Violence Against Women Act" (2008). See also comments by Leslye Orloff, one of the participants in drafting VAWA in each iteration, on file with the author.

81 For example, Legal Momentum (formerly the NOW Legal Defense and Education Fund) ensures that the voices of members of the National Network to End Violence Against Immigrant Women (NNEVAIW) were and are represented when Congress works on VAWA. This coalition started with a few members and has been growing ever since.

82 See also comments by Leslye Orloff, on file with the author.

83 See National Coalition Against Domestic Violence, *President Signs Violence Against Women Act*, <http://www.ncadv.org/files/WebsiteVAWADoc.pdf> (providing a summary of the legislative record for H.R. 3402, 109th Cong. (2005)).

A further example of a progression towards more inclusiveness, more consensus, and therefore a more sustainable law for Step Two, but also reaching into Step Three with the Selection of Problems to discuss, VAWA 2005 stated outright that men could be victims of domestic violence as women could be victims.⁸⁴ While trumpeted as a victory by the men's rights movement, gender inclusiveness was supported for years prior by members of the National Task Force to End Violence Against Women, members of Congress, and those approving grants under the Act. While many women's groups had long supported this position, men's rights groups saw this wording in VAWA as an acknowledgement of their issues, and as recognition of their input in deciding how and what issues VAWA addressed.⁸⁵

As to Step Three, Problem Discussion and Selection, as VAWA grows over the years, so does the list of issues addressed in each authorization.⁸⁶ With each reauthorization a greater number of and diversity of people have input as to what appears in the legislation as the scope of the Act increases. The Congressional process involved in making laws means that more and more issues are being recognized and discussed in hearings, findings of fact, and research, meaning that more issues are brought to the table and discussed by all involved.

As to Step Four, Problem Solving and Drafting, one of VAWA's most visible examples of problem solving was struck down by the U.S. Supreme Court in *U.S. v. Morrison*, when the provisions of VAWA 1994 providing a federal civil remedy for victims of gender-based violence was struck down.⁸⁷ However, despite what most law

84 See Brief for Northwest Immigrant Rights Project et al. as Amici Curiae Supporting Respondents, *Kewan v. Gonzales*, No. 04-70630, 2005 WL 2703727 (9th Cir., Aug. 15, 2005), 2005 WL 2572185 (Legal Momentum signed amicus brief submitted in support of reconsidering the dismissal of a petition to review a decision of the BIA affirming an Immigration Judge's decision to deny relief to a battered immigrant man in a Violence Against Women Act ("VAWA") cancellation of removal case); see also Press Release, Senator Joseph R. Biden, Jr., Senate Passes Violence Against Women Act of 2005 (Oct. 5, 2005) ("and will help law enforcement and social services coordinate their efforts to assist victims of domestic violence and sexual assault, regardless of gender."); see also http://www.ovw.usdoj.gov/state_grant_desc.htm (observing that the Department of Justice Office of Violence Against Women specifies that men must also be served by VAWA grant funded programs).

85 Press Release, Respecting Accuracy in Domestic Abuse Reporting (RADAR), VAWA Programs Must Help Male Victims, available at http://www.mediaradar.org/vawa_must_help_men_too.php.

86 Violence Against Women Act of 1994 (VAWA 1994), Pub. L. No. 103-322, 108 Stat. 1796 (1994) (VAWA 1994), reauthorized in 2000 as Victims of Violence and Trafficking Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464, (2000) (VAWA 2000), reauthorized in 2005 as part of the Department of Justice Appropriations Act (VAWA 2005), Pub. L. No. 109-108 § 631, 119 Stat. 2290, 2344 (2005) (VAWA 2005) (codified in scattered sections of the United States Code including 8, 16, 18, 28, and 42.).

87 529 U.S. 598 (2000).

students think after hearing of this case, VAWA is still alive and providing other empowering options for survivors of violence today.⁸⁸ VAWA was crafted to provide a broad range of relief and support for survivors of gender based violence, and these other parts of law survive and continue to be used today, even as many of them have been strengthened in each successive version of VAWA.⁸⁹ Just as the involvement of organizations in drafting and reauthorizing VAWA continues to grow, their ability to modify and create the law also continues to grow, as seen in the technical corrections and expanded reauthorizations. The leading organizations who are members of the Task Force have built strong grassroots connections in diverse communities, in order to base their support for and modification of VAWA on the needs of real women throughout the country.⁹⁰ The ability of these national organizations to tap into the grassroots base can be seen in the increased support for and use of VAWA as a tool for women to escape violence.⁹¹ On the other hand, grassroots participation must be channeled through national organizations based in Washington D.C., which may limit how much participation any one woman can have in creating this law. The amount of participation, and the way in which it is channeled, will always have to be addressed when working on a sustainable document that applies on a nation-wide scale, and the VAWA Task Force makes a concerted effort to respond to the needs and opinions of women nationwide.⁹²

Challenges

*1. The intersectionality of characteristics within each woman, i.e., race, sexuality, religion, nationality, class, etc., who makes up the community drafting a law or policy adds depth to the process and raises several issues.*⁹³ — If a truly representative group from a

88 For example, VAWA permits battered spouses to self-petition for immigration benefits by completing the United States Citizens and Immigration Services (USCIS) for I-360 as provided in section 204 of the Immigration and Naturalization Act (INA). See Immigration and Naturalization Act, 8 U.S.C. § 1154 (2006). This is a way for abused immigrants battered or subject to extreme cruelty by their U.S. citizen spouse, parent, or child (as well as many others in each successive reauthorization of VAWA) to apply for immigration status independently of the their abuser, providing a way for survivors to control their immigration status, as opposed to have it used against them to further the power and control of their abuser. The survivor controls her own immigration status and response to the battery or extreme cruelty she has endured.

89 Comments by Leslye Orloff, on file with the author.

90 *Id.*

91 *Id.*

92 *Id.*

93 See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

community is a part of the process, women with characteristics or issues that are in the minority could be overpowered or ignored by a majority rule. Also, sometimes pressure from a large group might push to ignore issues, such as sexuality or religion, which only some of the members face. The idea of sustainable development, to ensure that no harm is caused, may or may not fully address this concern, depending on the ways in which empowerment is practiced. It could be addressed if the issue is brought up at the beginning of the process and participants are willing to consciously work to respect the multiple facets of every woman's identity. However, since the process relies heavily on consensus, there may be pressure to follow a majority rule. Differences need to be respected for this to be a truly empowering process.

2. *International law was not created by women and in many ways still discriminates against women.* — As women draft policies and laws addressing their needs and the oppression they face, they are challenging the status quo. International law, organizations, conventions, and diplomatic relationships may be part of the problem that women are addressing in the creation of a convention of policy. Coordinating what women create through this process with existing systems will take time and outreach between women creating new documents and those currently in positions of power within international legal frameworks. It also requires recognition by those in power that women deserve respect and the right to define what problems they face and how to address those problems. This has already started to happen, notably with Beijing and the subsequent conferences, or even the African Protocol.⁹⁴ However, it needs to continue, and the products coming out of these conferences need to be given more weight on the international legal field.

3. *Logistically organizing conferences with wide representation from the community or communities of women touched by the law or policy, to draft laws or policies, will be difficult and costly.* — It is more time and cost efficient to have a few professionals evaluate a given situation and then draft the law or policy. However, the benefits of having something that more accurately addresses the needs of women in a given community and does so in a way that they are comfortable implementing far outweighs the initial cost of setting up a situation where this collaboration can happen. It is also more likely that a community will buy into and continue to follow a policy created

⁹⁴ Protocol to the African Charter on Human and People's Rights on the rights of Women in Africa, July 11, 2003, development of the protocol as described by Professor MacKinnon, class discussion during Women's Human Rights Seminar, University of Michigan, Fall 2006.

by them, as opposed to outsiders. The difficulty in organizing so many people and the time for the group to reach consensus can be balanced against the impact a law or policy drafted in this way can have on women's issues.

CONCLUSION

Great strides have been made by the women's movement towards empowering women and ensuring there is legal recourse for women in claiming their equality. To continue this process, the idea of sustainable empowerment can ensure that new laws and policies accurately reflect the current issues women face and deal with those issues in an effective and realistic manner. It is a process that gains legitimacy through respect and participation. It also ensures that women control the way women's issues are dealt with by international bodies and in international legal instruments. It is a way to prevent the hijacking of women's issues by those in power to promote their own agendas. Instead, the women who are affected by the issue will make the decisions. This process is also a symbol of respect for women; it ensures that women have a right to decide what happens to them and what laws govern them. This has yet to be fully realized in any legal instrument, but it may be possible through sustainable development and empowerment. That possibility exists because it is the creation of law through women's own voices and is based on ideas that have been supporting individual women survivors for years.

ARTICLE

REGULATING PREGNANCY IN TAIWAN: AN ANALYSIS FROM AN ASIAN LEGAL FEMINIST USING FEMINIST LEGAL THEORIES

By: Chih-Chieh Lin*

I. INTRODUCTION

With the increased application of fetal-protection policies, expectations regarding what a woman “should do” or “should not do” during pregnancy have become more widespread. In 2002, an Arkansas circuit court judge placed an unborn child in the custody of the state, based on evidence that the mother was using illegal drugs and had declined to receive any prenatal care.¹ The judge ordered the mother to stop using illegal drugs and to start prenatal care for her unborn child.² The judge later found the mother in contempt of court for failing to follow those orders.³ The United States Unborn Victims of Violence Act of 2004 also recognizes that criminal offenses committed against pregnant women potentially have two victims — the mother and the unborn child.⁴ Since the United States started the war on drugs, prosecuting pregnant women for using drugs with “possession of a controlled substance, delivering drugs to a minor, child abuse or neglect, cruelty to children, or even contributing to the delinquency of a minor,” has not been unusual.⁵ In the wake new legislation regarding “fetal rights,” based on the belief that a fetus is a “potential human being” and thus deserving of protection, leaves women the clear target of this legislation. Fetal-protection policies, which treat an unborn child as an independent third-party and police women’s bodies and behaviors, raise several constitutional issues and feminist concerns, specifically whether these policies deprive women of fundamental rights to privacy and personal autonomy.⁶

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1 Ark. Dep’t of Human Servs. v. Collier, 95 S.W.3d 772, 773-74 (Ark. 2003).

2 *Id.*

3 *Id.* at 774-75.

4 18 UNITED STATESUNITED STATES. § 1841 (Supp. 2008).

5 RACHEL ROTH, MAKING WOMEN PAY: THE HIDDEN COST OF FETAL RIGHTS 146-47 (2000).

6 Deanna Rae Reitman, Note, *The Collision Between the Right of Women, the Right of the Fetus and the Rights of the State: A Critical Analysis of the Criminal Prosecution of Drug Addicted Pregnant Women*, 16 ST. JOHN’S J. LEGAL COMMENT. 267, 268 (2002).

Attempting to regulate pregnancy is not unique to the United States. In Taiwan, to maintain sustainable birthrates and ensure the health of newborns, the government has started to adopt a series of steps to regulate women. Taiwan has a complex historical background and mixed culture, including Chinese-Han, Japanese, aboriginal, and South-Asian. Taiwanese women have faced various types of gender inequalities throughout the nation's history. Although women in Taiwan now enjoy more personal liberties, the subordination of women still shadows Taiwanese society.

The recent fetal rights policy in Taiwan, which regulates women's reproductive freedom and erodes their decision-making autonomy during pregnancy, illustrates motherhood's inferior role in a patriarchal society. The emergence and analysis of such policy has a complicated dynamic. Changes in women's social status, the structure of gender roles within families, the increasing tendency to remain single and have fewer children, and the rapid expansion of transnational marriages are factors in the formation of the reproductive-based discrimination in Taiwan.

In this paper, I will discuss the connection between changing gender roles and the rise of fetal-protection policies in Taiwanese society. I will explore how the State applies its legislative, administrative, and judicial powers to police women's bodies and behaviors. Next, using feminist legal theory to analyze policies of fetal rights, I will argue that these fetal-protection policies not only subordinate and discriminate against women, but also offer no real protection to the unborn fetus. Finally, I will propose the "harmonious model," which provides support resources and health education for pregnant women and serves as a more effective gender-equal way to resolve potential conflicts of interest between a mother and the unborn fetus.

II. AN OVERVIEW OF THE EVOLUTION OF GENDER EQUALITY IN TAIWAN

A. Mixed Cultures, Same Inferiority

1. *The Ching Dynasty: Before 1895.* — The development of gender equality in Taiwan reflects a complex dynamic of political and cultural transformation. Before Japan acquired Taiwan in 1895 as a result of Japan's overwhelming victory in the Sino-Japanese War, Taiwan was part of the Chinese Empire under the Ching Dynasty. While there were several different ethnic groups in Taiwan, such as Aboriginal, Hakka, and Ho-lo, it was the Han Chinese (mainly

organized by Hakka and Ho-lo people) that immigrated to Taiwan from Mainland China that formed a majority of the society.⁷

The political and social beliefs of the Han Chinese were fundamentally influenced by Confucianism, which formed the group's perspectives of gender roles, marriage arrangements, and family structure.⁸ Within Confucianism, the subordination of women takes many forms, especially in marriage and family relationships. Marriage and family structure under Confucianism have the following characteristics: "(1) monogamous relationships (but permits the existence of concubines), (2) firm heterosexual relationships, (3) marriage seen as the sole basis to establish a family, and (4) marriage/family seen as the single institution from which all relative relationships are generated."⁹

"According to the Han Chinese tradition, family membership, inheritance of property, and the distribution of authority are defined through the axis of father and son."¹⁰ Therefore, under the laws of the Ching Dynasty as well as Han Chinese tradition, once a woman married, her labor and income belonged to her husband's family. She was to obey her husband and the elder members of his family and could not possess nor inherit any property either from her husband or her biological parents.¹¹ In this patriarchal society, a woman's social status was vastly inferior. The primary role of women was to please their husbands and to bear children, where having a male offspring to carry the husband's family's surname was the most important obligation for a married woman.

2. *The Colonial Period: 1895 to 1945.* — Around 1900, after Japan colonized Taiwan, Taiwan adopted modern codes mostly modeled on continental European law.¹² Although western-style criminal and administrative laws took effect, the Japanese government "respected" Taiwan's traditions with regard to family problems or

7 See generally CIVIL ADMINISTRATION IN RURAL TAIWAN DURING THE CHING DYNASTY (YEN-HUEI, DAI, CH'ING-TAI T'AI-WAN ZHI HSIANG-ZHI) (1979).

8 See Teemu Ruskola, *Conceptualizing Corporations and Kinship: Comparative Law and Development in a Chinese Perspective*, 52 STAN. L. REV. 1599, 1623 (2000); see also Shu-chin Kuo, *A Cultural Legal Study on the Transformation of Family Law in Taiwan*, 16 S. CAL. INTERDISC. L.J. 379, 385 (2007).

9 See Kuo, *supra* note 9 at 832 (discussing Xiaoqing Feng, *A Review of the Development of Marriage Law in the People's Republic of China*, 79 U. DET. MERCY L. REV. 331 (2002)).

10 Pei-Chia Lan, *Among Women: Migrate Domesticity and Their Taiwanese Employers Across Generations*, in GLOBAL WOMAN 169-70 (Barbara Ehrenreich & Arlie Russell Hochschild eds., 2002).

11 TAY-SHENG, WANG, TAI-WAN FA-LEU-SHIH GAI-LU 106-107 LEGAL HISTORY IN TAIWAN] (2001).

12 Tay-sheng Wang, *The Legal Development of Taiwan in the 20th Century: Toward a Liberal and Democratic Country*, 11 PAC. RIM L. & POL'Y J. 531, 533 (2002).

inheritance disputes.¹³ During this time, the Japanese government tried to import Japanese culture into Taiwanese society through its “imperialization of the subjects” policy.¹⁴

This policy attempted to transform the identity of Taiwanese people, from “Taiwanese” to being the people of the Japanese Empire or “Mikado,” by imposing the thought of Japanese superiority. Although Japan westernized its legal and political system after the Meiji Restoration of 1868, women’s lives and social status were not equal to men. “According to Japan’s conservative majority, the ideal Japanese woman devotes herself exclusively to familial and domestic affairs, including caring for children and elderly relatives.”¹⁵ As a result, the new cultural ideas exported to Taiwan by the colonial government did not make any notable improvements in the subordination of Taiwanese women within their family lives.

From the middle of the colonial period to the time before World War II, the Taiwanese economy flourished. Following the development of domestic industry and business, and with a shortage of labor due to the war, women suddenly had access to Taiwan’s job market. Some female Taiwanese students, who came from rich families, were able to go to Japan to pursue medical degrees and return to practice in Taiwan.¹⁶ Few locally educated women, after receiving short-term training, could be teachers in elementary schools or licensed midwives.¹⁷ However, there were few professional women with this training. Most jobs for Taiwanese women were in manufacturing as factory laborers, porters on buses, conductors on trains, or servers in restaurants.¹⁸ Salary and work conditions for most working women were poor.¹⁹ Although they seemed to have more choices during the colonial period, their social status was still notably inferior to men.

3. *KMT Regime and Authoritarian Period: 1935 to 1987.* — In 1945, after Japan’s defeat in World War II, the Republic of China (“ROC”), led by Koumintang (“KMT”), acquired Taiwan. In late 1949, the island became a de facto state when the ROC central government moved to Taiwan due to its defeat in the civil war in

13 WANG, *supra* note 12, at 346-50.

14 Wang, *supra* note 12, at 535.

15 M. Christina Luera, Comment, *No More Waiting For Revolution: Japan Should Take Positive Action to Implement the Convention on the Elimination of All Forms of Discrimination Against Women*, 13 PAC. RIM L. & POL’Y J. 611-12 (2004).

16 TAIWAN PROVENIENCE LITERATURE COMMITTEE, TAIWAN JIEN-DAI-SHIH, SOCIETY, VOL. 3 124 [Modern Taiwan History] (1995).

17 *Id.* at 122-23, 125-26.

18 *Id.* at 126-31.

19 *Id.* at 130-32.

Mainland China.²⁰ The KMT regime took control of Taiwan and attempted to solidify its authoritarian rule. Although the KMT regime brought some western-style codes from Mainland China, many elements of these liberal ROC laws were reduced, especially in the areas of “the constitution, administrative regulation, judiciary, and criminal justice — all of which were closely related to the national governing power.”²¹ However, unlike the Japanese government, which basically respected Taiwan’s traditional customs in relation to family and inheritance issues, the KMT regime took a stricter attitude when its western-style family law conflicted with Taiwanese customs. According to the new laws under the KMT, men were not allowed to have concubines and the laws recognized women’s inheritance rights.²²

Under martial law, many civil rights provisions in the ROC constitution froze. However, for the first time in Taiwan’s history, women acquired the right to vote and receive “compulsory education,” which included six years of elementary school and three years of junior high school education. During this authoritarian period, gender equality seemed to make some positive steps forward. A prosperous economy and the development of greater industry created tremendous work opportunities for Taiwanese women.²³ Moreover, compulsory education enhanced the average education level of Taiwanese women. With the improved level of education, women had more choices in the workplace. Additionally, implementation of a strict monogamy law and enforcement of the right to inherit, improved both a women’s status in the family and greater protection of her property.

Unfortunately, in spite of these changes, both public and private fields were still full of gender discrimination during this period of Taiwanese history. For example, according to family law at that time, a wife was obliged to live with her husband. A child would carry on the father’s surname only if the mother did not have a brother. In the workplace, women’s primary occupations were routine jobs such as industrial workers, nurses, or secretaries instead of the high social-status jobs such as professors, judges, or doctors. Even if a woman and man performed equal work, they might not earn equal pay. In sum, the subtle improvement of women’s economic and educational status did not shake the solid unequal gender roles under the shadow of patriarchy. “In the Taiwanese society, the designated gender roles for a woman are, in a chronological sequence, a filial daughter, dutiful

20 WANG, *supra* note 12, at 537.

21 *Id.* at 537-38.

22 WANG, *supra* note 12, at 373.

23 TAIWAN PROVENIENCE LITERATURE COMMITTEE, *supra* note 17, at 236-37.

[and] chaste wife, and virtuous [and] loving mother.”²⁴ So although the economic environment improved and women’s mobility enhanced, this period never achieved formal or substantive gender equality.

4. *Liberal and Democratic Period: 1987 to Date.* — The lifting of martial law in 1987 heralded a new era for Taiwan and the Taiwanese women’s movement. The upgrading of the industrial infrastructure, modification of unreasonably restricted civil and political rights, and return of a number of academic elites who studied overseas, made Taiwan’s society more liberal and diverse. This period focused on human rights and Taiwanese women began to participate in political and social movements to change the existing inequality gap between men and women. Many women’s organizations formed to focus on economic inequality, women’s health, and legal inequality. The most remarkable achievement over the past fifteen years of organizing was the successful ratification of several gender-related laws.²⁵ These organization’s efforts accelerated the following legal reforms: (1) amending family to eliminate gender-discriminated marriage arrangements, (2) amending rape laws to include more types of sexual violations, (3) enacting the Anti-Rape Act to prevent sexual assaults, (4) enacting the Anti-Domestic Violence Act to protect disadvantaged members of the family, (5) enacting the Equal Protection Employment Act to provide equal treatment in the workplace, (6) enacting the Equal Protection in Education Act to ensure gender equality on campus, and (7) enacting Sexual Harassment Prevention Act to protect women’s sexual autonomy. Such legal reforms not only awakened public attention towards the subordination of women, but also formally improved women’s social status and legal rights.

While the women’s movement celebrated these remarkable legal achievements, women in Taiwan still face discrimination and subordination. On the surface, Taiwan is a modern, democratic country with many laws to ensure women’s rights; yet, its patriarchal culture defines what those laws actually mean. According to the 2005 Annual Report of Taiwanese Women’s Human Rights, many women believe that unequal gender values, such as the belief in male superiority, still hinder Taiwanese women from social participation. Moreover, traditional gender stereotypes and the lack of a comprehensive child-care policy continue to hinder women’s right to

24 Chao-Ju Chen, *Mothering under the Shadow of Patriarchy*, 1 NTU L. REV. 45, 47 (2006).

25 Xia-Dan, Wang, *Gender and Law* (Xien-Bie Yu Fa-Lu) in GENDER AND TAIWAN’S SOCIETY (Xien-Bie Xiang-Du Yu Taiwan She-Huei) 160 (Shu-ling, Huang & Mei-Huei, Yu ed., 2007).

work.²⁶ When society expects a woman to be a devoted wife, a good mother, and an able housekeeper, she does not really enjoy gender equality. Working women who want to enter the public sphere and be financially independent are still expected to meet their family obligations. When faced with such a dilemma, those women try to find assistance from other women — their mothers, mother-in-laws, domestic helpers, and even foreign brides — to meet their family obligations or cover the labor shortage in the private sphere.

B. The Role Replace: Transnational Marriage and Foreign Brides

The patriarchal tradition of “coupling-division” asks a Taiwanese woman to enter a heterosexual relationship, taking on the domestic work and child bearing, even if a woman has her own business. Taiwanese society evaluates a woman’s achievements by whom she marries, what education she gives to her children, and how she manages family affairs. To meet these social expectations, married women in Taiwan often find themselves engaged in a brutal battle — where they have to work as hard as men in public, while also assuming all of the housework and child rearing in private.

With the rise of women’s economic independence, more outstanding Taiwanese women are reluctant to take part in a traditional marriage.²⁷ Some women, even though they agree to wed, choose not to have children.²⁸ Recent changes in women’s economic and social status and the loosening of restrictive abortion laws, which allow women to terminate an involuntary pregnancy, stimulated a rapid decline in fertility rates in Taiwan.²⁹ According to 2006 national statistics, the fertility rate of child-bearing age Taiwanese women of was 1.11 percent, which was even lower than rates in the United States, Japan, France, and the United Kingdom.³⁰ However, “xianqi liangmu” defines what is considered a “good woman” and women who make personal choices not to become wives and mothers soon find themselves on the margins of social acceptance.³¹ Women in homosexual relationships do not fare much better. In Taiwan, heterosexual couples enjoy the legitimacy of marriage and material

26 TAIWAN FU-NUE REN-CHUENG DIAU-CHA BAU-GAU 24-26 (2006) [CHINESE ASSOCIATION FOR HUMAN RIGHT].

27 China Times, Jan. 27, 2008, available at <http://news.chinatimes.com/2007Cti/2007Cti-News/2007Cti-NewsContent/0,4521,110503+112008012700170,0 0.html>.

28 China Times, Jan. 12, 2008, available at <http://news.chinatimes.com/CMoney/News/News-Page/0,4442,content+120601+122008011200517,00.html>.

29 See 2006 Taiwan Year Book, Birth Rate from 1995-2004, http://www7.www.gov.tw/EBOOKS/TWANNUAL/show_book.php?path=8_001_12.

30 China Times, Jan. 12, 2008, available at <http://news.chinatimes.com/CMoney/News/News-Page/0,4442,content+120601+122008011200517,00.html>.

31 Chao-Ju Chen, *supra* note 25, at 47.

reciprocity, in such things as dowry, wedding gifts, and assistance in buying a home. Since homosexuality is still taboo in Taiwanese society, gay and lesbian couples do not have the right to marry nor receive financial assistance to establish a family. They also face difficulty in the workplace, having problems obtaining seniority and promotions.³²

Even with legal reforms, the patriarchal culture dominates the real world without regard to the type of relationships women engaged in. Many single women over the age of thirty-five in modern Taiwanese society feel ambivalent about marriage. On the one hand, they may enjoy economic independence and are spared from a marriage of necessity; on the other hand, they face anxiety and frustration regarding a perceived failure to fulfill the traditional roles assigned by society.³³

As employment opportunities and social participation increase for Taiwanese women, traditional gender roles are challenged and women experience greater autonomy. Taiwanese men find it harder to pursue their “dream wives” from among these hard-working Taiwanese women. The growing number of transnational marriages show that many Taiwanese men chose to go overseas to find eligible marriage partners rather than adjust to the changing gender roles. The prosperous economy and increasing globalization provide advantages for Taiwanese men to seek cross-border marriages in China and other South-Asian countries, such as Vietnam, Indonesia, and the Philippines.³⁴ The transnational-marriage wave reached its peak in 2004, during which almost one out of every four newly-wed brides was from China or South-East Asia.³⁵

Although many foreign brides marry to pursue better lives in Taiwan, they face social isolation in their newly adopted country. Many of the men who seek transnational marriages are low-wage earners and insist on maintaining traditional gender roles. While native Taiwanese women increasingly refuse to play the role of loving wife and mother, foreign brides have filled the void in the marriage

32 See Kuo, *supra* note 9, at 392.

33 See Yu-ning Chen & Mong Hwa Chin, *The Role Replaced: Unmarried Taiwanese Women and Foreign Brides*, in THINKING GENDER PAPERS 3 (2008), available at http://repositories.cdlib.org/csw/thinkinggender/TG08_Chen_Chin (follow “Download the Paper” hyperlink).

34 According to the data, by the year of 2007, the affluent economic status of Taiwan is evidenced by an average GDP in Vietnam, Indonesia and China. See generally WORLD DEVELOPMENT INDICATORS DATABASE, WORLD BANK, <http://siteresources.worldbank.org/DATASTATISTICS/Resources/GNIPC.pdf> (July 1, 2008).

35 DEPARTMENT OF STATISTICS, MINISTRY OF INTERIOR, <http://sowf.moi.gov.tw/stat/gender/ps03-04.xls>.

market. As fertility rates drop for Taiwanese women, foreign brides' fertility rates are rising. Statistical data shows that in 1998, foreign brides delivered 1 out of 19.53 newborns; however, in 2005, 1 out of 7.8 newborn infants was delivered by a foreign bride.³⁶

In addition to building a family, Taiwanese men pursue transnational marriages to find a woman to do the housework and take care of senior family members. While the men who go to developing countries to find brides may find it difficult to compete in the local Taiwanese marriage market, this is not true in other countries.³⁷ In contrast to many modern Taiwanese women, women in rural provinces of China or South Asia are willing to marry Taiwanese men and fulfill the patriarchal gender roles. Especially striking is that it is less expensive to marry than to hire a foreign domestic worker. Economically speaking, with the increase of Taiwan's annual wage, if a Taiwanese man wants to hire a foreign domestic servant to take care of the family, he would pay a minimum of \$8,500 (UNITED STATES) a year; while marrying a foreign bride to handle the housework would cost him only \$1,200 (UNITED STATES) for the dowry and the commission fee, giving economic incentives to marriage.³⁸ Moreover, "a wife will provide extra services that a cleaning lady will not: sex and childbearing."³⁹

While Taiwanese society creates the demand for immigrant brides, female immigrants suffer from discrimination, encountering difficulties in both the public and private spheres: like obtaining permanent residency, citizenship, the right to work, and recognition of educational degrees.⁴⁰ Due to their minority status, language proficiency, and cultural background, foreign brides also face barriers integrating into their husbands' families. The Taiwanese government has noticed these problems and instituted a series of new policies to assist foreign brides and their transnational families. While these policies address discrimination and culture bias against foreign brides, by social organizations criticize them as policing female bodies and controlling reproductive freedom.⁴¹

36 Tai-Lang, Jien, Taiwan Ren-Kou Chang-Che Yu Ren-Kou Jie-Kou Che Biang-Chien 74 [The Change of Taiwan's Population Policy and Population Structure]; Jiau-Yu Ze-Liau Yu Ien-Jiou [Education Information and Research] 1, 16 (2007).

37 Hung Cam Thai, *Clashing Dreams – Highly Educated Overseas Brides and Low-Wage UNITED STATES Husband*, in GLOBAL WOMEN 238-42 (Barbara Ehrenreich & Arlie Russell Hochschild eds., 2002).

38 Yu-ning Chen & Mong-hwa Chin, *supra* note 34, at 8.

39 *Id.*

40 Hsiao-hung Nancy Chen, *Human Rights' Issues Involved in Cross-Border Marriage*, 4-1 National Policy Quarterly (Kuo-Jia Cheng-Che Ji-Kan), 142 (2005).

41 Bruce Liao, *Our Law and Their Destiny in DO NOT CALL ME FOREIGN BRIDES* 146-69 (Xiao-juan, Xia ed., 2005).

III. The Role of Motherhood in Taiwan: An Analysis Using Feminist Legal Theory

A. Female Bodies and Population Control

In comparison to women in the United States⁴² and women in China,⁴³ Taiwanese women appear to enjoy more reproductive freedom with the passing of the Genetic Health Law in 1984. However, by looking more closely at the historical background of the Genetic Health Law, it is population policy, not women's autonomy, that defines a woman's reproductive freedom.

Due to controversial ethical issues, Taiwan's Genetic Health Law, first drafted in 1971, was placed on hold for thirteen years.⁴⁴ Prior to its 1984 passage, Taiwan had an extremely restrictive abortion law. Taiwan's Penal Code, forbade a woman from obtaining a legal abortion, even in cases of rape.⁴⁵ By severely restricting a woman's legal access to abortions, the only choice for those wishing to terminate an involuntary pregnancy was to have an unlicensed doctor, or ask a licensed doctor, to perform the unauthorized procedure. The passage of the Genetic Health Law, which has a provision for legal conditional abortions, reduced the number of illegal abortions in Taiwan.⁴⁶

Because Taiwan is an island, limiting population growth is an important task for the government. After losing the civil war, the KMT regime brought more than 70,000 people to Taiwan from Mainland China — the military personnel, government officers, and refugees. In the 1960s, in response to a rapidly growing population, the government first advocated the population policy, "two are just

42 Despite the 1973 Supreme Court decision of *Roe v. Wade*, 410 U.S. 113 (1973), which granted women the right to obtain an abortion, the issue remains controversial.

43 The Chinese government strictly maintains the "one-child" policy, under which women receive forcible abortions if they become pregnant again after having a child.

44 See Yen-lin, Ku, *Interaction Between the Women's Movement and Policy Formation: Analysis of Movement Strategies for Abortion Legalization and Equal Employment Opportunity*, 1 *Taiwan Studies* 44, 53 (1995-96).

45 David Sho-Chao Hung, *Abortion Rights in the United States and Taiwan*, 4 *CHI.-KENT J. INT'L & COMP. L.* 2, 15 (2004).

46 According to the law, under the following circumstances, a woman can undergo an induced abortion: "(1) if the woman or her husband has a genetic disease, infectious disease, or mental illness that may adversely affect eugenics, (2) if the woman or her husband's relatives within the fourth degree has a genetic disease that may adversely affect eugenics, (3) if the pregnancy or parturition would cause a fatal risk to the woman or cause mental or physical harm to the woman as determined by medical reason, (4) if the unborn baby will be born with a deformity as determined by medical reason, (5) if the woman was impregnated by rape or seduction or through a relative of which relationship the law would forbid as a marital one, and (6) if the pregnancy adversely affects the psychological or physical health of the woman or her family life." *Id.* at 17.

right,” which encouraged families to have only two children.⁴⁷ However, the population still grew at a rapid rate.⁴⁸ In 1979, the dictator President Chiang Ching-kuo mandated a new population policy⁴⁹ in which the annual rate of population growth should decrease to 1.25% in ten years and the government should protect eugenic health to enhance the quality of Taiwan’s people.⁵⁰ Following this mandate, the population policy changed from “two are just right” to “one is not too few; two are just right.”⁵¹ Additionally, the government accelerated drafting of the Genetic Health Law and the congress finally passed it in 1984. Not surprisingly, the enactment of the Genetic Health Law drove the birth rate down from 2.05% to 1.75% in ten years, with the rate declining every year.⁵² In 2006, with the birth rate fell to 1.115%.⁵³ Taiwan’s government has successfully suppressed population growth by loosening abortion restrictions in the name of eugenic protection.

While providing a legal alternative for women who seek an abortion, the purpose of the Genetic Health Law is not to ensure women’s reproductive freedom. The law is intended to help the government to exercise population control by decriminalizing doctor-performed abortions, and yet has the unintentionally provides the opportunity for abuse which has increased sex-selective technology. Before the passage of the Genetic Health Law, doctors who performed abortions committed a criminal offense, “providing assistance for abortion.” The Genetic Health Law protects doctors who perform abortions from criminal charges. The law also grants doctors the authority to determine whether a girl or woman is entitled to obtain a legal abortion, thus vesting doctors with the power and control over women’s bodies.⁵⁴ In essence, it is not women, but the government and the medical profession who benefit from the Genetic Health Law.

47 Ting-I, Tsai, *Declining Birth Rate Worries MOI*, TAIPEI TIMES, Oct. 15, 2002, at 2, available at <http://www.taipeitimes.com/News/taiwan/archives/2002/10/15/175736>.

48 *Id.*; see also Ministry of the Interior, *Monthly Bulletin of Interior Statistics, Population by Single Year of Age*, <http://www.moi.gov.tw/stat/english/index.asp>.

49 Jien, *supra* note 37, at 6.

50 *Id.*

51 Tsai, *supra* note 48.

52 See MINISTRY OF THE INTERIOR, MONTHLY BULLETIN OF INTERIOR STATISTICS, NUMBER AND RATES OF BIRTH, DEATH, MARRIAGE, AND DIVORCE, <http://www.moi.gov.tw/stat/english/index.asp>.

53 MINISTRY OF THE INTERIOR, *supra* note 50. Compare DEP’T OF HEALTH AND HUMAN SERVS., CTR. FOR DISEASE CONTROL, BIRTHS: FINAL DATA FOR 2005, *Tables C, 1, 10, 32*, http://www.cdc.gov/nchs/data/nvsr/nvsr56/nvsr56_06.pdf; POPULATION DIVISION OF THE DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS OF THE UNITED NATIONS SECRETARIAT, *World Population Prospects: The 2006 Revision and World Urbanization Prospects: The 2005 Revision*, <http://esa.un.org/unpp/index.asp?panel=2>.

54 See Chao-Ju Chen, *supra* note 25, at 57.

The ignorance of gender inequality in the promotion of birth control also creates a new form of subordination. According to observations from Taiwanese scholars, “the abuse of sex-selective technology in the abortion of female fetuses in Taiwan suggests the need to replace the neutral term ‘sex-selective abortion’ with the more accurate term ‘female-selective abortion.’”⁵⁵ In fact, “before it became technologically possible to determine the sex of a fetus, [the] conventional wisdom provided various methods to impregnate a wife with a male fetus.”⁵⁶ The easiest method “involved subjecting a woman to endless childbearing until at least a male baby was born.”⁵⁷ “The invention of female-selective technologies, [combined with loose abortion laws,] has modernized and facilitated male-dominated reproduction.”⁵⁸ Therefore, the Genetic Health Law, which permits women to receive legal abortion under the circumstance that the pregnancy adversely affects the psychological or physical health of the woman or her family life, provides a shortcut for those traditional families who do not want to have female babies.

Second-wave feminist, Susan Okin, argues that “the personal *is* political, and the public/domestic dichotomy is a misleading construct, which obscures the cyclical pattern of inequalities between men and women.”⁵⁹ The evolution of reproductive laws and birth control policies in Taiwan echoes such an argument and points out that power, which has always been understood as paradigmatically political, is also of central importance in family life. Although women’s rights groups in Taiwan expected to eliminate women’s subordination with passing the Genetic Health Law, hoping it would provide women with more choices to control their lives, they soon discovered that the law with its gender-neutral language reveals male-centric assumptions that have been used as a tool to reinforce gender inequality. As Catharine McKinnon argues, “gender is a question of power, especially of male supremacy and female subordination.”⁶⁰ Taiwanese society does not give women equal power in the private sphere of the family or in the public sphere of society. Thus, the law does not assure women’s autonomy, but provides an alternative to control women’s bodies.

55 *Id.* at 59.

56 *Id.*

57 *Id.*

58 *Id.*

59 SUSAN OKIN, JUSTICE, GENDER, AND THE FAMILY 111 (1989).

60 CATHARINE A. MACKINNON, *Difference and Dominance: On Sex Discrimination*, in FEMINISM UNMODIFIED 32, 40 (1987).

B. Regulating Reproductive Freedom and Punishing Pregnant Women

1. Same Reproductive Issues, Two Different Policies. — By deeming a woman's body a factory to produce healthy babies, Taiwanese society is eager to ensure the quality of the product, especially when the quantity of production continues to drop. The idea that babies can, and therefore should, be made "perfect" underlies pregnancy advice and both medical and social policing of pregnant women's lifestyles.⁶¹ Fetal-protection advocates in Taiwan are trying to save the low birth rate and enhance the population quality by narrowing the scope of legal abortions to stop the declining population and regulating pregnant women's behavior to monitor the quality of newborns.

According to the Genetic Health Law, there are six situations that legally warrant an abortion.⁶² Opponents, including religious groups and political parties, argue that the Genetic Health Law provides a loose restriction by permitting an abortion, when "the pregnancy either affects the mother's psychological or physical health or the mother's family life."⁶³ They believe that the scope of legal abortion under the Genetic Health Law is too broad as well as too vague.⁶⁴ For them, fetal personhood and family values should be protected by more restrictive abortion limitations.⁶⁵

In 2007, there were several amendments to the Genetic Health Law came before the Taiwanese Congress. Two main amendments, supported by the different political parties, imposed more restrictions on women seeking abortions. According to the draft amendments, a woman who seeks abortion should first go through mental health counseling, followed by a compulsory six-day waiting period, before receiving the procedure.⁶⁶ This amendment sparked pointed protests. Women and feminist scholars accused the government of manipulating women's bodies to raise or lower population numbers.⁶⁷ With the strong opposition by feminist groups, the congress did not pass the amendment; however, the proposal to narrow the scope of abortion

⁶¹ LAURY OAKS, *SMOKING & PREGNANCY- THE POLITICS OF FETAL PROTECTION* 19 (2001).

⁶² See Jien, *supra* note 37.

⁶³ See Symposium: Amending Genetic Health Law with Diverse Perspectives, Dec. 32, 2002, available at Taiwan, <http://old.npf.org.tw/Symposium/s91/911231-IA.htm>.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Angelica Oung, *Legislature Mulls Changes to Abortion Rules*, TAIPEI TIMES, Jan. 5, 2007, at 2, available at <http://www.taipeitimes.com/News/taiwan/archives/2007/01/05/2003343413>.

⁶⁷ *Id.*

laws is on hold and the congress placed it back on the agenda. In addition to limiting legal abortions to save the falling population, the government also encourages Taiwanese couples to have more children. Many county governments have begun to provide compensation for nursing care to families with newborns.⁶⁸

In contrast to restricting legal abortions available to Taiwanese women, the Taiwanese government encourages female immigrants in transnational families to take birth control. In an effort to address the ever increasing,⁶⁹ the Bureau of Health Promotion at the Department of Health provides financial support to foreign brides who seek birth control and legation.⁷⁰ Some counties, such as HsinChu and YuenLin, provide financial aid to foreign brides when they decide to seek an abortion to terminate the pregnancy.⁷¹ Only foreign brides receive this assistance. Taiwanese women do not share this “benefit.”

Many transnational marriages in Taiwan take place among low-income families or in families that have handicapped family members.⁷² If this financial assistance was part of a social-welfare program whose purpose was to reduce the medical expenses of the low-income families, the policy deserves support. However, this type of birth-control assistance reinforces the negative stereotypes and discriminatory medical checks on female immigrants, which sparks serious concern. Foreign brides coming from South Asia or China, are seen as coming from the least developed countries, where casual sex and contagious diseases are widespread.⁷³ These girls often have been unfairly labeled as indigent, greedy, and feculent. As a result, they receive multiple detailed physical exams when they try to immigrate to Taiwan. The first exam takes place in their hometown when they apply for a marriage visa, the second exam takes place when they enter Taiwanese territory, and the third exam takes place when they seek permanent residence in Taiwan.⁷⁴

68 See <http://www.baby-life.com.tw/baby-mother.com.tw/baby-life/2006/03/link-2.htm>.

69 See Jien, *supra* note 37.

70 See BUREAU OF HEALTH PROMOTION AT THE DEPARTMENT OF HEALTH, FINANCIAL AID FORM & GUIDE TO FOREIGN SPOUSES, *available at* <http://www.immigration.gov.tw/OutWeb/ch9/f9a-940809.html>.

71 See Health HsinChu County website *available at* http://foreignbride.hcshb.gov.tw/health_inspection.php; see also Heath Beureau website: <http://www.ylshb.gov.tw/newshis/index1.php?m=99&m1=14&m2=40&id=215>.

72 Yung-Che, Wang, *An Alalysis on Poverty of Families with Foreign/Chinese Spouse in Taiwan*, (Wui-Ji Yu Da-Lu Pei-Ou Jia-Ting Zhe Pin-Qiong Fen Xi), 4 JOURNAL OF SOCIAL WORK IN TAIWAN (TAIWAN SHE-HUI GONG-ZUO Ji-KAN) 16-20 (Jul. 2005).

73 *Id.* at 175.

74 Xue-hui, Chen, *Are We a Family? in DO NOT CALL ME FOREIGN BRIDES* 174 (Xiao-juan, Xia ed., 2005).

Population policies toward transnational families and foreign brides reflect a deep fear and prejudice of the Taiwanese government and people, which says that immigrant women are not good enough to be mothers; they are poor, they cannot produce perfect babies, and they have no idea about educating children. Second-wave feminists, who primarily focus on relationships between men and women, cannot explain the discrimination against foreign brides in Taiwan. Third-wave feminist theories, which have broader views on aspects of female sexuality, economic mobility, and the multi-faceted nature of racial, ethnic, class and gender identities, provide more insight into the issue of reproductive freedom for foreign brides in Taiwan. Third-wave feminists are divided as to the identity of “women” as a group.⁷⁵

On the one hand, [they] are demonstrably aware of discrimination against women and call for an end to double standards in sexual health and awareness, for the continued availability of birth control, and for more recognition of traditionally “female” roles such as caretaking. On the other hand, some third-wave writers claim that their brand of feminism ‘recognizes that the differences *among* women are as substantial as the differences *between* women and men.’⁷⁶

The reproductive issue in Taiwan represents this dual perspective. While it seems that every woman in Taiwan faces pressure from the gender-structured family and traditionally patriarchal culture, foreign brides, different from Taiwanese women, have to battle racial prejudice and other cultural stereotypes as well.

Foreign brides, like women of color and low-income women in the United States, have not always had access to family planning resources or been a part of the pro-choice movement.⁷⁷ However, this does not grant the Taiwanese government authority to control the reproduction activities of these women. As Nsiah-Jefferson argues, it is “difficult for many middle-class . . . feminists to understand and include the different perspectives and experiences of poor and minority women. Thus, it is particularly important that adequate information on the needs and experiences of all women be made available.”⁷⁸

The development of a complete health policy, which helps foreign brides to have access to (1) quality prenatal care, (2) resources to

⁷⁵ Bridget J. Crawford, *Toward a Third-Wave Feminist Legal Theory: Young Women, Pornography and the Praxis of Pleasure*, 14 MICH. J. GENDER & L. 99, 118 (2007).

⁷⁶ *Id.* at 118-19 (emphasis added) (quoting Rory Dicker & Alison Piepmeier, *Introduction* to CATCHING A WAVE: RECLAIMING FEMINISM FOR THE 21ST CENTURY 9-10 (Rory Dicker & Alison Piepmeier eds., 2003)).

⁷⁷ Laurie Nsiah-Jefferson, *Reproductive Laws, Women of Color, and Low-Income Women* in FEMINIST JURISPRUDENCE 322-23 (Patricia Smith ed., 1993).

⁷⁸ *Id.*

ensure the birth of healthy, wanted children, (3) protection against sterilization abuse, (4) sufficient information about sex and birth control, and (5) safe and affordable abortions in Taiwan, is necessary. Furthermore, the Taiwanese people, both men and women, must eliminate the discrimination against foreign brides. Otherwise, policies regarding foreign brides will perpetuate, even escalate, existing class and racial biases instead of providing real help.

2. Punishing Pregnant Women. — Similar to the United States fetal-protection policy which allows for the potential of legal intervention with regard to women's behavior and conduct during pregnancy, the fetal-protection movement in Taiwan targets pregnant women to punish them for certain behaviors during pregnancy, such as drug addiction, HIV infection, and smoking.

Under the current Taiwanese legal system, whether under civil or criminal law, a "fetus" is not legally a "person." But, the laws apply different principles when deciding on the status of a fetus. The civil law adopts the "born alive" rule — that if a baby is born alive, it can enjoy the same legal capacity when it was still a fetus.⁷⁹ In the case in which someone hits a pregnant woman and causes harm to the fetus, once the fetus is born alive, the newborn can file a civil suit against the perpetrator, seeking tort damages. On the other hand, if the fetus dies due to the inflicted harm before the birth, it does not have any right to claim. Under the criminal system, the principles of criminal law are concerned with the time in which the action of harm took place. Therefore, if someone hits a pregnant woman and causes harm to the fetus, the perpetrator is only liable for assaulting the mother, since the fetus was not a human being at the time when the offense occurred.⁸⁰ Furthermore, if the assault causes the death of the fetus, the perpetrator can only be charged with an aggravated assault against the mother, not homicide, because the victim of a homicide must be a human being.⁸¹

According to the "born-alive" rule, if the mother causes harm to the fetus during pregnancy, once the fetus is born alive, the baby has a cause of action against the mother. However, there has never been such a case in Taiwan because legal tradition imposes liability on a third party, not the mother. Additionally, it is very difficult to prove causation between the mother's conduct and the harm. Therefore, the only criminal liability a pregnant woman may be charged with for harming her fetus in Taiwan is the crime of abortion. A woman

⁷⁹ CODE CIVIL [C. CIV.] art. 6 (Taiwan) (a person's legal capability begins at birth and ends at death).

⁸⁰ CODE CRIM. [C. CRIM.] art. 277 (Taiwan) (One commits assault if he causes harm to human being's body or health.).

⁸¹ C. CRIM. art. 271 (Taiwan) (One commits homicide if he kills another human being.).

commits the crime of abortion when she aborts the fetus outside of the legal circumstances listed in the Genetic Health Law.

Since neither the civil code nor the criminal code recognize a fetus as a person before it is born, Taiwan's criminal system cannot follow the United States model, which recognizes criminal offenses such as assault, homicide, or child abuse for harm perpetuated against a fetus. Taiwan has developed a different strategy to regulate women's autonomy during pregnancy. First, as mentioned, political parties and religious groups have tried to amend the Genetic Health Law to impose more restrictions on abortions. Second, the legislature has begun to enact several administrative rules to regulate women's behavior during pregnancy. Third, the judicial system, exercising discretion at sentencing, usually orders more serious sanctions to drug-addicted women if they abuse drugs during pregnancy.

The 2007 amendment to the Tobacco Hazard Control Act shows how the government intervenes in the lives of pregnant women in the name of fetal-protection. Since 2000, health advocacy organizations, cooperating with fetal-rights supporters, sponsored a series of studies regarding smoking during pregnancy. These organizations highlighted the dangers of tobacco, describing how smoking mothers pass nicotine and carbon monoxide on to the fetuses and growing babies.⁸² Medical and legal scholars who support fetal-protection policies published journal articles addressing that causation between smoking and harm to the fetus and they strongly advocate the need to prohibit smoking during pregnancy.⁸³ According to their surveys and legal analysis, the Tobacco Hazard Control Act should be amended to forbid smoking during pregnancy and that women who break the prohibition should be fined and receive medical treatment.⁸⁴ Anti-smoking advocates and scholars are not the only two groups who support the regulation. The government, for the purpose of population control, has considered smoking-during-pregnancy regulations as well. In 2007, the congress finally amended the Tobacco Hazard Control Act to prohibit smoking during pregnancy. If a pregnant woman violates the law, she will receive compulsive health education to quit smoking.⁸⁵

These regulations are laughable. Technically, it is impossible for the government to tell whether a female smoker is pregnant. The only

⁸² See John Tung Foundation, <http://www.jtf.org.tw/JTF03/03-01.asp>.

⁸³ Shi, Hui-ling, *Fetal and Children's Protection under the Tobacco Hazard Control Act - An Opinion from the Expert* (Yien-Hai Fang-Zhe Fa Duei Tai-Er Ji Ying-You-Er Ying-lou Zhe Te-Bie Bao-Hu), 294 Taipei Bar Journal, 15-27 (2004); Yu-Bing, Kan, *A Study on Protection of Fetus and Young Children's Health Rights-focusing on the Proposal for Suppression Legislation of Tobacco Hazards*, Journal of Children Welfare, 43-62 (2003).

⁸⁴ *Id.*

⁸⁵ FAIGUI HUIBIAN, TOBACCO HAZARDS PREVENTION ACT, art. 12 (Taiwan).

possible way for the government to find a pregnant smoker is through prenatal check-ups. However, there are no legal means in Taiwan to require doctors to report a pregnant mother after the medical check, as smoking is legal. If congress enacts a law to force a doctor to make such a report, the rule would be held as an unconstitutional violation of people's privacy. Moreover, the amendment of the Tobacco Hazard Control Act requires pregnant smokers to receive "health education," as opposed to "medical treatment" or "group counseling." Whether "health education" effectively helps a pregnant smoker quit smoking is highly questionable. There are many other factors that can impact the health of a fetus. Second-hand smoke, for example, can cause low birth weights to a fetus.⁸⁶ Therefore, targeting only pregnant smokers while ignoring other harmful factors to the fetus does not protect "fetal rights." This merely reinforces gender discrimination and increases the unreasonable costs of motherhood.

The amendment of the Tobacco Hazards Control Act is unworkable and ineffective. Embedded in the legislation is an implied right of a fetus to grow up in an ideally healthy womb without any harm. However, does that right really exist? Does it accord to legal principles? Is it made with an unreasonable and discriminatory price toward women as a class? It seems that the government, the congress, and the scholars do not care. Unfortunately, with legal trends towards fetal protection, no one can guarantee that congress will enact similar laws such as an Alcohol Abuse Act or a Drug Abuse Act to protect fetal rights, regardless of whether these laws unreasonably intervene in women's autonomy.

Following the steps of congress, criminal courts in Taiwan support the policy of fetal-protection. Empirical data from court decisions, show that in cases involving a defendant who is a pregnant woman suffering from substance abuse, the court tends to impose a harsher sentence on the defendant. For example, in a Keelung District Court case, the court held that if "[t]he defendant uses drugs when she is two months pregnant Such a behavior not only harms herself, but also causes severe damage to the fetusThe defendant should receive a strict sentence of imprisonment."⁸⁷ Similarly, the Miaoli District Court contends that if "[t]he defendant was a drug offender [and] She did not seek help to quit the addiction; instead, she continued to abuse drugs during pregnancy The defendant's

86 See Chen Pei-chun, Li Hung-yo, Lin Puey-shiung & Sung Fung-chang, *Fu-Nu Chou-Yien Ji Er-Shou-Yien Han Di Chu-Sheng Ti-Zhueng Ying-Er*, Taiwan Gong-Gong Wei-Sheng Za-Zhi [Maternal Smoking, Environmental Tobacco Smoking and Low Birth Weight] 21-5 TAIWAN PUB. HEALTH MAG. 321-28 (2002).

87 KeeLung District Court, 94 Su Ze N. 189, Verdict.

behavior deeply affects the fetus's health Her conduct ignores that her fetus has the right not to be exposed to harmful substances The defendant should be sentenced seriously."⁸⁸

Determining whether a longer prison sentence effectively stops drug abuse during pregnancy is problematic. Compared to medical centers, drug treatment facilities in Taiwan's prisons are insufficient. While the government has made an effort to provide medical care to drug abusers, Taiwan's prison system continues to suffer from shortages of manpower and medical equipment.⁸⁹ Women abusing drugs during pregnancy are usually marginalized and suffer financial or other difficulties in society. Harsher sentences will not solve the problem; rather, it merely transfers the responsibility from the government to the pregnant mothers themselves making their situation worse.

The policy of punishing pregnant women for their behavior also extends to foreign brides. According to the Acquired Immuno-deficiency Syndrome Prevention Act enacted in 1990, if a foreign person in Taiwan is found to be HIV-positive, he or she should be deported immediately, even when the foreigner has a Taiwanese spouse.⁹⁰ Therefore, if a pregnant foreign bride is found to be HIV-positive and is in the early stages of pregnancy, i.e. before twenty-four weeks, the Taiwanese government will order her to leave Taiwan immediately.⁹¹ If the discovery occurs during the middle or late stages of pregnancy, the government will expel the foreign bride from Taiwan after she gives birth.⁹²

The HIV-infected woman can prove that she contracted the infection from her husband, the law allows HIV-infected foreign brides to file a complaint asking the government to review her case. However, her mandated immediate deportation makes it difficult for an HIV-positive woman to collect evidence and conduct the required legal procedures from overseas.⁹³ Another challenge is that under the

88 Miaoli District Court, 93 Yi Ze N. 362, Verdict.

89 Jimmy Chuang, *Drug Rehabilitation Spot Getting Off to a Bumpy Start*, TAIPEI TIMES, May 2, 2004, at 3, available at <http://www.taipeitimes.com/News/taiwan/archives/2004/05/02/2003153812>.

90 Faigui Huibian, AIDS Prevention and Control Act art. 14 (Taiwan), available at <http://law.moj.gov.tw/Eng/Fnews/Fnews/FnewsContent.asp?msgid=1897&msgType=en&keyword=Immunodeficiency>.

91 Wu Hui-ru, Taiwan AIDS Wui-Ju Pei-Ou Zai Fa-Lu-Shang De Kuen-Jing [*A Difficult Situation in Law – HIV-affected Foreign Spouses in Taiwan*], available at <http://migrant.coolloud.org.tw/node/11972>.

92 *Id.*

93 AIDS Prevention and Control Act (promulgated by the President of the Republic on Dec. 17, 1990, under Hua-Zong Yi Order No. 7210), art. 14-1, LAWS AND REGULATIONS DATABASE OF THE REPUBLIC OF CHINA (P.R.C.), available at <http://law.moj.gov.tw/Eng>.

Taiwanese Citizenship Act, a foreign bride must give up her original citizenship to obtain Taiwanese citizenship.⁹⁴ Therefore, an HIV-infected foreign bride is likely to become a refugee after being expelled by the government — they are forced to leave Taiwan without husbands, without their children, and without any claim to citizenship.

After much criticism, the congress amended the notorious regulations under the Acquired Immunodeficiency Syndrome Prevention Act in 2007. The title of the law has been changed to the “Legal Rights Protection Act of HIV-infected Patients,” which seems to focus more on providing assistance to HIV-infected patients rather than reinforcing the stigma of the illness. Under the new law, if a foreign bride is found HIV-positive, she is eligible to stay in Taiwan while filing the complaint and subsequent legal proceedings continue.⁹⁵ While the new rule is more generous to HIV-infected people, if an HIV-affected foreign bride fails to prove that she contracted the disease from her husband, the government will still expel her from Taiwan.

This, again, demonstrates the strong prejudice against female immigrants. The legislature contends that expelling HIV-infected foreigners seeks to protect public health and to curb the spread of AIDS.⁹⁶ As this policy demonstrates, HIV-infected foreign brides continue to be abandoned by Taiwanese society and government by condemning them for having a “shameful disease,” labeling them as unqualified mothers, and ordering them to leave Taiwan.

Policies like these send two messages. First, fathers have nothing to do with having a baby. Mothers bear the sole responsibility for maintaining the health and wellbeing of the fetus. Second, governmental interference in a woman’s body and her decision-making abilities is justifiable in the name of fetal-protection. These fetal-protection policies not only undermine respect for women’s bodily autonomy, but also ignore the reality of many women’s lives.⁹⁷ These policies discriminate against women as a group, and also create increased conditions for the oppression of foreign brides. As Mari

94 Nationality Act (promulgated by the President of the Republic on June 20, 2001, under Hua-Zong Yi Order No. 9000118960), art. 9, LAWS AND REGULATIONS DATABASE OF THE REPUBLIC OF CHINA (P.R.C.), *available at* <http://law.moj.tw/Eng>.

95 HIV Infection Control and Patient Rights Protection Act (promulgated by the President of the Republic, under Hua-Zong Yi Order No. 7210), art. 20, LAWS AND REGULATIONS DATABASE OF THE REPUBLIC OF CHINA (P.R.C.), *available at* <http://law.moj.tw/Eng>.

96 HIV Infection Control and Patient Rights Protection Act (promulgated by the President of the Republic, under Hua-Zong Yi Order No. 7210), art. 1, LAWS AND REGULATIONS DATABASE OF THE REPUBLIC OF CHINA (P.R.C.), *available at* <http://law.moj.tw/Eng>.

97 OAKS, *supra* note 62, at 176.

Matsuda and Angela Harris explain, a “multiple consciousness” analysis is an important tool in examining gender issues in the century of globalization.⁹⁸ While most women in Taiwan encounter the patriarchal culture in their everyday lives, different groups suffer from different oppressions. The best way to change the system and to empower women is to base one’s analysis on a localized understanding of women’s reality. Such an understanding, deepens feminist theories and, helps find useful solutions to change the patriarchal system.

Additionally, the mother and fetus are not in adversarial relationship. Instead, the two constitute a unity. The fetus is in the womb of the mother, as a part of the mother. When fetal rights overshadow the great costs of motherhood, women will decide not to have babies or abort their pregnancies. Alternatively, when a fetus suffers from a serious health problem, it is a potential threat to the mother’s health. Fetal-protection policies focusing solely on fetal personhood places the burden and blame on the pregnant woman. This not only violates legal principles in Taiwan, but also creates unnecessary conflict between a mother and her fetus. The law must recognize that “[t]o deprive women of their right to control their actions during pregnancy is to deprive women of their legal personhood.”⁹⁹ From a feminist point of view, a pregnant woman should be aware of the intricate relationship between the health of the fetus and the health of the mother. Therefore, the government should provide medical advice and assistance to women to help them avoid behaviors dangerous to this relationship, instead of imposing sanctions or heaping condemnation upon them.

IV. CONCLUSION

Motherhood has two levels of meanings, as personal experience and as social institution.¹⁰⁰ While many women seek motherhood, and many women embrace it unsought, many women lose their lives or liberty (substantially or literally) becoming or trying not to become, mothers.¹⁰¹ Catharine McKinnon argues that to reclaim the possibilities for women’s experiences of motherhood, one must begin

98 Mari Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN’S RTS. L. REP. 297 (1989); Angela Harris, *Race and Essentialism in Feminist Legal Theory*, in FEMINIST LEGAL THEORY 255 (Katharine T. Bartlett & Rosanne Kennedy eds., 1991).

99 Dawn Johnsen, *The Creation of Fetal Rights: Conflicts with Women’s Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599, 620 (1986).

100 CATHARINE MACKINNON, SEX EQUALITY 1991 (2001).

101 *See id.*

with a critique of the inequalities embedded in the institution of motherhood.¹⁰² Through my observations, I conclude that while Taiwan claims to be a “democratic” and “rule of law” country, its efforts on gender equality — culturally, legally, and systematically — are still extremely insufficient. Many modern Taiwanese women embrace greater economic independence and an improved social status, while the patriarchal culture overshadows their personal choices, family lives, and the legal system. The gender stereotypes associated with motherhood dominate public opinions, laws, and governmental policies. Men in Taiwanese society have ironically turned to finding immigrant brides in order to satisfy the patriarchal requirements of “xianqi liangmu,” while the greater society remains prejudiced against the immigrant wives. Even more troublesome, the state enacts laws and policies which reinforce this prejudice rather than working to eliminate gender and racial discrimination.

Reproductive issues in Taiwan are representative of the greater complexities of the gender phenomenon. Traditional feminist theories that focus primarily on inequities between men and women help us to understand the underlying issues prevalent in the fight for reproductive rights, but does not reveal the whole picture. Third-wave feminist theories, which employ multiple feminist methods, provide us with a broader vision to recognize multiple levels of oppression involved in this issue. This awareness will help develop diverse and effective solutions that reform the inequalities present in the discussion of reproductive rights.

With many Asian countries currently facing falling population trends, feminists should be very concerned about the increased development of fetal-protection policies. Pregnancy regulation in Taiwan shows how the state controls women’s bodies and integrity in the name of protecting a fetus and how power is manipulated to compound prejudice and discriminatory practices against foreign brides. Such policies result in the erosion of reproductive choices for women, a decrease in incentives for women to bear children, the marginalization and discrimination of transnational families, and, ultimately, the failure of fetal-protection policies to achieve their goals. The answer to improving low birth rates and improving infant mortality lies in what the state can provide in social, medical, financial, and legal support to women, not in severe sanctions and regulations imposed on women.

It is time for health practitioners, anti-smoking organizations, anti-drug advocates, legal experts, and policy makers, to direct their energy

102 *Id.*

and resources away from fetal-centered moral politics that condemn those women who refuse to have babies, who immigrate to Taiwan from other countries, or who do not comply with health advice as bad wives or bad mothers. Instead, these actors should adopt a harmonious policy that centers on helping parents overcome obstacles in bearing children, eliminating the conflict between a fetus and a mother, and in breaking down traditional family structures based on strict gender roles and expectations. This is a better solution in encouraging Taiwanese women to have babies. Before such a solution is well proposed and constructed, the best way for women to treat the current fetal-protection policies is to understand it, analyze it, and then reject it.

RECENT DEVELOPMENT

BEAN V. DEP'T OF HEALTH & MENTAL HYGIENE: A COMMITTED PERSON PETITIONING FOR RELEASE FROM CONFINEMENT IS NOT REQUIRED TO PRODUCE EXPERT MEDICAL TESTIMONY TO MEET THE EVIDENTIARY BURDEN.

By: Megan Ellenson

The Court of Appeals of Maryland held that when a committed person petitions for release, he or she does not have to produce expert medical testimony to satisfy the evidentiary burden that he or she would not pose a danger if released. *Bean v. Dep't of Health & Mental Hygiene*, 406 Md. 419, 959 A.2d 778 (2008). Rather, the court found that the requirement of expert testimony depends on the facts and circumstances in dispute and will be looked at on a case-by-case basis. *Id.* at 440-41, 959 A.2d at 791.

On December 3, 1985, Linwood Bean ("Bean") was committed to the Department of Health and Mental Hygiene ("Department") for inpatient treatment after being found not criminally responsible for assault with intent to murder. Bean was conditionally released from his commitment on three separate occasions. On October 15, 2001, his most recent release was revoked due to allegations of assault.

On December 23, 2004, Bean filed a petition for release in the Circuit Court for Baltimore City pursuant to Section 3-119 of the Maryland Code's Criminal Procedure Article. A jury trial was held to determine if Bean was eligible for release. During the trial, Bean's only two witnesses were himself and his friend, Andrew Conwell ("Conwell"), neither of whom were offered as experts. During testimony, both Bean and Conwell acknowledged that Bean had schizophrenia; however, both noted that Bean would not be a danger to himself or others if he was released. Specifically, Bean testified that he would continue to take his required medication upon release.

The Department produced expert testimony from Lisa Sloat, M.D., explaining that due to Bean's schizophrenia, he would pose a danger to himself and others if released. The case was submitted to the jury, who returned a verdict in favor of Bean's conditional release. The

Department filed a Motion to Stay Pending Appeal and an Application for Leave to Appeal with the Court of Special Appeals of Maryland. The Court of Special Appeals of Maryland granted the Department's motion and reversed the circuit court's decision, holding that a defendant who is committed must produce expert medical testimony to meet his burden of proof in proceedings determining eligibility for release. The Court of Appeals of Maryland granted Bean's petition for a writ of certiorari.

The Court of Appeals of Maryland began its analysis with an examination of the language of Title 3 of the Criminal Procedure Article of the Maryland Code. *Bean*, 406 Md. at 429, 959 A.2d at 784. The Court focused on Sections 3-101 through 3-123, which concern a person's mental capacity. *Id.* at 431, 959 A.2d at 785. The court found that Title 3 does not require courts to receive and consider expert testimony when determining a person's mental capacity. *Id.* at 431-32, 959 A.2d at 785. This includes release eligibility determinations. *Id.*

The burden is on the committed person to prove by a preponderance of the evidence that he is eligible for release. *Id.* at 429, 959 A.2d at 784 (citing MD. CODE ANN., CRIM. PROC. § 3-114(d) (West 2006)). This entails providing evidence to show that he will not be a danger to himself or others if released. *Bean*, 406 Md. at 429, 959 A.2d at 784 (citing MD. CODE ANN., CRIM. PROC. § 3-114(c) (West 2006)). The court found that based on the statute's language, the legislature left the necessity for expert testimony to be determined on a case-by-case basis. *Bean*, 406 Md. at 432, 959 A.2d at 785.

Based on the facts at issue in this case, the court determined that the material issue for the jury to decide was the factual dispute over whether Bean would continue to take the required medications if he was granted a conditional release. *Id.* at 432, 959 A.2d at 786. The court further stated that according to Maryland case law, expert testimony is required in a jury trial only when the issue to be determined is so intricately related to a certain profession that it is beyond the scope of knowledge that an average lay person possesses. *Id.* (citing *CIGNA Prop. & Cas. Cos. v. Zeitler*, 126 Md. App. 444, 463, 703 A.2d 248, 259-60 (1999)). The court found that Bean did not need to present expert medical testimony on his behalf because the facts in dispute did not involve a complex medical issue. *Bean*, 406 Md. at 432-33, 959 A.2d at 786. Instead, the issue involved disputed

facts that were dependent on assessing the credibility of Bean, and this was something an average lay person was capable of determining. *Id.*

The Department argued that determining whether a person with a mental disorder is dangerous always involves complex medical issues. *Id.* at 434, 959 A.2d at 787. Therefore, expert testimony is required. *Id.* The court quickly dismissed this argument, noting that the dangerousness issue does not always present itself as a complex medical question requiring expert testimony. *Id.* Instead, the necessity of expert testimony depends “on the nature of the disputed issues.” *Id.*

The intermediate appellate court, in holding that a person must provide expert medical testimony to prevail in a release proceeding, relied on a previous opinion from the Court of Appeals of Maryland. *Id.* at 434-35, 959 A.2d at 787 (citing *Jewel Tea Co. v. Blamble*, 227 Md. 1, 174 A.2d 764 (1961)). The Court of Appeals of Maryland noted, however, that the intermediate court erred in two aspects. *Bean*, 406 Md. at 435, 959 A.2d at 787. First, the proposition relied on by the Court of Special Appeals of Maryland to support its holding was not applied to the issue in the case from which the proposition was taken. *Id.* (citing *Jewel Tea Co.*, 227 Md. at 7, 174 A.2d at 767). Second, numerous jurisdictions, including Maryland, have found that the dangerousness a committed person may pose if released does not fall into the category of complex medical questions that can only be resolved by “dueling” expert testimony. *Bean*, 406 Md. at 435, 959 A.2d at 787. The court further explained that its holding in *Jewel Tea Co.* was not based on the fact that the expert and lay opinions conflicted, but, rather, on the fact that the plaintiff’s testimony was grounded in speculation and possibilities. *Id.* at 436, 959 A.2d at 788 (citing *Jewel Tea Co.*, 227 Md. at 8, 174 A.2d at 768). Therefore, the court, here, refused to hold that the dangerousness posed by a committed person always constitutes a complex medical issue requiring expert testimony because such a holding would contradict Maryland and federal case law. *Bean*, 406 Md. at 437, 959 A.2d at 788.

Finally, the court addressed a United States Supreme Court case introduced by both parties’ briefs. *Bean*, 406 Md. at 438-39, 959 A.2d at 789-90 (citing *Barefoot v. Estelle*, 463 U.S. 880 (1983)). In *Barefoot*, the petitioner argued that psychiatrists, in a capital sentencing proceeding, could not reliably predict the dangers posed by a person. *Bean*, 406 Md. at 438-39, 959 A.2d at 789-90 (citing

Barefoot, 463 U.S. at 896). The Supreme Court found that while expert testimony was not required, it could be helpful and relevant to the disputed issue. *Bean*, 406 Md. at 439, 959 A.2d at 790 (citing *Barefoot*, 463 U.S. at 897-99). The Court of Appeals of Maryland determined that *Barefoot* supported its holding that expert testimony was not required in *Bean*'s proceeding. *Bean*, 406 Md. at 440-41, 959 A.2d at 791. However, the court stressed that expert testimony could be helpful in release proceedings when used on a case-by-case basis. *Id.*

In *Bean*, the Court of Appeals of Maryland plainly stated that while expert medical testimony is not required, it can play an important role in release eligibility proceedings. As a result, the court gives a strong indicator to those involved in these proceedings that while it is not necessary for either party to retain the services of an expert, doing so could be quite helpful to their case. The use of expert testimony will strengthen a party's argument by providing supporting medical expertise. It will also be helpful because the expert medical testimony will more than likely be used by the jury to determine whether a person poses a danger to himself and others if released.

RECENT DEVELOPMENT

DOE V. MONTGOMERY COUNTY BD. OF ELECTIONS: THE LIMITATIONS PERIOD FOR JUDICIAL REVIEW OF PETITION CERTIFICATION ACCRUES AFTER AGGRIEVEMENT, AND MANDATORY REFERENDUM PETITION SIGNATURE REQUIREMENTS APPLY TO ACTIVE AND INACTIVE VOTERS.

By: Christian Kintigh

The Court of Appeals of Maryland held that the limitations period for judicial review of petition certification accrues after a final administrative decision causes aggrievement, and statutory petition signature requirements are mandatory and must apply to both active and inactive voters. *Doe v. Montgomery County Bd. of Elections*, 406 Md. 697, 962 A.2d 342 (2008). Specifically, when a timely challenge to a referendum petition is brought following the final petition certification, the court found it unconstitutional for a law to provide for separate lists of active and inactive voters so that inactive voters are excluded from calculating the required number of signatures. *Id.* at 726, 962 A.2d at 359.

In November 2007, the Maryland Citizens for Responsible Government (“Citizens Group”) used the referendum process to challenge a law enacted by the Montgomery County Council and signed by the County Executive. For the law to be placed on the ballot as referendum, the Citizens Group was required to collect signatures from five percent of the registered voters in Montgomery County. On November 30, 2007, the Montgomery County Board of Elections (“County Board”) informed the Citizens Group that 25,001 signatures were required to send the issue to the ballot, with the first half due to the County Board by February 4, 2008, and the second half due by February 19, 2008. On December 3, 2007, the Citizens Group received a letter from the County Board approving the form of the petition, and on December 7, 2007, the Citizens Group received an electronic version of the form. On February 4, 2008, as required, the Citizens Group submitted 15,146 signatures, and on February 19, 2008, they submitted an additional 15,506 signatures. On March 6,

2008, the County Board sent a letter to the Citizens Group certifying the petition.

On March 14, 2008, twelve Montgomery County citizens, including Jane Doe (“Doe”), challenged the petition by filing a complaint in the Circuit Court for Montgomery County seeking judicial review and declaratory relief. Doe and the County Board filed for summary judgment. At the hearing, it was revealed that the County Board did not include inactive voters when calculating the required signatures based on five percent of registered voters. Doe was allowed to file an amended complaint, and subsequently, the circuit court entered summary judgment in favor of the County Board. Doe petitioned for a writ of certiorari and expedited review, and the County Board cross-petitioned. The Court of Appeals of Maryland granted both petitions.

The Court of Appeals of Maryland first determined whether Doe’s March 14, 2008, complaint was timely. *Doe*, 406 Md. at 710, 962 A.2d at 350. Section 6-210(e) of the Election Law Article of the Maryland Code provides that judicial review for petition certification must be sought within ten days of the related administrative determination. *Id.* at 713, 962 A.2d at 351 (quoting MD. CODE ANN., ELEC. LAW § 6-210 (LexisNexis 2003)). The County Board argued that the cause of action accrued before March 6, 2008, because each previous letter from the County Board constituted separate administrative determinations. *Doe*, 406 Md. at 713-14, 962 A.2d at 351-52. As a result, the County Board alleged that Doe’s March 14, 2008, complaint was untimely. *Id.* Conversely, Doe argued that the March 6, 2008, petition certification was the final administrative determination that caused aggrievement, and judicial review was not appropriate before that date. *Id.* at 714, 962 A.2d at 352.

The court found that when an administrative agency has exclusive jurisdiction to resolve a dispute, the interested parties must wait for a final administrative decision before seeking judicial review. *Id.* at 717, 962 A.2d at 353-54 (quoting *State v. Md. State Bd. of Contract Appeals*, 364 Md. 446, 457, 773 A.2d 504, 510-11 (2001)). The court determined that aggrievement, in the context of judicial review of administrative decisions, meant that an individual must be “personally and specifically affected” in a way different from the general public. *Doe*, 406 Md. at 716, 962 A.2d at 353 (quoting *DuBay v. Crane*, 240 Md. 180, 185, 213 A.2d 487, 489-90 (1965)). The court found that Doe was not aggrieved by any of the letters sent before the petition certification, nor were any of those actions final administrative

determinations. *Doe*, 406 Md. at 718, 962 A.2d at 354. Those letters merely informed the Citizens Group of the status of the signature requirements for the pending petition. *Id.* On March 6, 2008, the County Board certified that the Citizens Group had met the requirements to put the question on the ballot. *Id.* This was the final administrative determination and the point in time when Doe became aggrieved. *Id.* at 718, 962 A.2d at 354-55. Therefore, Doe's March 14, 2008, complaint was timely. *Id.* at 718, 962 A.2d at 355.

The court then turned its attention to whether petition signature requirements should be calculated without including inactive voters. *Id.* at 722, 962 A.2d at 357. Section 3-503 of the Election Law Article of the Maryland Code provides for separate lists of active and inactive voters, so that inactive voters may not be counted for official administrative purposes. *Id.* at 725-26, 962 A.2d at 359 (quoting MD. CODE ANN., ELEC. LAW § 3-503 (LexisNexis 2003)). The court previously addressed whether the term "registered voter" includes inactive voters. *Doe*, 406 Md. at 723, 962 A.2d at 357 (quoting *Md. Green Party v. Md. Bd. of Elections*, 377 Md. 127, 832 A.2d 214 (2003)). There, the court warned against maintaining a separate registry of inactive voters and held that statutes or regulations which treat active and inactive voters differently are unconstitutional. *Doe*, 406 Md. at 724, 962 A.2d at 358 (citing *Green Party*, 377 Md. at 142-43, 832 A.2d at 223).

In *Doe*, the court further explained that there was no authority for the legislature to decree that an inactive voter does not possess all the rights of a registered voter, including the ability to petition for referendum. *Doe*, 406 Md. at 726, 962 A.2d at 359 (quoting *Green Party*, 377 Md. at 143, 832 A.2d at 223). Here, over 50,000 inactive voters were not counted to determine the proper amount of signatures required for the referendum petition. *Doe*, 406 Md. at 726-27, 962 A.2d at 359. If these inactive voters had been counted, the five percent signature requirement would not have been met. *Id.* at 727, 962 A.2d at 359-60. Therefore, the court held that the County Board was required to include both inactive and active voters when calculating the number of signatures required for a valid referendum petition. *Id.*

Finally, the court addressed 10,876 signatures on the petition that did not comport with the voter's registration identification. *Id.* at 727, 962 A.2d at 360. Section 6-203 of the Election Law Article of the Maryland Code states that the signature elements are "requirements" and must be satisfied for each signature to be validated and counted.

Id. at 727-28, 962 A.2d at 360 (quoting MD. CODE ANN., ELEC. LAW § 6-203 (LexisNexis 2003)). The County Board argued that validation requirements should be liberally construed because verification requires the election authorities to “ensure that the name of the individual who signed the petition is listed as a registered voter.” *Doe*, 406 Md. at 731, 962 A.2d at 362. The court determined that validation is a distinct step that occurs before signature verification, and as a result, the plain meaning of “requirements” indicates that the provisions are mandatory and not suggestive. *Id.* at 732, 962 A.2d at 362-63. As a result, the court declared the 10,876 challenged signatures invalid as a matter of law. *Id.* at 733, 962 A.2d at 363.

The decision in *Doe* ensures that strict compliance with statutory requirements is necessary to use referendum to modify state law. Practitioners must be aware that the ten-day limitations period for judicial review may begin to accrue at different times depending on when the challenger is aggrieved. Consequently, special attention must be paid to the nature of the challenge because failing to object at the right time can foreclose relief or waste time and money. By calculating petition signature requirements with active and inactive voters, the court sets a high hurdle for future referendum issues. Collecting the required signatures may be more difficult because many inactive voters may have moved or be otherwise unavailable to sign a referendum petition.

RECENT DEVELOPMENT

KARSENTY V. SCHOUKROUN: AN INTER VIVOS TRANSFER OF PROPERTY, WHERE THE DECEDENT RETAINED CONTROL DURING HIS LIFETIME, IS NOT PER SE VIOLATIVE OF A SURVIVING SPOUSE'S STATUTORY RIGHT TO A SHARE OF THE ESTATE.

By: Erin Day

The Court of Appeals of Maryland held that an *inter vivos* transfer may not be invalidated, for the purpose of determining a spouse's elective share, based solely on the fact that the decedent retained control of the property during his lifetime. *Karsenty v. Schoukroun*, 406 Md. 469, 959 A.2d 1147 (2008). Even where such transfers derogate a surviving spouse's statutory right to the decedent's net estate, the transfer is not *per se* fraud. *Id.* at 490, 959 A.2d 1159.

Gilles H. Schoukroun ("Gilles") died in October 2004. His estate planning arrangements were carried out in accordance with his will and a revocable trust. Gilles' will bequeathed his tangible personal property to his wife of four years, Kathleen Sexton ("Kathleen"). She was also the beneficiary of Gilles' life insurance proceeds totaling \$200,000. Gilles had a contractual obligation to maintain a life insurance policy naming his daughter from a previous marriage, Lauren, as the beneficiary but, Gilles failed to do so. Instead, Gilles named Lauren, as the beneficiary of the trust. He appointed himself as the trustee and Maryse Karsenty ("Maryse"), his sister, as the trustee upon his death, with Kathleen as the alternative trustee in the event that Maryse could not serve. The trust, valued at about \$422,000, included three financial accounts and two IRA transfer-on-death accounts.

In February 2005 Kathleen renounced Gilles' will and filed for a statutory share of the estate. Kathleen filed a complaint in the Circuit Court for Anne Arundel County, claiming that the trust constituted fraud in violation of her statutory right as the surviving spouse. The circuit court determined that the trust did not constitute fraud. Both parties appealed. The Court of Special Appeals of Maryland reversed the trial court's disposition as to Kathleen's fraud claim. The Court of

Appeals of Maryland granted Maryse's petition and Kathleen's conditional cross-petition for writs of certiorari.

The court first analyzed Maryland's elective share statute which provides surviving spouses with the option of either taking the property left to them pursuant to the decedent's will, or taking a one-third share of the decedent's "net estate." *Karsenty*, 406 Md. at 487, 959 A.2d at 1157 (citing MD. CODE ANN., EST. & TRUSTS § 3-203 (West 2008)). Looking at the "unambiguous" language of Section 3-203 of the Estates and Trusts Article of the Maryland Code ("Section 3-203"), the court determined that "net estate" includes only property to which the decedent retained an interest following his death. *Karsenty*, 406 Md. at 488, 959 A.2d at 1158 (citing 1 PAGE OF THE LAW OF WILLS § 16.10(2003)). The court concluded that the trust did not fall within the definition of "net estate" because Gilles' interest in the trust terminated at his death. *Karsenty*, 406 Md. at 488, 959 A.2d at 1158. Therefore, in accordance with Section 3-203, Kathleen was not entitled to a statutory share of the trust. *Id.* at 489, 959 A.2d at 1158.

Kathleen maintained that the value of the trust should be included as part of Gilles' net estate because the transfer to Lauren was invalid. *Id.* at 489, 959 A.2d at 1158-59. Kathleen argued that a *per se* rule had been established in Maryland, requiring that *inter vivos* transfers be pulled into the decedent's net estate when the decedent retained control of the property. *Id.* at 491, 959 A.2d at 1159 (citing *Knell v. Price*, 318 Md. 501, 569 A.2d 636 (1990)). The court decided that a decedent's control over property during life did not, in and of itself, constitute *per se* fraud. *Karsenty*, 406 Md. at 491, 959 A.2d at 1159-60. The decision to set aside such agreements should be done on a case-by-case basis, after considering all surrounding facts and circumstances. *Id.* at 491, 959 A.2d at 1160.

The court next analyzed the facts and circumstances to be considered in determining the validity of such transfers. *Id.* at 502, 959 A.2d at 1166. Historically, *inter vivos* transfers were invalidated when the court determined that the transfer was a "mere device or contrivance." *Id.* at 507, 959 A.2d at 1169 (citing *Hays v. Henry*, 1 Md. Chan. 337 (1851)). While that precise language has been abandoned, the standard remains the same. *Karsenty*, 406 Md. at 509, 959 A.2d at 1170. In a case involving a revocable deed of trust, the court refused to invalidate the trust as violative of spousal rights based on the determination that the transfer was "complete and bona fide." *Id.* at 509, 959 A.2d at 1170 (citing *Brown v. Fid. Trust Co.*, 126 Md.

175, 94 A. 523 (1915)). Here, although Gilles retained control over the trust during his life, a decedent's retained control alone does not discern a genuine *inter vivos* transfer from a fraud. *Karsenty*, 406 Md. at 501, 959 A.2d at 1165-66.

Admitting the difficulty in distinguishing a bona fide transfer from a "sham," the court listed three considerations to assist in the analysis. *Id.* at 514, 959 A.2d at 1173. First, is whether the decedent retained an interest in, or continued to enjoy, the transferred property. *Id.* Although such control does not, by itself, invalidate the transfer, it raises the question of good faith. *Id.* at 515, 959 A.2d at 1173 (citing *Mushaw v. Mushaw*, 188 Md. 511, 519, 39 A.2d 465, 468 (1944)). Second, judicial discretion should not be used to undo estate planning arrangements which are valid and legitimate. *Karsenty*, 406 Md. at 515, 959 A.2d at 1174. Third, the validity and legitimacy of such arrangements should be assessed after considering a number of relevant factors. *Id.* at 516, 959 A.2d at 1174.

The court analyzed several factors, but noted that the list expounded is not exhaustive. *Id.* at 525, 959 A.2d at 1180. First, is the extent of control retained by the decedent. *Id.* at 516, 959 A.2d at 1174. The court noted that in every case involving an invalidated *inter vivos* transfer, the decedent retained a "significant" amount of control. *Id.* The court should also consider whether the decedent actually exercised that retained control. *Id.* at 522, 959 A.2d at 1178. Excessive control or enjoyment of the property suggests that the decedent did not truly intend to part with ownership. *Id.* Here, the circuit court indicated that while Gilles retained control over the trust, he did not exercise that control or interfere with the trust. *Id.* at 523, 959 A.2d at 1179.

Furthermore, the motives of the decedent and the beneficiary of the *inter vivos* transfer should be considered. *Id.* at 517-19, 959 A.2d at 1175-76. The decedent's motives may indicate that the transfer "actually was intended to be complete and bona fide." *Id.* at 518, 959 A.2d at 1175. Also, in addition to possible collusion, future courts should consider whether the beneficiary's motives were to defraud the decedent or the surviving spouse. *Id.* at 519, 959 A.2d at 1176.

Another factor is the degree to which the surviving spouse is deprived of property that otherwise would have been included in the decedent's net estate. *Id.* at 20, 959 A.2d at 1176. The *inter vivos* transfer is more likely to be valid when the decedent leaves reasonable provisions for the surviving spouse. *Id.* at 520, 959 A.2d at 1177. Here, the circuit court determined that Gilles did not intend to defraud

Kathleen, rather, he intended to provide for both Lauren and Kathleen. *Id.* at 519, 959 A.2d at 1176. The court noted that although Lauren benefited more, Kathleen was by no means left destitute. *Id.* at 522, 959 A.2d at 1178.

A final factor is the familial relationship between the decedent and the beneficiary of the *inter vivos* transfer. *Id.* at 524, 959 A.2d at 1179. A transfer is more likely valid if made to support children from a previous marriage, especially when the surviving spouse and decedent were only recently married. *Id.* Not only did Gilles have a pre-existing obligation to provide for Lauren, but Gilles and Kathleen were only married a short time. *Id.* at 525, 959 A.2d at 1179.

Karsenty established the current standard for determining the validity of an *inter vivos* transfer that affects the statutory entitlements of a surviving spouse. An *inter vivos* transfer will not be set aside based solely on the decedent's retained control of the transferred property, and careful planning can ensure the validity of such transfers. For example, the decedent should not exercise excessive control over the property during his lifetime. Additionally, the transfer will seem more bona fide where there is a legitimate purpose behind the transfer, as well as reasonable, alternative provisions for the surviving spouse. Maryland estate planners should be aware of this decision and the specific facts and circumstances that tend to illustrate a legitimate and bona fide *inter vivos* transfer of property.

RECENT DEVELOPMENT

MARCANTONIO V. MOEN: AN EXPERT'S AFFIDAVIT MATERIALLY CONTRADICTS A PRIOR SWORN STATEMENT ONLY WHEN THERE IS AN IRRECONCILABLE STATEMENT OF MATERIAL FACT.

By: Joseph Maher

The Court of Appeals of Maryland held that an affidavit is a material contradiction of prior deposition testimony, under Maryland Rule 5-201(e), when it creates an irreconcilable factual discrepancy of consequence to the expert's previous sworn statement. *Marcantonio v. Moen*, 406 Md. 395, 959 A.2d 764 (2008). Upon finding a material contradiction, the court may strike the disingenuous affidavit. *Id.* at 412, 959 A.2d at 774.

In August 2000, Sherri Schaefer ("Schaefer") informed her gynecologist, Melissa Moen, M.D., ("Dr. Moen") that she was experiencing abnormal vaginal bleeding. The next month, Dr. Moen performed an ultrasound; however, she did not perform a biopsy at this time. Paula DeCandido, M.D., ("Dr. DeCandido") interpreted the ultrasound. Dr. DeCandido failed to report a 1.5 centimeter mass located on Schaefer's right ovary. Continuing to experience physical ailments, Schaefer returned to Dr. Moen and underwent a biopsy in April 2001. Schaefer was diagnosed with cancer and received treatment until her death on May 18, 2005.

Prior to her death, Schaefer and her husband, Charles Marcantonio ("Marcantonio"), filed a claim in the Circuit Court for Anne Arundel County against Drs. Moen and DeCandido ("Medical Providers") for negligently failing to diagnose and treat Schaefer's cancer in 2000. After Schaefer's death, Marcantonio added wrongful death and survivorship claims against the Medical Providers in an amended complaint.

Two expert witnesses for Marcantonio were deposed. The first expert, Dr. Hutchins, testified that he reasonably believed that Dr. Moen departed from the applicable standard of care, but he would not render an opinion as to the cause of Schaefer's death. In a subsequent affidavit, Dr. Hutchins rendered an opinion, within a reasonable

degree of medical probability, that Dr. Moen's failure to diagnose Schaefer's condition in 2000 was the proximate cause of her death.

Dr. Shmookler, Marcantonio's second expert, testified in his deposition that he did not have an opinion of the staging or prognosis of Schaefer's cancer, within a reasonable degree of medical probability, during May and July 2001. However, in a subsequent affidavit, Dr. Shmookler stated that the failure to properly diagnose the ovarian tumor in September 2000 was a substantial factor which proximately caused Schaefer's death.

The Medical Providers filed a motion to strike the affidavits of Drs. Hutchins and Shmookler. The circuit court granted the motion on the basis that the affidavits materially contradicted the prior deposition testimony of the experts, in violation of Maryland Rule 2-501(e) ("Rule 2-501(e)"). As a result, the circuit court granted summary judgment in favor of the Medical Providers. On appeal by Marcantonio, the Court of Special Appeals of Maryland affirmed. Marcantonio petitioned for a writ of certiorari to the Court of Appeals of Maryland, and the court granted the petition.

In its analysis, the Court of Appeals of Maryland determined under what circumstances, pursuant to Rule 2-501(e), an affidavit materially contradicts an expert's prior deposition testimony. *Marcantonio*, 406 Md. 405 n.8, 959 A.2d at 769 n.8. The Medical Providers argued that the plain language of Rule 2-501(e) requires its application to any contradiction found in an affidavit which conflicts with a prior sworn statement. *Id.* at 407-08, 959 A.2d at 771. In contrast, Marcantonio argued that Rule 2-501(e) only applies to contradictions of material fact between deposition testimony and an affidavit. *Id.* at 409, 959 A.2d at 772.

In a prior case, the Court of Appeals of Maryland decided that the sham affidavit rule did not mesh with Maryland law because it shifts the determination of credibility from the trier of fact to the judge on summary judgment. *Id.* at 407, 959 A.2d at 771 (citing *Pittman v. Atl. Realty*, 359 Md. 513, 540-42, 754 A.2d 1030, 1041 (2000)). The sham affidavit rule, which has been adopted by every federal circuit, provides the trial court with discretion to disregard an affidavit that materially contradicts prior sworn testimony when afforded no explanation. *Marcantonio*, 406 Md. at 405, 959 A.2d at 770 (citing *Pittman*, 359 Md. at 529, 754 A.2d at 1038). Subsequently, in 2003, the Rules Committee examined the issue of sham affidavits and recommended that a subsection be added to Rule 2-501. *Marcantonio*, 406 Md. at 407, 959 A.2d at 771. The Court of Appeals of Maryland

accepted the Rules Committee's recommendation to include subsection (e), which now reads in pertinent part, that "[i]f the court finds that an affidavit or other statement under oath materially contradicts the prior sworn statement, the court shall strike the contradictory part." *Id.* (citing Md. Rule 2-501(e)).

The rule does not define "material contradiction" so the court examined the ordinary meaning of the words. *Marcantonio*, 406 Md. at 409, 959 A.2d at 772. The court explained that a "material contradiction," under Rule 5-201(e), occurs when a statement is "irreconcilable" to the affiant's prior sworn statement because a factual assertion is "significantly opposite." *Id.* at 410, 959 A.2d at 773. The court provided an example involving an individual's exposure to lead paint where the deposition provided a specific time period; however, the later affidavit set forth a different length of time. *Id.* at 406, 410, 959 A.2d at 770-71, 773 (citing *Pittman*, 359 Md. at 518, 523-26, 754 A.2d at 1032, 1035-37). There was a clear material contradiction of the amount of time because both statements could not be true; therefore, the court may properly strike an affidavit under such a circumstance. *Marcantonio*, 406 Md. at 410, 959 A.2d at 773.

In comparison, the court looked to the District of Columbia Court of Appeals for an example of what is not considered a material contradiction. *Id.* at 411, 959 A.2d at 773 (citing *Hinch v. Lucy Webb Hayes Nat. Training*, 814 A.2d 926 (D.C. 2003)). In that case, the initial deposition stated that the expert could not "tease apart" the exact cause of the plaintiff's injury from the several possible causes; however, the affidavit stated, to a reasonable degree of medical certainty, that the defendant's negligence caused the plaintiff's injuries. *Marcantonio*, 406 Md. at 411, 959 A.2d at 773 (citing *Hinch*, 814 A.2d at 931). The court held that this did not constitute a "clear and explicit contradiction." *Marcantonio*, 406 Md. at 411, 959 A.2d at 773-74 (citing *Hinch*, 814 A.2d at 931).

The Court of Appeals of Maryland continued to cement its definition of a material contradiction through rulings of other jurisdictions and the purpose of the Maryland summary judgment procedure. *Marcantonio*, 406 Md. at 411-12, 959 A.2d at 774. Upon this justified definition, the court held that the affidavits of Drs. Hutchins and Shmookler did not materially contradict their prior deposition testimonies. *Id.* at 413-14, 959 A.2d at 775. Dr. Hutchins' affidavit was viewed to supplement his deposition, demonstrating a change in intention and not a factual contraction. *Id.* at 413, 959 A.2d at 774-75. Dr. Shmookler's affidavit was deemed to be, at best, a

credibility issue and not an issue of fact. *Id.* at 414, 959 A.2d at 775. The absence of an opinion as to Schaefer's prognosis or staging did not prohibit Dr. Shmookler from making an opinion pertaining to the failure of the treating physician's diagnosis of the tumor. *Id.*

While the court clearly elucidates the definition of a "material contradiction" under Maryland Rule 2-501(e), the court's interpretation in this matter greatly affects the current practitioner in his approach to depositions and summary judgment proceedings. This ruling allows an expert to give vague and indirect answers in the early stages of a lawsuit to avoid claims of summary judgment. Although this approach to the discovery process may in some ways affect judicial economy, it promotes justice by focusing summary judgment only on material facts, not on the existence of mere contradiction or witness credibility.

RECENT DEVELOPMENT

MCGLONE V. STATE: A MANDATORY SENTENCE ENHANCEMENT FOR CONVICTION OF A THIRD CRIME OF VIOLENCE DOES NOT REQUIRE INTERVENING TERMS OF CONFINEMENT OR SEQUENTIALITY BETWEEN PREDICATE CONVICTIONS.

By: Christopher Martini

The Court of Appeals of Maryland held that mandatory sentencing for the conviction of a third crime of violence does not require an intervening incarceration between predicate convictions or sequentiality. *McGlone v. State*, 406 Md. 545, 959 A.2d 1191 (2008). Specifically, upon a third conviction for a crime of violence, the court determined that a criminal defendant is eligible for a twenty-five year mandatory sentence if the two previous convictions occurred on separate occasions and the offender served at least one term of confinement. *Id.*, 406 Md. at 553, 959 A.2d at 1195.

On June 27, 1977, Lemuel Lindsay McGlone, Jr. (“McGlone”) was indicted for an armed robbery that occurred in New Jersey on May 19, 1977. While on bond, McGlone robbed a convenience store in Prince George’s County, Maryland, in December 1979. McGlone plead guilty to the Maryland robbery in June 1980 and was sentenced to ten years of incarceration. In November 1980, while serving the Maryland sentence, McGlone plead guilty to robbery and armed robbery in New Jersey, receiving a ten-year sentence to be served concurrently with the Maryland sentence.

In June 1988, the grand jury for Montgomery County indicted McGlone for crimes related to the distribution and manufacturing of PCP, as well as attempting to avoid arrest. On February 14, 1989, McGlone was convicted of, among other things, the use of a handgun in the commission of a crime of violence. The Circuit Court for Montgomery County sentenced McGlone to twenty-five years incarceration without the possibility of parole for the use of a handgun in the commission of a crime of violence.

On June 13, 2007, McGlone filed a motion to correct an illegal sentence, arguing that the mandatory sentence enhancement applies

when there are two prior convictions for crimes of violence separated by sequentially served terms of confinement. The circuit court denied the motion, and McGlone filed a timely appeal with the Court of Special Appeals of Maryland. The Court of Appeals of Maryland issued a writ of certiorari before any proceedings took place in the intermediate appellate court.

To assess whether the trial court properly sentenced McGlone, the Court of Appeals of Maryland analyzed the plain language of the habitual offender statute in the Maryland Code. *McGlone*, 406 Md. at 553, 959 A.2d at 1195 (citing MD. ANN. CODE art. 27, § 643B(C) (1957) (repealed 2002) (re-enacted in MD. CODE ANN., CRIM. LAW § 14-101 (West 2002 & Supp. 2007) (hereinafter “Section 643B(c)”). Under the plain language of Section 643B(c), a criminal defendant is considered a “habitual offender,” and subject to mandatory sentencing, if the offender was convicted on “two separate occasions” for crimes of violence arising from two separate incidents. *McGlone*, 406 Md. at 553-54, 959 A.2d at 1196. Additionally, the defendant also must serve at least one term of incarceration to be eligible for the mandatory sentence. *Id.* at 554, 959 A.2d at 1196.

According to the court, McGlone fell within this statutory scheme. *Id.* McGlone was convicted on two separate occasions of crimes of violence — June 19, 1980, for robbery, and on November 25, 1980, for robbery and armed robbery. *Id.* Both convictions arose from separate incidents, the first in New Jersey and the second in Maryland. *Id.* Additionally, McGlone served ten years incarceration for the prior convictions, which is at least one term of confinement required under the statute. *Id.* at 554-55, 959 A.2d at 1196.

McGlone, citing Maryland case law, argued that eligibility for mandatory sentencing requires a term of confinement between the two prior convictions. *Id.* at 555, 959 A.2d at 1196. The court rejected this argument by explaining that McGlone improperly relied on prior case law. *Id.* The court specifically addressed Section 643B(b) and not Section 643B(c), which was at issue on appeal. *Id.* at 555, 959 A.2d at 1196-97 (citing *Montone v. State*, 308 Md. 599, 612, 521 A.2d 720, 721 (1987)). Here, the court specifically refused to interpret Section 643B(c) in the same manner as it had previously interpreted Section 643B(b) because each section contains expressly different requirements. *McGlone*, 406 Md. at 556, 959 A.2d at 1197. By reading Section 643B(c) to require separate terms of confinement, the

court would have to ignore the plain language of the statute, which requires “at least one term of confinement.” *Id.*

Additionally, McGlone cited to another Maryland case to support the proposition that the requirement of intervening terms of confinement is equally applicable to Section 643B(c) as it is to Section 643B(b). *Id.* at 557, 959 A.2d at 1198. In that case, the court stated that it was commenting “on the operation of Section 643B(b), [but] our remarks are equally applicable to Section 643B(c).” *Id.* at 557, 959 A.2d at 1198 (quoting *Minor v. State*, 313 Md. 573, 576, 546 A.2d 1028, 1029 (1988)). Here, the court explained that the appropriate interpretation of these remarks is that subsections (b) and (c) require the defendant to have separate convictions for crimes of violence and to actually serve the necessary terms of incarceration for those crimes under the applicable subsection. *McGlone*, 406 Md. at 557-58, 959 A.2d at 1198. The court did not state that intervening terms of confinement also are required under Section 643B(c). *Id.* at 558, 959 A.2d at 1198.

Regarding McGlone’s second argument that there is a sequentiality requirement under Section 643B(c), the Court of Appeals of Maryland again relied on the plain language of the statute. *Id.* at 559, 959 A.2d at 1199. The plain language of Section 643B(c) does not suggest that each predicate offense and conviction must occur sequentially for the statute to apply. *Id.* at 559, 959 A.2d at 1199. Stated alternatively, a criminal defendant need not be incarcerated between predicate convictions to qualify for mandatory sentencing under Section 643B(c). *Id.* at 560, 959 A.2d at 1199. Instead, the only requirement with respect to sequentiality under Section 643B(c) is that the predicate offenses must occur on separate occasions. *Id.* at 559, 959 A.2d at 1199.

The statute defines “separate occasion” as “one in which the second or succeeding offense is committed after there has been a charging document filed for the preceding occasion.” *Id.* at 560, 959 A.2d at 1199 (quoting MD. ANN. CODE art. 27, § 643B(c) (1957 & Supp. 1987) (repealed 2002)). By the plain meaning of the definition, Section 643B(c) contains no requirement that the predicate offenses occur in a commission, conviction, commission, conviction sequence. *McGlone*, 406 Md. at 560, 959 A.2d at 1199. Section 643B(c) simply requires that the second predicate offense occurs after the charging document has been filed for the first offense. *Id.* at 560, 959 A.2d at 1200.

The court determined that *McGlone* fell squarely within the statutory definition, as the indictment for his first predicate offense of armed robbery in New Jersey preceded the commission of his second predicate offense of robbery in Prince George's County. *Id.* at 560-61, 959 A.2d at 1200. *McGlone*'s offenses fell within the gamut of Section 643B(c), and thus the trial court did not abuse its discretion by instituting the mandatory sentence of twenty-five years of incarceration for the use of a handgun during the commission of a crime of violence. *Id.* at 561, 959 A.2d at 1200.

The court's decision in *McGlone* requires attorneys and judges to be particularly attentive to the past convictions of criminal defendants. Upon conviction for a third crime of violence, so long as the defendant served at least one term of confinement and was convicted previously of two separate crimes of violence, a sentencing judge must sentence the defendant to a term of at least twenty-five years imprisonment, without the possibility of suspension or parole. Attorneys must be aware of this requirement and pay attention to the ramifications of a potential third conviction for a defendant when deciding whether to accept a favorable plea bargain or elect to take the matter to trial. As a result, *McGlone* requires increased vigilance of criminal trial participants and ensures harsher punishment for recidivist violent offenders.

RECENT DEVELOPMENT

***PRIDGEON V. BD. OF LICENSE COMM'RS FOR PRINCE
GEORGE'S COUNTY: BOARD OF LICENSE
COMMISSIONERS WAS STATUTORILY REQUIRED TO
HOLD A HEARING ON WHETHER A LIQUOR LICENSE
SHOULD BE RENEWED, EVEN THOUGH THE PROTEST
WAS WITHDRAWN PRIOR TO THE HEARING.***

By: Neal Desai

The Court of Appeals of Maryland held that there were no standing or due process issues when the Board of License Commissioners for Prince George's County held a hearing on whether a liquor license should be renewed after a protest was filed, despite the fact that the protest was withdrawn prior to the hearing. *Pridgeon v. Bd. of License Comm'rs for Prince George's County*, 406 Md. 229, 958 A.2d 289 (2008). More specifically, the court stated that withdrawal of the protest had no effect on the rights of others attending the hearing to be heard. *Id.* at 236, 958 A.2d at 293.

In a letter dated February 26, 2006, the president of Hillside Civic Association of Capital Heights, Maryland and twelve other persons ("Civic Association"), signed a protest in opposition to the renewal of Senate Liquor Store's ("Senate Inn") liquor license. Prior to the protest hearing scheduled on May 10, 2006, counsel for the Civic Association and Frank G. Pridgeon, Sr. ("Pridgeon"), the liquor license holder for Senate Inn, entered into a voluntary agreement, whereby the Civic Association withdrew their protest in return for operating concessions. The Board of License Commissioners for Prince George's County ("Board") held a hearing despite the Civic Association's withdrawal of the protest pursuant to the agreement. On May 24, 2006, the Board refused to renew Senate Inn's beer, wine, and liquor license, and ordered the Senate Inn to cease the sale of alcoholic beverages.

Pridgeon appealed to the Circuit Court for Prince George's County, which affirmed the Board's ruling. Pridgeon appealed to the Court of Special Appeals of Maryland. Before the intermediate appellate court heard the case, the Court of Appeals of Maryland issued a writ of certiorari on its own initiative.

The court first looked at whether the protest hearing was rendered moot by the withdrawal of the protest, or whether viable issues remained before the Board. *Pridgeon*, 406 Md. at 234, 958 A.2d at 292. The court stated that under the plain language of Article 2B, Section 10-302(g)(2) of the Maryland Code (“Section 10-302(g)(2)”), the Board was required to conduct a full protest hearing once the protest was filed. *Id.* (citing MD. ANN. CODE art. 2B, § 10-302(g)(2)(West 1957)). Pursuant to Section 10-302(g)(2), if a protest is filed, the license shall not be renewed without a hearing before the Board. *Pridgeon*, 406 Md. at 234, 958 A.2d at 292 (citing MD. ANN. CODE art. 2B, § 10-302(g)(2)). The court also found that renewal of the license is not a matter between the licensee and the protestant. *Pridgeon*, 406 Md. at 235, 958 A.2d at 292. Rather, it is a matter between the licensee and the Board. *Id.* The Board shall then determine, among other things, whether the licensee and the licensed premises meet certain requirements. *Id.* Then, the Board must look at possible problems that may justify denying renewal of the license. *Id.*

Furthermore, the filing of a protest does not provide a protestant with any special standing. *Id.* at 235, 958 A.2d at 292-93. Therefore, despite withdrawal of the protest, the court found that the Board still was required to make the same determinations under Article 2B, Section 10-202(a)(2) of the Maryland Code that it was required to make at the time the protest was filed. *Id.* at 235, 958 A.2d at 293. None of these issues became moot when the Civic Association withdrew the protest. *Id.* Therefore, the court agreed with the Board’s interpretation of Section 10-302(g)(2) that if a protest is filed, a hearing must be held, and agreed that this is consistent with the words of the statute. *Id.* at 238, 958 A.2d at 294-95.

The Court of Appeals of Maryland then looked at whether the Civic Association was the only entity with standing to challenge the renewal of the license. *Id.* at 236, 958 A.2d at 293. The Civic Association’s withdrawal meant that only the Civic Association itself voluntarily declined to present its case against *Pridgeon*. *Id.* Any person, not just the protestants, shall be heard at a protest hearing. *Id.* (citing MD. ANN. CODE art. 2B, § 10-202(a)(1)(iv)(West 1957)). Furthermore, the court explained that a person may be heard and present evidence at the hearing even if they lack standing to file a protest. *Pridgeon*, 406 Md. at 236, 958 A.2d at 293.

The Court of Appeals of Maryland also addressed whether *Pridgeon* was denied his due process rights because he did not receive notice from everyone who may attend the license renewal hearing. *Id.*

The court found that the Board's decision to proceed without Civic Association and hear arguments from others was not a violation of Pridgeon's due process because once the hearing was scheduled, Pridgeon was put on notice that he may have to appear before the Board. *Id.* Furthermore, those who plan on attending the hearing are not required to give notice in advance. *Id.* Even though the applicant reached an agreement with all the protestants, the hearing is not prevented from going forward. *Id.* This is especially true if others who are opposed to the liquor license renewal plan to attend the hearing. *Id.* Pridgeon, as the applicant for the liquor license renewal, should have been aware of these procedural points. *Id.*

Pridgeon made two additional arguments. *Id.* at 239, 958 A.2d at 295. First, he argued that his license should have been renewed because the Board's denial resulted from changes of practices and policies in handling protest hearings, which required the adoption of appropriate rules and regulations. *Id.* The court rejected this argument because the Board has never adopted a policy, whether formal or informal, "obviating the need for a statutorily mandated hearing on a protested renewal for any reason." *Id.* Second, Pridgeon argued that under the Administrative Procedure Act, administrative agencies would declare the protest hearing moot upon withdrawal of the protest by the Civic Association. *Id.* The court also rejected this argument by stating that the Administrative Procedure Act is not applicable to proceedings before the liquor boards. *Id.* at 239-40, 958 A.2d at 295 (citing *Valentine v. Bd. of License Comm'rs*, 291 Md. 523, 530, 435 A.2d 459, 463 (1981)).

Pridgeon clarifies Maryland law in establishing that where a protest for renewal of a liquor license is withdrawn prior to the Board's hearing, the Board still is statutorily required to hold the hearing. As a result, according to Maryland law, once a protest is initiated, an agreement between the original protestants and the licensee will not suffice to prevent a hearing before the Board or to prevent the denial of one's liquor license. The Maryland practitioner representing the license holder should be prepared for any consequence resulting from the filing of a protest because arguments of standing and due process seem unlikely to prevail. Now, it seems the only way to prevent a hearing is to make negotiations before a protest is filed, thus preventing the protest. Once a protest is filed, Maryland practitioners should verify that those who signed the protest were authorized to do so.

RECENT DEVELOPMENT

SUPERVISOR OF ASSESSMENTS V. STELLAR GT: A MID-CYCLE REVALUATION OF REAL PROPERTY FOR TAX ASSESSMENT PURPOSES MUST BE CAUSED BY A STATUTORILY SPECIFIED FACTOR.

By: David Coppersmith

The Court of Appeals of Maryland held that the mid-cycle revaluation of real property must be caused by one of the factors specified in Section 8-104(c) of the Tax-Property Article of the Maryland Code. *Supervisor of Assessments v. Stellar GT*, 406 Md. 658, 961 A.2d 1119 (2008). Specifically, the court held that the mid-cycle revaluation of real property caused by its sale price, rather than a factor specified in the statute, amounted to an impermissible retroactive reassessment. *Id.* at 675, 961 A.2d at 1129.

In October 2003, the Montgomery County Office of the Maryland Department of Assessments and Taxation (“Department”) valued Georgian Towers, a high-rise apartment building then owned by Borger Management (“Borger”), in anticipation of Georgian Towers’ 2004 assessment notice. Prior to the valuation, Borger submitted information to the Department listing all renovations that occurred during 2003. Although these renovations added at least \$50,000 in value to the property, an assessor from the Department never visually inspected the property after the renovation information was submitted. Georgian Towers’ assessment notice was issued by the Department in December 2003, with the property valued at \$52.6 million. In March 2004, Borger sold Georgian Towers to Stellar GT (“Stellar”) for approximately \$89 million. Following the sale, in June 2004, the Department revalued the property based upon the sale price and sent an assessment notice to Stellar, informing Stellar that the property had been revalued from \$52.6 million to \$89 million, resulting in a substantial tax increase.

Stellar appealed the mid-cycle revaluation, first to the Property Tax Assessment Appeals Board and then to the Maryland Tax Court, both of which affirmed the Department’s mid-cycle revaluation. Stellar then sought judicial review in the Circuit Court for Montgomery

County, which affirmed the Tax Court's decision. Stellar subsequently appealed to the Court of Special Appeals of Maryland, which reversed, holding that the Supervisor of Assessments ("Supervisor") used the sale price as a retroactive justification for reassessment in violation of Section 8-104 of the Tax-Property Article of the Maryland Code ("Section 8-104"). The Supervisor petitioned the Court of Appeals of Maryland for a writ of certiorari, which was granted.

While the Department assesses real property in Maryland once every three years, Section 8-104 allows for a mid-cycle revaluation if one of six specific events enumerated within the statute causes a change in the property's value. *Stellar GT*, 406 Md. at 661-62, 961 A.2d at 1121 (citing MD. CODE ANN., TAX-PROP. § 8-104(c) (West 2001)). These events include (1) a change in zoning classification by the owner; (2) a change in use or character; (3) substantially completed improvements are made which add at least \$50,000 in value to the property; (4) an error in calculation or measurement of the real property caused the value to be erroneous; (5) a residential use assessment is terminated pursuant to Section 8-226 of the Tax-Property Article of the Maryland Code; or (6) a subdivision occurs. *Stellar GT*, 406 Md. at 662, 961 A.2d at 1121 (citing MD. CODE ANN., TAX-PROP. § 8-104(C)).

The Supervisor contended that upon learning of substantially completed improvements, not captured in an existing assessment and adding value to the property, the Supervisor must revalue the property, regardless of how that knowledge was acquired. *Stellar GT*, 406 Md. at 670, 961 A.2d at 1126. Specifically, the Supervisor contended that Section 8-104 does not restrict the use of information concerning an increase in value. *Id.* Conversely, Stellar contended that a sale of real property is not one of the circumstances listed under Section 8-104 to cause a revaluation, even if a statutory factor that could initiate the revaluation was uncovered. *Id.*

The court explained that the word "cause" within Section 8-104(c) means "a reason for an action or condition." *Id.* at 671, 961 A.2d at 1126 (quoting MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 196 (11th ed. 2005)). The court determined that the cause of Georgian Towers' revaluation was the sale price, rather than a review of the premises, the documents available from the permit office, or the documents submitted by the owner. *Stellar GT*, 406 Md. at 671, 961 A.2d at 1126. The Department did not seek the relevant building

permits until after it had decided that the sale price indicated the regular assessment must have been erroneous. *Id.* at 671, 961 A.2d at 1127 (quoting *Stellar GT v. Supervisor of Assessments*, 178 Md. App. 624, 634, 943 A.2d 100, 106 (2008)). Additionally, the assessor did not conduct a visual inspection of the renovation work, despite Borger submitting information indicating that the renovations that were completed in 2003 increased the value of the property by more than \$50,000. *Stellar GT*, 406 Md. at 671, 961 A.2d at 1127 (quoting *Stellar GT*, 178 Md. App. at 634, 943 A.2d at 106).

The court found that the legislature chose to link mid-cycle reassessment to “the occurrence of certain specified events...likely to presage a change in value”, rather than any change in value. *Stellar GT*, 406 Md. at 672, 961 A.2d at 1127 (quoting *Supervisor of Assessments of Balt. City v. Chase Assocs.*, 306 Md. 568, 577, 510 A.2d 568, 572 (1986)). In *Chase Associates*, the court determined that “cause” within Section 8-104 is equated with “linkage”, rather than “trigger” as opined by the Tax Court. *Stellar GT*, 406 Md. at 673, 961 A.2d at 1128 (citing *Chase Assocs.*, 306 Md. at 577, 510 A.2d at 572). The court, here, disagreed with the Supervisor’s contention that the existence of one of the statutory factors, even if the revaluation was not based upon that factor, enabled revaluation. *Stellar GT*, 406 Md. at 673, 961 A.2d at 1128.

The court found that a sale cannot be linked to a mid-cycle revaluation, and therefore, the Supervisor must assert that a link exists between substantially completed improvements and the new value. *Id.* at 673, 961 A.2d at 1128 (citing *Montgomery County Bd. of Realtors, Inc. v. Montgomery County*, 287 Md. 101, 103, 411 A.2d 97, 98 (1980)). The court explained that to avoid retroactive reassessment, a revaluation must not be linked to a sale, but to one of the enumerated statutory factors, which the Supervisor admitted did not cause the revaluation of Georgian Towers. *Stellar GT*, 406 Md. at 675, 961 A.2d at 1129. The Supervisor stated that the major guide in arriving at the \$89 million assessment was the sale price, and the renovation costs were not taken into account in revaluing the property. *Id.* at 671, 961 A.2d at 1126-27.

The Supervisor also contended that Section 8-401 of the Tax-Property Article of the Maryland Code (“Section 8-401”) enables revaluation of real property during the next calendar year, regardless of what precipitated the revaluation. *Id.* at 675-76, 961 A.2d at 1129. Section 8-401(f) relates to the effect of failing to send notice within

thirty days of the assessment becoming final, which creates an irrebutable presumption that the prior value has not changed. *Id.* at 678, 961 A.2d at 1130 (quoting MD. CODE ANN., TAX-PROP. § 8-401(f) (West 2001)). The court rejected this argument, determining that Section 8-401 is dependent on Section 8-104 for the permissible factors for reassessment and does not enable revaluation for any factor other than those statutorily specified. *Stellar GT*, 406 Md. at 678, 961 A.2d at 1130-31.

The Court of Appeals of Maryland's decision in *Stellar GT* protects owners and potential buyers of real property from retroactive reassessments by the Department of Assessments and Taxation. The court limited the causes for a mid-cycle reassessment of real property to those factors specifically enumerated within Section 8-104(c), restricting the use of information concerning an increase in the value of real property. The Department of Assessments and Taxation is prohibited from revaluing real property mid-cycle solely because its sale price is higher than the current assessment. This decision puts the Department on notice that, upon learning of substantially completed improvements which add value to real property, it must review either the real property itself or documentation of the improvements, and take this information into account for the reassessment.

RECENT DEVELOPMENT

TAYLOR V. STATE: UNDER MARYLAND RULE 5-806, A PARTY MAY ATTACK THE CREDIBILITY OF A HEARSAY DECLARANT DURING THE CROSS-EXAMINATION OF A TESTIFYING WITNESS BUT MAY NOT PRESENT PROOF OF A DECLARANT'S MISCONDUCT.

By: N. Tucker Meneely

In a matter of first impression, the Court of Appeals of Maryland held that Maryland Rule 5-806 permits a party to impeach the credibility of a hearsay declarant through the cross-examination of a testifying witness provided that no extrinsic evidence of the declarant's misconduct is put forth. *Taylor v. State*, 407 Md. 137, 963 A.2d 197 (2009). The court determined that to hold otherwise would permit a party to insulate a hearsay declarant from impeachment. *Id.* at 164, 963 A.2d at 213.

On September 22, 2004, Todd Tyrone Taylor ("Taylor") was involved in a sexual encounter with B.D., a 15 year-old boy. After notifying his parents, B.D. interviewed with Detective Deana Mackie ("Detective Mackie") of the Montgomery County Police Department. A forensic nurse examined B.D., and B.D. informed the nurse that he had performed fellatio and had anal intercourse with Taylor. A subsequent DNA sample taken from B.D. matched that of Taylor.

Taylor was indicted on two counts of sexual offense in the third degree and one count of sexual offense in the fourth degree. Before the Circuit Court for Montgomery County, the State, instead of having B.D. testify, relied on testimony from B.D.'s father and Detective Mackie. During the father's cross-examination, Taylor intended to impeach B.D.'s version of the encounter by alleging that B.D. had previously lied to his father about his sexual experience. During Detective Mackie's cross-examination, Taylor further attempted to establish that B.D. had told inconsistent stories about his encounter with Taylor. In both instances, the trial court prohibited Taylor's questioning with regards to B.D.'s history of lying and his sexual experience.

The jury convicted Taylor of one count of sexual offense in the third degree. Taylor appealed to the Court of Special Appeals of Maryland, which held that the trial court did not err in curtailing B.D.'s impeachment, and, if error had occurred, it was harmless. The Court of Appeals of Maryland granted Taylor's petition for a writ of certiorari.

Before the Court of Appeals of Maryland, Taylor argued that the questions regarding B.D. lying about his sexual experience and the encounter with Taylor were admissible because they had impeachment value bearing on B.D.'s veracity. *Taylor*, 407 Md. at 153, 963 A.2d at 206. Therefore, Taylor argued, the questions were not affected by the extrinsic evidence limitation of Maryland Rule 5-608(b) ("Rule 5-608(b)"). *Id.* Alternatively, the State argued that Taylor's questions constituted the introduction of extrinsic evidence, and therefore, the questions were impermissible under Rule 5-608(b). *Id.*

The Maryland Rules of Evidence provide that a party may impeach a hearsay declarant with any evidence that would be admissible had the declarant testified as a witness. *Id.* at 153, 963 A.2d at 206 (citing Md. Rule 5-806(a)). Due to the confluence of Maryland Rules 5-806 and 5-608(b), the court first determined whether Taylor would have been permitted, under Rule 5-608(b), to cross-examine B.D. with the same questions he was prohibited from asking B.D.'s father and Detective Mackie at trial. *Taylor*, 407 Md. at 153-54, 963 A.2d at 206.

The Court of Appeals of Maryland has held that, under Rule 5-608(b), witnesses may be questioned regarding matters that are likely to affect their credibility, test their memory or knowledge, or show their relation or bias to the parties. *Id.* at 154, 963 A.2d at 207 (quoting *State v. Cox*, 298 Md. 173, 178, 468 A.2d 319, 321 (1983)). The cross-examination is limited in that proof of particular facts is inadmissible when impeaching a witness. *Taylor*, 407 Md. at 157, 963 A.2d at 209. The purpose of this limitation is to avoid distracting the jury with a mini-trial regarding a collateral matter, while still allowing questions about prior instances of lying. *Id.* at 159-60, 963 A.2d at 210 (citing *Merzbacher v. State*, 346 Md. 391, 417-20, 697 A.2d 432, 445-46 (1997)).

Applying these principles, the court found that under Rule 5-608(b), if B.D. had testified, the questions Taylor planned to ask during cross-examination would have been permitted because they went directly toward B.D.'s character for truthfulness. *Taylor*, 407

Md. at 160, 963 A.2d at 211. However, if B.D. simply had replied “no” to these questions, Taylor would have been bound by B.D.’s answers. *Id.* Taylor could not have introduced extrinsic evidence to prove that B.D. lied about his sexual experience or his encounter with Taylor. *Id.*

Given that Taylor did not have the opportunity to cross-examine B.D. at trial, the court turned its focus to whether, under Maryland Rule 5-806 (“Rule 5-806”), the State could have avoided the impeachment of B.D.’s veracity by never calling him to the stand. *Id.* at 161, 963 A.2d at 211. Observing that this was an issue of first impression, the court examined federal case law for guidance. *Id.*

Federal courts indicated that Rule 806 of the Federal Rules of Evidence, which is similar in important respects to Maryland Rule 5-806, would allow the impeachment of a non-testifying hearsay declarant, but not proof of misconduct. *Id.* Specifically, the unavailability of a declarant would not always foreclose using prior misconduct as an impeachment tool. *Id.* at 163, 963 A.2d at 212 (quoting *U.S. v. Saada*, 212 F.3d 210, 221 (3rd Cir. 2000)). The witness could be questioned about the declarant’s misconduct, so long as there was no introduction of extrinsic evidence. *Taylor*, 407 Md. at 163, 963 A.2d at 212 (citing *Saada*, 212 F.3d at 221). One federal court reasoned that evidence of prior misconduct would not have been admissible had a declarant testified, and therefore, under Federal Rule 806, it also was inadmissible during the cross-examination of a testifying witness. *Taylor*, 407 Md. at 162, 963 A.2d at 212 (citing *U.S. v. White*, 116 F.3d 903, 920(D.C. Cir. 1997)).

Similarly, based on the determination that Taylor could have asked B.D. whether he lied about his sexual experience and his encounter with Taylor under Rule 5-608(b), the Court of Appeals of Maryland found that Rule 5-806 would permit the same questions to be posed to B.D.’s father and Detective Mackie. *Taylor*, 407 Md. at 164, 963 A.2d at 213. Therefore, the court held that the trial court erred in limiting Taylor’s cross-examination of B.D.’s father and Detective Mackie. *Id.* However, due to the substantial amount of DNA evidence, the majority held that this error was harmless and did not sway the verdict. *Id.* at 166-67, 963 A.2d at 214. Conversely, the dissent argued that had the jury been given the opportunity to hear that B.D. lied, the jury might have had a different perspective on the scientific evidence, which may have resulted in a different verdict. *Id.* at 179, 963 A.2d at 222 (Bell, C.J., dissenting).

By clarifying the scope of Rule 5-806, *Taylor* gives an opposing party the opportunity to establish a hearsay declarant's penchant for untruthfulness. This decision is particularly important in cases where a declarant's well-being requires that they refrain from testifying, especially in cases involving minors or victims of sexual offenses. Before this decision, a party's strategy may have included presenting a declarant's statements through other witnesses. Now, depending on the depth of favorable evidence, a party may have no choice but to put a declarant on the stand. Otherwise, a party will be forced to leave attacks to a declarant's credibility unanswered. These instances may be rare, because under Rule 5-806, an opposing party is prohibited from presenting contrary extrinsic evidence and bound by whatever answer a testifying witness provides.

RECENT DEVELOPMENT

TURNER V. KIGHT: FILING PENDENT CLAIMS IN FEDERAL COURT SUSPENDS THE STATE STATUTE OF LIMITATIONS UNTIL THIRTY DAYS AFTER THE PENDANT CLAIMS TERMINATE.

By: Michael Beste

The Court of Appeals of Maryland held that when state law claims are filed in federal court based on supplemental jurisdiction, pursuant to Section 1367 of Title 28 of the United States Code, the state statute of limitations is suspended while the pendant claims are pending. *Turner v. Kight*, 406 Md. 167, 957 A.2d 984 (2008). The court further held that the suspension continues from the filing of the claim in federal court until thirty days after the district court dismisses the claim or, if appealed, the order dismissing the appeal or a mandate affirming the district court's dismissal. *Id.* at 189, 957 A.2d at 996-97.

On May 15, 2001, Sherri Turner ("Turner") filed a complaint in the United States District Court for the District of Maryland ("District Court") against Montgomery County Sheriff Raymond Kight and other officials ("County Officials"), alleging twelve federal law violations and seven Maryland state law violations. The allegations arose from events that transpired in April 2000, concerning the execution of a warrant for Turner's arrest and alleged mistreatment while in the State's custody. On March 26, 2002, the District Court granted summary judgment in favor of the County Officials on ten federal law counts, and dismissed two federal law counts. Consequently, the District Court declined to assert jurisdiction over the state law claims. On January 15, 2004, following denial of Turner's second motion to reconsider, Turner filed a timely appeal to the United States Court of Appeals for the Fourth Circuit. On January 7, 2005, the appellate court affirmed the District Court's decision. On March 16, 2005, the appellate court issued an appellate mandate, affirming the dismissal. On March 21, 2005, the mandate was docketed, terminating the federal action.

On March 11, 2005, Turner filed the state law claims in the Circuit Court for Montgomery County. The circuit court granted the County

Officials' motion to dismiss, holding that Section 1367(d) of Title 28 of the United States Code ("Section 1367(d)") required Turner to file a complaint in state court within thirty days following the District Court's dismissal because the three-year state statute of limitations ran while the claims were pending in federal court. Turner appealed to the Court of Special of Appeals of Maryland, which agreed with the circuit court's rationale and affirmed the dismissal. The Court of Appeals of Maryland granted Turner's petition for a writ of certiorari.

Section 1367(d) provides that the statute of limitations of pendent claims in federal court "shall be tolled while the claim is pending and for a period of 30 days after it is dismissed." *Turner*, 406 Md. at 175, 957 A.2d at 988 (quoting 28 U.S.C. § 1367(d) (1990)). The Court of Appeals of Maryland found that the definitions of "tolling" and "pending," as used in Section 1367(d), were ambiguous. *Turner*, 406 Md. at 176-79, 957 A.2d at 989-90. Accordingly, the court relied on other jurisdictions and legislative history to determine Congress' intent. *Id.* at 177-82, 957 A.2d at 989-93.

The court acknowledged three possible interpretations of the tolling effect provided in Section 1367(d) which have been adopted in other jurisdictions: the suspension approach, the extension approach, and the substitution approach. *Id.* at 177, 957 A.2d at 989-90 (citing *Goodman v. Best Buy, Inc.*, 755 N.W.2d 354, 356-58 (Minn. Ct. App. 2008)). The court adopted the suspension approach, which provides that state statutes of limitations are suspended while pendent claims are pending in federal court. *Turner*, 406 Md. at 182, 957 A.2d at 992-93. The court explained that under this approach, when the claims are dismissed from federal court, the statutory period resumes for plaintiffs filing state law claims in state court, in addition to a thirty day extension. *Id.* at 177-78, 957 A.2d at 990.

The court recognized that some jurisdictions rejected the suspension approach because thirty days is ample time to file claims in state court. *Id.* at 179, 957 A.2d at 991 (citing *Kolani v. Gluska*, 64 Cal. App. 4th 402, 410 (1998)). Nevertheless, the court found that, by definition, a "tolling statute...interrupts the running of a statute of limitations in certain situations." *Turner*, 406 Md. at 181, 957 A.2d at 992 (quoting BLACK'S LAW DICTIONARY 1525 (8th ed. 2004)). The court also found that this interpretation of "tolling" was adopted by the United States Supreme Court. *Turner*, 406 Md. at 181, 957 A.2d at 992 (citing *Chardon v. Soto*, 462 U.S. 650, 652 (1983)). The court concluded that Congress intended the suspension approach because it

is most consistent with the common definition of “tolling.” *Turner*, 406 Md. at 182, 957 A.2d at 992-93.

The court examined the extension approach, which provides that plaintiffs have thirty days to file a complaint in state court following termination of pendent claims in federal court, but only when the state statute of limitations expires while the pendant claims are pending. *Id.* at 177, 957 A.2d at 990. The court found that Congress did not intend this approach because Section 1367(d) requires tolling in every claim based on supplemental jurisdiction, not merely upon the condition that the state statutory period expired. *Id.* at 179-80, 957 A.2d at 991 (citing *Goodman*, 755 N.W.2d at 357-58). Despite the court’s recognition that the extension approach avoids encroachment upon state sovereignty, the court asserted that it must interpret Congress’ intent, not implant its concerns into the legislation. *Turner*, 406 Md. at 181-82, 957 A.2d at 992.

The court also analyzed the substitution approach, in which the federal statute of limitations substitutes the state limitations period when a party files pendent claims in federal court. *Id.* at 177, 957 A.2d at 990 (citing *Goodman*, 755 N.W.2d at 356-57). The court found that Section 1367(d) provides that the statutory period is tolled, not substituted, while the claims are pending. *Turner*, 406 Md. at 180, 957 A.2d at 991. The court explained that if Congress intended a substitution approach, it would have specified the moment in which the federal statute of limitations supersedes the state law. *Id.* (citing *Goodman*, 755 N.W.2d at 357-58).

The court next considered the definition of “pending,” as used in Section 1367(d), and found that term ambiguous because it was unclear whether a claim was pending during appeal. *Turner*, 406 Md. at 182, 957 A.2d at 993. The court reasoned that if claims were not “pending” during appeal, plaintiffs would be forced to file protective claims in state court while pursuing an appeal in federal court. *Id.* at 186, 957 A.2d at 995. The court anticipated that because state courts may be disinclined to permit inactive cases on the docket, litigation may ensue in both systems, leading to potential inconsistent results. *Id.*

Relying on legislative history, the court noted that language, which suggested that a claim is pending only while in the district court, was omitted from a proposal for Section 1367(d). *Id.* at 188-89, 957 A.2d at 996 (citing H.R. REP. NO. 101-734, at 11 (1990)). The court found that this omission suggested that Congress intended claims to be pending while on appeal. *Turner*, 406 Md. at 189, 957 A.2d at 996.

Although the court found that claims are pending through an appeal of right, the court noted that claims may not be pending when petitioning for certiorari because appeals to courts of last resort are discretionary. *Id.* at 183, 957 A.2d at 993 (citing *Kendrick v. City of Eureka*, 82 Cal. App. 4th 364, 370 (2000)). The court declined to decide this issue, however, because it was not presented by the parties on appeal. *Turner*, 406 Md. at 189, 957 A.2d at 997. The court held that Turner properly filed a complaint in state court before the statute of limitations ran. *Id.* at 189, 957 A.2d at 997.

The court's holding in *Turner* provides plaintiffs with ample time to file state law claims in state courts following dismissal of pendent claims in federal courts. However, practitioners should be mindful that the court reserved the issue of whether a claim is pending while petitioning the United States Supreme Court for certiorari. Therefore, attorneys should file protective actions in state court to prevent the statute of limitations from expiring while petitioning for a writ of certiorari. Furthermore, attorneys should meticulously count the days to determine the new statute of limitations for state law claims, rather than simply estimating or counting a certain number of years into the future. Despite modern electronic scheduling capabilities, such a calendaring process is ripe for confusion and mistakes.

RECENT DEVELOPMENT

WALKER V. STATE: A SHOWING ON THE RECORD THAT, UNDER THE TOTALITY OF THE CIRCUMSTANCES, THE DEFENDANT HAD KNOWLEDGE OF THE JURY TRIAL RIGHT SATISFIES THE REQUIREMENT OF A KNOWING WAIVER OF THE RIGHT TO A JURY TRIAL.

By: Katrine Bakhtiary

The Court of Appeals of Maryland held that the requirement of a knowing waiver of the right to a jury trial, pursuant to Maryland Rule 4-246(b), is satisfied when the record shows that, under the totality of the circumstances, the defendant had some knowledge of the jury trial right. *Walker v. State*, 406 Md. 369, 958 A.2d 915 (2008). More specifically, a knowing waiver is made when the record shows that the trial judge specifically knew the defendant had a previous jury trial experience, and, in such a case, the defendant is imputed to know the burden of proof in a criminal trial and that the jury trial would consist of a twelve-member jury. *Id.* at 385, 958 A.2d at 924.

On July 24, 2005, Kevin Walker (“Walker”) was arrested and charged with numerous violations, including possession of a forged document. Several weeks before trial, the district court received a demand for a jury trial from Walker’s counsel. Walker’s trial was scheduled in the Circuit Court for Howard County. On the day of Walker’s trial, the state informed the court, on the record, and Walker’s counsel agreed, that the parties were proceeding on a not guilty agreed statement of facts concerning the charge of possession of a forged document. A dialogue between Walker, his attorney, and the court took place, qualifying Walker on the record as to the not guilty agreed statement of facts.

During the colloquy, Walker’s attorney asked Walker if he understood the meaning of proceeding on a not guilty statement of facts and that proceeding in such a manner meant Walker was giving up his right to a jury trial. Walker acknowledged that he understood. The court then asked Walker if he understood he was waiving his right to a jury trial. Walker replied he did not know this at first but that he became aware that he was waiving his right to a jury trial. The court

then acknowledged that Walker had been before the same court and the same judge in a jury trial, and therefore, Walker fully understood jury trials. Walker agreed to the final statement by the court informing him that he was waiving his right to a jury trial in proceeding on a not guilty agreed statement of facts.

The Circuit Court for Howard County found that Walker made a “knowing, intelligent and voluntary decision” and waived his right to trial by jury. Walker appealed to the Court of Special Appeals of Maryland on the basis that the circuit court erred in not determining, on the record, whether Walker’s waiver of a jury trial was made knowingly, pursuant to Maryland Rule 4-246(b). The Court of Special Appeals of Maryland affirmed the lower court’s decision. The Court of Appeals of Maryland granted Walker’s petition for a writ of certiorari.

The requirement of Maryland Rule 4-246(b), that the waiver of a jury trial be made “knowingly,” came from a revision to Rule 735, which required the defendant to have “full knowledge of his right to a jury trial.” *Walker*, 406 Md. at 378, 958 A.2d at 920 (citing *Abeokuto v. State*, 391 Md. 289, 317-18, 893 A.2d 1018, 1034 (2006)). The revision indicated a desire to abandon a rigid requirement of the trial judge advising the defendant of the right to a jury trial through a litany of questions and instructions. *Walker*, 406 Md. at 379, 958 A.2d at 920 (citing *State v. Bell*, 351 Md. 709, 724, 720 A.2d 311, 318 (1998)). The court noted that the change in the rule mitigated the knowledge requirement for a valid waiver such that the defendant’s knowledge did not need to be “complete or entire.” *Walker*, 406 Md. at 379, 958 A.2d at 920-21 (quoting *Bell*, 351 Md. at 730, 720 A.2d at 321). The court further explained that the right to a jury trial is waived when there has been an “intentional relinquishment or abandonment of a known right or privilege.” *Walker*, 406 Md. at 378, 958 A.2d at 920 (quoting *Powell v. State*, 394 Md. 632, 639, 907 A.2d 242, 247 (2006)).

The Court of Appeals of Maryland discussed prior decisions which addressed the application of the “knowing” requirement. *Walker*, 406 Md. at 379-81, 958 A.2d at 920-22. For example, a knowing waiver was made where the defendant was told the number of jurors in the jury and the standard of proof, despite the fact that the defendant was not informed that the verdict had to be unanimous among the jurors. *Id.* at 379, 958 A.2d at 921 (citing *Bell*, 351 Md. at 730, 720 A.2d at 321). Similarly, when a defendant was not told the details of the process of selecting the jury, the court still found the waiver to be

knowingly made. *Walker*, 406 Md. at 380, 958 A.2d at 921 (citing *State v. Hall*, 321 Md. 178, 183, 582 A.2d 507, 510 (1990)). A defendant made a knowing waiver of the right to a jury trial by waiving the right after being asked seven times if he understood his rights and the nature of a jury trial, which was explained to him in “byte-size groups.” *Walker*, 406 Md. at 380-81, 958 A.2d at 921-22 (quoting *Abeokuto*, 391 Md. at 320, 893 A.2d at 1036). In examining these cases, the court noted that the determination of whether a waiver of the right to a jury trial was made knowingly depends on the facts and the totality of the circumstances of each case. *Walker*, 406 Md. at 380, 958 A.2d at 921 (citing *Hall*, 321 Md. at 182-83, 582 A.2d at 507).

Walker argued that the facts of his case were more similar to those in a previous decision where the court found the defendant did not knowingly waive his right to a jury trial, and therefore, that case should be controlling here. *Walker*, 406 Md. at 381-82, 958 A.2d at 922 (citing *Tibbs v. State*, 323 Md. 28, 31-32, 590 A.2d 550, 551 (1991)). The court, in *Tibbs*, based its finding on the fact that the defendant did not receive any information concerning the nature of a jury trial, and the mere fact that the defendant had certain “unspecified” experiences with the criminal justice system was not adequate to find a knowing waiver of the right to a trial by jury. *Walker*, 406 Md. at 382, 958 A.2d at 922 (quoting *Tibbs*, 323 Md. at 31-32, 590 A.2d at 551).

The Court of Appeals of Maryland distinguished *Tibbs* from the present case, primarily because Walker’s experiences with the criminal justice system were not “unspecified” since he had a prior jury trial with the same judge that presided over the trial at issue. *Walker*, 406 Md. at 385, 958 A.2d at 924. Additionally, the court found other facts on the record that showed Walker had some knowledge of his right to a jury trial. *Id.* at 382-83, 958 A.2d at 922-23. The court focused on the decision Walker made to demand a jury trial which moved his case from district court to circuit court. *Id.* at 382, 958 A.2d at 922. Also, the court noted Walker’s attorney reached an agreement with the prosecutor, and Walker chose to proceed on a plea of not guilty with an agreed statement of facts. *Id.* at 383, 958 A.2d at 923. Finally, Walker stated on the record in circuit court that he understood that he was waiving his right to a jury trial. *Id.* The court concluded that, considering the totality of the circumstances, the circuit court had an adequate basis to determine that Walker knowingly waived a jury trial. *Id.*

In relying on the totality of the circumstances, the court made clear that the “knowledge” element of a valid waiver of the right to a jury trial need not be explicitly stated on the record. Instead, trial judges may infer knowledge from the defendant’s experiences. In considering this, defense attorneys should be aware that noting a successful appeal based on the validity of a knowing waiver of the right to a jury trial will be a challenge, unless the defendant stated unequivocally on the record that he either did not understand the right or process of a jury trial, or that he was not waiving his right to a jury trial.