

Piercing the Veil

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INTRODUCTION

The failure of the international community to intervene in Afghanistan prior to September 11th was more than a failure of politics. It was also a failure of law. To put it bluntly, human rights law has a problem with religion. In a postmodern world in which the nation-state has been deconstructed and eighteenth- and nineteenth-century notions of unmediated national sovereignty have been properly put to rest, religion—and its attendant category, culture—represent the New Sovereignty.¹ Human rights abuses that since World War II are no longer acceptable when committed by states² are paradoxically tolerated when justified in the name of religion or culture. September 11th crystallized this fact. The infamous Taliban regime in Afghanistan assumed power in 1996 and immediately began stripping women of fundamental human rights³ to

1. See HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* 445 (2d ed. 2000) (“If notions of state sovereignty represent one powerful concept and a force that challenges and seeks to limit the reach of the international human rights movement, religion can then represent another.”); David Kennedy, *International Law and the Nineteenth Century: History of an Illusion*, 17 *QUINNIAC L. REV.* 99, 101 (1997) (describing the historical movement in international law “from autonomy to community,” and expressing concern that “there remain those (often in politics, or in the third world, or new to the field) who would return us to a time of sovereignty”). My use of the word *sovereignty* refers to its traditional sense as the right to be let alone—what’s *new* are the parties making these claims. Cf. ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995). In the words of Anne-Marie Slaughter (writing in her memorial to Abe Chayes), Chayes and Chayes offer an evolving sense of the term in which “sovereignty no longer means the right to be left alone, but rather the right and capacity to participate ‘in the regimes that make up the substance of international life.’” Anne-Marie Slaughter, *In Memoriam*, 114 *HARV. L. REV.* 682, 684-85 (2001) (quoting CHAYES & CHAYES, *supra*, at 27).

2. It is easy to forget that individual rights are of only recent vintage in international law. As Louis Henkin reminds us:

[F]or hundreds of years international law and the law governing individual life did not come together. International law, true to its name, was law only between States, governing only relations between States on the State level. What a State did inside its borders in relation to its own nationals remained its own affair, an element of its autonomy, a matter of its “domestic jurisdiction.”

LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS, VALUES AND FUNCTIONS* 209 (1989). But as a general matter, human rights law is just one example of the gradual whittling away of traditional notions of state sovereignty. See Anupam Chander, *Diaspora Bonds*, 76 *N.Y.U. L. REV.* 1005, 1039 (2001) (“While it is true . . . that there was never an era in which nation-states had absolute dominion over their territory, the last century saw a higher degree of legalization of intrusions into territorial sovereignty, as well as a magnification of the number and breadth of such intrusions.”).

3. Implementing the “strictest interpretation of Shari’a law ever seen in the Muslim world,” the Taliban closed down girls’ schools and banned women from working outside the home, smashed TV sets, forbade a whole array of sports and recreational activities, and ordered all males to grow long beards. AHMED RASHID, *TALIBAN: MILITANT ISLAM, OIL AND FUNDAMENTALISM IN CENTRAL ASIA* 29, 50-51 (2000). A strict dress code was imposed on women, which required them to wear head-to-toe veils, *id.* at 50, and people were required to blacken the windows of their homes so women could not be seen from the street, *id.* at 70. Women were banned from general hospitals, *id.* at 71, and their health suffered dramatically, see Physicians for Human Rights, *The Taliban’s War on Women—a Health and Human Rights Crisis in Afghanistan*, at

education,⁴ healthcare,⁵ work,⁶ and movement.⁷ But war, not law, defeated what has been described as the world's most ruthless fundamentalist regime. For all its pomp and circumstance, international human rights had little to do with it.⁸

Current scholarship posits an inherent conflict between women's rights and culture.⁹ But this Article argues that religion qua religion is less the problem than is our traditional legal construction of this category. Premised on a centuries-old, Enlightenment compromise that justified reason in the public sphere by allowing deference to religious despotism in the private, human rights law continues to define religion in the twenty-first century as a sovereign, extralegal jurisdiction in which inequality is not only accepted, but expected. Law views religion as natural, irrational, incontestable, and imposed—in contrast to the public sphere, the only viable space for freedom and reason. Simply put, religion is the “other” of international law.

Today, fundamentalists are taking advantage of this legal tradition.¹⁰ Yet, contrary to law's centuries-old conception, religious communities are

http://www.phrusa.org/research/health_effects/exec.html (last visited Jan. 29, 2003). For the texts of Taliban decrees, see *Final Report on the Situation of Human Rights in Afghanistan*, U.N. ESCOR, 53d Sess., U.N. Doc. E/CN.4/1997/59 (1997).

4. See Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, art. 10, 1249 U.N.T.S. 13, 18 (entered into force Sept. 3, 1981) [hereinafter *Women's Convention*]; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, art. 13, 993 U.N.T.S. 3, 8 (entered into force Mar. 23, 1976) [hereinafter *Covenant on Economic, Social and Cultural Rights*]; *Universal Declaration of Human Rights*, art. 26, G.A. Res. 217 (III)A, U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948) [hereinafter *Universal Declaration of Human Rights*]. See generally *Convention Against Discrimination in Education*, May 22, 1962, 429 U.N.T.S. 93.

5. See *Women's Convention*, *supra* note 4, arts. 12, 14, at 19-20; *Covenant on Economic, Social and Cultural Rights*, *supra* note 4, art. 12, at 8; *Universal Declaration of Human Rights*, *supra* note 4, art. 25(1).

6. See *Women's Convention*, *supra* note 4, art. 11, at 18-19; *Covenant on Economic, Social and Cultural Rights*, *supra* note 4, arts. 7, 8, at 6-7; *Universal Declaration of Human Rights*, *supra* note 4, art. 23.

7. See *International Covenant on Civil and Political Rights*, adopted Dec. 19, 1966, art. 20(2), S. EXEC. DOC. E, 95-2, at 23 (1978), 999 U.N.T.S. 171, 178 (entered into force Mar. 23, 1976); *Universal Declaration of Human Rights*, *supra* note 4, art. 13.

8. While the Bush Administration did cite the Taliban's mistreatment of women in its denunciation of the regime, American intervention was motivated principally by the desire to reduce the threat of terrorism from al Qaeda by destroying the group's sanctuary. Given the U.S. government's prior indifference, the invocation of the plight of women seems more cynical than sincere.

9. See, e.g., Susan Moller Okin, *Is Multiculturalism Bad for Women?*, in *IS MULTICULTURALISM BAD FOR WOMEN?* 7 (Joshua Cohen et al. eds., 1999) (arguing that multiculturalism is not in the best interests of women and children).

10. See Christina M. Cerna & Jennifer C. Wallace, *Women and Culture*, in *1 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW* 623, 646 (Kelly D. Askin & Doreen M. Koenig eds., 1999) (“States have used this distinction [between public and private] to the disadvantage of women by asserting that certain harmful practices are cultural traditions, and thus outside of the realm of human rights law.”); Ann Elizabeth Mayer, *Cultural Particularism as a Bar to Women's Rights: Reflections on the Middle Eastern Experience*, WLUML DOSSIER 16, Nov. 1996, at 21, 26 (“Middle Eastern governments [can exploit] Western stereotypes of Islam.”).

internally contested, heterogeneous, and constantly evolving over time through internal debate and interaction with outsiders.¹¹ And this has never been so true as in the twenty-first century. Individuals in the modern world increasingly demand change *within* their religious communities in order to bring their faith in line with democratic norms and practices.¹² Call this the New Enlightenment: Today, individuals seek reason, equality, and liberty not just in the public sphere, but also in the private spheres of religion, culture, and family.¹³ Current law, however, elides these claims for modernization. Failing to recognize cultural and religious communities as contested and subject to change, legal norms such as the “freedom of religion,” the “right to culture,” and the guarantee of “self-determination” defer to the claims of patriarchal, religious elites, buttressing their power over the claims of modernizers. Paradoxically, law’s failure to question or revisit its old Enlightenment views is obstructing the emergence of the New Enlightenment. In short, human rights *law*, not religion, is the problem.¹⁴

But on the ground, women’s human rights activists are piercing the veil of religious sovereignty. Betraying a growing disconnect between human rights law and human rights practice, this Article presents a close study of women’s human rights activists working in Muslim communities and countries. It demonstrates that, despite law’s formal refusal to acknowledge claims of internal dissent, women are nonetheless claiming their rights to challenge religious and cultural authorities and to imagine religious community on more egalitarian and democratic terms. Just as we “pierce the veil” of corporate sovereignty in cases of injustice or fraud,¹⁵ women

11. See, e.g., MICHAEL M.J. FISCHER & MEHDI ABEDI, *DEBATING MUSLIMS: CULTURAL DIALOGUES IN POSTMODERNITY AND TRADITION* (1990) (highlighting internal plurality and contest among Muslims).

12. See, e.g., GARRY WILLS, *WHY I AM A CATHOLIC 3* (2002) (posing the question: “How does one remain a Catholic while criticizing some of the church’s authority figures?”). Wills describes three reactions to his earlier book, *Papal Sin*, which criticized the Church. The first group asked him how he could reconcile his faith with his criticism of the Church. “The second asked why I did not leave.” *Id.* at 4. The third group—the secularists—“thought I was right to criticize dishonesty in church leaders but wrong to expect anything else.” *Id.* at 5. Wills says he wrote *Why I Am a Catholic* for the first group “against the charges of the second and third groups.” *Id.* at 6.

13. See, e.g., *FREEDOM OF RELIGION AND BELIEF: A WORLD REPORT 14* (Kevin Boyle & Juliet Sheen eds., 1997) (discussing the recurring theme of women’s and gay rights within religious communities around the world, writing that one might see these campaigns “as part of a larger debate about democracy within religious communities, movements, and churches”); see also discussion *infra* Section II.D, Part III.

14. Cf. Cerna & Wallace, *supra* note 10, at 646 (arguing that “[l]egal systems based on traditional liberal philosophy” make it difficult to stop harmful discrimination against women); David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 *HARV. HUM. RTS. J.* 101 (2002) (“The legal regime of ‘human rights,’ taken as a whole, does more to produce and excuse violations than to prevent and remedy them.”).

15. This Article uses the metaphor of “piercing the veil” in the context of human rights law and does not address the doctrine as it relates to corporate law. On piercing the veil in corporation law generally, see STEPHEN M. BAINBRIDGE, *CORPORATION LAW AND ECONOMICS* 151-90

activists are asserting a right to confront oppressive laws and practices otherwise legally shielded in the name of religion.

Scholars have failed to recognize the full significance of these efforts. By insisting, in the words of President George W. Bush, “if you’re not with us, you’re against us,”¹⁶ scholars celebrate campaigns for women’s rights in Muslim communities for their similarities to Western women’s rights movements, but elide what is different in these claims.¹⁷ In fact, these campaigns present powerful critiques of current law, which offers women a right to religious freedom (on leaders’ terms) or to equality (within the public sphere), but no right to both. Envisioning a third way, women human rights activists in Muslim communities are pursuing equality and freedom *within* the context of religion, not just *without* it.

We ignore these activists at our peril. In an era of rising fundamentalism in which women’s—and men’s—lives are increasingly governed by private, not public, laws,¹⁸ securing human rights *requires* deconstructing religion and culture. As the anthropologist Lila Abu-Lughod writes, “We have become politicized about race and class, but not culture.”¹⁹ The same can be said—perhaps more forcefully—about religion,²⁰ which law’s Enlightenment origins have encouraged us to fear and to worship. Unmasking the politics and mutability of religion that traditional legal narratives have concealed, we must identify that part of religion that is a human or legal construction and thus requires justification and accountability.²¹ As Kahled Abou El Fadl asks, “In Islamic thought, God is the authoritative source of law, but what is the balance between God’s authoritativeness and the potential for human authoritarianism?”²²

(2002); ROBERT C. CLARK, *CORPORATE LAW* 37, 71-85 (1986); and Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036 (1991).

16. Arundhati Roy, *The Algebra of Infinite Justice*, GUARDIAN (London), Sept. 29, 2001, Saturday Review, at 1 (arguing that Bush’s ultimatum is “not a choice that people want to, need to, or should have to make”).

17. See discussion *infra* Section IV.A.

18. Here I refer to formal and informal laws, including custom and tradition.

19. See Lila Abu-Lughod, *Do Muslim Women Really Need Saving? Anthropological Reflections on Cultural Relativism and Its Others*, 104 AM. ANTHROPOLOGIST 783, 789 (2002).

20. See, e.g., Diana L. Eck, *The Multireligious Public Square, in ONE NATION UNDER GOD? RELIGION AND AMERICAN CULTURE* 3 (Marjorie Garber & Rebecca L. Walkowitz eds., 1999); *id.* at 5 (remarking on “academic blindspots when it comes to religion”). Eck writes that “[t]aking religion seriously as a category of analysis” means abandoning the “highly reified thing-ish notion of religion as if ‘it’ were a bounded set of ideas, institutions, and practices.” *Id.* Far from it, Eck describes “religious traditions such as Christianity, Buddhism, and Islam” as “dynamic, more like rivers than structures, constantly negotiating the terms and directions of change.” *Id.*

21. I do not attempt to offer a study in Islamic law in this Article, but rather, focus solely on legal constructions of religion. For introductions to Islam and Islamic legal systems, see KAHLED ABOU EL FADL, *SPEAKING IN GOD’S NAME: ISLAMIC LAW, AUTHORITY AND WOMEN* (2001); KAREN ARMSTRONG, *ISLAM: A SHORT HISTORY* (2000); DAVID PEARL, *A TEXTBOOK ON MUSLIM LAW* (1979); and LAWRENCE ROSEN, *THE JUSTICE OF ISLAM: COMPARATIVE PERSPECTIVES ON ISLAMIC LAW AND SOCIETY* (2000).

22. KAHLED ABOU EL FADL, *REBELLION AND VIOLENCE IN ISLAMIC LAW* 1 (2001).

This is nothing less than a question of life or death. In Pakistan last summer, a mentally disturbed young man was stoned to death for alleged blasphemy, and a tribal council ordered that a young woman be raped as revenge for a crime allegedly committed by her brother—all on the basis of traditional Islamic Shari'a law.²³ In Nigeria, another woman, Amina Lawal, awaits her fate after an appeals court in that country upheld a Shari'a court's ruling that Lawal be stoned to death because she gave birth to a child outside of marriage.²⁴ Nigeria's Supreme Court may ultimately decide the case. But as it currently stands, there is no legal theory—either under Nigerian national law or international human rights law—for overturning the pronouncements of a religious court.²⁵

In such cases, law's conception of religion and culture matters. So long as law continues to hold a fundamentalist view of religion and culture, it will transfer more power to fundamentalists and traditionalists at the expense of human rights. This Article is an effort to intervene in this process.²⁶ I lay the groundwork for my argument in Part I, describing the New Sovereignty and the New Enlightenment as parallel movements. Paradoxically, just as claims to absolute religious authority are becoming weaker in the modern world, calls for law to protect or preserve religious

23. See Beena Sarwar, *Brutality Cloaked as Tradition*, N.Y. TIMES, Aug. 6, 2002, at A15. As Pakistani journalist Beena Sarwar wrote in the *New York Times*, the tribal court pronouncement reflects an increased willingness on the part of the state to authorize local authoritarian rulers—in the name of deferring to customary, religious, or traditional laws—to govern the lives of citizens. Aside from noting the dubious “religious” or “traditional” basis of these new laws, Sarwar finds “equally troubling . . . that the state, in its insecurity, might even cede more power by redefining public affairs as private, thereby shifting accountability away from itself and into the hands of others.” *Id.*

24. The sentence has been commuted until after Lawal has finished weaning her less than one-year-old baby. See Simon Robinson, *Casting Stones; The Koran Says Nothing About Stoning. Why Is This Mother Facing Death?*, TIME, Sept. 2, 2002, at 36; Camillus Eboh, *Mother Must Be Stoned To Death, Rules Nigerian Court*, INDEPENDENT (London), Aug. 20, 2002, at 12. On death by stoning in the Muslim world, see generally H.R. Con. Res. 351, 107th Cong. (2002) (expressing “the sense of the Congress that the United States should condemn the practice of execution by stoning,” and discussing State Department documentation of executions by stoning in Nigeria, Iran, Saudi Arabia, Somalia, Sudan, and Yemen).

25. Although Nigerian government officials—including President Olusegun Obasanjo—have made statements to the international press that they will not tolerate a stoning under Shari'a law, they have made conflicting statements within Nigeria about the importance of Shari'a law and its long established acceptance in the Nigerian constitution. See, e.g., Tokunbo Adedjoja & Abimbola Akosile, *Anti Miss World Protests*, THIS DAY, Nov. 26, 2002, at <http://allafrica.com/stories/printable/200211260367.html> (reporting President Obasanjo's statements that “Shari'a law has always been part of our law” and that “Shari'a is not a new thing in our constitution”); Nigeria Vows To Block Islamic Court's Executions by Stoning, DOW JONES INT'L NEWS, Nov. 10, 2002, 11/10/02 DJINS 02:49:00 (Westlaw); Press Release, Amnesty International, Nigeria: Amina Lawal—the Nigerian Government's Double Speech, at <http://www.web.amnesty.org/ai.nsf/Index/AFR440222002> (last visited Jan. 28, 2003).

26. The issue is of utmost importance today in countries such as India, Mali, the Philippines, and South Africa, where authorities are debating reforms to their personal and/or customary laws. The question is whether women's and other modernizers' views of what constitutes religion and tradition will be heard, or whether lawmakers will simply defer to patriarchal leaders. See discussion *infra* Section II.D.

authority against claims for change and modernity are becoming more pronounced. Taking advantage of the legal tradition of deference to religion, contemporary fundamentalists are using law to buttress authoritarian and patriarchal claims against the challenges of the New Enlightenment. As this Part shows, whether and how we pierce the veil of the New Sovereignty will have profound consequences for the future of the New Enlightenment emerging on the ground.

In Part II, I revisit the traditional intellectual history of international law in order to better understand how law's construction of religion as law's "other" obstructs new constructions of religion as compatible with rights. I argue that our entrenched narrative of international law as in transition away from the premodern world of religion toward a modern world of secular rights makes no accommodation for the *presence* of religion, or modern claims for both religion and rights. The result is that, in case after case in both international and national law, law is siding with fundamentalists over modernizers within religious and cultural communities.

Part III turns to the work of the transnational information-sharing and solidarity network, Women Living Under Muslim Laws, and the unexamined archives of women's human rights education manuals, to demonstrate how, on the ground, women activists in the Muslim world are defying the transition narrative and confronting fundamentalist and legal constructions of religion *here and now*. Rather than accepting the binary framework of religion (on traditional leaders' terms) or rights (without normative community), activists are developing strategies and new human rights theory that enable women to claim freedom and equality within the context of normative community. Based on close readings of nontraditional sources of international law—illuminated by interviews with leading activists from around the globe—I begin to identify in the work of these activists the rumblings of the New Enlightenment, and a conceptually coherent framework for operationalizing modernity within the context of culture and community. In the final Part, I suggest how law, in harnessing these bottom-up strategies and theories, may pierce the veil of the New Sovereignty and operationalize the New Enlightenment.

A note before proceeding. Some may object to my titling an article about women in the Muslim world "Piercing the Veil."²⁷ Nevertheless, I use

27. Particularly after September 11th, such a title could be characterized as everything from trite to offensive. Indeed, by now the veil trope may seem exhausted. See, e.g., Jen'nan Ghazal Read & John P. Bartowski, *To Veil or Not To Veil*, 14 GENDER & SOC'Y 395 (2000); Nicole Gaouette et al., *Voices from Behind the Veil*, CHRISTIAN SCI. MONITOR, Dec. 19, 2001, at 1; Marilyn Gardner, *Lifting the Veil on Women's Subjugation*, CHRISTIAN SCI. MONITOR, Nov. 28, 2001, at 15; Donna Gehrke-White, *Behind the Veil, a Strength of Faith*, MIAMI HERALD, Nov. 24, 2001, at 1E; L.S. Klepp, *Under the Veil*, ENT. WKLY., Oct. 26, 2001, at 112; Stanley Kurtz, *Veil of Fears: Why the Veil*, NAT'L REV., Jan. 28, 2002, at 36; Richard Lacayo, *About Face*, TIME,

this title as a legal term of art. Simply put, no legal phrase highlights better the ultimate argument of this Article: that in many ways, religion, like the corporation, is a construction of law. At its most basic level, this legal doctrine reminds us that law should intervene, even when deference is otherwise the rule, when grave injustice is at hand. But at a deeper level—and this is my concern—“piercing the veil” reveals that far from existing in the world as a natural, discrete category with an inherent essence, religion is in part constructed by legal narrative, theory, and doctrine. Indeed, in today’s increasingly fragmented world, more and more it is law—and not religion itself—that determines the boundaries of religious jurisdiction and the amount of autonomy and equality that are possible within the religious sphere. Thus far, law has used its power to authorize fundamentalist control over women and individuals, forcefully helping to preserve tradition against modernity. “Piercing the Veil,” then, is both a description and a prescription. Law must both recognize and confront the veil of religious sovereignty.

I. GROUNDWORK

A. *The New Sovereignty*

Today we are witnessing the rise of religion and culture as the New Sovereignty at the very moment that we are hearing rumblings on the ground of a New Enlightenment. While religious sovereignty is not new, the conflict between religion and culture and the global recognition that “women’s rights are human rights” is growing.²⁸ Unlike other rights,²⁹

Dec. 3, 2001, at 34 (using the title “Lifting the Veil” on the magazine’s cover); Pete Norman & Eileen Finan, *Veil of Tears*, PEOPLE, Nov. 12, 2001, at 106; Atefeh Oliyai, *From Behind the Veil*, FEMINIST VOICES, Nov. 2, 1997, at 7; Sean Salai, *Veiled Messages*, WASH. TIMES, Aug. 2, 2002, at A2; *CNN Presents: Beneath the Veil* (CNN television broadcast, Aug. 26, 2001).

28. Hillary Rodham Clinton, Remarks for the United Nations Fourth World Conference on Women (Sept. 8, 1995), at gopher://gopher.undp.org:70/00/unconfs/women/conf/gov/950905175653 (proclaiming the mantra of the conference: “If there is one message that echoes forth from this conference, it is that human rights are women’s rights. . . . And women’s rights are human rights.”). Women at the United Nations Fourth World Conference on Women held in Beijing in 1995 popularized this phrase, but women’s rights were first recognized as officially human rights during the World Conference on Human Rights held in Vienna in 1993. See *Vienna Declaration and Programme of Action*, pt. 1, ¶ 11, U.N. Doc. A/CONF.157/23 (1993).

29. See Courtney W. Howland, *The Challenge of Religious Fundamentalism to the Liberty and Equality Rights of Women: An Analysis Under the United Nations Charter*, 35 COLUM. J. TRANSNAT’L L. 271 (1997) (comparing the refusal to accept religious or cultural justifications for racial apartheid to the easy acceptance of such claims in the case of women’s rights); Ann Elizabeth Mayer, *A “Benign” Apartheid: How Gender Apartheid Has Been Rationalized*, 5 UCLA J. INT’L L. & AFF. 237 (2001) (juxtaposing the treatment of racial and gender apartheid in international human rights law).

women's human rights are being consistently undermined by claims of religious freedom³⁰ and "cultural exceptionalism."³¹

To be sure, the New Sovereignty emerges out of the old Enlightenment, which theorized freedom in the public sphere in exchange for despotism in the private.³² But the New Sovereignty is fueled by more recent developments, as well. Specifically, the New Sovereignty must be seen in response to the New Enlightenment. As this Article will illustrate through numerous examples and case studies, today more and more individuals are challenging traditional religious and cultural authorities and demanding more reason, choice, liberty, and equality within their religious and cultural communities. I call this the New Enlightenment. These individuals reject the binary approach of the Enlightenment, which forces individuals to choose between religious liberty (on leaders' terms) in the private sphere and equality (without normative community) in the public sphere. Rather, they articulate a vision of human flourishing that requires freedom *within* the context of religious and cultural community. This vision includes not only a right to equal treatment in one's cultural or religious community, but also a right to engage in those communities on one's own terms.

In earlier work, I have described the emergence of these types of normative claims as the rise of "cultural dissent."³³ Liberal histories describe empowered selves rejecting community in favor of individualism.³⁴ Less remarked upon have been new social movements for a right to constitute individual identity within communities, but with a right to choice within those confines. As I have argued, cultural dissenters, or

30. See Mayer, *supra* note 10, at 21-32 (describing the growing popularity of arguments to curtail women's rights in the name of "Islam"); Yasmin Abdullah, Note, *The Holy See at United Nations Conferences: State or Church?*, 96 COLUM. L. REV. 1835 (1996) (describing Vatican campaigns against women's rights at international conferences in both Cairo and Beijing).

31. Thomas M. Franck, *Are Human Rights Universal?*, FOREIGN AFF., Jan.-Feb. 2001, at 191 (noting more cultural challenges to the universality of human rights); see also LOUIS HENKIN ET AL., HUMAN RIGHTS 391 (1999) (writing that cultural relativism "presents a particularly acute challenge in respect of women's human rights"); Berta Esperanza Hernández-Truyol, *Human Rights Through a Gendered Lens: Emergence, Evolution, Revolution*, in 1 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW 3, 37 (Kelly D. Askin & Dorean M. Koenig eds., 1999) ("[W]omen's rights are especially fragile to a claim of 'culture.'"); Arati Rao, *The Politics of Gender and Culture in International Human Rights Discourse*, in WOMEN'S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES 167, 169 (Julie Peters & Andrea Wolper eds., 1995) ("No social group has suffered greater violation of its human rights in the name of culture than women."). The debate about whether human rights are compatible with "Asian values" has been particularly heated. See generally THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS (Joanne R. Bauer & Daniel A. Bell eds., 1999). For a trenchant reply to this claim, see Amartya Sen, *Human Rights and Asian Values*, NEW REPUBLIC, July 14 & 21, 1997, at 33 (documenting substantial theorizing about tolerance and freedom within Asian traditions).

32. See discussion *infra* Part II.

33. Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495, 498-500, 516-23 (2001).

34. See THOMAS M. FRANCK, THE EMPOWERED SELF: LAW AND SOCIETY IN THE AGE OF INDIVIDUALISM 74-75 (1999) (identifying a new right of individuals to define their identities outside of traditional identities).

“individuals within a community [who seek] to modernize, or broaden, the traditional terms of cultural membership,”³⁵ normatively challenge traditional liberal understandings of liberty and equality as premised on a “thin” theory of the self.³⁶ Their claims suggest that traditional liberalism takes too lightly the ease of exit from one’s community and the desirability of culture; I read in the rise of cultural dissent that human flourishing requires not only a liberty right to normative community, but access to community free of the fear of discrimination within it.³⁷ Similarly, a meaningful right to equality requires equality not just in the public sphere, but also within the contexts of the communities that are important to people.

But thus far, law has not recognized these new social movements. Worse still, law has become complicit in the backlash efforts of traditionalists to stymie these movements.³⁸ Premised upon old Enlightenment notions that theorize freedom in the public sphere but not the private, current law elides the claims of modernizers for freedom within a cultural and religious context, and, paradoxically, sides with fundamentalist or traditionalist leaders instead. The upshot is that law, rather than facilitating human rights and modernity, is buttressing the power of traditionalists against change. This is the phenomenon I call the New Sovereignty—the increasing use of law to protect and preserve cultural stasis and hierarchy against the challenges to cultural and religious authority emerging on the ground.

My argument on cultural dissent forms the first of a trilogy of works on the theme of law’s role in thwarting modernity and cultural change.³⁹ The instant Article forms the middle work in the trilogy. This Article instantiates cultural dissent on a global scale through an examination of women’s human rights movements. Going further, it introduces the dual concepts of the New Sovereignty and the New Enlightenment in order to highlight the increasing role played by *law* in obstructing cultural dissent and social change. Seeing these as parallel movements highlights that the absence of law from religion is not natural. To the contrary, in a modern world in which religious authority increasingly is buttressed by law, and not internal norms, a legal veil, and not religion itself, will increasingly insulate

35. Sunder, *supra* note 33, at 498.

36. *Id.* at 551.

37. *See id.*

38. *See id.* at 500-03.

39. My first article in this series focused on freedom of association as guaranteed by the First Amendment. *See id.* at 523, 523-48 (arguing, based on a close reading of *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), that freedom-of-association law responds to increasing dissent and expressive conflict within an association with “an all-out rescue mission” to protect the association against “dilution” and change).

religious community from modernity and change.⁴⁰ Perhaps most importantly, this Article advances my earlier work by identifying *strategies* for implementing the New Enlightenment. It is neocritical in that, post-critique, it proposes a blueprint for cultural reconstruction. It finds this blueprint in the groundwork of women's human rights activism in Muslim communities. In their praxis I identify an alternative between the euphoria of liberal Enlightenment and the despair of cultural relativism. The final work in the trilogy, *IP³*, examines how yet another legal domain—intellectual property—is being deployed to stymie cultural change.⁴¹ It suggests that the convergence of intellectual property, identity politics, and the Internet Protocol creates a similarly volatile mixture of subaltern empowerment and dominant backlash through law.⁴²

B. *The New Enlightenment*

Women activists working in Muslim communities on the frontlines of the war against fundamentalism are laying the groundwork for a new vision of human rights that would pierce the veil of religious sovereignty. Women's human rights campaigns in Muslim communities fundamentally challenge traditional human rights law, which views identity as imposed and provides no individual right to contest cultural or religious norms from within. Under current law, an individual may choose either to remain in a discriminatory culture—on the leaders' terms—or to exit. Dissenters have no right to stay within their communities and contest or reform them.⁴³ Nor is there any right to religion or culture on one's own terms—that is, to plurality and choice *within* culture. In short, law requires women to choose between religion and rights. Traditionally, feminists have accepted this framework, arguing that when weighing religious freedom against equality, women's rights should trump.⁴⁴ Choosing rights over religion generally

40. See Sunder, *supra* note 33, at 509 (similarly noting, in the context of freedom-of-association law, that “increasingly, it will be law, not culture, that regulates a community's borders and determines how much information, autonomy, and equality individuals within a community will enjoy”).

41. See Madhavi Sunder, *IP³* (2003) (unpublished manuscript, on file with author) (arguing that while new technological and global architectures are empowering more people to proclaim themselves as subjects, not objects, of culture, intellectual property law is capitulating to the demands of traditional cultural producers in struggles to create and control cultural meanings).

42. See *id.*

43. Current law stresses alienability—the right to exit from and choose among competing religions—at the expense of personhood, roots, and loyalty. For one critical perspective on this approach, see Makau Wa Mutua, *Limitations on Religious Rights: Problematizing Religious Freedom in the African Context*, in *RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE* 417, 417 (Johan D. van der Vyver & John Witte, Jr., eds., 1996) (problematizing the “right to proselytize in the marketplace of religions” at the expense of the cultural survival of less market-dominant groups). See generally MARGARET JANE RADIN, *CONTESTED COMMODITIES* (1996).

44. See Hilary Charlesworth, *The Challenges of Human Rights Law for Religious Traditions*, in *RELIGION AND INTERNATIONAL LAW* 401 (Mark W. Janis & Carolyn Evans eds., 1999)

entails either leaving one's community—literally seeking asylum elsewhere⁴⁵—or else praying that one's culture becomes “extinct.”⁴⁶

Assaulting this binary discourse, Gayatri Chakravorty Spivak described Third World women as having to choose from either the colonizer's story that “white men are saving brown women from brown men” or the nativists' argument: “The women actually wanted to die.”⁴⁷ With no alternative discourse in sight, Spivak famously asked, “Can the subaltern speak?”⁴⁸ Now, rumblings from international women's human rights campaigns in Muslim communities suggest that women are finding a voice. Confronted with the same options today,⁴⁹ women reformers in Muslim

(arguing that “the tradition of human rights [should] take precedence over religious traditions”); Donna J. Sullivan, *Gender Equality and Religious Freedom: Toward a Framework for Conflict Resolution*, 24 N.Y.U. J. INT'L L. & POL. 795, 828-29 (1992) (advocating a balancing approach to religion and rights); cf. Memorandum from Madhavi Sunder to Rhonda Copelon, Remedies for Women Against Religious Intolerance: Possibilities for Bringing Claims Under the U.N. Rapporteur on Religious Intolerance (Aug. 23, 1995) (on file with author) (arguing against a dichotomized view of religion and women's human rights).

45. See Eve McCabe, Comment, *The Inadequacy of International Human Rights Law To Protect the Rights of Women as Illustrated by the Crisis in Afghanistan*, 5 UCLA. J. INT'L L. & FOREIGN AFF. 419, 422 (2000) (arguing that the inability of human rights law to address the practices of groups such as the Taliban “leaves asylum law as the most viable instrument available to women to address violations of their human rights”).

46. Okin, *supra* note 9, at 22-23 (arguing that women from patriarchal minority cultures “might be much better off if the culture into which they were born were either to become extinct (so that its members would become integrated into the less sexist surrounding culture) or, preferably, to be encouraged to alter itself so as to reinforce the equality of women”).

47. Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, in MARXISM AND THE INTERPRETATION OF CULTURE 271, 296-97 (Cary Nelson & Lawrence Grossberg eds., 1988). For other critical examinations of the interplay between women, culture, postcoloniality, and rights, see LEILA AHMED, WOMEN AND GENDER IN ISLAM 244 (1992) (writing that the notion that “progress for women could be achieved only through abandoning the native culture . . . was the product of . . . the discourses of patriarchal colonialism in the service of particular political ends”); KAREN KNOP, DIVERSITY AND SELF-DETERMINATION IN INTERNATIONAL LAW (2002) (highlighting indigenous and Third World women's anticolonial claims, which are obscured by binary discourses of women's equality versus indigenous self-determination); MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 167-240 (2000); Lila Abu-Lughod, *The Marriage of Feminism and Islamism in Egypt: Selective Repudiation as a Dynamic of Postcolonial Cultural Politics*, in REMAKING WOMEN: FEMINISM AND MODERNITY IN THE MIDDLE EAST 243, 262 (Lila Abu-Lughod ed., 1998) (offering a history of Egyptian feminism that attempts to stand outside the tropes of cultural transplants, on the one hand, and cultural authenticity, on the other); and Seyla Benhabib, *Cultural Complexity, Moral Interdependence, and the Global Dialogical Community*, in WOMEN, CULTURE, AND DEVELOPMENT: A STUDY OF HUMAN CAPABILITIES 235, 240 (Martha C. Nussbaum & Jonathan Glover eds., 1995).

48. Spivak, *supra* note 47, at 296. For incisive critiques of the trope of “saving” Muslim women, see MARNIA LAZREG, THE ELOQUENCE OF SILENCE: ALGERIAN WOMEN IN QUESTION (1994); Abu-Lughod, *supra* note 19, at 787 (warning that “we need to be vigilant about the rhetoric of saving people”); and Lata Mami, *Contentious Traditions: The Debate on Sati in Colonial India*, in RECASTING WOMEN: ESSAYS IN INDIAN COLONIAL HISTORY 88 (Kumkum Sangari & Sudesh Vaid eds., 1989).

49. See Farida Shaheed, *The Other Side of the Discourse: Women's Experiences of Identity, Religion and Activism in Pakistan*, in SHAPING WOMEN'S LIVES: LAWS, PRACTICES AND STRATEGIES IN PAKISTAN 415, 441 (Farida Shaheed et al. eds., 1998) (observing that “[i]ncreasingly, vast numbers of women whose faith is a living reality are being pushed into a no-

communities increasingly refuse to choose between religion and rights⁵⁰ and demand both.⁵¹ Turning traditional legal understandings of the “right to religion” and the “right to culture” on their heads, these activists are rejecting law’s deference to the views of religious leaders and demanding an individual right to construct one’s identity, not just *without* religious and cultural community but also *within* it. As one activist put it, women “must have the right to challenge both the doctrinaire, legalistic version of religion and the ethnic and religious chauvinism currently ascendant in the political arena without, necessarily, being obliged to renounce their religion or their ethnic identity.”⁵² Recognizing that neither legal doctrine nor theory adequately addresses their interest in freedom within identity,⁵³ activists are forging their own strategies and theories that allow for both culture *and* change.

This is an important new conception of women’s human rights, and of freedom itself. While feminists have made important inroads in challenging

win choice: to give up their faith altogether or to conform to the dictates of groups whose political agendas are cloaked in religious discourse” (citations omitted).

50. See, e.g., FAITH AND FREEDOM: WOMEN’S HUMAN RIGHTS IN THE MUSLIM WORLD (Mahnaz Afkhami ed., 1995); Azizah al-Hibri, *Islam, Law and Custom: Redefining Muslim Women’s Rights*, 12 AM. U. J. INT’L L. & POL’Y 1, 3 (1997) (describing many Muslim women as wanting “to be good Muslims, but [wanting] to have their rights as well”); Azizah Y. al-Hibri, *Deconstructing Patriarchal Jurisprudence in Islamic Law: A Faithful Approach*, in GLOBAL CRITICAL RACE FEMINISM: AN INTERNATIONAL READER 221, 229 (Adrien Katherine Wing ed., 2000) (asserting that “the solution to Muslim women’s human rights problems is not to ask these women to cast away their deepest beliefs in search of a Western quick fix”); Radhika Coomaraswamy, *Different but Free: Cultural Relativism and Women’s Rights as Human Rights*, in RELIGIOUS FUNDAMENTALISMS AND THE HUMAN RIGHTS OF WOMEN 79, 85-87 (Courtney W. Howland ed., 1999) (rejecting an either/or approach that would “balance” women’s rights against freedom of religion in favor of an approach that embraces both religion and equality).

51. See discussion *infra* Part III. In highlighting the challenges of Muslim women activists to traditional notions of religion and culture, I do not mean to essentialize them as more religious than non-Muslims. In fact, women’s rights activists in the Muslim world engage in numerous strategies for women’s rights “from the exclusively secular to the exclusively theological, with many permutations in between.” Farida Shaheed, *Controlled or Autonomous: Identity and the Experience of the Network, Women Living Under Muslim Laws*, 19 SIGNS 997, 999 (1994).

52. Shaheed, *supra* note 49, at 442.

53. *Id.* (describing this as a “neglected area . . . both in scholarship and in activism”); see also Bahia Tahzib-Lie, *Applying a Gender Perspective in the Area of the Right to Freedom of Religion or Belief*, 2000 BYU L. REV. 967, 969 (2000) (arguing that “[dissenting] women who object to certain interpretations of their religion or belief imposed by religious leaders or society or women who are committed to a different religion or belief from that of the wider society” are often overlooked in analyses of the “right to freedom of religion”); Bahia G. Tahzib-Lie, *Women’s Equal Right to Freedom of Religion or Belief: An Important but Neglected Subject*, in RELIGIOUS FUNDAMENTALISMS AND THE HUMAN RIGHTS OF WOMEN, *supra* note 50, at 117 (observing the absence of any global document addressing women’s equal right to freedom of religion). Abdullahi Ahmed An-Na’im’s work is a notable exception. See ABDULLAHI AHMED AN-NA’IM, TOWARD AN ISLAMIC REFORMATION: CIVIL LIBERTIES, HUMAN RIGHTS AND INTERNATIONAL LAW 10 (1990); Abdullahi Ahmed An-Na’im, *Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives, A Preliminary Inquiry*, 3 HARV. HUM. RTS. J. 13, 15, 21 (1990) [hereinafter An-Na’im, *Human Rights*] (concluding that “human rights advocates in the Muslim world must work within the framework of Islam to be effective” and asserting that “a modern ‘Shari’a’ could be . . . entirely consistent with current standards of human rights”).

the absolute sovereignty of the private sphere,⁵⁴ particularly on the issue of violence,⁵⁵ women's rights to contest and create normative community—that is, to make cultural meanings—have been far less theorized. Muslim women's claims suggest that women's human rights must go beyond *freedom from violence to freedom to make the world*.

Where law has faltered, new intellectual disciplines such as cultural studies and subaltern studies have stepped in to support such efforts. Unlike traditional human rights law, which despite its universal aspirations is marked by cultural relativism,⁵⁶ these disciplines theorize *change* within cultural communities.⁵⁷ Going further, subaltern studies confronts traditional models of representing, or telling stories about, change. In an important book, *Provincializing Europe*, Dipesh Chakrabarty critiques what he calls Western “historicism,” which posits a singular future for all the world's people in which to have justice and to be a “modern individual”

54. See Hernández-Trujol, *supra* note 31, at 32 (describing the public/private dichotomy as “slowly being eviscerated” by feminists). For trenchant critiques of the public/private dichotomy, see Hilary Charlesworth, *Feminist Methods in International Law*, 93 AM. J. INT'L L. 379, 382-83 (1999) (arguing that law's noninterference in the private domain legitimates and supports the power of men over women); Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291, 342 (1994) (examining “whether state involvement in the commission of the offense is the *sine qua non* of the definition of torture as a violation of international human rights”); Hilary Charlesworth, *The Public/Private Distinction and the Right to Development in International Law 1*, at <http://www.law-lib.utoronto.ca/diana/fulltext/char2.htm> (last visited Aug. 31, 2001) (arguing that international law “is built on paradigms which privilege a male perspective,” specifically, the public/private perspective that is central to liberalism).

55. See *Declaration on the Elimination of Violence Against Women*, G.A. Res. 48/104, U.N. GAOR, 48th Sess., Agenda Item 111, at 4, U.N. Doc. A/RES/48/104 (1994) (“States should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination.”).

56. See Karen Engle, *From Skepticism to Embrace: Human Rights and the American Anthropological Association from 1947-1999*, 23 HUM. RTS. Q. 536 (2001) (describing human rights law as culturally relativist); see also Martin Chanock, “Culture” and Human Rights: *Orientalising, Occidentalising and Authenticity*, in *BEYOND RIGHTS TALK AND CULTURE TALK: COMPARATIVE ESSAYS ON THE POLITICS OF RIGHTS AND CULTURE* 15, 15 (Mahmood Mamdani ed., 2000) (writing that sophisticated understandings of culture are “curiously absent from the notions of ‘culture’ used in the human rights debates, in which the sacralised idea of culture still dominates”); Austin Sarat & Thomas R. Kearns, *The Unsettled Status of Human Rights: An Introduction*, in *HUMAN RIGHTS: CONCEPTS, CONTESTS, CONTINGENCIES* 1, 16-17 (Austin Sarat & Thomas R. Kearns eds., 2001) (describing the traditional conception of culture in human rights law as discreet and homogeneous). The historical bent toward cultural relativism in traditional anthropology reflects the influence of anthropologist Franz Boas, who affirmed cultural relativism as a critique of imperialism and racism. See ELVIN HATCH, *CULTURE AND MORALITY: THE RELATIVITY OF VALUES IN ANTHROPOLOGY* 8 (1983); ADAM KUPER, *CULTURE: THE ANTHROPOLOGISTS’ ACCOUNT* 2 (1999).

57. See, e.g., GAYATRI CHAKRAVORTY SPIVAK, *IN OTHER WORLDS: ESSAYS IN CULTURAL POLITICS* 197 (1987) (“The work of the Subaltern Studies group offers a theory of change.”). Cultural studies spotlight the “radical social and cultural transformation” of contemporary global society. See generally Cary Nelson et al., *Cultural Studies: An Introduction*, in *CULTURAL STUDIES* 1, 5, 8-9 (Lawrence Grossberg et al. eds., 1992). For more background in cultural studies theory, see John Fiske, *Cultural Studies and the Culture of Everyday Life*, in *CULTURAL STUDIES*, *supra*, at 154; and Richard Johnson, *What Is Cultural Studies, Anyway?*, 16 SOC. TEXT 38 (1986-1987).

means to become “a European.”⁵⁸ In the historicist view, the world’s future is marked by classic ideas of secularism—that is, by adherence to the rule of law in the public sphere, with identity, community, and “despotism”⁵⁹ reserved to the private sphere. Cultures marked by anything less than this ideal separation between public and private, Chakrabarty writes, are characterized as *in transition* or *developing*, sitting in an “imaginary waiting room of history”⁶⁰ until they are ready to claim the mantle of the “modern.”

Under the historicist view, the continuing commitment of Muslim women activists to religion seems anachronistic; only their commitment to “rights” resonates. But as Chakrabarty argues, such historicism obscures the continuing reality of religion, culture, peasantry, and parochialism in our present. By conceiving of these phenomena as something in the past to be overcome, transition narratives “blind us to the responsibility of looking at the shapes and forms our modernity is taking.”⁶¹ A goal of subaltern studies, in contrast, is to see how individuals are living in the present, negotiating universal ideals about law, justice, and rights with their continuing commitment to religion and culture.⁶² Complicating historicist descriptions of change, subaltern studies pluralize and plot reform movements, in Spivak’s words, “as confrontations rather than transition.”⁶³

In the next two Parts, I contrast these narratives in the context of international law. While a confrontation narrative informed by subaltern studies reads Muslim women as remaking international law, and not simply receiving it,⁶⁴ the traditional legal narrative of law *in transition* elides this

58. DIPESH CHAKRABARTY, *PROVINCIALIZING EUROPE* 33 (2000).

59. Dipesh Chakrabarty, *Postcoloniality and the Artifice of History: Who Speaks for “Indian” Pasts?*, in *A SUBALTERN STUDIES READER, 1986-1995*, at 263, 269 (Ranjit Guha ed., 1997) (defining “despotism” not as “a government of mere caprice and whim,” but as “the opposite of English constitutional government”).

60. CHAKRABARTY, *supra* note 58, at 8.

61. *Id.* at 235-36 (quoting Sudipta Kaviraj’s observation that “the more modernity unfolds [the more] it seems to appear inescapably plural”).

62. Chakrabarty is careful to note that he is not “shunning European thought,” which “is a gift to us all,” but merely questioning its totalizing features. *Id.* at 255. At the same time, subaltern studies is philosophically grounded “in a radical critique and transcendence of liberalism,” particularly of liberalism’s “bureaucratic” conception of citizenship and the modern state. *See* Chakrabarty, *supra* note 59, at 286.

63. SPIVAK, *supra* note 57, at 197.

64. My readings of Muslim women’s human rights campaigns are consistent with Harold Koh’s descriptions of “transnational legal process” and Anne-Marie Slaughter’s “new real world order.” Koh and Slaughter demonstrate how transnational and nonstate actors are renegotiating the meaning of international law to suit their evolving needs and aspirations. *See generally* Harold Hongju Koh, *Transnational Legal Process*, 75 *NEB. L. REV.* 181, 183-84 (1996) (describing “transnational legal process” as the theory and practice of how public and private actors—nation-states, international organizations, multinational enterprises, nongovernmental organizations, and private individuals—interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of transnational law); Anne-Marie Slaughter, *The Real New World Order*, *FOREIGN AFF.*, Sept.-Oct. 1997, at 183 (describing the new world governance system as a network, or “dense web of relations” between a changing cast

story. The transition narrative does not merely construct religion as law's "other," but also thwarts the new constructions of religion and its relationship to law that the New Enlightenment envisions. It is to this narrative that I now turn.

II. TRANSITION

A. Law's "Past"

International law ceremoniously recounts its birth in 1648.⁶⁵ This date simultaneously marks the end of a great religious conflict (the Thirty Years' War), which brought down the Holy Roman Empire, and the Peace of Westphalia, which created the modern nation-state system. Starting law's story here is important. By placing itself temporally after religion—and, as we shall see, as a philosophical response to the problem of religion—in one swift move, religion is constructed as law's *past*.⁶⁶ The period of the Empire prior to 1648 is marked by a rule of religious ideology claiming to be universal.⁶⁷ This ideology was imposed; it was irrational and undemocratic. In contrast, the emerging nation-state system, built on notions of equality and enforceable agreement, symbolized the response of philosophy and reason to the chaos of religion. If religion was law's past, law was to be religion's future.

Law's transition narrative was characteristic of the Enlightenment era. Also known as the Age of Reason, the period from the late seventeenth through the end of the eighteenth century was preoccupied with touting the preeminence of reason, science, and law over the absurdities of religion, which was thought to leave men in a state of perpetual "immaturity."⁶⁸

of transnational state and nonstate actors). See also W. Michael Reisman, *International Lawmaking: A Process of Communication*, The Harold D. Lasswell Memorial Lecture (Apr. 24, 1981), in *SOURCES OF INTERNATIONAL LAW* 497 (Martti Koskenniemi ed., 2000) (outlining the New Haven School, or Communications Theory of international law, which envisions international legal rules as "continuously being fashioned and refashioned by a wide variety of global actors to suit the needs of the living"); discussion *infra* Part III, Section IV.A.

65. See JÜRGEN HABERMAS, *THE PHILOSOPHICAL DISCOURSE OF MODERNITY: TWELVE LECTURES* 17 (Frederick Lawrence trans., MIT Press 1987) (describing the Peace of Westphalia as the beginning of law and as a dismantling of the "world of the divine"); David Kennedy, *Images of Religion in International Legal Theory*, in *RELIGION AND INTERNATIONAL LAW*, *supra* note 44, at 145, 146; Hilaire McCoubrey, *Natural Law, Religion and the Development of International Law*, in *RELIGION AND INTERNATIONAL LAW*, *supra* note 44, at 177, 179.

66. As David Kennedy quips, "Religion is something we used to have." Kennedy, *supra* note 65, at 145.

67. Kennedy, *supra* note 1, at 112 (describing "a pre-legal international world of politics, war, religion, and ideology").

68. IMMANUEL KANT, *An Answer to the Question: What Is Enlightenment?*, in *PERPETUAL PEACE AND OTHER ESSAYS ON POLITICS, HISTORY, AND MORALS* 41, 41 (Ted Humphrey trans., Hackett Publ'g Co. 1983) (1795) (defining enlightenment as "man's emergence from his self-imposed immaturity").

Where the final end was the attainment of Truth, philosophers from René Descartes to John Locke, Immanuel Kant, and David Hume argued that freedom by way of exercising one's own reason—not blindly following the church—was the surest path to enlightenment.⁶⁹ With the help of *philosophes* from Voltaire to Diderot, who translated the grand philosophers' ideas to the people, the idea that reason (exercised through science, politics, and law) would overpower—and eventually vanquish—religion grew.⁷⁰ Nineteenth-century evolutionary theory continued to conceive of religion as “an early human condition from which modern law, science, and politics emerged and became detached.”⁷¹ In the twentieth century, Max Weber and adherents of Karl Marx would advance similar theses about the inevitable obsolescence of religion.⁷²

We see the narrative at work in the intellectual history of international law. While Christianity undoubtedly influenced international law,⁷³ the discipline's leading thinkers—the “fathers of international law”—sought to distance themselves from law's religious past. In this effort, some were more successful than others. While Hugo Grotius, the first “father of international law,” believed in secular law, his writings nonetheless grounded the new discipline in natural law theories.⁷⁴ Over time, the discipline moved further away from religion, with some help from another “father,” Emmerich de Vattel.⁷⁵

Human rights law has pursued a similar, albeit shorter, path. Born from the ashes of World War II, human rights law also has sought to transition

69. See FRANK E. MANUEL, *THE AGE OF REASON* 32 (1951) (describing the Enlightenment view that religion “was nothing but an absurd imposition upon the ignorant”). “Religion was struck at because it was not rational,” Manuel wrote. *Id.* at 33. “Even more,” he continued, “it was attacked as a patent fraud, the artifice of those who controlled the instruments of the cult.” *Id.*

70. *Id.* at 26-31.

71. TALAL ASAD, *GENEALOGIES OF RELIGION: DISCIPLINE AND REASONS OF POWER IN CHRISTIANITY AND ISLAM* 27 (1993).

72. See, e.g., MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 70 (Talcott Parsons trans., Routledge 1992) (1904) (“The people filled with the spirit of capitalism to-day tend to be indifferent, if not hostile, to the Church.”).

73. See James A.R. Nafziger, *The Functions of Religion in the International Legal System, in RELIGION AND INTERNATIONAL LAW*, *supra* note 44, at 155, 162 (“Scholars generally agree . . . that much modern international law grew out of Christian civilization.”).

74. Mark W. Janis, *Religion and the Literature of International Law: Some Standard Texts, in RELIGION AND INTERNATIONAL LAW*, *supra* note 44, at 121, 122-23 (describing Grotius as a thinker who labored to construct a field of international law that “sought to moderate the excesses of the Thirty Years War (1618-1648),” but who “throughout *De Jure Belli Ac Pacis* . . . relied heavily on proofs and evidences from the Bible to demonstrate the truth of his propositions”); McCoubrey, *supra* note 65, at 183 (“The work of Hugo Grotius was far less a break with the past than is sometimes supposed.”).

75. Janis, *supra* note 74, at 127-28 (finding Vattel more committed to a secular theory of international law and more skeptical of religion than was Grotius). Janis notes that while Grotius closed his 17th-century text “with a prayer,” Vattel's famous *The Law of Nations* (1758) concluded with a quintessential “18th century Age of Reason passage” that made its “final appeal not to God but to accuracy and utility.” *Id.* at 126.

away from religion and natural law⁷⁶ to become a purely “secular matter.”⁷⁷ Thus, while human rights may be better guaranteed if one were to find religious justifications for them, the point is that such justifications are not required.⁷⁸

B. Law's “Other”

Of course, law's transition from religion did not excise religion from our lives. To the contrary, it simply excised religion from *law*, and vice versa. In the real world, religion remains, but as an “extralegal field,”⁷⁹ banished from the public and reserved to the private sphere.⁸⁰ Seeking to make a clean break with the past,⁸¹ law could separate from religion only by definitional fiat, constructing religion as something wholly distinct from law—that is, as law's “other.”⁸²

The Enlightenment facilitated this partition. At the same time that international law emerged as a discipline governing the public realm, Enlightenment theory did the important work of transforming the conception of religion from political ideology to personal belief. As Talal Asad recounts in his *Genealogy of Religion*, European historians contend that “the constitution of the modern state required the forcible redefinition of religion as belief, and of religious belief, sentiment, and identity as personal matters that belong to the newly emerging space of private (as opposed to public) life.”⁸³

According to Kant and his colleagues, one could acquire enlightenment by transcending his religious passions and applying reason. Significantly, enlightenment was fully attainable through the exercise of reason *in the*

76. The foundational documents of international human rights law—the United Nations Charter (1945), the International Covenant on Civil and Political Rights (1976), and the International Covenant on Cultural and Economic Rights (1976)—all reflect natural law origins. See Hernández-Truyol, *supra* note 31, at 21.

77. RHODA E. HOWARD, HUMAN RIGHTS AND THE SEARCH FOR COMMUNITY 12 (1995) (writing that human rights “are derived from human thought about the nature of justice, not from divine decree”). As Kennedy describes, modern human rights law reflects a “[p]ost-enlightenment, rationalist, secular, Western, modern, capitalist” philosophy. Kennedy, *supra* note 14, at 114.

78. See HOWARD, *supra* note 77, at 12.

79. Kennedy, *supra* note 65, at 149.

80. David Kennedy, *Losing Faith in the Secular: Law, Religion, and the Culture of International Governance*, in RELIGION AND INTERNATIONAL LAW, *supra* note 44, at 309, 313 (“Religion was to be respected, even honored, in its own sphere—the domain of private commitment and spiritual meaning.”).

81. See Kennedy, *supra* note 65, at 146 (describing law's view of its own birth as pristine, believing that it “shares nothing with the messy collapse itself”).

82. See Gustavo Benavides, *Modernity*, in CRITICAL TERMS FOR RELIGIOUS STUDIES 186, 196 (Mark C. Taylor ed., 1998) (describing secularization as leading, not to the “disappearance of religion,” but rather to the “differentiation and narrowing of the institutional religious realm”).

83. ASAD, *supra* note 71, at 205.

public sphere alone, even if individuals lacked the same liberty in the private sphere.⁸⁴ “The *public* use of one’s reason must always be free, and it alone can bring about enlightenment among mankind,” Kant wrote.⁸⁵ But, he continued, “the *private* use of reason may . . . often be very narrowly restricted, without otherwise hindering the progress of enlightenment.”⁸⁶

The fact that religion and reason could coexist, albeit separately, made enlightenment, in Kant’s words, a “least harmful” proposition.⁸⁷ The revolutionary concept of enlightenment was acceptable precisely because it did not reject, but rather cabined, religion, attempting to control religious passions by carefully tucking them away in the private sphere.⁸⁸ Freedom in the public sphere became freedom itself; the private sphere could continue to harbor passion and unreason without inhibiting freedom.

But controlling religion entailed far more than spatial separation. The redefinition of religion as belief, or something internal and private, turned on conceiving of religion as both foundationally and functionally distinct from the public fields of law and science. Foundationally, religion as belief was not premised upon reason—unlike science, it was not something that could be tested, challenged, or questioned. To the contrary, Kant and Hume argued that religion was inherently incapable of being understood through reason because the only proof of God was faith.⁸⁹ In contrast to “rational” subjects such as law and science—open knowledge systems continually and rationally tested against new and external ideas—religion as a knowledge

84. See KANT, *supra* note 68, at 42 (“Nothing is required for this enlightenment, however, except *freedom*; and the freedom in question is the least harmful of all, namely, the freedom to use reason *publicly* in all matters.”).

85. *Id.*

86. *Id.* Kant defined the public use of one’s reason as the use of reason before the public, or “the entire *literate world*.” He called “the private use of reason that which a person may make in a *civic post* or office that has been entrusted to him”—that is, in the private sphere. *Id.*

87. *Id.*

88. That said, Kant (and Hume) may not have conceived of the stark separation of public and private that we have today. For example, Kant described the following situation as “wholly impossible” and unacceptable in an enlightened society:

But would a society of pastors, perhaps a church assembly or venerable presbytery . . . not be justified in binding itself by oath to a certain unalterable symbol in order to secure a constant guardianship over each of its members and through them over the people, and this for all: I say this is wholly impossible. Such a contract, whose intention is to preclude forever all further enlightenment of the human race, is absolutely null and void . . .

Id. at 43.

89. See DAVID HUME, AN INQUIRY CONCERNING HUMAN UNDERSTANDING (Charles W. Hendel ed., Prentice-Hall, Inc. 1995) (1748); IMMANUEL KANT, RELIGION WITHIN THE BOUNDARIES OF MERE REASON (Allen Wood & George di Giovanni eds. & trans., Cambridge Univ. Press 1998) (1793). Interestingly, preeminent scientists have made similar arguments in the modern day. See STEPHEN JAY GOULD, ROCKS OF AGES: SCIENCE AND RELIGION IN THE FULLNESS OF LIFE 111 (1999) (rejecting the “model of warfare between science and religion” because what distinguishes the two is reason).

system was premised upon closure. Religious beliefs appeared absolute and bounded, incapable of being tested or judged.⁹⁰

Undoubtedly, these Enlightenment views influenced later anthropological and sociological understandings of religion.⁹¹ As the anthropologist Bronislaw Malinowski famously wrote of religion in a 1936 essay, "It is not easy to dissect with the cold knife of logic what can only be accepted with a complete surrender of heart."⁹² Even the influential anthropologist, Clifford Geertz, although usefully conceiving of religion as a cultural system consisting of meanings, signs, and symbols,⁹³ ultimately characterized religion as a closed system of meaning, in contrast to open systems such as law and science.⁹⁴ The presumed lack of contestation within religious communities contributed to the depiction of religion as internally homogeneous. Indeed, Emile Durkheim defined religion as "a unified system of beliefs and practices relative to sacred things, . . . beliefs and practices which unite into one single moral community called a Church, all those who adhere to them."⁹⁵ Durkheim believed religious systems were distinct and wholly separate from one another and internally unified.⁹⁶ Thus, religion continued to be understood as inherently personal,⁹⁷ uncontestable, homogeneous, and communal.⁹⁸

While religion's irrationality and spirituality made it unsuitable for law and science, it was perfectly suited for different functions. Where law and

90. Thomas Paine wrote that "[r]eason is the forbidden tree of priest-craft." T.P. [Thomas Paine], *Of the Religion of Deism Compared with the Christian Religion and the Superiority of the Former over the Latter*, 1 PROSPECT; OR, VIEW OF THE MORAL WORLD 235, 244 (1804); see also CORNEL WEST, *The Historicist Turn in Philosophy of Religion*, in THE CORNEL WEST READER 360, 361 (1999) (writing that "post-Humean and post-Kantian philosophers of religion were forced either to give up or to redefine the scientific character of religious beliefs and thereby to conceptually redescribe such beliefs in moral, affective, aesthetic or existential terms").

91. See ASAD, *supra* note 71, at 207 (acknowledging that "the concepts and practices of religion and state have not remained unchanged since Kant," but, nonetheless, "liberals continue to invoke his principle of the public use of reason as the arbiter of true knowledge").

92. BRONISLAW MALINOWSKI, *The Foundations of Faith and Morals*, in MALINOWSKI AND THE WORK OF MYTH 131, 133-34 (Ivan Strenski ed., 1992).

93. Clifford Geertz, *Religion as a Cultural System*, in THE INTERPRETATION OF CULTURES 87, 89 (1973).

94. *Id.* at 125; see also CLIFFORD GEERTZ, ISLAM OBSERVED: RELIGIOUS DEVELOPMENT IN MOROCCO AND INDONESIA (1968).

95. EMILE DURKHEIM, THE ELEMENTARY FORMS OF RELIGIOUS LIFE 44 (Karen E. Fields trans., Free Press 1995) (1912).

96. *Id.* at 38 (writing that when a "certain number of sacred things have relations of coordination and subordination with one another, so as to form a system that has a certain coherence and does not belong to any other system of the same sort, then the belief and rites, taken together, constitute a religion").

97. Twentieth-century theorists critiqued the evolutionary view of religion as past, but continued to understand religion as "a distinctive space of human practice and belief." ASAD, *supra* note 71, at 27.

98. *Id.* at 9 (characterizing religion as "an eminently social thing. Religious representations are collective representations that express collective realities; rites are ways of acting that are born only in the midst of assembled groups and whose purpose is to evoke, maintain, or recreate certain mental states of those groups.").

science would satisfy individuals' material needs, religion and culture provided that more elusive good: meaning.⁹⁹ Malinowski ends his famous essay, *The Foundation of Faith and Morals*, with a plea imploring all people to "work for the maintenance of the eternal truths which have guided mankind out of barbarism to culture, and the loss of which seems to threaten us with barbarism again."¹⁰⁰ Religion, Malinowski concluded, provides society with those "indispensable pragmatic figments without which civilization cannot exist."¹⁰¹

In short, religion could coexist with law so long as the two remained separate,¹⁰² and forcefully so.¹⁰³ Going further, their distinctiveness required their coexistence. Religion (now moved to the private sphere) was left to govern moral life, while law (in the public sphere) would govern material and political life. Development and modernity are defined by the perfect separation of law and religion into distinct, sovereign jurisdictions.

C. *Constructing and Obstructing*

Revisiting law's story reveals not only how law has objectified religion but, more importantly, sheds light on how law's transition narrative *obstructs new constructions* of religion. In order to justify legal control of the public sphere, the Enlightenment banished religion from its jurisdiction and constructed religion as a separate, sovereign sphere in which the law does not belong. But in fact, law does far more than simply cabin or confine religious passion. In ceding complete authority to religion without subjecting it to tests of rationality and legitimacy, law plays a far more

99. See, e.g., PAUL TILICH, WHAT IS RELIGION? 60 (James L. Adams ed., 1969) ("Religion is the sum total of all spiritual acts directed towards grasping the unconditional import of meaning through the fulfillment of the unity of meaning.").

100. MALINOWSKI, *supra* note 92, at 172.

101. *Id.*

102. Significantly, anthropologists such as E.B. Tylor and James George Frazer defined magic as primitive beliefs and practices that attempted to interpret the world rationally, in contrast to religion, which was characterized in spiritual, nonrational terms. Defining religion and magic this way enabled scholars to predict that science would replace magic (revealing the empirical observations of magic to be mistaken, incomplete, or faulty), while religion would remain. See Stephen Sharot, *Magic, Religion, Science, and Secularization*, in RELIGION, SCIENCE, AND MAGIC: IN CONCERT AND IN CONFLICT 261, 262 (Jacob Neusner et al. eds., 1989) ("Religion . . . is defined only in terms of its difference from science so that there is no question of its being replaced by science."). See generally JAMES GEORGE FRAZER, THE GOLDEN BOUGH: A STUDY IN MAGIC AND RELIGION 58 (1930) (describing mankind's "great transition from magic to religion" as a process by which man admitted that he could not control nature and thus gradually came to believe, or to have faith, in beings higher than man who did exert such control); EDWARD BURNETT TYLOR, PRIMITIVE CULTURE (1871) (laying a foundation for an understanding of religion as "belief").

103. Kennedy, *supra* note 65, at 149 (describing "law's singular and repressive relationship to religion"); see also *id.* ("It is unsurprising that a law so constructed would be obsessed with the relationship, the line, the distinction, between international law and sovereignty . . .").

active role in defending a particular conception of religion and, ultimately, in obstructing change.

As we shall see more fully in Part III, individuals on the ground are increasingly challenging the traditional Enlightenment view of religion, both descriptively and prescriptively. Case studies of women human rights reformers in Muslim communities show women contesting traditionalist and fundamentalist dogma and thereby undermining the myth of homogeneous and static religious identity. At the same time, women reformers are making new normative claims, asserting a new right to define their religious identity themselves. While these claims suggest that religious identity was always more contested than traditional Enlightenment theory revealed, they also suggest that today more of one's religious identity than ever before is contestable and subject to reconstruction.¹⁰⁴

Thus far, however, law has not recognized these claims, preferring instead seventeenth- and eighteenth-century Enlightenment views that define freedom as reason in the public sphere and preserve religion as a sphere without rights. Because law views religion as static and unchanging, law fails to recognize contestation within religious communities, making it more difficult to bring about changes on the ground. Worse still, current law actively advantages the status quo and status quo elites in these communities.¹⁰⁵

New Enlightenment claims are defeated at law's door because the modern legal view of religion is not substantially different from the traditional one. As Alan Brownstein describes, freedom of religion in the United States continues to be defined as an inherently individual or dignitary right to personal belief.¹⁰⁶ Recently, there has been a movement toward viewing religion in more communal—rather than individual—terms,¹⁰⁷ particularly focusing on the right of religious groups to contribute

104. For a similar argument about the movement from status to contract in the relationship between individuals and culture, see Sunder, *supra* note 33, at 522 (describing how cultural membership has evolved from Pierre Bourdieu's notion of culture as "habitus"—something that determines one's identity—toward a conception of culture as evolving and constructed from the bottom up).

105. One could go further and suggest that law actively shapes religious community. It may be the case, for example, that religious leaders take fundamentalist positions because that is what the law expects of them.

106. Alan E. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 OHIO ST. L.J. 89, 95 (1990) (defining, from a U.S. constitutional standpoint, the free exercise of religion as "essentially a dignitary right," and explaining that "[i]t is part of that basic autonomy of identity and self-creation which we preserve from state manipulation, not because of its utility to social organization, but because of its importance to the human condition").

107. Stephen L. Carter, *Liberal Hegemony and Religious Resistance: An Essay on Legal Theory*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 25, 37 (Michael W. McConnell et al. eds., 2001) (describing religion as "a communal rather than an individual exercise").

to public debate.¹⁰⁸ Michael McConnell, for example, critiques the Enlightenment roots of liberal secularism, not because traditional discourses take the public out of the private, but rather, because these discourses blunt the influence of religion in the public sphere.¹⁰⁹ But religious sovereignty in the private sphere has gone virtually unchallenged. In fact, this sovereignty appears so strong today that we are witnessing more “like religion”¹¹⁰ arguments, in which groups—even those that have suffered discrimination in the name of religion—seek their own rights to be let alone, rather than rights to contest religious sovereignty.¹¹¹

While law remains true to its origins, scholars outside law are beginning to challenge the binaries of traditional Enlightenment discourse.¹¹² For some time, progressive, feminist, and even Third World

108. See Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 673 (2002) (describing the transformation in Establishment Clause jurisprudence from protecting the individual liberty of conscience of religious dissenters toward guaranteeing the political equality of religious minorities). Perhaps the most significant debates on this issue revolve around those who challenge John Rawls’s theory of “public reason,” which argues that in a constitutional regime “we must each give up forever the hope of changing the constitution so as to establish our religion’s hegemony.” See JOHN RAWLS, *The Idea of Public Reason Revisited*, in THE LAW OF PEOPLES 129, 150 (1999). I do not engage this debate here, focusing instead on the more often ignored question of the role of exercising reason within the religious sphere, rather than religion in the public sphere.

109. See Michael W. McConnell, “God Is Dead and We Have Killed Him!”: *Freedom of Religion in the Post-Modern Age*, 1993 BYU L. REV. 163, 166; Michael W. McConnell, *Old Liberalism, New Liberalism, and People of Faith*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT, *supra* note 107, at 5 (chastising secularism for its presumption that the public sphere can exist without religion).

110. I am tracking Janet Halley’s identification of “like race” arguments, in which groups analogize discrimination against them to that suffered by racial minorities, in hopes of obtaining greater legal protection. See Janet E. Halley, “Like Race” Arguments, in WHAT’S LEFT OF THEORY?: NEW WORK ON THE POLITICS OF LITERARY THEORY 40 (Judith Butler et al. eds., 2000).

111. See David B. Cruz, *Disestablishing Sex and Gender*, 90 CAL. L. REV. 997 (2002) (arguing that sexuality should be treated like religion and accorded a similar degree of personal autonomy); William N. Eskridge, Jr., *A Jurisprudence of “Coming Out”: Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411, 2411 (1997) (writing that the “public law consensus to preserve and protect the autonomy of religious and ethnic subcultures” should be extended to sexual minorities); Andrew Koppelman, *Three Arguments for Gay Rights*, 95 MICH. L. REV. 1636, 1648 (1997) (noting that protection for gay rights can be invoked by analogy to the protection of religious minorities, “who exercise [their] important [religious] liberty in unpopular ways”).

112. See CORNEL WEST, *Religion and the Left*, in THE CORNEL WEST READER, *supra* note 90, at 372; Janet R. Jakobsen & Ann Pellegrini, *Getting Religion*, in WOMEN, GENDER, RELIGION: A READER 518, 525 (Elizabeth A. Castelli ed., 2001) (expressing concern that scholars’ exclusive focus on “fundamentalism” reinforces the notion of religion as irrational without taking the responsibility of understanding the moderate and modern forces within religion); Russell T. McCutcheon, *The Category “Religion” in Recent Publications: A Critical Survey*, 42 NUMEN 284, 285-87 (1995) (comparing characterizations of religion as an essence with more critical approaches); Miriam Peskowitz, *What’s in a Name? Exploring the Dimensions of What “Feminist Studies in Religion” Means*, in WOMEN, GENDER, RELIGION: A READER, *supra*, at 29, 29 (asking: “What happens as we write about women and gender while simultaneously making visible the Enlightenment constructs that restrict the imagination of women and gender in the first place?”); Randi R. Warne, *Gender*, in GUIDE TO THE STUDY OF RELIGION 140, 151 (Willi

actors have been influenced by Enlightenment beliefs that freedom is possible only in secular terms.¹¹³ But now some question the extent to which acceptance of the Enlightenment's public/private dichotomy has turned on downplaying discrimination in the private sphere, especially discrimination against women.¹¹⁴ These scholars challenge the notion that freedom in the public sphere is enough and assert that the private sphere should be a sphere in which we may demand reason and rights.

While traditional theories of religion as a sphere of injustice held religious beliefs to be unchanging, contemporary theorists argue that, in fact, religion is much more internally contested and subject to reasoned argument and change than earlier theorists acknowledged.¹¹⁵ Key to this notion of religion as mutable, rather than a natural, unchanging essence, is the observation that while the subject matter of religion is spiritual and textual, it is human beings who interpret religion and make it meaningful for their time. The fundamentally human aspects of religion and culture, then, may be subject to tests of rationality and legitimacy. As Bhikhu Parekh writes, "The divine will is a matter of human definition and interpretation, and requires [human beings] to show why they interpret their religion in one way rather than another and why they think that their interpretation entails a particular form of behaviour."¹¹⁶ "Religion does

Braun & Russell T. McCutcheon eds., 2000) (critiquing the secularization narrative, which makes the public sphere preeminent over the private). Within law, David Kennedy's critical work on religion and law is a notable exception. See Kennedy, *supra* note 14, at 115 (arguing that human rights discourse "overemphasizes" the naturalness of religion and "underestimates" religion's "plasticity").

113. See CHAKRABARTY, *supra* note 58, at 4 ("Modern social critiques of caste, oppressions of women, the lack of rights for laboring and subaltern classes in India, and so on—and, in fact, the very critique of colonialism itself—are unthinkable except as a legacy, partially, of how Enlightenment Europe was appropriated in the [Indian] subcontinent."); WEST, *supra* note 112, at 373 (writing that "[i]n Europe—where the Enlightenment ethos remained (and still remains) hegemonic among intellectuals and the literate middle classes—secular sensibilities were nearly prerequisite for progressive outlooks, and religious beliefs usually a sign of political reaction"); Elizabeth A. Castelli, *Women, Gender, Religion: Troubling Categories and Transforming Knowledge*, in WOMEN, GENDER, RELIGION: A READER, *supra* note 112, at 3, 5 ("It has been an obstacle to some conversations that many feminists . . . have tended to read 'religion' as an abstraction solely in negative terms . . ."); Shaheed, *supra* note 49, at 416 (writing that Pakistani leaders "had internalized the premise of the colonial discourse that any religious/cultural tradition deviating from the approved Eurocentric Christian tradition was incompatible with the desired goal of modernity and progress").

114. See, e.g., Suad Joseph, *Gendering Citizenship in the Middle East*, in GENDER AND CITIZENSHIP IN THE MIDDLE EAST 3, 25-26 (Suad Joseph ed., 2000) (arguing that civil society theorists' "overprivileging of the public sphere as a source of democracy and the exclusive focus on the public/private binary have been made possible by glossing over gendered antidemocratic forces").

115. See ASAD, *supra* note 71, at 236 ("Religious traditions have undergone the most radical transformations over time.").

116. BHIKHU PAREKH, *RETHINKING MULTICULTURALISM: CULTURAL DIVERSITY AND POLITICAL THEORY* 334-35 (2000). Parekh writes:

There is a pervasive tendency among religious people to claim to be in possession of divinely vouchsafed infallible truths which they are not at liberty to compromise. This

involve faith," Parekh admits, "but it is not a matter of faith alone, which is why the two should not be equated. It involves judgment, choice and decision, and hence reason and personal responsibility."¹¹⁷

Finally, Enlightenment definitions of religion as "natural" and as personal belief obscure the role of politics—and more importantly power—in religious contexts.¹¹⁸ Religion has become "problematically detached from the specific historical contexts, social frameworks, political struggles, and institutional constraints that have produced it."¹¹⁹ Thus, traditional anthropologists are criticized for being more concerned with discerning what constitutes Truth in various religions—that is, in studying the religious object—than with studying how and by whom religion as an object came to be produced.¹²⁰

In short, religion's conceptualization as law's other not only helps to confine religion but also to defend it.¹²¹ The Enlightenment rendered religion immutable and without need for justification or legitimacy—religion cannot be defended against irrationality because irrationality is thought to be its essence.¹²² Heterogeneity and critical discourses within religion are subverted in favor of the imposed views of religious leaders.¹²³ Religion is studied and preserved as a fixed, unchanging object rather than as an ever-shifting, subjective construct.

Revealing this relationship between law and religion suggests that law does more than cabin and control religion. In defending the near absolute sovereignty of religion, law has ceded enormous power to the private sphere and, in the process, has created a different kind of beast. The perverse result of "othering" discourses is that the "other" often appropriates its negative image and wears it with pride. Thus, we see law's fundamentalist view of religion being reproduced by religious fundamentalists, who hold themselves out as an alternative to the West's morally defunct, bureaucratic rationality. More significantly, religious leaders take advantage of a legal tradition that does not think critically

is a wholly false reading of religion. No religion is or can be wholly divine in the sense of being altogether free of human mediation. Its origin and inspiration are divine but human beings determine its meaning and content.

Id.

117. *Id.*

118. See *ASAD*, *supra* note 71, at 29 ("The theoretical search for an essence of religion invites us to separate it conceptually from the domain of power.").

119. Castelli, *supra* note 113, at 6.

120. See *ASAD*, *supra* note 71.

121. See *id.* at 28 (writing that defining religion as distinct from law "is at once part of a strategy (for secular liberals) of the confinement" of religion "and (for liberal Christians) of the defense of religion").

122. *Id.* at 50 ("The separation of religion from science, common sense, aesthetics, politics, and so on, allows [religious theorists] to defend it against charges of irrationality.").

123. *Id.* at 232.

about the internal political dimensions of religion and that presumes religion is imposed without internal contest or claims of right.

D. *Cases in Point*

The practical effect of law's view of religion is that law defers to fundamentalist claims to discriminate in the name of religion or culture, thwarting the claims of dissenting women and other advocates of change. This is the case in both international and national law.

1. *CEDAW (Global)*

The Convention on the Elimination of Discrimination Against Women (CEDAW), which has been called the "International Bill of Rights for Women,"¹²⁴ offers a case in point. CEDAW is a wide-ranging, comprehensive treaty covering civil, political, and cultural rights intending to protect women in both their public and private lives.¹²⁵ To date, 170 countries have either ratified or acceded to CEDAW, the only major international human rights instrument to address women's human rights exclusively.¹²⁶ On paper, CEDAW is a milestone achievement for women's rights, going so far as to call on states to change customary, cultural, and religious laws premised upon the inequality of the sexes.¹²⁷

But thus far CEDAW's goals—especially with respect to the protection of women in the private sphere—have been foiled. One of the most broadly ratified conventions, CEDAW also has the dubious distinction of having the highest number of reservations by the states party to it.¹²⁸ While the reservations cover many issues, the most damning are those that reject CEDAW's obligations where they interfere with religious or customary

124. Sheila Jayaprakash, *The Right To Be Equal*, HINDU, Apr. 23, 2000, at 4.

125. Most notable is CEDAW's Article 5(a), which provides:

States Parties shall take all appropriate measures:

To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women

Women's Convention, *supra* note 4, art. 5(a), 1249 U.N.T.S. at 17.

126. OFFICE OF THE UNITED NATIONS HIGH COMM'R FOR HUMAN RIGHTS, STATUS OF RATIFICATIONS OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES (2002), at <http://www.unhchr.ch/pdf/report.pdf>.

127. See Women's Convention, *supra* note 4, art. 5(a), 1249 U.N.T.S. at 17.

128. See HENKIN ET AL., *supra* note 31, at 362 (writing that as of April 1999, CEDAW "has attracted the greatest number of reservations with the potential to modify or exclude most, if not all, of the terms of the treaty" (quoting Belinda Clark, *The Vienna Convention Reservations Regime and the Convention of Discrimination Against Women*, 85 AM. J. INT'L L. 281, 371 (1991))).

laws.¹²⁹ These laws, such as many laws based on Shari'a, are particularly regressive on women's issues.¹³⁰ When other signatory states complained to the United Nations that the reservations based on religion, culture, and custom violated international human rights law, which allows parties to make reservations to treaties only if they do not undermine the "object and purpose" of the treaty,¹³¹ they were cowed into silence by charges of religious intolerance and cultural imperialism.¹³² While the United Nations has repeatedly called on parties to withdraw their reservations,¹³³ thus far

129. Many Middle Eastern and Islamic countries, for example, Bangladesh, Egypt, Iraq, Kuwait, Libyan Arab Jamahiriya, Malaysia, Maldives, and Morocco, took reservations to parts of the Convention citing prejudice to Shari'a. United Nations, Convention on the Elimination of All Forms of Discrimination Against Women, Reservations and Declarations, at http://www.un.org/Depts/Treaty/final/ts2/newsfiles/part_boov/iv_boov/iv_8.html#16G2eePatr (last visited Jan. 30, 2003) [hereinafter CEDAW Reservations and Declarations]. Other countries, including India, Israel, and Singapore, took similar reservations on general freedom of religion grounds. *Id.* In addition, a small number of countries, including India, Kuwait, Morocco, Niger, Singapore, and Tunisia, expressed reservations based on customary laws and cultural mores. *Id.* The effort to subsume international human rights law under religious and customary law is not new. Many Muslim states, for example, have long asserted a right to religious and cultural difference in defiance of universal rights. The most symbolic of their statements is the 1990 Cairo Declaration of Human Rights in Islam. Authored by the Organization of the Islamic Conference, this document protests the universality of international human rights and declares that all human rights are subsumed under the Islamic law of Shari'a. See *Cairo Declaration on Human Rights in Islam*, U.N. GAOR, 2d Sess., Agenda Item 11, U.N. Doc. A/CONF.157/PC/35 (1992).

130. See, e.g., An-Na'im, *Human Rights*, *supra* note 53, at 36-50 (finding inconsistencies between Shari'a and international human rights standards, including in the area of women's rights, but arguing that it is possible to reinterpret Shari'a to be consistent with international human rights norms).

131. Article 19 of the Vienna Convention on the Law of Treaties "provides that a state ratifying a treaty may make a reservation unless it is 'prohibited by the treaty' or 'is incompatible with the object and purpose of the treaty.'" Section 313 of the *Restatement (Third), Foreign Relations Law of the United States* (1987), is to the same effect." STEINER & ALSTON, *supra* note 1, at 439 (quoting Vienna Convention on the Law of Treaties, *opened for signature*, May 23, 1969, art. 19, S. EXEC. DOC. L, 92-1, at 16 (1971), 1155 U.N.T.S. 331, 336-37). In general, tolerance of reservations has been urged in order to achieve greater participation in the treaty and to enable a state to protect its interests as much as possible. See *id.* at 441. Article 28(2) of the Women's Convention also expressly prohibits reservations that contravene its "object and purpose." Women's Convention, *supra* note 4, art. 28(2), 1249 U.N.T.S. at 23.

132. See Mayer, *supra* note 29, at 271 ("[A]ttempts to deter the practice of reservations in conflict with the object and purpose of CEDAW have met with resistance in the form of accusations that these were tantamount to Western attacks on Islam and/or the Third World." (citation omitted)).

133. See REPORT OF THE FOURTH WORLD CONFERENCE ON WOMEN, ¶ 130, U.N. Doc. A/CONF. 177/20, U.N. Sales No. E.96.IV.13 (1995) (calling on states parties to CEDAW to "consider withdrawing reservations . . . [and] ensure that no reservation is incompatible with the object and purpose of the Convention or otherwise contrary to international treaty law"); Press Release, Commission on Human Rights, Commission on Human Rights Takes Up Integration of Human Rights of Women and Gender Perspective, U.N. Doc. HR/CN/909 (Apr. 13, 1999), at <http://www.un.org/News/Press/docs/1999/19990413.hrcn909.html> (recommending that "all Governments should ratify, without reservation, the Convention on the Elimination of all Forms of Discrimination Against Women"). See generally General Recommendations Made by the Committee on the Elimination of Discrimination Against Women, General Recommendation No. 4 (1987), at <http://www.un.org/womenwatch/daw/cedaw/recomm.htm> (expressing concern in 1987 over reservations to CEDAW and suggesting "that all States parties concerned reconsider such reservations with a view to withdrawing them").

any changes made by Muslim countries (other than Turkey) resulting from these efforts have been little more than semantic.¹³⁴ The fact is, as Hilary Charlesworth observes, that although the religion- and culture-based reservations to CEDAW are likely invalid under international law, “there are no satisfactory mechanisms in international law to challenge reservations adequately.”¹³⁵ Human rights law’s universal aspirations notwithstanding, “implicitly, the U.N. acquiesced to the cultural relativist position on women’s rights.”¹³⁶

But deference to religious leaders’ arguments elides the claims of women dissenters within these religious communities. In fact, many women within the states parties making the religion- and custom-based reservations oppose the reservations, and contest the religious interpretations on which they are based.¹³⁷ These women argue that their governments—and the international human rights community—have improperly deferred to traditionalists and so-called cultural leaders’ interpretations of private laws without taking proper account of modernizing views.

2. *Personal Laws (India)*

India offers one of the most infamous examples in international law of how political and legal systems together subordinate modern, egalitarian religious views to traditional, patriarchal ones. In 1985, the Supreme Court of India recognized the right of an elderly Muslim woman, Shah Bano, to alimony from her divorcing husband based on section 125 of India’s code of criminal procedure.¹³⁸ While many lower courts had similarly found a right to alimony for Muslim women under this provision,¹³⁹ this case sparked a firestorm of protest because the Hindu judge, C.J. Chandrachud, expressly rejected the argument that Muslim personal law allowed a husband to pay a divorcing wife any amount of his choosing for a period of three months (*iddat*), this completely absolving him from further support

134. See CEDAW Reservations and Declarations, *supra* note 129. Among Muslim states parties, only Turkey withdrew all reservations based on religion. See *id.*

135. Charlesworth, *supra* note 44, at 408-09 (noting that rejections of the reservations themselves have been rejected as a form of religious intolerance).

136. Mayer, *supra* note 10, at 21-32.

137. See UNIFEM, Bringing Equality Home: Reservations (Nov. 2, 2002), at <http://www.unifem.undp.org/resources/cedaw/cedaw10.html> (describing efforts of women’s NGOs to contest CEDAW reservations from within their states).

138. The Indian court held:

Under section 125 (1)(a), a person who, having sufficient means, neglects or refuses to maintain his wife who is unable to maintain herself, can be asked by the Court to pay a monthly maintenance to her at a rate not exceeding five hundred rupees. . . . “[W]ife” includes a divorced woman who has not remarried.

THE SHAH BANO CONTROVERSY 25 (Asghar Ali Engineer ed., 1987) (quoting Khan v. Bano, A.I.R. 1985 S.C. 945, 948).

139. See NUSSBAUM, *supra* note 47, at 172.

thereafter.¹⁴⁰ Before Muslim women had time to celebrate, then-Prime Minister Rajiv Gandhi, motivated by the fear of losing his Muslim male supporters, quickly introduced legislation to overturn the decision.¹⁴¹ The resulting Muslim Women's Protection After Divorce Act of 1986¹⁴² "deprived all and only Muslim women of the right of maintenance guaranteed under the Criminal Procedure Code."¹⁴³

Muslim women expressed outrage, especially because the government never sought input from the diverse Muslim community about the issue. Standing on the steps of Parliament the day the Act was passed, one activist asked, "If by making separate laws for Muslim women, you are trying to say that we are not citizens of this country, then why don't you tell us clearly and unequivocally that we should establish another country—not Hindustan or Pakistan but Auratstan (women's land)?"¹⁴⁴ A watershed decision, *Shah Bano* touched off activism worldwide; reformers used the case to highlight the problem of state deference to oppressive religious practices, and more importantly, the state's refusal to take into account the varying religious perspectives within India's minority Muslim community.

Activists are bringing this critique to bear on questions of CEDAW reservations and the reform of personal laws. Though the Indian government ratified CEDAW in 1993, it did so with reservations regarding social and cultural patterns, rights within the family, and rights relating to marriage.¹⁴⁵ But now, a women's NGO, Women's Action Research and Legal Action for Women (WARLAW), is "develop[ing] an innovative and incisive legal challenge to force the [Indian] Government to take action on its CEDAW commitments" and to revisit its reservations.¹⁴⁶ In particular, WARLAW brought a petition to the Indian Supreme Court asking the court to order the government to specify "*how it intends to determine whether communities want [their] personal laws changed*" and how the government "*intends to include the voices of women from these communities when*

140. See *Bano*, A.I.R. 1985 S.C. at 945. For a fuller account of the *Shah Bano* decision and its aftermath, see NUSSBAUM, *supra* note 47, at 172-73 (reporting that the "Islamic clergy and the Muslim Personal Law Board organized widespread protest against the ruling, claiming that it violated their free exercise of religion"); and Martha C. Nussbaum, *India: Implementing Sex Equality Through Law*, 2 CHI. J. INT'L L. 35, 44-47 (2001).

141. See, e.g., Edward A. Gargan, *Hindu Rage Against Muslims Transforming Indian Politics*, N.Y. TIMES, Sept. 17, 1993, at A1 ("Worried about Muslim support, Rajiv Gandhi had the Parliament change the law to void the court's ruling."); Steven R. Weisman, *Dispute over a Moslem Divorce Ensnarls Gandhi*, N.Y. TIMES, Feb. 9, 1986, at A3 ("Politicians who have met with Mr. Gandhi say he will probably support legislation to reverse the effects of the *Shah Bano* decision. But feminists have served notice that if this happens, his party will 'forfeit its claim to represent women,' as one leader put it.")

142. The Muslim Women (Protection of Rights on Divorce) Act (1986), at <http://indiacode.nic.in/cgi/nph-bwsgi/BASIS/indweb/all/actret/SF>.

143. NUSSBAUM, *supra* note 47, at 173.

144. Nussbaum, *supra* note 140, at 45 (citation omitted).

145. See CEDAW Reservations and Declarations, *supra* note 129; UNIFEM, *supra* note 137.

146. UNIFEM, *supra* note 137.

making this assessment."¹⁴⁷ While many women have lobbied for India to abandon its personal laws altogether in favor of a Uniform Civil Code,¹⁴⁸ still others, like the members of WARLAW, assert that what matters is that the government take all constituents within a religious community into account when ceding power to such communities.¹⁴⁹ But thus far, just as was the case in the *Shah Bano* controversy, the state has not acknowledged women's efforts in this regard, and the personal laws have been left intact.¹⁵⁰

3. *Freedom of Religion and Tribal Sovereignty* (United States)

While the United States does not expressly delegate the governance of private matters to various communities through personal or customary laws, deference to religious or other private communities arises nonetheless in a number of contexts. The associational speech and religious freedoms guaranteed by the First Amendment offer one principal mechanism for halting public intervention. In *EEOC v. Catholic University of America*,¹⁵¹ for example, Sister Elizabeth McDonough alleged sex discrimination and retaliatory conduct in violation of Title VII of the Civil Rights Act of 1964. McDonough argued that she was denied tenure at Catholic University because of her sex. But the Court of Appeals for the District of Columbia Circuit dismissed the claim on the ground that its adjudication on the merits would violate the First Amendment.¹⁵² Deferring to university authorities as the arbiters of the organization's norms, the court upheld university leaders' freedom of religion over the dissenting claim of Sister McDonough.

While it does not involve religion per se, tribal sovereignty for Native Americans is yet another area in which U.S. law defers to traditionalists within a culture over the claims of reformers. In *Santa Clara Pueblo v. Martinez*,¹⁵³ a Pueblo woman and her daughter sought to apply the federal Indian Civil Rights Act to challenge a tribal rule that granted tribal membership to children of mixed marriages only when the father was

147. *See id.* (emphasis added).

148. *See* Padmaja A. Patil, *Socio-Economic and Political Policies in the 1990s and Status of Women in India*, 19 J. THIRD WORLD STUD. 195, 199-201 (2002).

149. *See* Nussbaum, *supra* note 140, at 46 (writing that the adoption of a Uniform Civil Code in India currently seems unlikely and that, in the meantime, "internal reform" of personal laws "is the best option for the foreseeable future").

150. Proposed revisions to Christian personal laws dating back to the late nineteenth century, for example, have languished in Parliament since 1994. *See* Shuma Raha, *Women: The Right Fight*, STATESMAN, Jan. 27, 2001, at 2001 WL 4381562 (reporting that "even when a particular community had been progressive enough to submerge their internal divisions and urge reforms, the government . . . had balked at implementing them").

151. 83 F.3d 455, 457 (D.C. Cir. 1996).

152. *Id.*

153. 436 U.S. 49 (1978).

Pueblo and not when the mother was Pueblo.¹⁵⁴ The U.S. Supreme Court decided that it lacked jurisdiction to address the claim.¹⁵⁵ Describing the Pueblo as a “distinct”¹⁵⁶ community—“a separate people”¹⁵⁷—with sovereignty over its internal affairs, the Court declined to intervene, so as to protect the “tribe’s ability to maintain itself as a culturally and politically distinct entity.”¹⁵⁸ Applying the traditional rationale for deference—not wanting to impose the state’s view on the tribe—the Court failed to acknowledge that the tribe itself was conflicted. Ignoring the actual internal diversity of views within the tribe (evidenced by the legal claim itself), the Court deferred to tribal leaders at the expense of the Pueblo woman’s effort to seek equal justice for women within the tribe.¹⁵⁹

4. *Customary Laws (Zimbabwe, Nigeria, and South Africa)*

In 1999, the landmark decision of the Supreme Court of Zimbabwe in *Magaya v. Magaya*¹⁶⁰ shocked the international human rights world. In this case, the eldest daughter of a deceased, polygamist man was denied rights to her father’s estate and ejected from the premises when a younger son decided to claim ownership. The court based its decision on a provision of Zimbabwe’s intestacy code, which states:

“If any African who has contracted a marriage according to African law or custom or who, being unmarried, is the offspring of parents married according to African law or custom, dies intestate his estate

154. *Id.* at 51.

155. The U.S. Supreme Court decided that Congress, however oddly, had conferred certain civil rights on tribal members, but had provided no means to enforce these federal rights in federal court. *Id.*

156. *Id.* at 55 (citations omitted).

157. *Id.* (citations omitted).

158. *Id.* at 72; cf. *Lovelace v. Canada*, U.N. GAOR, 36th Sess., Supp. No. 40, U.N. Doc. A/3640 (1981). In *Lovelace*, the Human Rights Committee, a body that monitors states parties’ compliance with the International Covenant on Civil and Political Rights, upheld the claim of Sandra Lovelace, who was born and registered as a “Maliseet Indian” but who lost her tribal membership and privileges under the Canadian Indian Act because she married a non-Indian man. *Id.* The Committee held that the deprivation of Lovelace’s Indian status—a deprivation that would not have occurred if Lovelace were a man marrying a non-Indian woman—violated her rights under article 27 of the Covenant, which states that “persons belonging to . . . minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture.” *Id.* ¶ 13.2. The Committee further concluded that “to deny Sandra Lovelace the right to reside on the reserve [does not seem] reasonable, or necessary to preserve the identity of the tribe.” *Id.* ¶ 17. Karen Knop reveals that the Canadian Indian Act incorrectly presumed that traditional Maliseet culture was patrilineal. Indigenous women activists such as Lovelace highlighted that, in fact, Maliseet culture was matrilineal and the Canadian Indian Act was a colonial imposition of patriarchy. Knop argues that characterizations of the *Lovelace* decision as a victory for all women’s equality rights minimizes “Lovelace’s claim about the cultural violence of colonialism.” KNOP, *supra* note 47, at 367.

159. See *Santa Clara Pueblo*, 436 U.S. at 72.

160. 1999(1) Zim. L. Rep. 100.

shall be administered and distributed according to the customs and usages of the tribe or people to which he belonged.”¹⁶¹

The Supreme Court declined to interfere with the “African law and custom” of the father’s tribe, which refuses to appoint a woman as heir to a deceased father’s estate when there is a living son.¹⁶² When the female Magaya alleged a prima facie violation of the Zimbabwean Constitution’s guarantee of equality for women, the court held that the division between customary law and civil law set forth in the Constitution exempts customary law from constitutional scrutiny.¹⁶³

The case is only one of the most recent flashpoints on a continent that has long debated the role of customary laws in its many countries. Another battleground is post-apartheid South Africa. There, the Supreme Court of Appeal recently held that women married under African customary law are bereft of “all rights under a matrimonial property regime.”¹⁶⁴ Because of the ruling, many “African women are [now] excluded from inheritance.”¹⁶⁵ Interestingly, critical appraisals of customary laws and their effect on women’s rights in South Africa have not called for the end of the personal laws, but rather for more dynamic and progressive understandings of such laws.¹⁶⁶ Activists denounce the static understanding of such laws and the legal system’s “cultural relativism.”¹⁶⁷ Reformers emphasize the need for state legal systems to take into account evolving and contested understandings of personal laws, just as is done for civil laws. Similar efforts can be seen in Nigeria,¹⁶⁸ where Amina Lawal awaits the judgment

161. *Id.* at 103 (quoting Administration of Estates Act ch. 6:01, § 68(1)) (emphasis omitted); see also David M. Bigge & Amélie von Briesen, *Conflict in the Zimbabwean Courts: Women’s Rights and Indigenous Self-Determination in Magaya v. Magaya*, 13 HARV. HUM. RTS. J. 289 (2000) (analyzing the *Magaya* case).

162. *Magaya*, 1999(1) Zim. L. Rep. at 104.

163. *Id.* at 105-06; see also Katherine Franke, *Illegalized Sexual Dissent: Sexualities and Nationalisms*, in *DISSENT IN DANGEROUS TIMES* (Austin Sarat ed., forthcoming 2004) (manuscript at 14-17, on file with author) (describing the political context for Zimbabwe’s recent regressive approach to women’s rights, particularly with respect to land distribution).

164. Khadija Magardie, Ctr. for Socio-Legal Studies, Customary Law Threatens [sic] Women’s Rights, at <http://www.csls.org.za/dw/art10j.html> (last visited Nov. 4, 2002).

165. *Id.*

166. See Penelope E. Andrews, *Striking the Rock: Confronting Gender Equality in South Africa*, 3 MICH. J. RACE & L. 307 (1998) (advocating a balance between protecting indigenous culture and women’s rights); Elsje Bonthuys, *Accommodating Gender, Race, Culture and Religion: Outside Legal Subjectivity*, 18 S. AFR. J. ON HUM. RTS. 41, 55 (2002) (arguing for a solution that avoids the “impossible choice” for women between conforming to civil law standards or retaining “old forms of custom or religious law”); Martin Chanock, *Law, State and Culture: Thinking About “Customary Law” After Apartheid*, in *ACTA JURIDICA* 1991, at 52, 67 (T.W. Bennett et al. eds., 1991) (arguing for an understanding of customary law as “tradition” with a “future”—that is, as something that develops over time “without the exclusive control of male elders and without state support for their interests”).

167. Magardie, *supra* note 165.

168. In a joint statement by Baobab, a Nigerian women’s rights organization that focuses on women’s legal rights under customary, statutory, and religious laws, and Amnesty International,

of an appeals court about her sentence of stoning-to-death for adultery. In these countries, organizations such as the Gender Research Project at the Centre for Applied Legal Studies at Wits University in South Africa¹⁶⁹ and the International Human Rights Law Group in Nigeria¹⁷⁰ are dedicated not to abolishing customary laws but to making them just.

* * *

But these efforts are falling on deaf ears. Without a theory that recognizes contest within cultural communities, and the possibility of progressive change in the context of culture or religion, cultural dissent is either ignored or affirmatively shut down.

In each of these cases, current law is lacking both procedurally and substantively. Premised upon an outmoded conception of religion as homogeneous and static, law presumes religious communities have a uniform view and refuses to confront actual plurality and contestation within a religious community. But as these examples, and the more in-depth case studies in the next Part show, women are challenging law's presumptions. All over the world, women are contesting traditional customary and religious laws and demanding a right to participate in the process of making religious or cultural meanings. Seen in this light, current law is procedurally faulty because law does not recognize everyone equally within the community as having a say in these processes. Perversely, law's Enlightenment view of religion leads it to only recognize the claims of fundamentalists and traditionalists, empowering these voices over those of modernizers. Women's activism around the globe also challenges the normative premise of current law, which accepts (and expects) imposed identity and despotism within religion, so long as one has freedom in the

the organizations took no position on "the introduction and application of Shari'a law per se, as long as it is carried out in full respect of international human rights standards, and in accordance with the conventions of international law signed and ratified by Nigeria." See News Release, Amnesty International, BAOBAB for Women's Human Rights and Amnesty International Joint Statement on the Implementation of New Sharia-Based Penal Codes in Northern Nigeria (Mar. 25, 2002), at <http://www.amnestyusa.org/news/2002/nigeria03252002.html>; see also Michele Landsberg, *Muslim Feminist Focuses on Roots of Extremism*, TORONTO STAR, Dec. 15, 2002, 2002 WL 103590078 (discussing Baobab's use of Islamic law to appeal cases such as Lawal's and the organization's proposition that the strict interpretations of Shari'a currently being offered by courts—such as the "strict isolation of women, flogging and stoning to death"—have not, in fact, been part of Nigerian tradition).

169. CTR. FOR APPLIED LEGAL STUDIES, UNIV. OF WITWATERSRAND, GENDER RESEARCH PROGRAMME 1999, at 1, at <http://www.wits.ac.za/cals/gender/annual%20reports/1999.pdf>; see also Ctr. for Applied Legal Studies, Univ. of Witwatersrand, Women and Customary Law Reform, at http://www.kit.nl/gcg/html/women_and_law_reform_projects_.asp (last visited Dec. 1, 2002).

170. Int'l Human Rights Law Group, IHRIG Women's Inheritance Rights in Africa Initiative, at http://www.hrlawgroup.org/initiatives/inheritance_rights/ (last visited Aug. 8, 2002) (describing efforts "to end unjust inheritance practices in Africa since 1998").

public sphere. Departing from this traditional view, women are today making normative demands for a right to freedom and equality *within* religion, as well as in the public sphere. But current law ignores these claims. Intent on actively defending the norms of the old Enlightenment, today's law is obstructing the operation of the norms of the New Enlightenment. Simply stated, yesterday's Enlightenment has become today's New Sovereignty.

III. CONFRONTATION

But on the ground, women in the Muslim world are piercing the veil of religious sovereignty. Far from reflecting a world in transition in which formal laws (such as treaties and conventions) are imposed on individuals at the grass-roots level, a close study of women activists in the Muslim world demonstrates how they are confronting problems with formal laws that often privilege the viewpoints and interests of traditionalists and patriarchs. Rather than accepting the binary framework of religion (on traditional leaders' terms) or rights (without normative community), activists are developing strategies that enable women to claim both. Going further, they are articulating new normative visions of women's human rights that fundamentally challenge the Enlightenment premises of existing laws. In contrast to the transition model, this confrontation brings to view a far more dialogical model of interaction between formal human rights law and informal human rights mechanisms; it suggests that strategic and normative claims of "rights" on the ground may be ultimately distinct from those articulated in formal law. Substantively, the dialogical model presents new visions of law with which traditional law must reckon.

This Part presents two case studies that glimpse this dialogical model in action. First, I highlight the human rights strategies of the transnational network Women Living Under Muslim Laws (WLUML). WLUML exemplifies an operational human rights strategy that provides women the option of articulating and demanding freedom and equality within the context of a normative (i.e., religious and/or cultural) community. Next, I offer a close reading of *Claiming Our Rights: A Manual for Human Rights Education in Muslim Societies*,¹⁷¹ published in 1998. The Manual, like WLUML, identifies and employs strategies for allowing women access to both equality and community. But the Manual perhaps goes further than WLUML by identifying the core principles and theories undergirding its strategy. Reading them together, I identify a conceptually coherent theme in

171. MAHNAZ AFKHAMÍ & HALEH VAZIRI, CLAIMING OUR RIGHTS: A MANUAL FOR HUMAN RIGHTS EDUCATION IN MUSLIM SOCIETIES (1998). In this Article, I will refer to this manual as "*Claiming Our Rights*" or "the Manual."

the work of both WLUML and the Manual. Both herald what I characterize as the rumblings of a New Enlightenment. As these case studies show, activists on the front lines of the war against Muslim fundamentalism are challenging old Enlightenment views that would leave religion and culture as spheres of despotism, and are asserting instead rights to liberty and equality within the private, as well as public, sphere.

A. *Human Rights Networks:
Women Living Under Muslim Laws*

Information-sharing and solidarity networks linking women worldwide via computers, fax machines, and the Internet have been an important source of community building¹⁷² and international lawmaking,¹⁷³ particularly in the Muslim context.¹⁷⁴ The work of WLUML offers a powerful example. Seeking to facilitate women's human rights as articulated in international instruments within Muslim communities or countries, WLUML employs strategies that begin to bridge the gaps in formal legal analysis that currently confound the realization of women's rights in these contexts. In the process, WLUML's strategies suggest ways of rethinking the formal law.

Founded in 1984, WLUML emerged as a response to rising fundamentalism and identity politics in Algeria.¹⁷⁵ There, as elsewhere in the Muslim world, women's autonomy was increasingly being threatened in the name of "Islamic" laws and customs seeking to preserve a distinctive way of life by heavily regulating women and their bodies, long thought of as important sites for the articulation of community identity.¹⁷⁶

Rather than simply acquiescing to the claims of fundamentalists, or pursuing women's human rights purely through secular strategies, as formal human rights law would require, WLUML forged an alternate course. By

172. See Anupam Chander, *Whose Republic?*, 69 U. CHI. L. REV. 1479, 1493-95 (2002) (describing how the Internet helps nurture transnational communities).

173. See generally ANNEISE RILES, *THE NETWORK INSIDE OUT* (2000) (describing the rise of national, regional, and international women's "networks" as a mechanism for pursuing human rights after the United Nations Fourth World Conference on Women in Beijing in 1995); Anne-Marie Slaughter, *Globalization, Accountability and the Future of Administrative Law: The Accountability of Government Networks*, 8 IND. J. GLOBAL LEGAL STUD. 347 (2001) (noting the expanding influence of "transgovernmental regulatory networks").

174. See Susan Sachs, *Where Muslim Traditions Meet Modernity*, N.Y. TIMES, Dec. 17, 2001, at B1 (describing how the world's Muslim women are increasingly "confident of their religious judgment and use the Internet as a forum to promote an alternative vision of the rights of Muslim women").

175. See generally Int'l Women's Human Rights Law Clinic & WLUML, *Shadow Report on Algeria: To the Committee on the Elimination of Discrimination Against Women* (1999), at <http://www.nodo50.org/mujeresred/argelia-shadowreport.html>.

176. See HILARY CHARLESWORTH & CHRISTINE CHINKIN, *THE BOUNDARIES OF INTERNATIONAL LAW* (2000); PARTHA CHATTERJEE, *THE NATION AND ITS FRAGMENTS* (1993).

networking, or sharing information with women around the world—particularly women from other Muslim communities—WLUML sought to contest the fundamentalist depictions of religious law emerging in Algeria. To this end, WLUML collected information chronicling the existence of alternative legal systems in Muslim communities that were far less repressive—indeed, were progressive—on women’s issues. The network shared this information with Algerian activists, thereby contesting fundamentalist depictions of monolithic “Muslim” laws. The network also provided an important source of solidarity and support for activists, by connecting Algerian women with other Muslims—not just Westerners—who supported the Algerian women’s claims for autonomy. Strategically, this offered an important retort to fundamentalists who depicted women’s rights as “Western” and un-Islamic.

These strategies enabled Algerian women to pursue greater freedom and equality, but without conceding their right to religion. Significantly, WLUML’s approach confronted not only fundamentalist understandings of religion, but formal legal understandings, as well. WLUML challenged traditional legal notions about who has the power to define religious meaning and law’s conception of the very nature of religion. To this day, WLUML continues to identify many of the same problems impeding the attainment of women’s rights in Muslim communities as those that existed back in 1984. And the network employs strategies to address these problems that are very similar to those used in its earliest days.

1. *Identity Problems*

WLUML asserts that the most serious challenge to women’s rights in the Muslim world today is the imposition of identity by Muslim laws,¹⁷⁷ particularly the imposition of a religious identity on women.¹⁷⁸ Increasingly, laws in the name of Islam or characterized as “Muslim” impose a singular—and, typically, conservative—view of religious identity on women in Muslim communities. In a personal interview, Anissa Hélié, director of WLUML’s international coordination office in London, says that characterizing laws and practices as religious is particularly challenging to

177. See ANISSA HÉLIE, *FEMINISM IN THE MUSLIM WORLD: LEADERSHIP INSTITUTES* 31 (2000) (observing that “[f]ar from being innocent, this myth [of a homogeneous Muslim world] limits women’s and people’s ability to evaluate what pertains to customs, law and religion and therefore undermines their ability to assert their rights”); WLUML, *Plan of Action—Dhaka* (1997), at <http://www.wluml.org/english/publications/engpofa.htm> [hereinafter *Plan of Action*] (identifying the concept of one, homogeneous Muslim world as a myth and as one of the chief factors undermining “women’s ability to control change and re-invent [their] lives”).

178. WLUML, *LAWS, INITIATIVES IN THE MUSLIM WORLD* 21 (1998) [hereinafter *WOMEN, LAWS, INITIATIVES*] (expressing concern that many states are “promoting religious identity as the primary identity”).

the realization of women's rights because the talismanic incantation of religion insulates the claims from critique. Laws in Muslim communities "are characterized as Islamic, divinely ordained, and something you therefore can't challenge," Hélie says.¹⁷⁹ Whereas secular laws are political and contestable, religious laws are deemed fixed and immutable. Fueled by the "myth of a homogeneous Muslim world," and made worse by women's isolation and lack of knowledge about their rights, women and men are made to believe that the fundamentalist view is the only way imaginable for a woman unless she abandons her religion.¹⁸⁰ Coupled with this position is the assertion—made by both fundamentalists and some cultural relativists in the West—that human rights are a Western construct that are incompatible with Islam.

WLUML notes that such identity politics affect women even in a secular state because regardless of the formal governing laws, private "Muslim" customs have a profound influence in shaping women's possibilities.¹⁸¹ Moreover, as Farida Shaheed, coordinator of WLUML's regional coordination office for Asia has written, "whenever the coexistence of multiple legal systems provides an option on the same issue, all too frequently the one least favorable to women is the one that is implemented."¹⁸²

2. *Identity Strategies*

But rather than advocate purely secular strategies for equality in the public sphere without addressing growing inequality in the private (as the traditional human rights approach would suggest), WLUML employs strategies that contest fundamentalist depictions of identity. This approach entails both critiquing the fundamentalist claims about women's religious identity and empowering women to reshape religious identity in more egalitarian terms.¹⁸³

179. Interview with Anissa Hélie, Author, in London, Eng. (July 11, 2002); *see also* WLUML, International Coordination Office Flyer (on file with author) ("A major challenge lies in the fact that, typically, in each community, this entire body of rules is characterised as 'Islamic,' justified as divinely-ordained, and constructed as immutable and unchallengeable. We are therefore led to believe that the only way of 'being' is the one culturally imposed on us . . .").

180. Interview with Anissa Hélie, *supra* note 179.

181. "In most of the Muslim world, patriarchal customs—rather than state law—restrict women's mobility, severely limit their access to public spaces, certain occupations, and information, and deny women equal access to economic resources, health facilities, judicial processes and to educational and job opportunities." WOMEN, LAWS, INITIATIVES, *supra* note 178, at 9; *see also id.* ("Customs can override formal legal or religious provisions . . .").

182. Shaheed, *supra* note 51, at 1000. For example, even where formal laws are secular, such as in Turkey and Uzbekistan, customary practices refer to Islam. *See* WOMEN, LAWS, INITIATIVES, *supra* note 178, at 12.

183. WLUML's foundational document, the 1986 Aramon Plan of Action, argues for "focusing on the private as an area of enormous potential change." Cassandra Balchin, *The*

WLUML's first strategy for undermining the fundamentalists' claims involves highlighting the political and historical contingency of practices thought to be essential to Islam. To this end, the network collects and disseminates information about the actual diversity of laws and customs throughout the Muslim world.¹⁸⁴ The network collects and circulates information about progressive Muslim laws; makes Dossiers, or reproduced academic articles on women and law, available in hard copy and on the Internet; produces information kits, a news sheet, and special bulletins; and disseminates Action Alerts (including over the Internet) on a regular basis, which publicize urgent cases requiring immediate solidarity. The network makes much of this information available in multiple languages.¹⁸⁵ In addition, WLUML fosters "shared lived experiences through exchanges," promoting "face-to-face interaction between women from the Muslim world who would normally not have a chance to travel and meet with women from other, culturally diverse, Muslim societies."¹⁸⁶ These exchanges help to break women's isolation and undermine the claims of fundamentalists that there is just one way of being Muslim.¹⁸⁷

Sharing this information undercuts the claim that certain practices are essential to religious belief. For example, WLUML's research shows that practices such as female genital mutilation are not essential to Islam but, rather, vary by time and location. Female genital mutilation has never even existed in some Muslim communities, and in other communities the practice is more popular among Christians than Muslims. Similarly, exposing diversity in the areas of reproductive rights and family law has also "enabled women to disentangle the complex threads of religion, custom, and law."¹⁸⁸ As one writer observes, seeing the variety of Muslim

Network "Women Living Under Muslim Laws": Strengthening Local Struggles Through Cross-Boundary Networking, 45 SOC'Y INT'L DEV. 128, 128 (2002).

184. Far from discovering any single way of being Muslim, WLUML's research has shown that in fact Muslim women's lives

"range from being strictly closeted, isolated and voiceless within four walls, subjected to public floggings and condemned to death for presumed adultery . . . and forcibly given in marriage as a child, to situations where women have a far greater degree of freedom of movement and interaction, the right to work, to participate in public affairs and also exercise a far greater control over their own lives."

Shaheed, *supra* note 51, at 1007 (quoting WLUML, 1986 Aramon Plan of Action).

185. *Id.* at 1009.

186. *Id.* at 1010.

187. *See id.* at 1005. As Shaheed writes:

[C]ontacts and links with women from other parts of the Muslim world—whose very existence speaks of the multiplicity of women's realities within the Muslim context—provide an important source of inspiration [and] . . . give[] material shape to alternatives. Both encourage women to dream of different realities—the first step in changing the present one.

Id. at 1007.

188. Balchin, *supra* note 183, at 128.

laws for themselves helps women “to distinguish between patriarchy and religion.”¹⁸⁹

Highlighting support for women’s rights within the Muslim community also offers a powerful tool to counter fundamentalist claims that feminism and human rights are Western and un-Islamic.¹⁹⁰ In another effort to empower women to reclaim feminism, in preparation for its Feminism in the Muslim World Leadership Institutes,¹⁹¹ the network has collected and shared historical examples of women’s rights activism in the Muslim world from the eighth to the twentieth centuries. “It was very important for women from the community to claim feminists from their own culture, and from their personal lives (stories about grandmothers, etc.),” Hélié explains.¹⁹² “It’s a tool,” says Cassandra Balchin, assistant director of WLUMI’s international coordination office in London.¹⁹³ In a personal interview, Balchin continues, “[We are] giving women the tool to be able to say that women’s rights are part of your own culture.”¹⁹⁴

Significantly, WLUMI’s anti-essentialist critique is aimed at both fundamentalists and the liberal Left. For Mariémé Hélié Lucas, the founder and former international coordinator of WLUMI, cultural relativism from *both sides* of the political spectrum is “*the big threat*.” “People from the Left will say, ‘Well, it’s their culture. Who are we? Are we racists? We can’t interfere,’” says Hélié Lucas in an interview.¹⁹⁵ The problem with that way of thinking, she says, is that “everything can be tolerated in the name of culture.”¹⁹⁶ A better approach, Hélié Lucas urges, is to examine the sources of cultural edicts, and to ask whose interests are being served or disserved by them.¹⁹⁷

Hélié Lucas recalls a case in which one’s conception of religion made all the difference. The case involved a divorce dispute in Britain between a Pakistani woman and a Nigerian man. The couple met as students in Britain

189. Homa Hoodfar, *Muslim Women on the Threshold of the Twenty-First Century*, WLUMI DOSSIER 21, Sept. 1998, at 7.

190. Shaheed writes:

The condemnation of any challenges to existing Muslim laws as rejections of Islamic injunctions and the very concept of Muslim womanhood is a very potent formula for maintaining the status quo, as it implicitly threatens challengers with ostracization. . . . Under these circumstances, questioning, rejecting, or reformulating Muslim laws is indeed a major undertaking.

Id. at 1005.

191. The Feminism in the Muslim World Leadership Institutes took place in Turkey (1998) and Nigeria (1999) and were organized in collaboration with the Center for Women’s Global Leadership.

192. Interview with Anissa Hélié, *supra* note 179.

193. Interview with Cassandra Balchin, Author, in London, Eng. (July 11, 2002).

194. *Id.*

195. Interview with Mariémé Hélié Lucas, Author, in Montpellier, Fr. (June 25, 2002).

196. *Id.*

197. *Id.* This is similar to exercises in the *Claiming Our Rights* manual. See *infra* Section III.B.

and eventually married and had a child there. Later, when the couple sought to divorce, the husband asked the British judge for a divorce under Shari'a law. When the judge appeared ready to defer to the man's version of the divorce rules under Shari'a, advocates for the wife approached WLUML. WLUML sent the judge examples of cases from all over the Muslim world in which marriages were dissolved to the benefit of the woman. "[We were] exposing someone who is a cultural relativist," H lie Lucas says of the judge. "He was prepared to divorce them in the name of Shari'a. But what is Shari'a? . . . [W]hich one is the right one?"¹⁹⁸

Today, this is an especially important issue in places such as Mali, the Philippines, South Africa, and Palestine, where officials are considering reform of personal, customary, and religious laws. The WLUML network gives reformers in these communities information about alternative systems of justice within Muslim frameworks that women may present for consideration at home.¹⁹⁹ Empowered by the network, women are claiming a right to offer their own interpretations of religion and law and are demanding that the state recognize their claims. "We have to ask who defines culture," H lie Lucas says. "I want to define my own culture. Are you going to deny me this right?"²⁰⁰

Significantly, for H lie Lucas, the most notable change observed in the network since it began deals with women's increasing autonomy to challenge proffered religious interpretations and to offer their own meanings instead. "It has changed insofar as women feel more and more powerful to change both [religion and culture]," H lie Lucas says. "I think that's what comes out of nearly twenty years of work. They don't swallow what they are told is tradition or is religion. They don't gulp it down anymore."²⁰¹

3. *Identity Norms*

It is at this point that WLUML's innovative strategies start to look like normative claims. According to Shaheed, WLUML posits that

it is only when women start assuming the right to define for themselves the parameters of their own identity and stop accepting unconditionally and without question what is presented to them as the "correct" religion, the "correct" culture, or the "correct"

198. Interview with Mari m  H lie Lucas, *supra* note 195.

199. Balchin, *supra* note 183, at 127-28 (writing that personal law reformers around the world "are using their linkages through WLUML to access alternative visions of justice for women in family laws and strengthen their ability to promote this vision").

200. Interview with Mari m  H lie Lucas, *supra* note 195.

201. *Id.*

national identity that they will be able effectively to challenge the corpus of laws imposed on them.²⁰²

The network writes, “*The essential issue is who has the power to define what women’s identities should be. . . . It is time to challenge—both politically as well as personally—those who define what the identity of women should be as Muslims.*”²⁰³ WLUML calls upon women to “create [their] own identity” by, among other things,

- asking [themselves] and analyzing who is imposing new dress codes on [them] and why;
- breaking the male monopoly of religious interpretations . . . ;
- and, most importantly, by functioning as alternative legitimising reference points for each other.²⁰⁴

In short, WLUML demands that women enjoy a right to challenge *and to create normative community*—that is, a right to make the world. This claim challenges not only the fundamentalists’ view of religion, but law’s view as well. As Hélié Lucas says, paradoxically, both “want a homogeneous view of Muslim laws.”²⁰⁵ Thus, WLUML holds individuals accountable for not taking women’s cultural and religious interpretations into account when deferring to traditionalist interpretations of personal, religious, or customary laws. For example, in its third Plan of Action written in Dhaka in 1997, WLUML directly confronts the “progressive media” for “fall[ing] into the trap of cultural relativism,”²⁰⁶ writing that “[i]n the name of the right to difference, they are prepared to support any practice, be it totally unjust and against the common understanding of human rights, if so-called ‘authentic leaders’ of the community justify it by reference to culture or religion.” The Plan of Action condemns the media for giving “a platform to fundamentalists as *the sole representatives* of Muslims.”²⁰⁷

202. Shaheed, *supra* note 51, at 1008.

203. WOMEN, LAWS, INITIATIVES, *supra* note 178, at 24 (emphasis added).

204. *Id.* at 46.

205. Interview with Mariémé Hélié Lucas, *supra* note 195.

206. Plan of Action, *supra* note 177.

207. *Id.* (emphasis added). WLUML also criticizes “human rights groups,” which it claims “perhaps unintentionally . . . help build the legitimacy of fundamentalist groups. Because their mandate is primarily to focus on the violations of human rights by the state, human rights groups focus on violations committed against fundamentalists such as arbitrary arrest and illegal detention, torture and absence of fair trials.” *Id.* at 6. While WLUML concedes the importance of such work, it contends that “the extreme imbalance between the representation of violations committed by the state and by fundamentalists in recent human rights reports creates de facto support for fundamentalists.” *Id.*

WLUML emphasizes that far from being homogeneous and fixed, religion and culture are and *ought to be* plural, contested, and constantly evolving to meet the changing needs and demands of modern individuals. Thus, WLUML's work within the framework of religion and culture does not limit itself to reading Islamic texts or discovering fundamental truths and essences.²⁰⁸ Rather, the network understands religion and community as historical—hence, changing with cultural changes—and based on individual autonomy—that is, as emerging from the definitions that individual members themselves forge. WLUML empowers individual women to take part in the process of defining their religious community and identity based on historically evolving needs and aspirations, reason, and exchange of information with people inside and outside the Muslim world.

4. *WLUML's Challenge to Human Rights Law*

WLUML's identity strategies and evolving norms reveal the deficiency of the strategies and choices offered by traditional human rights law. While traditional human rights law is content not to challenge despotism in the private, religious and cultural sphere—indeed, it more often defends despotic religious practices—WLUML is confronting injustice within the contexts of religion and culture. WLUML's approach is in part strategic: The network recognizes that religious claims are particularly hard to challenge, and therefore expends effort to deconstruct religious claims as, in part, contingent and political. Perhaps more importantly, WLUML recognizes that many women will resist rights if they are only possible outside the context of religious and cultural community. Thus, it pursues strategies that would reconcile religion and rights, making it possible for women to have both.

But WLUML's proclamation of a right to contest and create culture also presents a normative challenge to traditional legal understandings of rights, and freedom itself. The organization suggests that normative, religious, and cultural experience may be so important that it requires more

208. Reformers characterize a purely textualist approach as too limited. "We can show that what the Prophet said was a step forward" on a particular issue, such as slavery or women's rights, Hélié Lucas says. Interview with Mariémé Hélié Lucas, *supra* note 195. "But we cannot limit ourselves to that. If the Prophet says 'beat your wife lightly,' or 'be kind to your slave,' a religious approach would limit itself to these" instructions. *Id.* "Maybe within reinterpretation people can go further than that. But a secular approach would be no slavery" under any circumstances. *Id.* In addition, few Muslim women have the expertise or credentials to challenge traditional Islamic interpretations. "If you are talking about reinterpretations, there the problem is historical—that women have historically been excluded from interpretation, and they therefore lack the capacity in terms of knowledge of Arabic, knowledge of jurisprudence, admission into colleges that teach theology, etc.," says Balchin. Interview with Cassandra Balchin, *supra* note 193. "It's very difficult if you don't know Classical Arabic. It's difficult if you don't have the legitimacy of education at certain places." *Id.*

substantive rights within these spheres than are currently recognized by formal law. Under current law, individuals would have a right to exit a discriminatory community in pursuit of equality in the public sphere. But WLUML's strategies suggest that exit rights, without more, would deprive women of the fundamentally important right to religious community. At the same time, WLUML's work suggests that a meaningful right to religious or cultural community requires that individuals have a right to participate in the shaping of the community because community without equality or freedom within it is also insufficient. In short, WLUML's strategies articulate a *right to more democratic culture*.

It is important to note that WLUML's innovative, culture- and religion-based approaches to women's human rights do not reject wholesale traditional, secular human rights approaches. Nor does WLUML pursue the culture- and religion-based strategies exclusively. To be sure, WLUML also employs purely secular strategies for pursuing women's human rights and many WLUML activists identify themselves as secularists.²⁰⁹ Staying tuned to what strategies work best in particular contexts, WLUML activists emphasize that "these are choices, not destiny."²¹⁰ But as H elie Lucas points out, many observers try to confine the network to its "work from within."²¹¹ "Whenever we do a religious interpretation [project] it's really easy to get funding," H elie Lucas says, and "it's usually what we are asked to speak about. There are all sorts of indications that this is what we should be—indigenous."²¹² For example, some outsiders incorrectly see all of the

209. H elie contrasts the network with the U.S.-based Catholics for a Free Choice, with which WLUML collaborates regularly. Interview with Anissa H elie, *supra* note 179. The difference between the two groups, H elie says, is that the members of Catholics for a Free Choice are mostly believers, which is not the case in the Network. While many women linked to WLUML are indeed believers in Islam, there are also many people who choose a secular approach (although they may also be believers), and there are those who are not believers but still, because they were born and raised in a Muslim community, are assumed to be "Muslim women" to whom Muslim laws are applied. *Id.*

210. WLUML, *Introduction*, WLUML DOSSIER 23/24, July 2001, at 3; see also M.A. H elie Lucas, *What Is Your Tribe?: Women's Struggles and the Construction of Muslimness*, WLUML DOSSIER 23/24, July 2001, at 49, 59 ("What is of most interest to me is the fact that amongst different but complementary strategies [of Muslim feminists], only one is artificially isolated, getting most attention, most funding, most recognition. It is seen as the only authentic one, the best for 'Muslims.' Indeed, it is the strategy of religious interpretation."); Shahrzad Mojab, *The Politics of Theorizing "Islamic Fundamentalism": Implications for International Feminist Movements*, WLUML DOSSIER 23/24, July 2001, at 64, 71 (critiquing the myth of the "Muslim woman" whose identity is determined singly by religion); Farida Shaheed, *Constructing Identities—Culture, Women's Agency and the Muslim World*, WLUML DOSSIER 23/24, July 2001, at 33, 34 (expressing concern that preoccupation with religiously based reform efforts by Muslim women at the expense of recognizing multiple strategies, including the secular, "over-determines the role of Islam in the lives of women," and implies that "Muslims somehow manage to live in a world that is defined solely by a religious identity, is exclusive of all non-Muslims and that is insulated from any other social political or culturally relevant influences such as structures of power, the technological revolution, the culture of consumerism, etc.").

211. Interview with Mari em  H elie Lucas, *supra* note 195.

212. *Id.*

group's activities "as reinterpreting the *Qur'an*," Hélie Lucas explains. "They essentialize us."²¹³ Of course, there is essentializing from the other side as well. While some view WLUML as primarily religious, "in other countries we are labeled atheists," Hélie Lucas muses.²¹⁴

To be sure, many WLUML networkers hold secular, universal views of women's rights. At the same time, observing the dialogical relationship between traditional understandings of formal secular law, and its implementation and interpretation on the ground by networkers, we can also see that WLUML's emerging strategies and norms may be ultimately distinct from those articulated in traditional human rights law. Unlike some of their Western counterparts, who might be quicker to equate being secular with being antireligious, WLUML recognizes that to claim their rights, women must be able to influence the content of religion and culture. Indeed, WLUML contends that even in a secular state, the private spheres of family, culture, and religion, and not the public sphere alone, profoundly influence women's lives and opportunities. In order to have more freedom in all aspects of their lives, WLUML innovatively suggests, women need to be actively involved in critiquing, contesting, and remaking culture. Emerging from WLUML's confrontation with traditional human rights law is a new legal claim: Women must have a right to create their culture on their own terms.

B. *Human Rights Manuals*—Claiming Our Rights

Human rights training manuals are yet another neglected source of international law. At first glance, these manuals appear merely a useful tool for helping to communicate with women on the ground about their rights in international law, or for training the trainers—that is, teaching human rights activists from groups such as Human Rights Watch and Amnesty International how to conduct consciousness-raising²¹⁵ sessions with women in local communities worldwide. But on closer inspection, we see that human rights training manuals, like WLUML, play an important role in remaking legal strategies and theories. In fact, the manuals may go even further than networks such as WLUML, in that they are explicitly articulating theories of women's human rights, and developing and testing creative strategic programs to implement these theories. In this sense, studying the normative theories and strategies underlying such manuals offers another view of how rights on the ground are evolving differently from law in theory.

213. *Id.*

214. *Id.*

215. On consciousness raising as a feminist strategy for change generally, see CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 83-105 (1989).

This Section studies *Claiming Our Rights: A Manual for Women's Human Rights Education in Muslim Societies*,²¹⁶ an ambitious, first-of-its-kind manual designed to foster women's human rights at the grass-roots level in Muslim communities. *Claiming Our Rights*—first published in 1996²¹⁷—diverges from prior manuals in significant ways. Cowritten for the Sisterhood Is Global Institute (SIGI) by Mahnaz Afkhami and Haleh Vaziri, *Claiming Our Rights* sought to address specific problems that scholars and activists identified as impeding women's human rights in the Muslim world.²¹⁸ First, reformers were concerned that a lack of local and cultural texts and stories to help convey the abstract rights expressed in international legal documents would make the translation of women's human rights concepts to local Muslim communities difficult. Second, reformers had no theory or strategy to respond to claims by religious fundamentalists—and some Western cultural relativists—that secular, universal human rights are “Western” and thus incompatible with an Islamic or Muslim way of life. Third, and perhaps most importantly, without a mechanism for reconciling human rights and being Muslim, reformers found themselves only able to make rights arguments in secular terms, completely relinquishing the terms of cultural and religious identity to patriarchs.

Thus, the Manual's goals were both strategic and normative. Strategically, *Claiming Our Rights* sought to facilitate the transmission of international human rights law to local Muslim communities, while

216. AFKHAMI & VAZIRI, *supra* note 171. The Manual, which was first published in 1996, has since been translated and adapted for use in countries as diverse as Azerbaijan, Bangladesh, Egypt, India, Iran, Jordan, Lebanon, Malaysia, Pakistan, Syria, the United States, and Uzbekistan. As of 1998, nearly 2000 women and men were estimated to have participated in the Manual's pilot workshops. *See id.* at iii.

217. *See* Barbara Crossette, *A Manual on Rights of Women Under Islam*, N.Y. TIMES, Dec. 29, 1996, at A4 (announcing the Manual's historic publication “with the shadow of a repressive Islamic regime in Afghanistan hovering over the debate” on women's human rights in the Muslim world).

218. *See generally* KUMARI JAYAWARDENA, FEMINISM AND NATIONALISM IN THE THIRD WORLD 2 (1986) (observing that feminism was “not imposed on the Third World by the West” and detailing a far more complex history of feminism in the Third World); FATIMA MERNISSI, BEYOND THE VEIL: MALE-FEMALE DYNAMICS IN MODERN MUSLIM SOCIETY 169 (Ind. Univ. Press 1987) (1975) (describing acquisition of greater rights by women in Muslim communities as “a random, non-planned, non-systematic phenomenon, due mainly to the disintegration of the traditional system under pressures from within and without”); VALENTINE M. MOGHADAM, MODERNIZING WOMEN: GENDER AND SOCIAL CHANGE IN THE MIDDLE EAST (1993) (noting that Islamist feminist movements simultaneously seek to maintain authentic cultural traditions and institutions while selectively incorporating from the West to advance women's rights); WOMEN, ISLAM AND THE STATE (Deniz Kandiyoti ed., 1991) (highlighting the role of state building in the development of feminisms in Muslim societies); Chandra Talpade Mohanty, *Under Western Eyes: Feminist Scholarship and Colonial Discourses*, in THIRD WORLD WOMEN AND THE POLITICS OF FEMINISM 51, 51 (Chandra Talpade Mohanty et al. eds., 1991) (positioning “the intellectual and political construction of ‘third world feminisms’” at the crossroads of two simultaneous projects: one of deconstructing hegemonic Western feminist discourses and another of constructing historically, geographically, and culturally grounded feminisms).

effectively answering the claim that universal rights are not relevant to Muslim women. Normatively, the Manual would challenge the supposed incompatibility of religion and rights.

The result is a manual that, unlike traditional human rights law, reconceives rights as also relevant in religious and cultural spheres, not just in the public sphere. Arranged into twelve workshop sessions revolving around hypothetical scenarios that highlight the human rights articulated during the Fourth World Conference on Women convened in Beijing, China, in September 1995,²¹⁹ the Manual employs several strategies that I label as translation, textualism, constructivism, and reconstructivism. Translation involves collecting stories, texts, idioms, folklore, and other examples from local cultural and religious life to help translate abstract international human rights laws to women on the ground. Textualism—the collection and presentation of specific religious and cultural texts that help explain and support the rights articulated in international law—is part and parcel of the translation effort. Viewed by themselves, the translation and textualism strategies—to the extent the Manual relies on texts supportive of women’s rights and international law—appear to affirm the law’s transition thesis. Religious and cultural texts are used strategically and functionally to help deploy secular, universal human rights at the grass roots. The universal rights themselves remain unchallenged.

But viewed in conjunction with two other strategies—constructivism and reconstructivism—the Manual begins to look more like a confrontation with traditional international law than an easy transition to it. The Manual’s textualism does not rely purely on texts that support women’s rights—let’s call these “good texts”—but also includes religious and cultural texts that challenge the rights expressed in international law. Faced with these “bad texts,” women participants are not asked to choose either religion or rights in cases of conflict, but rather, are encouraged to discuss the texts and to critique them. Religious texts are revealed as, in part, human constructions that are historically contingent and biased. This is the constructivist mode. Revealing some religious truths as partial, women are empowered to reconstruct religious and cultural norms in ways that reflect modern, international human rights principles and women’s own current needs and aspirations.

219. These issues include women’s rights to autonomy in family-planning decisions; bodily integrity; subsistence; education and learning; employment and fair compensation; privacy; religious beliefs; free expression; and political participation, as well as their rights within the family and during times of conflict. See AFKHAMI & VAZIRI, *supra* note 171, at 11.

1. *Translation*

Initially, *Claiming Our Rights* simply seeks to translate, or “use indigenous ideas, concepts, myths, and idioms to explain the rights contained in international documents” to Muslim women at the grass-roots level.²²⁰ For years, Muslim activists and scholars worried that the lack of culturally relevant language to convey to Muslim women the message of international human rights documents was a major impediment to the propagation of the concepts and to expansion of women’s human rights in Muslim societies.²²¹ At a meeting in Berlin in May 1995, representatives from sixteen Muslim countries meeting to discuss strategies for improving women’s human rights in their regions concluded that “the production of material using indigenous concepts and ideas to support international rights documents” was a project of “highest priority.”²²²

True to this goal, *Claiming Our Rights* presents excerpts from several leading human rights instruments—including the Universal Declaration of Human Rights (1948),²²³ the International Covenant on Economic, Social and Cultural Rights (1966),²²⁴ the International Covenant on Civil and Political Rights (1966),²²⁵ and the Convention on the Elimination of All Forms of Discrimination Against Women (1979)²²⁶—in dialogue with supporting texts from Muslim communities, such as the sura of the *Qur’an*,²²⁷ samples of *hadith* concerning women,²²⁸ examples of women role models, some from among Muhammad’s wives and daughters,²²⁹ and samples of Arabic proverbs concerning women.²³⁰

The cultural and religious examples are offered to help explain abstract international rights in a local language.²³¹ The notion of “equality,” for

220. *Id.* at 1 (discussing the need to find indigenous concepts and ideas “to support” international rights documents).

221. *Id.* (“The idea of a human rights education project for women in Muslim societies originated during a series of meetings, discussions, and conferences held and sponsored by SIGI since 1993.”).

222. *Id.*

223. *Id.* at 85-89.

224. *Id.* at 91-99.

225. *Id.* at 101-15.

226. *Id.* at 117-27.

227. The sura are passages from the *Qur’an*. *Id.* at 53-73.

228. *Id.* at 75-78. The Manual describes *hadith* as “the term applied to the reports of the Prophet Muhammad’s words and actions.” *Id.* at 75. *Hadith* were first recorded by the Prophet’s companions orally and later translated into writing. Because of the human intervention involved in writing the *hadith*, the authenticity of many of them—of which there are thousands—remains a subject of disagreement among Islamic scholars. *Id.*

229. *Id.* at 79-81.

230. *Id.* at 83-84.

231. The Manual does not limit the use of cultural examples in training sessions to those examples it supplies. Instead, Manual facilitators are requested to “make a point of collecting cultural materials—proverbs, quotes from literary works, biographies of role models, and/or newspaper clippings” found in the cultural settings in which they are teaching. *Id.* at 13.

example, is engaged in the very first workshop session through reflection on a *hadith* from the Prophet Muhammad, which states that “[a]ll people are equal, as equal as the teeth of a comb.”²³² Women consider the meaning of equality through discussion of the Prophet’s recorded statement that “[t]here is no claim of merit of an Arab over a non-Arab, or of a white over a black person, or of a male over a female.”²³³

2. *Textualism*

In order to translate international rights to local communities, the Manual relies heavily on texts from religious and cultural sources that support women’s rights—my so-called “good texts.” On the issue of domestic violence, for example, the Manual offers a verse from the *Qur’an* that states that “[i]f a wife fears cruelty or desertion on her husband’s part, there is no blame on them if they arrange an amicable settlement between themselves.”²³⁴ On the subject of the freedom of religion, the Manual quotes the *Qur’an* as stating, “[l]et there be no compulsion in religion.”²³⁵ “Good texts” help women relate to international human rights. At the same time, “good texts” respond to claims by fundamentalists and cultural relativists that universal human rights are foreign to Muslim religion and culture. “Good texts” demonstrate to women that their human rights are “supported by their cultural traditions.”²³⁶

Without more, the Manual’s strategies of translation and textualism do not represent anything new in human rights theory. In both instances, culture is engaged pragmatically, accommodating women’s religious beliefs, but ultimately only in the service of helping women to learn their universal human rights.

But the Manual’s textualism also includes “bad texts”—that is, texts that might be read as more hostile, or equivocal, with respect to women’s equality and autonomy. In a session on women’s right to choose whom to marry, for example, the Manual juxtaposes international legal text stating that “[m]arriage shall be entered into only with the free and full consent of the intending spouses”²³⁷ with conflicting religious texts. One verse from the *Qur’an* states, “We have enjoined upon man (to be good) to his parents,” asking women to think about their obligations to obey elders; yet another verse states that believers “enjoin what is just, and forbid what is evil,” suggesting, perhaps, that women ought to do what is right for them.²³⁸

232. *Id.* at 16.

233. *Id.*

234. *Id.* at 27.

235. *Id.* at 39.

236. Letter from Sisterhood Is Global Institute to author (Jan. 29, 1997) (on file with author).

237. AFKHAMI & VAZIRI, *supra* note 171, at 19.

238. *Id.*

Women are encouraged to discuss the issue in light of these multiple texts. In an exercise on veiling, the Manual offers a verse from the *Qur'an* stating that men should be modest before God by lowering their gaze, but that modest women should “draw their veils over their bosoms and not display their beauty except to their husbands” and other members of their family.²³⁹ Facilitators then ask women whether these injunctions require different obligations of women and men, and who decides how women dress.²⁴⁰ In both of these examples, texts are used not merely to translate rights, but also to encourage women to weigh and judge the texts themselves.

3. *Constructivism*

It is in this critical textualist approach that the Manual begins to look like something new. By encouraging women to question religious texts, the Manual challenges the traditional legal conception of religion as natural and incontestable. To the contrary, one of the “major premises” of the Manual is that many religious texts are historically contingent and subject to human bias.²⁴¹ For example, the Manual characterizes the “*shari'a*—the rules which have governed Muslim societies throughout the centuries,” as “historically determined and temporally situated because it has had to be rendered understandable to each age and community by reference to the needs of that age and community.”²⁴² The Manual states that the Shari'a laws, which were written by men, may be flawed and politically biased. “Because human society has been organized hierarchically and patriarchally across the ages, the *shari'a*, like all other religiously inspired laws, reflects the social realities specific to that age,” the Manual states.²⁴³

The constructivist strategy emphasizes not only the contestability of religious laws and interpretations, but also their multiplicity and flexibility. “The interpreters of the *Qur'an* . . . have been able to offer different interpretations during different epochs precisely because the original ‘Word’ is infinite in depth and scope,” the Manual states.²⁴⁴ “Hence, it is applicable to innumerable circumstances and is able to define evolving conditions infinitely.”²⁴⁵

239. *Id.* at 23.

240. *Id.* at 23-24.

241. *Id.* at 3.

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

4. *Reconstructivism*

Revealing that religion is in part a human construction is a first step in enabling women to question and critique religious laws. But the Manual goes further. It also empowers women to *reconstruct* religion. Through twelve workshops, the Manual uses hypotheticals, role playing, and storytelling to enable women to construct a dialogue and negotiate, rather than avoid, the tensions between Muslim traditions, international human rights concepts, and evolving notions of gender equality.²⁴⁶ In its own words, the Manual examines not the conflict but the “relationship between a woman’s basic human rights and her culture.”²⁴⁷ Under this approach, rights are not imposed from outside or above a community, but rather are derived from the process of women negotiating conflicts within the community.

In short, women’s human rights emerge, or are reconstructed, through dialogue and participation—both within one’s cultural community and ultimately in the legal world of international human rights itself. The cultural basis for human rights in Muslim communities under the reconstructivist method, then, is not just proverbs and quotations from religious texts, but the workshop participants themselves. The Manual self-consciously seeks to help “individuals become participants in defining the relevance and validity of ideas regardless of their source or age,” stating that “[t]he appropriate function of a human rights education model, therefore, is to promote ‘rights’ by facilitating individuals’ participation in the definition of law or truth.”²⁴⁸ It is only when women “reclaim their own cultures, interpreting texts and traditions in self-empowering ways . . . , [that] women may truly claim their rights.”²⁴⁹

Thus, the Manual is a tool not just for teaching knowledge, but for empowering action—that is, for empowering women to construct new cultural, religious, and legal knowledge. Practical exercises prepare and empower women for the political activity of rejecting imposed norms and,

246. See, e.g., *id.* at 27-29 (presenting a hypothetical conversation between Leila and her friend Zahra, who has just been raped); *id.* at 33-35 (describing the dilemma of Ayda, a top student who is denied permission to take a science class because of her gender); *id.* at 36-37 (presenting a hypothetical in which Fatima, a medical student, discovers she is being paid less than half of what a male medical student is being paid for the same work in a local doctor’s office). There is an interesting coincidence of method here with the approach of some critical race scholars, who also rely upon dialogue and narrative to promote rights consciousness. See, e.g., DERRICK BELL, *AND WE ARE NOT SAVED* (1987); RICHARD DELGADO, *THE RODRIGO CHRONICLES* (1995).

247. AFKHAMI & VAZIRI, *supra* note 171, at 12.

248. *Id.* at 4. Rather than aiming at incontrovertible truths, it produces dialogical frames where “ideas can be freely discussed and analyzed,” the Manual states of its methodology. *Id.*; see also *id.* at 5 (explaining that the model “does not aim to teach a particular truth but rather to establish dialogue”); *id.* at 12 (“[T]his manual does not seek to impart truth.”).

249. *Id.* at 9.

in turn, creating their own truths and meanings. Throughout the Manual, exercises focus on encouraging women to speak their conscience and to express themselves freely, “without self- or other kinds of censorship,”²⁵⁰ in a variety of settings, public and private. In a session on women’s rights and responsibilities within the family, for example, participants are asked to consider how they interact with male members of their family.²⁵¹ By asking the women when was the last time they asked a male relative for something, and how they broached the subject,²⁵² the exercise encourages women to share both frustrations experienced in communicating with male family members and strategies for successful communication. Participants discuss a hypothetical conflict between a daughter, Leila, and her father over the choice of whom to marry.²⁵³ Leila is not averse to the man her father has chosen for her, but would like the opportunity to get to know him before finalizing the arrangement. The young man, Karim, has no objection, but Leila’s father does. Participants are asked to consider Leila’s rights and obligations, and how Leila may successfully present her views to her father.

Another exercise encourages women to discuss family planning with their husbands. In this hypothetical, Leila, now married to Karim, wants to use contraception but Karim is afraid of community stigma.²⁵⁴ The Manual facilitates the discussion with an excerpt from CEDAW articulating women’s right to “decide freely and responsibly on the number and spacing of their children” and a verse from the *Qur’an* stating that with respect to parenting, “[n]o soul shall have a burden laid on it greater than it can bear.”²⁵⁵ Participants are asked to “consider what aspects of [their] cultural and religious experiences support women’s rights within the family.”²⁵⁶

Later, the Manual directly addresses women’s rights to challenge religious authorities. In an exercise entitled “Learning Your Faith,” the Manual seeks to “underscore the relationship between how and by whom Islam is taught, and what is learned, to suggest that women are capable of understanding Islam and may do so differently than men, and to explore women’s actual and potential role in teaching and interpreting Islam.”²⁵⁷ Women are asked whether “both women and men” are “capable of reading and understanding the Qur’an and *hadith*,” and “[i]f women interpreted the Qur’an, would they emphasize different issues than those that men have

250. *Id.* at 40.

251. *Id.* at 17-18.

252. *Id.* at 17.

253. *Id.* at 18-19.

254. *Id.* at 21-22.

255. *Id.* at 22-23.

256. *Id.* at 19.

257. *Id.* at 35.

stressed?”²⁵⁸ The Manual asks, “If you were a religious expert in your community what aspects of Islam would you emphasize?”²⁵⁹

The penultimate exercise has the leading characters from the hypotheticals—Leila, Karim, and friends—now organizing and leading a demonstration at the local university, to protest the university’s attempt to silence a friend, Huda, who has written controversial poetry about her experience with domestic violence.²⁶⁰ Participants are asked, “Should women organize around a common cause? Should women lead their communities? Have you ever organized and/or led a group to pursue a common goal?”²⁶¹ The final session asks women, “How is the promotion of women’s basic human rights a community project?”²⁶² In addition to encouraging dialogue, several exercises throughout the Manual encourage women to draft model laws that better address women’s issues. Women are asked, for example, to “write a law” addressing the crime of violence against women.²⁶³ After discussing their experience in coming to consensus on this project, women are asked what role they may play “in writing and/or strengthening the laws against various forms of violence?”²⁶⁴

5. *Rumblings of a New Enlightenment*

It is through this reconstructivist approach—to both religion and law—that *Claiming Our Rights* charts new ground. Unlike traditional conceptions of human rights, the Manual envisions—and fosters—a notion of democracy within culture, not just outside of it.²⁶⁵ Here we can hear the rumblings of a New Enlightenment: The Manual questions traditional assumptions that rights, reason, and autonomous participation and speech belong purely in the public realm. “The operative concepts here are identity and authenticity in a context of freedom and equality,” the Manual states.²⁶⁶

An interview with one of the Manual’s coauthors reveals more about the cultural and political context within which the Manual seeks to intervene. Mahnaz Afkhami explains that this radical new approach to thinking about religion and rights emerged out of Muslim feminists’ frustrations with traditional conceptions of women’s human rights.²⁶⁷ On the one hand, she recalls, Muslim reformers were frustrated with the claims

258. *Id.*

259. *Id.*

260. *Id.* at 44-46.

261. *Id.* at 46.

262. *Id.* at 49.

263. *Id.* at 29.

264. *Id.*

265. *Id.* at 5 (describing the Manual as “geared to ideas, structures, and actions that enhance democracy and promote civil society”).

266. *Id.* at 6.

267. Telephone Interview with Mahnaz Afkhami, Author (Aug. 1, 2002).

of fundamentalists and cultural relativists, who held that human rights are Western or foreign. "I have traveled all over the Muslim world and I've never heard anybody say that we don't want [a right] because it's a Western right," says Afkhami, an international women's rights activist for almost thirty years. "[T]he right to choice—no one opposes that."²⁶⁸

On the other hand, Afkhami says that reformers began to resent the traditional notion that religion and rights do not mix. "During my own work with women's groups in Iran in the 70s we had a hands off relationship with religion," Afkhami recalls. "We did not engage because we were presented with the option that either you believed in rights or you believed in your religion and there was just no way of doing both."²⁶⁹ But later reformers began to challenge this dichotomy, asserting that choosing rights over religion was an extreme sacrifice many women were being forced to make.²⁷⁰ As Afkhami tells it, this changing consciousness coincided with shifts due to modernization and globalization. Over time, she contends, women—both those on the ground and those in activist and leadership positions—felt more empowered to question traditional religious and legal rules. "As traditional societies change, people become more conscious of individual rights," Afkhami says. "At one point, the law was the given that everybody accepted and people just had to obey what was given. Now we are moving toward rights. We are moving from law to rights."²⁷¹

In other words, modernizing societies—including Muslim societies—are moving away from accepting law or imposed identities toward a new era that posits an individual's right to construct identity and conceptions of rights on one's own terms. The Manual's reconstructivist approach is premised on this notion: Individuals are not taught "truths" written in international law, but rather are empowered to construct their own version of the truth—be it in a cultural, religious, or public context. "The essential part of the methodology is the consciousness that you don't dictate to people, by either religious edicts or human rights edicts," Afkhami says.

You let people discuss it for themselves and come to conclusions for themselves. It's striving for a new way of learning that emphasizes the individual as an empowered being who can decide for herself. It connects again to the idea that that person also decides how she sees her religion and how she sees the relationship between various rights and her religion.²⁷²

268. *Id.*

269. *Id.*; see also *IN THE SHADOW OF ISLAM: THE WOMEN'S MOVEMENT IN IRAN* (Azar Tabari & Nahid Yeganeh eds., 1982).

270. Telephone interview with Mahnaz Afkhami, *supra* note 267.

271. *Id.*

272. *Id.*

For Afkhami, the Manual's engagement with religion does not make it antiseccular. In fact, Afkhami believes that "[s]ecularism is at the heart of human rights" because women should not have any identity—let alone a religious identity—imposed upon them.²⁷³ But some Western feminists "go beyond this by not accepting that people have a right to be religious," Afkhami says. The Manual, in contrast, asserts that women "have a right to their own spirituality, their own exercise of religion." Afkhami continues that "sometimes feminists have had a way of not valuing the adherence of a lot of other feminists to religion. That's something that has caused a bit of difficulty in solidarity building."²⁷⁴

Significantly, while *Claiming Our Rights* confronts human rights law, it does not reject it. Rather, it takes human rights claims and makes them applicable in more aspects of women's lives—that is, in private as well as public contexts. Afkhami says of the Manual,

It's radical . . . because it is a new way of going the furthest that one can in allowing people to make choices and to have autonomous definitions of their identity, both spiritual and otherwise. . . . It allows people—for many, many millions for the first time—to think that it is possible to relate to God directly, to relate to culture directly, and to make their own sense of what it means.²⁷⁵

Indeed, this is a "radical" new conception of human rights. While traditional legal understandings of the "right to religion" favor leaders' views of the religion over those of dissenters and actively affirm the right of leaders to impose their views on members, the Manual views freedom of religion and choice as an individual right to participate in the group and to shape one's own religion—not just as an individual right to belong or to leave. "You talk about the right to exercising your religion, but the nuance of here's an individual woman wanting to say what her religion means to her and not wanting to comply with what some *mullah* says it is" has been less theorized, Afkhami says. *Claiming Our Rights* allows the religious authority "the right to his interpretation, but he just simply does not have the right to tell me to change my interpretation," Afkhami continues, acknowledging that in this way the Manual heralds "a new way of extending, expanding, and communicating the actual practice of the right to religion."²⁷⁶

To be sure, like WLUML, the Manual does not advocate a culture- or religion-based approach to human rights in all contexts. Field studies

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.*

testing the Manual in various countries have found that religious approaches are more appealing in some countries and less so in others.²⁷⁷ For example, in her home country, Iran, where theocracy has been in place for more than twenty years, Afkhami says that religious approaches are not popular. "There [women] resist religion and they want to deal more with [international] conventions and material like that," she says. "In general, the population in Iran since the revolution has become more and more secular. Not in terms of the government but in terms of the civil society. So in different settings, different aspects of the [Manual] have been stressed."²⁷⁸ In Afghanistan, on the other hand, many reformers have found that some engagement with culture and religion is necessary.²⁷⁹

The Manual's open framework has led to its appropriation by numerous groups around the world. According to Afkhami, *Claiming Our Rights* has thus far been translated into twelve languages and has been further "reevaluated and readjusted as it has been produced and implemented in different countries."²⁸⁰ "The methodology and the Manual is totally flexible," Afkhami says, so that "[p]eople are making new versions of the Manual all the time. There is not only a Jordanian version of it, but there are many Jordanian versions of it."²⁸¹

Where the Manual itself has not been adapted, its approach has been.²⁸² Even traditional human rights manuals that at one time took a purely

277. See SISTERHOOD IS GLOBAL INSTITUTE ANNUAL REPORT 2000 (offering detailed country reports from field tests of the Manual in Azerbaijan, Bangladesh, Egypt, India, Jordan, Lebanon, Pakistan, Syria, and Uzbekistan).

278. Telephone Interview with Mahnaz Afkhami, *supra* note 267.

279. June Starr's work on Islamic justice in Turkey suggests a dialectical relationship between secular and religious law. According to Starr, religious campaigns become popular after periods of secularization; and, vice versa, secular campaigns have more resonance after theocratic moments. See JUNE STARR, *LAW AS METAPHOR* 176 (1992) (writing that the comeback of religious sentiments within otherwise secular campaigns for legal reform in the Islamic context does not represent a problematic aberration in the secular legal project, but "merely another swing in the pendulum toward more complexity in the dialogue").

280. AFKHAMI & VAZIRI, *supra* note 171, at 9.

281. Telephone Interview with Mahnaz Afkhami, *supra* note 267.

282. A review of other country-specific manuals for women's human rights suggests that the cultural approach is used by a number of women's human rights groups. See, e.g., ZEINAB ABBAS, *HUMAN RIGHTS EDUCATION FOR WOMEN: AN ISLAMIC PERSPECTIVE* (n.d.) (asking Sudanese women to discuss religious and cultural tenets that both contradict and support women's human rights); MANISHA GUNASEKARA, *DRAFT TRAINING MANUAL ON WOMEN'S HUMAN RIGHTS EDUCATION* 86 (1995) (encouraging women to "recast" traditional folklore and religious texts "from a constructive feminist optic" and calling for a "radical reinterpretation of tradition"); LILA-PILIPINA, *WOMEN'S HUMAN RIGHTS EDUCATION: A TRAINING MANUAL* 9 (1995) (urging Filipino women at the grass roots to reconceive international human rights, and recognizing the limitations of international treaties "vis-à-vis religion, ethnicity, neocolonialism, class stratification[,] . . . racism and other patriarchal ideologies of power"); cf. B.A.B.E.: WOMEN'S HUMAN RIGHTS GROUP, *TRAINING ON WOMEN'S RIGHTS AS HUMAN RIGHTS* (1995) (using culture for educational, but not necessarily nationalist, purposes); MEGHNA GUHATHAKURTA & KHADIJA LINA, *EMPOWERING WOMEN AT THE GRASSROOTS: A MANUAL FOR WOMEN'S HUMAN RIGHTS EDUCATION* (1995) (taking a more secular approach that focuses on increasing women's political participation in hopes of securing a Uniform Family Code that

“secular” approach²⁸³ have begun to highlight some of the themes in *Claiming Our Rights*. A popular human rights education manual called *Local Action, Global Change: Learning About the Human Rights of Women and Girls*,²⁸⁴ written by human rights educators Julie Mertus, Nancy Flowers, and Mallika Dutt, is an example. While early drafts of *Local Action, Global Change* took a traditional universal approach to women’s human rights that spent little time on questions of religious or cultural community,²⁸⁵ the current version questions the efficacy of a purely secular approach in securing women’s rights.²⁸⁶ In the context of the family, for example, *Local Action, Global Change* notes the use of religious arguments to prevent secular legal reforms, which are effectively characterized as foreign and “counter to religious law and custom.”²⁸⁷

Taking a reconstructivist approach similar to *Claiming Our Rights*, the manual states that it may be “necessary to create an *enlightened* religious interpretation of different religions, since it is the right of all people to believe.”²⁸⁸ An exercise entitled “Analyzing Culture” asks participants to list religious and cultural practices in their lives that are different for women and men. Participants are asked, “Who is imposing the practice?” and “Who is benefiting from the practice?” Under this new approach, women are not asked whether human rights should trump religious laws, but rather, whether it is possible to find “interpretations of culture and religion that are not oppressive to any group of people.”²⁸⁹ The manual asks women how they would “go about promoting those interpretations.”²⁹⁰ Finally, rather than view human rights as fixed in positive international human rights law, the revised manual calls human rights “dynamic and evolutionary.”²⁹¹ Documents such as CEDAW “are the fundamental documents for giving women some idea of existing international standards.” But the manual continues that

will end misuse of religion and governance of family relations by Islamic personal law). Many of these manuals were sponsored and partially funded by the People’s Decade for Human Rights Education, a United Nations project.

283. Interview with Nancy Flowers, Author and Human Rights Educator, Amnesty International, in Stanford, Cal. (Oct. 29, 1997).

284. See JULIE MERTUS ET AL., *LOCAL ACTION, GLOBAL CHANGE: LEARNING ABOUT THE HUMAN RIGHTS OF WOMEN AND GIRLS* (1999).

285. In fact, a pre-Beijing version sought to help women transcend parochial identifications and embrace their global identity as women. Julie Mertus et al., *Our Human Rights: A Manual for Women’s Human Rights* (1995) (unpublished manuscript, on file with author).

286. The Manual also directly quotes many contemporary human rights activists in the Muslim world. See, e.g., MERTUS ET AL., *supra* note 284, at 41 (quoting Nawal El Saadawi and Farida Shareed); *id.* at 41-42 (citing reports of the 1994 WLUML conference in Lahore, Pakistan).

287. *Id.* at 41.

288. *Id.* (quoting Nawal El Saadawi, *Fundamentalism—a Universal Phenomenon*, WLUML DOSSIER 9/10, Dec. 1991, at 30) (emphasis added).

289. *Id.* at 29.

290. *Id.*

291. *Id.* at 206.

these documents should not be presented as “perfect” or “settled.” Women should be encouraged to examine and question everything. The facilitator may point out that women’s participation and gender perspective in the drafting and enforcement of international documents has been far from perfect. Moreover, not all groups of women have been addressed. Participants should consider how these documents might have been different if all women’s concerns had been represented and respected.²⁹²

This review of contemporary women’s human rights training manuals reveals that traditional understandings about the “universality” of human rights are changing. During the last century universality was consonant with a notion of positive law that is external to communities and that either trumps local culture or takes a backseat to it. Recent editions of *Claiming Our Rights* and other contemporary human rights education manuals suggest, however, that evolving notions of human rights are derived both from within cultures, in response to their needs and evolving values, and in dialogue between reformers on the ground and formal human rights instruments.²⁹³

But how are formal law and legal institutions responding to this dialogue? Perhaps more important still, how should they respond? I turn to these questions in the next Part. Here I conclude by summing up the new normative conception of rights emerging on the ground through Muslim women’s activism. Feminist analysis emerging in Muslim communities does more than offer an anti-essentialist critique showing that Islam is diverse. Feminists assert that Islam *ought* to be diverse. Feminists working in Muslim communities assert women’s rights to contest imposed identities and to create plural and autonomous normative visions of culture and religion. Articulating a new right to make one’s own identity, they fundamentally challenge current legal constructions of religion and culture. While current law conceives of individuals as having the freedom to pick and choose between communities, but allocates the right to define the community to religious and cultural leaders, women in Muslim communities are asserting that individual members of a community ought to be able to participate in this process.

292. *Id.* at 205-06.

293. Sally Engle Merry makes a similar observation in a recent article describing three different approaches to gender violence in a small Hawaiian town. Merry observes that the three approaches—one based on rights, one based on religion, and one based on indigenous community—were strikingly different in how they defined and dealt with gender relations. At the same time, Merry notes that all three approaches shared “similar technologies of the self” through free will and choice. Merry’s point is that local communities reflect “modern” conceptions of the self as autonomous and rational, while imagining just societies that are not necessarily secular or universal. Sally Engle Merry, *Rights, Religion, and Community: Approaches to Violence Against Women in the Context of Globalization*, 35 *LAW & SOC’Y* 39, 40 (2001).

Herein lies an important contribution to theorizing women's international human rights. Feminists in Muslim communities are boldly taking the critique of the public/private dichotomy beyond *freedom from* violence to *freedom to* create normative community. Under this view, while women should have a right to exit a normative community and choose another one if they want to, they should also have a right to stay within their communities and reform them. Current law's focus on exit elides many women's desire to maintain religious and cultural community. At the same time, a right to culture is not enough if women have no right to participate in making the culture. For women to assert cultural and religious rights requires a reconception of culture and religion as spaces that allow for reasoned, autonomous, and democratic participation. It is in this sense that the rights-based claims of feminists working in Muslim communities are distinct from traditional, Western human rights claims. Whereas the old Enlightenment sought freedom and equality in the public sphere alone, feminists in Muslim communities herald the New Enlightenment, demanding autonomy and democracy in both public and private spheres.

IV. FUTURES

"Imaginations of socially just futures for humans usually take the idea of single, homogenous, and secular historical time for granted," Chakrabarty writes.²⁹⁴ But in presuming that the world's peoples are marching in lockstep toward a singular future,²⁹⁵ we elide alternatives and blind ourselves to incisive critiques of current law and of liberalism itself.²⁹⁶ Viewed as confrontation rather than as transition, the claims of women reformers in Muslim communities offer important new takes on traditional law and its attendant notions of cultural relativism, multiculturalism, imposed identity, and narratives of transition. This Part highlights these contributions by offering the normative critiques of reformers working in Muslim communities as a theoretical road map for piercing the veil of the New Sovereignty. More broadly, it highlights their contributions in the hopes of illuminating the importance of shifting from

294. CHAKRABARTY, *supra* note 58, at 15.

295. See Lawrence M. Friedman, *Erewhon: The Coming Global Legal Order*, 37 STAN. J. INT'L L. 347, 355-56 (2001) (describing "the spread of U.S. law and U.S. lawyering abroad" as, in part, "a matter of taste, like the spread of Coca-Cola" and explaining that "[i]t is perhaps also sheer convenience and the fact that Americans were in the field fairly early, and because their style of lawyering suits the needs of the international order").

296. See Bhikhu Parekh, *A Varied Moral World*, BOSTON REV., Oct.-Nov. 1997, at <http://bostonreview.mit.edu/br22.5/parekh.html> (observing "an increasing tendency among liberals to equate 'liberalism' and the good" and lamenting that this "prevents us from asking if liberal principles are good and, conversely, if nonliberal principles might also be good").

an impositional to a dialogical approach in our study of law and development.

The last Section in this Part shifts from theory to practice. Returning to the grave human rights problems with which this Article began—the plight of Amina Lawal and others suffering under the despotism of fundamentalism in religious law and culture—I consider what strategies, procedures, and prescriptions law should adopt to better address such cases.

A. *Piercing the Veil of the New Sovereignty*

Read one way, campaigns for women's rights in Muslim communities suggest a swift victory for the *universality* of human rights. Rejecting culturally relativist arguments that cultural groups ought to be let alone and allowed to continue their discriminatory ways, more and more of the world's women assert—in the words of the United Nations Special Rapporteur on Violence Against Women, Radhika Coomaraswamy—that “[c]ultural diversity should be celebrated only if those enjoying their cultural attributes are doing so voluntarily.”²⁹⁷ Challenging the essentialist theory that Islam and the West are clashing civilizations that share no fundamentals,²⁹⁸ the rights-based efforts of women in the Muslim world provide persuasive evidence that liberty and democracy have a truly universal appeal.²⁹⁹ And thus far, this is the way they have been understood. Thomas M. Franck's impressive history of the transition from communitarianism to individualism by “societies everywhere—in Western

297. Radhika Coomaraswamy, *Reinventing International Law: Women's Rights as Human Rights in International Community*, in *DEBATING HUMAN RIGHTS: CRITICAL ESSAYS FROM THE UNITED STATES AND ASIA* 167, 181 (Peter van Ness ed., 1999).

298. Harvard's Samuel P. Huntington has led this crusade. See SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF THE WORLD ORDER* (1996); Samuel P. Huntington, *The Clash of Civilizations*, *FOREIGN AFF.*, Summer 1993, at 22, 40 (“Western ideas of individualism, liberalism, constitutionalism, human rights, equality, liberty, the rule of law, democracy, free markets, the separation of church and state, often have little resonance in Islamic . . . cultures.”). Ernest Gellner's significant work on Islamic legal orders takes a view similar to Huntington's. See, e.g., ERNEST GELLNER, *CONDITIONS OF LIBERTY: CIVIL SOCIETY AND ITS RIVALS* 28-29 (1994) (describing Islam as “an absolute moral community” that, in contrast with Civil Society, lacks individualism, intellectual pluralism, and a variety of political institutions and associations); ERNEST GELLNER, *POSTMODERNISM, REASON AND RELIGION* (1992) (explaining the rise of Islamic fundamentalism and critiquing postmodern relativism).

299. JOEL BEININ & JOE STORK, *On the Modernity, Historical Specificity, and International Context of Political Islam*, in *POLITICAL ISLAM* 3, 21 (Joel Beinin & Joe Stork eds., 1997) (arguing that “the ‘clash of civilizations’ thesis . . . invokes an essentialist, ahistorical culturalism” and that “Islam, like all cultural systems, is a contested field of meaning”); Amartya Sen, *A World Not Neatly Divided*, *N.Y. TIMES*, Nov. 23, 2001, at A39 (criticizing a “clashing civilizations” view of Islam and the West, which imagines uniformity within cultures and stark differences across cultures, and arguing that such a view robs us “of our plural identities” and “impoverishes the world”). On “Orientalism,” or the West's view of Islam as “other,” see EDWARD SAID, *THE EDWARD SAID READER* 171 (Moustafa Bayoumi & Andrew Rubin eds., 2000).

and non-Western societies³⁰⁰—gains much legitimacy from observing that activists from the Third World “have taken the lead in insisting that human rights are not a set of imposed western ideas, but are of universal application, speaking to the human condition.”³⁰¹ Franck even quotes *Claiming Our Rights* for its proposition that human rights are universal and not in conflict with Islam.³⁰²

In another recent book, Martha C. Nussbaum similarly concludes after years of field studies on women’s rights movements in India and other developing countries³⁰³ that “no argument has yet shown that there is any human being who does not desire choice.”³⁰⁴ The result of such characterizations is the quick conclusion that “the answer” to modernity, the world over, is “democracy, stupid.”³⁰⁵ And democracy as we know it in the West, to be specific. Nussbaum, for example, has concluded that “[a]ny universalism that has a chance to be persuasive in the modern world must . . . be a form of political liberalism.”³⁰⁶ After September 11th, even Salman Rushdie joined the chorus, arguing that “the world of Islam must take on the secular-humanist principles on which the modern is based.”³⁰⁷

Such claims reflect a familiar story about the production and reception of legal consciousness, in which the West is the primary site of legal production—exporting such goodies as secularism and the “rule of law”—and the Third World is the happy receptor of such knowledge and structures.

But read another way, claims for women’s human rights in Muslim communities signify much more than a world “in transition.” To be sure, women from Muslim countries and communities embrace the universal concepts of justice, equality, and democracy. But unlike traditional Western lawyers, they seek to apply these concepts within explicitly religious and cultural contexts, not in the public sphere alone. Feminists in Muslim

300. FRANCK, *supra* note 34, at 148.

301. *Id.* (quoting Rosalyn Higgins, *Ten Years on the Human Rights Committee*, 6 EUR. HUM. RTS. L. REV. 570, 575 (1996)). Franck quotes Kofi Annan, the Secretary-General of the United Nations, who characterizes “the idea that different societies and cultures view fundamental human rights differently” as “truly demeaning . . . of the yearning for human dignity that resides in every African heart.” *Id.*

302. *See id.* at 120.

303. MARTHA C. NUSSBAUM, *SEX AND SOCIAL JUSTICE* 9 (1999) (“The universals defended here are the fruit of many years of collaborative international work.”).

304. *Id.* at 11.

305. Thomas L. Friedman, *Today’s News Quiz*, N.Y. TIMES, Nov. 20, 2001, at A19 (writing that the key to the future of Arab-Muslim states is “democracy, stupid!”); *cf.* Amy Chua, *Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development*, 108 YALE L.J. 1 (1998) (complicating evolutionary theories of democratization and marketization in the context of market-dominant ethnic minorities).

306. NUSSBAUM, *supra* note 303, at 9.

307. Salman Rushdie, Editorial, *Yes, This Is About Islam*, N.Y. TIMES, Nov. 2, 2001, at A25 (arguing that Muslim nations must restore religion to the personal, rather than the political, sphere “in order to become modern”).

communities argue that the same democratic principles that guide the public sphere should apply within the family, culture, and religion—that is, in spheres traditionally defined by Western law as private and virtually unregulated. This is a radical shift from traditional human rights law, which posits freedom only in secular terms.

The transition narrative explains away these differences. Muslim women's claims are hailed for their affirmation of rights and universality,³⁰⁸ while differences are characterized as strategic cultural accommodations or worse—as nostalgic,³⁰⁹ self-defensive,³¹⁰ and “disingenuous”³¹¹—that is, as signs of “incomplete transition”³¹² or failed “legal transplants.”³¹³ The cultural accommodation view³¹⁴ understands the engagement of women in Muslim communities with culture and religion as strategic and necessary in the “shadow”³¹⁵ of fundamentalism, but without normative value. In this view, religious discourse is just a means to an end, with true justice arising when the transition to secular rights—that is, a proper division between public and private—is complete. Presuming that religion is inherently a sphere of injustice, the transition narrative misses the new normative claim that religion *ought* to be just.

Characterizing claims for rights within religion as mere cultural accommodations also indigenizes the claims, confining their relevance to local, not global, contexts. When I presented early drafts of this paper, the

308. As subaltern studies scholars describe, historicism reduces the reform efforts of Third World actors to mere mimicry of the West. See HOMI BHABHA, *THE LOCATION OF CULTURE* 86 (1994) (defining “colonial mimicry” as “the desire for a reformed, recognizable Other, as a subject of a difference that is almost the same, but not quite”).

309. See CHAKRABARTY, *supra* note 58, at 27 (acknowledging that his identity-based thesis leaves him “open to the charge of nativism, nationalism—or worse, the sin of sins, nostalgia”).

310. Gellner describes cultural arguments as reflecting a tendency to self-defensiveness among Muslim apologists, which ultimately creates the anomaly of “a modern science-based culture with native idioms.” JOHN HUTCHINSON, *THE DYNAMICS OF CULTURAL NATIONALISM* 32 (1987).

311. One law professor characterized feminist readings of the *Qur'an* this way during a presentation of some of the ideas in this Article.

312. CHAKRABARTY, *supra* note 58, at 31.

313. See generally ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (1974). For more critical explications of the “transplant” hypothesis in law-and-development scholarship, see Pierre Legrand, *The Impossibility of “Legal Transplants,”* 4 *MAASTRICHT J. EUR. & COMP. L.* 122 (1997) (critiquing the “transplant” thesis as betraying “a political decision to marginalize difference and correlatively to extol sameness”); and David Kennedy, *The Politics and Methods of Comparative Law* 13 (n.d.) (unpublished manuscript, on file with author) (describing differences under the transplant hypothesis as arising from “[f]ailed transplant efforts, indigenous reactions against transplantation [and] intentional or accidental misreadings of transplanted material”). Both Kennedy and Legrand note that “legal transplant” analysis is used more often to explain similarities than differences in legal reform efforts.

314. See Legrand, *supra* note 313, at 122 (describing the “transplant” thesis as conceiving of culture as an “irrational interloper” that interferes with the implementation of “objective” legal rules); Kennedy, *supra* note 313, at 17 (writing that “[s]imilarities between legal phenomenon in different locations . . . tend to be allocated to economic stages or functional necessities, while differences tend to be allocated to cultures”).

315. Crossette, *supra* note 217.

first reaction of the audience members was that this strategy is well and good for Muslim women who have to confront religion (“They live in theocratic states!”), but that it offers little help to Western women. This view obscures the struggle with fundamentalism at home. In fact, the United States is in the company of Afghanistan in refusing to ratify CEDAW.³¹⁶ While conservatives in the United States have openly expressed their concern about the “radical” nature of CEDAW, which “threatens” American family values,³¹⁷ American commentators nonetheless argue that the United States should ratify the Convention in order to help women in the Third World, not at home.³¹⁸ Convinced that the real threat to women’s rights is elsewhere,³¹⁹ many refuse to confront Muslim women’s New Enlightenment claims. The implication is that enlightenment in the public sphere was good enough in the eighteenth century, and remains so in the twenty-first century as well.

But far from speaking narrowly to indigenous needs alone, women’s human rights claims emerging in the Muslim world present a powerful normative critique of the New Sovereignty in international and national law. Denouncing law for conceding power to patriarchal leaders of private groups without engaging the diversity of views within cultural communities,³²⁰ activists highlight the role of the state in authorizing traditional views of religion over the claims of dissenting women. We can learn more from this claim than simply its anti-essentialist critique. Seeing

316. See United Nations, Convention on the Elimination of All Forms of Discrimination Against Women, Signatures and Ratifications, at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty10.asp> (last visited Jan. 23, 2003).

317. See James Dao, *Senate Panel Approves Treaty Banning Bias Against Women*, N.Y. TIMES, July 31, 2002, at A3 (noting that conservatives fear the treaty will be used to impose a feminist agenda on issues ranging from abortion rights to employment quotas); Katha Pollitt, *Ashcroft Loves Iran*, NATION, July 8, 2002, at 10 (describing Attorney General John Ashcroft’s distaste for CEDAW and reiterating Jesse Helms’s statement in 2000 calling CEDAW “a terrible treaty negotiated by radical feminists with the intent of enshrining their anti-family agenda into international law”).

318. See Nicholas D. Kristof, *Bush vs. Women*, N.Y. TIMES, Aug. 16, 2002, at A17 (claiming that CEDAW “would make no difference in America but would be one more tool to help women in countries where discrimination means death”); Nicholas D. Kristof, *Women’s Rights: Why Not?*, N.Y. TIMES, June 18, 2002, at A23 (writing that “frankly, the treaty has almost nothing to do with American women, who already enjoy the rights the treaty supports” and arguing that “[i]nstead, it has everything to do with the half of the globe where to be female is to be persecuted until, often, death”).

319. See Leti Volpp, *Feminism Versus Multiculturalism*, 101 COLUM. L. REV. 1181 (2001) (arguing that Western feminist obsession with the problems of immigrant and Third World women obscures violence and discrimination against women in the West).

320. See Clara Connolly & Pragna Patel, *Women Who Walk on Water: Working Across “Race” in Women Against Fundamentalism*, in WOMEN, GENDER, RELIGION: A READER, *supra* note 112, at 447, 447, 461 (critiquing what they call the “classic multicultural, noninterventionist style” emerging in British jurisprudence, and explaining that the activist group Women Against Fundamentalism “rejects the politics of what has come to be known in Britain as ‘multiculturalism’ that delivers women’s futures into the hands of fundamentalist ‘community leaders’ by seeing these as representatives of the community as a whole”).

how the New Sovereignty has arisen in response to the New Enlightenment illustrates how, in a globalizing world witnessing fragmentation and change, law itself has become an important tool for forcefully preserving traditional communities. Simply put, “[i]n the modern day, insularity does not come naturally. Those who seek it must fight for it.”³²¹ Currently, legal norms such as cultural relativism and multiculturalism buttress the power of traditionalists over modernizers. Because law conceives of religion in fundamentalist terms, religious communities are continually being remade to reflect fundamentalist views.

It matters how law conceives culture and religion. Current legal conceptions of culture and religion view both as static and homogeneous, and make no conceptual space for internal change.³²² In contrast, reformers in the Muslim world suggest that in the twenty-first century, we need a normative theory of cultural change that allows individuals a way of imagining autonomous and egalitarian lives outside the secular, bureaucratic freedom of traditional liberalism. The fear is that without a discourse that allows women to choose freedom within a context of faith, reactionary impulses will win out over progressive ones. That is, as freedom and the future become associated only with the bureaucratic West, many in the Muslim world seek to maintain their religious identity in what appears to be the only place remaining—the past.³²³

In contrast, reformers with a dynamic and historically contingent understanding of religion question the authenticity of “traditional” laws, which are often the products of either internal power politics or colonialism. Indian principalities, for example, generally had uniform laws governing all aspects of life until British rule. The British established separate “personal laws” governing family life and property inheritance for each religious community, while creating a national system of commercial and criminal

321. Sunder, *supra* note 33, at 501.

322. For some recent, thoughtful attempts to retheorize multiculturalism, see JACOB T. LEVY, *THE MULTICULTURALISM OF FEAR* 52 (2000) (arguing for a new understanding of multiculturalism that offers “no cultural shield to protect violent and cruel internal practices”); AYELET SHACHAR, *MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN’S RIGHTS* 5-8 (2001) (arguing for “joint governance” of cultural communities between local leaders and the state in order to protect internal minorities’ rights, particularly the rights of women); and Iris Marion Young, *Two Concepts of Self-Determination*, in *HUMAN RIGHTS: CONCEPTS, CONTESTS, CONTINGENCIES*, *supra* note 56, at 25 (arguing for a revised understanding of self-determination from noninterference to nondomination, whereby minorities may enjoy a separate existence so long as there is no internal domination). On cultural relativism, see SATYA P. MOHANTY, *LITERARY THEORY AND THE CLAIMS OF HISTORY: POSTMODERNISM, OBJECTIVITY, AND MULTICULTURAL POLITICS* (1997).

323. See M.H.A. Reisman, *Islamic Fundamentalism and Its Impact on International Law and Politics*, in *RELIGION AND INTERNATIONAL LAW*, *supra* note 44, at 357, 364 (“The future was hopelessly penetrated by non-Islamic elements, while the past remained pure. To maintain their identity, Moslem leaders became backward-looking.”).

law.³²⁴ Thus, postcolonial studies belie traditional notions of noninterference on which cultural relativism and multiculturalism are based. As Lila Abu-Lughod writes, “[I]t is too late not to interfere. The forms of lives we find around the world are already products of long histories of interactions.”³²⁵

Today, both Western feminism and religious fundamentalism are competing to define women’s identity—the former as secular and free, the latter on religious leaders’ terms.³²⁶ But as I have sought to show, women increasingly reject these options, choosing a third way that seeks identity on more enlightened terms. This activism suggests that the central question of the new century will not be individualism *or* identity, but rather *who has the power to define identity*.³²⁷ Despite increasing skepticism in the academy about the possibilities for freedom within identity,³²⁸ women’s human rights reformers in Muslim communities are not rejecting identity, but calling for the right to reconstruct it.³²⁹

In short, advocacy for women’s rights in the Muslim world signals a fundamental change in the conception of identity itself. While traditional human rights to identity presume that identity will be imposed within groups (albeit freely chosen from among groups), the activists I have highlighted here seek to expand choice *within* identity groups. This claim presupposes not only that identity groups are internally plural, but that they

324. See Nussbaum, *supra* note 140, at 40 (explaining that the current “decentralized situation dates back to the Raj, when the British codified commercial and criminal law for the nation as a whole, but, in the spirit of divide and rule, encouraged the maintenance of separate spheres of civil law in non-commercial areas”); see also KNOP, *supra* note 47, at 364 (describing how indigenous women in Canada revealed that the Canadian Indian Act codified “not indigenous customs” as claimed, “but European patriarchy”).

325. Abu-Lughod, *supra* note 19, at 786-87.

326. See Minoos Moallem, *Transnationalism, Feminism, and Fundamentalism, in WOMEN, GENDER, RELIGION: A READER*, *supra* note 112, at 119, 120 (“Feminisms and fundamentalisms are now competing global forces, both attempting to find means to control the mechanism of cultural representation.”).

327. As Cornel West writes:

The crucial intellectual battles of the day . . . are no longer over Truth but rather over the production of truths—and this truth-production is a fully historical and political affair. That is, we do not passively accept the Truth from a static past, but rather we contribute to the creation of new truths by reinterpreting old truths of dynamic traditions in light of new circumstances and challenges.

Cornel West, *Faith, Struggle, and Reality*, 45 CHRISTIANITY & CRISIS 400, 401 (1985).

328. See, e.g., PAUL GILROY, *AGAINST RACE: IMAGINING POLITICAL CULTURE BEYOND THE COLOR LINE* (2000); K. Anthony Appiah, *Identity, Authenticity, Survival: Multicultural Societies and Social Reproduction, in MULTICULTURALISM* 149, 162-63 (Amy Gutmann ed., 1994) (asking whether, if we take autonomy seriously, identity does not replace “one kind of tyranny with another”); Janet E. Halley, *Culture Constrains, in IS MULTICULTURALISM BAD FOR WOMEN?*, *supra* note 9, at 100, 103-04.

329. In this sense women’s strategies reflect the view of West, who writes that identity politics, “on the one hand, are inescapable and, on the other hand, still too limited.” CORNEL WEST, *Christian Love and Heterosexism, in THE CORNEL WEST READER*, *supra* note 90, at 401, 407.

should be, in order to allow individuals more room to negotiate their membership in the group—from the traditional end of the spectrum to the radical.³³⁰

Finally, although a transition narrative would explain women's religion-based claims as a remnant of the past, Muslim women's claims are a far cry from nostalgic. Critically engaging religion, reformers on the ground are taking seriously the claims and desires of modern peoples and, in so doing, offer the possibility for futures in which freedom may be imagined both within and without faith.³³¹ What is more, campaigns for human rights in Muslim communities challenge the linear, evolutionary view of law and history implicit in transition narratives. Presenting a more contextual, contingent, and dynamic model of legal history, campaigns for women's human rights in Muslim communities illustrate an ongoing process resembling what Reva Siegel describes as "preservation-through-transformation."³³² In this view, the legal system does not merely function in the service of "rights" and "justice," but rather, is continually coopted by status quo interests against change.³³³ In the present context, law attempts to create a sphere of enlightenment in the public realm, but fundamentalists and traditionalists take advantage of this liberal compromise, asking law to define more of life's activities as belonging to the private domain. The reformers in Muslim communities that this Article highlights are boldly confronting the traditional transition theories of law and religion that have made this cooptation possible. Keeping their eye on the prize, their theories and strategies emerge from efforts to attain freedom and equality *now*, and in new and expansive ways.

330. See Henry J. Steiner, *Ideals and Counter-Ideals in the Struggle over Autonomy Regimes for Minorities*, 66 NOTRE DAME L. REV. 1539, 1553-54 (1991) (expressing concern that the current conception of group autonomy does not, but ought to, provide that all persons are empowered "to decide whether to remain on one side of a cultural boundary, to shift to another side, or to seek a life not committed to one or the other community"); Donna J. Sullivan, *Advancing the Freedom of Religion or Belief Through the UN Declaration on the Elimination of Religious Intolerance and Discrimination*, 82 AM. J. INT'L L. 487, 488 (1988) (observing that the notion of intolerance only applies between religious groups and not within them).

331. As West writes, "The major contribution religious revivals can make to left strategy is to demand that Marxist thinkers and activists take seriously the culture of the oppressed." WEST, *supra* note 112, at 378. West denounces the Left, which he claims has championed the cause of oppressed peoples while having "little understanding and appreciation of the culture of these people." *Id.* The Enlightenment legacy, he argues, led to the Left's "inability to believe in the capacities of oppressed peoples to create cultural products of value." *Id.*

332. Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113 (1997) ("Efforts to reform a status regime bring about changes in its rule structure and justificatory rhetoric . . .").

333. See *id.* ("The ways in which the legal system enforces social stratification are various and evolve over time.").

B. Operationalizing the New Enlightenment

As my grandmother, a physics professor in India, would quip, “In this dynamic world, one cannot be static.” Just as September 11th forced us to reconsider our old understandings of war, we should also reconsider the legal tradition of religious sovereignty. Far from being obscurantist about change, law must adapt so that the original goals of the Enlightenment may prevail. Substantive cultural change will entail abandoning transition narratives that posit the old Enlightenment as the end of history and the new one as an anachronism.³³⁴ Today, individuals want rationality within religious and cultural contexts.³³⁵ In pursuing this right, they open up not only new strategies for maintaining old rights, but entirely new ways of imagining socially just futures, where democracy is both preferable and possible in all aspects of our lives.³³⁶

Thus far, I have argued that law has been complicit in thwarting the New Enlightenment. In this final Section, I begin to address the next step: What might law do instead? Ought law merely to do a better job of staying out of internal religious conflict, thereby vowing to be no longer complicit in the backlash projects of traditionalists and elites (i.e., let the market and private coercion work things out)? Or should law try to adjudicate cultural claims based on a different set of normative principles—namely, those of the New Enlightenment rather than the old? I propose that law should rethink its procedures and prescriptions in light of the New Enlightenment.

Thin rules—such as a right of exit or the right to freedom in the public sphere—sufficed to fulfill Enlightenment goals, but today, individuals need and demand more. I do not offer any simple legal rule in their place—such as one that states that equality norms should trump religious liberty norms, or a rule that would prohibit personal, customary, or religious law altogether in favor of a uniform public legal system. Such rules are

334. As Kennedy explains, we have a problem when eighteenth-century notions of the world prohibit us from seeing the new problems and solutions of the twenty-first century. He writes:

The movement’s Western liberal origins become part of the problem . . . when particular difficulties general to the liberal tradition are carried over to the human rights movement. When, for example, the global expression of emancipatory objectives in human rights terms narrows humanity’s appreciation of these objectives to the forms they have taken in the nineteenth- and twentieth-century Western political tradition.

Kennedy, *supra* note 14, at 114.

335. See Rodney Stark, *Rationality*, in GUIDE TO THE STUDY OF RELIGION, *supra* note 112, at 239, 239-44 (advocating rationality within religious thought).

336. See ‘ABDOLKARIM SOROUSH, *Tolerance and Governance, A Discourse on Religion and Democracy*, in REASON, FREEDOM & DEMOCRACY IN ISLAM: ESSENTIAL WRITINGS OF ‘ABDOLKARIM SOROUSH 131, 135 (Mahmoud Sadri & Ahmad Sadri eds. & trans., 2000) (arguing that democracy does not require traditional secularism, and explaining that “[t]he practice that truly violates democracy is not embracing a faith but the imposition of a particular belief or punishment of disbelief” (emphasis added)). On contemporary intellectuals in the Muslim world—from secular intellectuals to “modern Muslim activist” intellectuals—see JOHN L. ESPOSITO & JOHN O. VOLL, MAKERS OF CONTEMPORARY ISLAM (2001).

themselves “thin” in that they fail to recognize a central claim of the New Enlightenment—that women ought to be able to have equality even within the context of religion or community.

Rather, I offer here a set of procedures and principles, fueled by the larger vision of a New Enlightenment, that would allow law and legal decisionmakers to operationalize this New Enlightenment.

1. *Passive Proceduralism*

This prescription would require legal decisionmakers (for example, judges, national lawmakers, international human rights treaty-making participants, and United Nations and regional human rights committees) to recognize that religions are dynamic communities, whose norms are in a state of constant negotiation—and that the law impedes this dynamism (usually in favor of powerful members of the community) whenever it imposes upon religious communities a static, top-down vision of what that community is.³³⁷ In light of this reality, legal decisionmakers would cease privileging the norms of religious elites and would instead place elites and dissenters on an equal footing—but only when a specific dispute is brought before a decisionmaker. This approach is procedural insofar as it requires that all members of a community are represented before the courts, legislatures, and human rights bodies. Merely acknowledging an internal diversity of interests—when such diversity actually exists—may help decisionmakers to become less complicit in backlash efforts on behalf of the status quo. Furthermore, a finding of diverse claims about the meaning of membership may ultimately lead decisionmakers to refuse to enforce strict rights to exclude from the normative community based on claims of inauthenticity, thus making the communities themselves more accommodating of difference and pluralism.

Revisiting the cases in point that I highlighted in Section II.D may be helpful in illustrating this approach. In each of those cases—women protesting their countries’ religious and culture-based reservations to CEDAW, Muslim women seeking to reform personal laws in India, religious women challenging sex discrimination in the United States, tribal women striving for gender equality within the tribe in the United States, and African women seeking reform of discriminatory customary laws—the primary fault of legal decisionmakers at both the international and national

337. This is Robert Cover’s argument. Cover recognized that law is more often jurispatholic—killing off the “law” offered by dissenters—than jurisgenerative. See Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 53 (1982) (famously writing: “Judges are people of violence. Because of the violence they command, judges characteristically do not create law, but kill it. Theirs is the jurispatholic office. Confronting the luxuriant growth of a hundred legal traditions, they assert that *this one* is law and destroy or try to destroy the rest.”).

levels has been a failure to acknowledge the claims of dissenting women for more equality within their religious and cultural group, and for a liberty right to define the group's norms. In all of these cases, legal authorities currently practice a policy of deference to religious leaders, who are given absolute authority to define the norms of the group. In contrast, the passive proceduralism I suggest here would require legal decisionmakers to recognize multiple claims to define community. Passive proceduralism would prevent law from being coopted by status quo interests, and would allow for the proliferation of greater difference, equality, and liberty within each group.

To be sure, this approach only facilitates the substantive goals of the New Enlightenment—freedom and equality within normative communities—to the extent that such claims are actually made before legal decisionmakers. In many cases, communities may lack serious dissent; in the next Subsection, I consider law's role in facilitating internal dissent and individual capabilities for participating in the processes of cultural meaning-making. But the question of how much dissent is necessary to warrant legal recognition remains. Certainly, the extent of dissent within a community will also turn on the opportunity for dissent. But assuming ample opportunity to dissent, what is the procedural obligation to recognize a small dissenting minority—say, two out of a hundred? Again, recognition of even this small group of dissenters' claims would descriptively acknowledge that the group is not, in fact, homogeneous. But recognition of these dissenters' claims also implicates some of the more substantive goals of the New Enlightenment—namely, that individuals have a right to dissent and be different within normative spaces. Recognizing the existence of difference—no matter how little—would make it more difficult to legally impose conformity and repress autonomy.

As anemic as the passive proceduralist approach may seem on one level, it acquires some vigor in that religious groups are increasingly seeking refuge in the law from internal voices of modernization and dissent. Today, we see cultural groups increasingly turning to law to help forcefully preserve traditional communities. In the face of such preservationist movements, the law should acknowledge the dynamic nature of religious communities and block the efforts of religious elites who would lock in their privileged status quo in the name of religious tradition. Yet the voice of dissent would have to originate from within a religious community. In these cases, law would merely recognize that dissent and would thereby empower the subaltern to speak.

2. *Robust Proceduralism*

The passive proceduralist approach merely asks lawmakers to respond to claims brought before them. But this approach presumes that women and other disempowered individuals within communities have the knowledge or strength to question their leaders and to demand cultural change. In order to empower the subaltern to speak, the state must take an affirmative role in promoting discourse and in ensuring that women are given access to educational and economic opportunities so that they will have the critical tools to challenge received norms and to make the world their own. For example, the state may encourage more networking efforts similar to those pioneered by NGOs such as WLUML (by, for example, guaranteeing their ability to operate without interference within its borders), and more on-the-ground education, empowerment, and consciousness raising such as that facilitated by human rights manuals like *Claiming Our Rights*. Or a state may go as far as ensuring women equal access to educational and religious institutions at all levels, and access to unregulated global media and technologies, such as the Internet.³³⁸ At either end of the spectrum, this approach, too, is procedural in that it requires law to empower previously marginalized voices to participate in the processes of cultural meaning-making. But it is more robust in that it envisions an affirmative role for the state in shaping a more broadly educated and represented cultural citizenry.

Robust proceduralism would also require a state to protect cultural dissenters from suppression, harassment, and violence. In this Article, I have mostly spoken about cultural dissent as an unmitigated good; I have tried to highlight the powerful, dissenting voices of Muslim women that have too often been ignored. But my championing of such efforts is not naive. On a daily basis, these women risk their lives in order to claim their rights to religion and equality. To be sure, dissent is a very dangerous proposition. Thus, any state that seeks to foster such dissent must acknowledge the need to provide for legal mechanisms to protect women and other dissenters against violent backlash. This protection would take many forms. Just as in the United States where the First Amendment recognizes the need to protect unpopular speakers from being silenced by the state, states should also recognize free speech rights within private, normative groups.³³⁹ Women dissenters, in particular, may be vulnerable to suppression by more violent means, including sexual harassment and

338. See Madhavi Sunder, *Intellectual Property and Identity Politics: Playing with Fire*, 4 J. GENDER RACE & JUST. 69, 94 (2000) (arguing against national laws that would limit access to global media and technology in order to promote cultural survival).

339. I make this argument elsewhere. See Sunder, *supra* note 33, at 562 (arguing for a "right to speak and to challenge oppressive cultural norms and practices" from within a cultural association).

rape.³⁴⁰ Indeed, women in all contexts, from social workers and human rights agents to dissenting women in villages, are potential victims of violence aimed at silencing their speech.³⁴¹ Particularly where a state is employing change-agents to pursue social and human rights reform, robust proceduralism would require that the state take responsibility for punishing those who use violence to suppress cultural dissent.³⁴²

3. *Substantive Prescriptions*

While the case of the small minority of dissenters begins to implicate more substantive goals, the case of the “bad dissenters”—those dissenters who seek more repression, not more freedom—presents even more difficult issues. In this case, operationalizing the New Enlightenment requires making substantive legal judgments. At the same time, these legal judgments may be perfectly consistent with the types of legal judgments required by the old Enlightenment. Recall that the traditional legal rule of religious sovereignty is based on a normative vision outlined by the Enlightenment—freedom in the public sphere is freedom itself. But I have argued in this Article for a new normative vision emerging from the groundwork of women’s human rights activism. These activists herald a more expansive understanding of freedom as requiring rights within public and private spaces, namely within normative, religious, and cultural communities. Thus, just as Enlightenment norms required legal decisionmakers to reject legal claims to discriminate in the public sphere, so too would New Enlightenment norms reject claims to discriminate in the private sphere.

Some may read my Article as a call for an even more substantively activist role for international law in which it intervenes directly in religious communities to enforce norms of international human rights law. This might mean, for example, compelling Islamic authorities to conform Shari’a to the Universal Declaration of Human Rights, or the Papacy to

340. I have written about a path-breaking sexual harassment case in India in which a state-sponsored social worker was subjected to sexual harassment, culminating in a gang rape, in response to her efforts to educate women and men in rural communities about the hazards of child marriages. Her tragedy became a test case in India. Reformers sought legal recognition of sexual harassment as an employment hazard, particularly for women working as change-agents. See Madhavi Sunder, *In a “Fragile Space”: Sexual Harassment and the Construction of Indian Feminism*, 18 LAW & POL’Y 419, 425 (1996) (describing reformers’ argument that sexual harassment—including gang rape—is a tool for controlling and silencing “women engaged in the delicate but real work of constructing national and gender identity”).

341. See *id.* at 428-33 (highlighting interviews with women victims of sexual harassment from all over India working in a variety of fields).

342. The Indian Supreme Court has held that states have such an obligation. See *Vishaka v. Rajasthan*, A.I.R. 1997 S.C. 3011 (outlining national guidelines for the protection of women against workplace sexual harassment).

conform its stance on abortion and birth control to the strictures of CEDAW. But this would be taking my argument too far.

That said, I suspect that cultural dissent is more often the rule than the exception—that is, that dissenting voices within cultures are omnipresent. I am often asked, for example, whether the prescriptions I offer here would require substantive intervention with respect to the Hmong immigrant community in the United States, which has attained notoriety for its ostensibly traditional practice of “marriage by capture” or “marriage by abduction.”³⁴³ The questioners almost always presume that Hmong immigrants uniformly accept and defend this practice.³⁴⁴ But as Bill Ong Hing has exposed through first-hand research among immigrant Hmong youth, many Hmong-Americans dissent from such traditions. Indeed, Hing finds his interviewees are committed to maintaining and fostering their cultural identity, but are less than reverent about how they do so. They “sense an obligation to learn about and perpetuate their culture [but] want to do so on their own terms.”³⁴⁵ Similarly, returning to the case of Amina Lawal, many within Nigeria contest the rise of strict, Shari’a law in that country.³⁴⁶

My point is that while questions about substantive intervention in cases of *no cultural dissent* may be sound in theory, I do not think that they represent a very common problem in fact.³⁴⁷ In most cases, individuals are challenging oppressive cultural and religious norms and appealing to legal authorities to hear their case. But legal authorities are rejecting their claims at present, paradoxically protecting religious elites against rumblings for change and modernity. In this sense, this Article agrees with scholars such

343. Deirdre Evans-Pritchard & Alison Dundes Renteln, *The Interpretation and Distortion of Culture: A Hmong “Marriage by Capture” Case in Fresno, California*, 4 S. CAL. INTERDISC. L.J. 1, 14 (1994) (describing such practices as involving a Hmong male’s kidnapping of a woman against her will, intending that she become his bride—where this custom is recognized, he will obtain the sanction of both his and her family for their marriage at a later date).

344. *Cf. id.* at 14-16 (describing this practice as only one among many marriage practices in Hmong culture, with some allowing a woman much greater choice in the selection of a marriage partner). Evans-Pritchard and Renteln critique the use of a “cultural defense” in such cases because this approach all too often presents “a single uniform version of a marriage practice,” despite contest within a culture over such practices. *Id.* at 21. The writers highlight that many cases involved claims by Hmong women in the United States, including a prospective bride and her mother, who appealed to American authorities not to recognize such marriages. *Id.* at 16.

345. Bill Ong Hing, *Refugee Policy and Cultural Identity: In the Voice of Hmong and Lu Mien Young Adults* 48, 50 (Jan. 16, 2002) (unpublished manuscript, on file with author) (describing young Hmong women, in particular, as “embracing gender equality” in the self-conscious process of forming their cultural identity).

346. *See supra* notes 168-170 and accompanying text; *see also* Janine di Giovanni, *Divine Injustice*, *TIMES* (London), Nov. 30, 2002, at 24 (chronicling protests against Lawal’s stoning sentence by Nigerian feminist organization, Baobab).

347. In the rare case of no cultural dissent, I do not, at this time, propose further substantive intervention on the basis of my theory. Indeed, such cases are beyond the scope of my proposals, which are not intended to cover comprehensively each and every instance of injustice in the private sphere.

as Franck and Nussbaum that people, the world over, want freedom and equality. I diverge from them in that I emphasize that, contrary to traditional liberalism, women and men increasingly pursue such values within private, cultural spaces as well as public ones. Today, the world's women are reimagining traditional, liberal notions of freedom and equality in thicker, richer ways. For law to leave them with the options of centuries past elides their claims, and their important legal contributions. Instead, law can and should operationalize the New Enlightenment they herald by recognizing diverse ways of imagining socially just futures.

CONCLUSION

Just as the eighteenth-century public acquired its Enlightenment less from philosophers than through the work of *philosophes*—"populizers" such as "journalists, men of letters, the bright young talkers of the salons"³⁴⁸—the twenty-first century public is acquiring a New Enlightenment from the real-world activists of the transnational human rights movement. Forging ahead of both anthropological and legal theorists, the international human rights reformers working within a Muslim context are challenging traditional understandings of both religion and international law as imposed, and advocating instead a right to question, critique, and indeed, recreate normative communities for themselves. Contrary to their popular image as either slaves to tradition or naive champions of it, reformers in Muslim communities are doing the hard work of reimagining the present and future. Yet, we are ignoring it.³⁴⁹ By continuing to read their actions within a meta-narrative of transition, we reduce their agency to mere mimicry of the West, or we write off their commitment to religion and difference as a relic of the past. Having no context for conceiving the presence of religion *and* equality, we discount as conservative or ignore completely the radically new frameworks for human rights they are building. In short, Muslim women are producing a new legal consciousness but there is static on the receiving end.

348. See Crane Brinton, *Enlightenment*, in 2 THE ENCYCLOPEDIA OF PHILOSOPHY 519, 519 (Paul Edwards et al. eds., 1972). Crane Brinton is the former President of the American Historical Association.

349. For example, in an editorial on the importance of internal dialogue within religious communities, Thomas Friedman contended that while "Christianity and Judaism struggled with this issue for centuries . . . a similar internal struggle within Islam to re-examine its texts and articulate a path for how one can accept pluralism and modernity—and still be a passionate, devout Muslim—has not surfaced in any serious way." Thomas L. Friedman, Editorial, *The Real War*, N.Y. TIMES, Nov. 27, 2001, at A19. That same day, on the pages of Friedman's paper, another writer argued that Afghan women "have already shown their determination to create change from within," stressing that "Western organizations can be more effective in helping women if they ground their support in the positions of Muslim feminists." Rina Amiri, Editorial, *Muslim Women as Symbols—and Pawns*, N.Y. TIMES, Nov. 27, 2001, at A19.

In critiquing international law's transition narrative, I do not intend to call for a return to the past of religious Empire. Rather, I call for international law to think beyond the old Enlightenment to the new one. In the twenty-first century, new theories and normative demands may better guide our laws to guaranteeing more freedom, not less. The New Enlightenment does not reject the old one, but rather takes it further,³⁵⁰ demanding reason and rights within normative as well as secular community. This requires piercing the veil that protects religious authoritarianism from the processes of justice. For international law to be truly modern, it must begin to confront its own traditions.

350. In this sense I agree with Habermas that "the defects of the Enlightenment can only be made good by further enlightenment." Thomas McCarthy, *Introduction to HABERMAS*, *supra* note 65, at vii, xvii.