

1996

# International Human Rights Law, Feminist Jurisprudence, and Nietzsche's "Eternal Return": Turning the Wheel

Barbara Stark

*Maurice A. Deane School of Law at Hofstra University*

Follow this and additional works at: [https://scholarlycommons.law.hofstra.edu/faculty\\_scholarship](https://scholarlycommons.law.hofstra.edu/faculty_scholarship)

---

## Recommended Citation

Barbara Stark, *International Human Rights Law, Feminist Jurisprudence, and Nietzsche's "Eternal Return": Turning the Wheel*, 19 Harv. Women's L.J. 169 (1996)

Available at: [https://scholarlycommons.law.hofstra.edu/faculty\\_scholarship/197](https://scholarlycommons.law.hofstra.edu/faculty_scholarship/197)

This Article is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Faculty Scholarship by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact [lawcls@hofstra.edu](mailto:lawcls@hofstra.edu).

# INTERNATIONAL HUMAN RIGHTS LAW, FEMINIST JURISPRUDENCE, AND NIETZSCHE'S "ETERNAL RETURN": *TURNING THE WHEEL*

BARBARA STARK\*

## INTRODUCTION

Much of the important feminist scholarship on international human rights law has been deconstructive;<sup>1</sup> that is, feminists have taken apart international human rights law to show how it neglects and marginalizes women, how it does not do enough for them, and how it may even perpetuate their subordination.<sup>2</sup> Less has been written about its potential

---

\* Associate Professor, University of Tennessee College of Law. LL.M., Columbia Law School, 1989; J.D., N.Y.U. School of Law, 1976; B.A., Cornell University, 1974. Warm thanks to Fran Ansley, Kathy Bohstedt, Hilary Charlesworth, Judy Cornett, Tom Davies, Rosalind Hackett, Catharine MacKinnon, Glenn Harlan Reynolds, Nadine Taub, Shelley Wright, and the students in my International Human Rights Seminar for their helpful comments on earlier versions of this Article; to Aya Gruber for a thoughtful edit; to Werner Dannhauser for an unforgettable introduction to Nietzsche; and to Katrina Bowman for her diligent secretarial assistance. I presented ideas from this Article at the Annual Meetings of the International Studies Association and the American Society of International Law, and I thank the participants for their comments. I also gratefully acknowledge the generous support of the Faculty Development Programs of the University of Tennessee and the College of Law, the Lewis King Kreig & Waldrop Fund, and the Carden Research Fund. Susanne Bales, Philip Burnett, Gabrielle Cowan, and Jeffrey Grimes provided outstanding research assistance.

<sup>1</sup> See J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743 (1987). For the purposes of this Article, deconstruction may be understood as a form of critical analysis with which to expose and question the underlying premises of a particular assumption. Professor Balkin's pellucid introduction focuses on the "inversion of hierarchies and the liberation of the text from the author." *Id.* at 746. The feminist scholarship cited in *infra* note 2 has ably done both. For full and rigorous discussions of deconstruction in general, see JONATHAN CULLER, *ON DECONSTRUCTION: THEORY AND CRITICISM AFTER STRUCTURALISM* (1982); JACQUES DERRIDA, *OF GRAMMATOLOGY* (Gayatri C. Spivak trans., 1976). For a sharply observed deconstruction of gender, see Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 806 (1989).

<sup>2</sup> See, e.g., Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613 (1991) (providing a groundbreaking analysis of gender bias of international law); HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES (Rebecca Cook ed., 1994) [hereinafter HUMAN RIGHTS OF WOMEN]; Symposium, *Feminist Inquiries into International Law*, 3 TRANSNAT'L L. & CONTEMP. PROBS. 293 (1993); Marilyn Waring, *Gender and International Law: Women and the Right to Development*, 12 AUSTRAL. Y.B. INT'L L. 177 (1992); Charlotte Bunch, *Women's Rights as Human Rights: Toward a Re-Vision of Human Rights*, 12 HUM. RTS. Q. 486, 487 (1990) ("The specific experiences of women must be added to traditional approaches to human rights in order to make women more visible and to transform the concept and practice of human rights in our culture so that it takes better account of women's lives."); Karen

usefulness, especially for women in the United States.<sup>3</sup> This Article is part of an emerging reconstructive project.<sup>4</sup> It explains what American feminists would gain by giving international human rights an active role in domestic feminism.

Part I explains how human rights law enables those denied their rights to assert claims against their own States.<sup>5</sup> Part II relies on the recent work of feminist historian Gerda Lerner to describe how women have repeatedly reinvented "feminist consciousness" during the past 300 years of Western civilization<sup>6</sup> and how feminist consciousness has repeatedly waned and disappeared. It then explains how international human rights law supports that consciousness. Part III draws on Nietzsche's theory of the "eternal return"<sup>7</sup> to show how American feminists can claim international human rights law as their own. Part IV uses Adrienne Rich's powerful poem *Turning the Wheel*<sup>8</sup> to show how feminists can free themselves from Lerner's cycles of consciousness and oblivion by using international human rights law to focus on the real needs of American women.

---

Engle, *International Human Rights and Feminism: When Discourses Meet*, 13 MICH. J. INT'L L. 517 (1992); Rebecca J. Cook, *Women's International Human Rights: A Bibliography*, 24 N.Y.U. J. INT'L L. & POL'Y 857 (1992).

<sup>3</sup> The most notable exception is the outstanding body of work on the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), entered into force Sept. 3, 1981. G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46 (1980), reprinted in 19 I.L.M. 33 (1980). See, e.g., MALVINA HALBERSTAM & ELIZABETH F. DEFEIS, WOMEN'S LEGAL RIGHTS: INTERNATIONAL COVENANTS AN ALTERNATIVE TO ERA? (1987); Cook, *supra* note 2. But see Anne F. Bayefsky, *General Approaches to the Domestic Application of Women's International Human Rights Law*, in HUMAN RIGHTS OF WOMEN, *supra* note 2, at 353-54 (stating that CEDAW itself reflects the marginalization of women's rights).

For descriptions of the ways in which women on welfare are disregarded, or worse, see Martha Minow, *The Welfare of Single Mothers and Their Children*, 26 CONN. L. REV. 817 (1994); NANCY FRASER, UNRULY PRACTICES: POWER, DISCOURSE, AND GENDER IN CONTEMPORARY SOCIAL THEORY (1989); Martha L. Fineman, *Images of Mothers in Poverty Discourses*, 1991 DUKE L.J. 274. For a more recent assessment, see Arvonne S. Fraser, *The Women's Human Rights Treaty*, ASIL NEWSL. (Am. Soc'y of Int'l L., Wash., D.C.), Mar.-May 1995, at 19.

<sup>4</sup> See, e.g., Katherine M. Culliton, *Finding a Mechanism to Enforce Women's Right to State Protection from Domestic Violence in the Americas*, 34 HARV. INT'L L.J. 507 (1993); Carol S. Bruch, *The 1989 Inter-American Convention on Support Obligations*, 40 AM. J. COMP. L. 817 (1992); see also NADINE TAUB, INTERNATIONAL CONFERENCE ON POPULATION AND DEVELOPMENT (1994); Symposium, *International Protection of Reproductive Rights*, 44 AM. U. L. REV. 963 (1995); REBECCA J. COOK, THE ELIMINATION OF SEXUAL APARTHEID: PROSPECTS FOR THE FOURTH WORLD CONFERENCE ON WOMEN (1995).

<sup>5</sup> In international law, "State" is commonly used to refer to a "Nation." I follow that convention here, while using "state" with a lowercase "s" to refer to a constituent unit of the U.S. federal system.

<sup>6</sup> GERDA LERNER, THE CREATION OF FEMINIST CONSCIOUSNESS: FROM THE MIDDLE AGES TO EIGHTEEN-SEVENTY (1993).

<sup>7</sup> See *infra* text accompanying notes 68-86.

<sup>8</sup> ADRIENNE RICH, *Turning the Wheel*, in A WILD PATIENCE HAS TAKEN ME THIS FAR 59 (1982).

## I. INTERNATIONAL HUMAN RIGHTS LAW

Unlike the rest of international law, which is concerned with the behavior of States toward other States, human rights law focuses on the conduct of States toward their own people.<sup>9</sup> States endorsed the radical notion of universal human rights in horrified response to the human rights atrocities of World War II.<sup>10</sup> For the first time in history, States recognized a bottom line of human "dignity."<sup>11</sup> They conceded that their own people had fundamental rights beyond those established under their own domestic laws, rights that even States themselves could not legally abrogate.<sup>12</sup>

Drafted in 1945, the United Nations Charter expressed States' commitment to international human rights in the most general terms.<sup>13</sup> The Universal Declaration of Human Rights, drafted three years later, was

<sup>9</sup> See LOUIS HENKIN ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 595 (3d ed. 1993); Richard Bilder, *An Overview of International Human Rights Law*, in *GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE* 3 (Hurst Hannum ed., 1984).

<sup>10</sup> For a definitive history of the period, see RUTH B. RUSSELL, *A HISTORY OF THE UNITED NATIONS CHARTER: THE ROLE OF THE UNITED STATES 1940-45* (1958); see also JOHN B. HUMPHREY, *HUMAN RIGHTS & THE UNITED NATIONS: A GREAT ADVENTURE* (1984) (providing a first-hand account by a participant). See generally *TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 1946-49* (3d vol. 1951); *Judicial Decisions: International Military Tribunal (Nuremberg), Judgment and Sentences*, 41 AM. J. INT'L L. 172 (1947).

Human rights advocates find the Holocaust very important and its denial very disturbing. See DEBORAH E. LIPSTADT, *DENYING THE HOLOCAUST: THE GROWING ASSAULT ON TRUTH AND MEMORY* (1993); PIERRE VIDAL-NAQUET, *ASSASSINS OF MEMORY: ESSAYS ON THE DENIAL OF THE HOLOCAUST* (1992). For accounts of women's specific experiences, see *DIFFERENT VOICES: WOMEN AND THE HOLOCAUST* (Carol Rittner & John K. Roth eds., 1993) (providing an anthology of female experiences under the Nazis, including accounts by eyewitnesses and interpreters); R. RUTH LINDEN, *MAKING STORIES, MAKING SELVES: FEMINIST REFLECTIONS ON THE HOLOCAUST* (1993).

The idea of human rights as we know it may have originated substantially earlier than World War II. See Jan Herman Burgers, *The Road to San Francisco: The Revival of the Human Rights Idea in the Twentieth Century*, 14 HUM. RTS. Q. 447 (1992) (tracking declarations drafted before World War II). Burgers shows that the Charter was signed in San Francisco just a few days after the end of the War, before the extent of the Holocaust was known. While the Universal Declaration was signed a few years later, it, too, tracks these earlier documents. See *id.*

Human rights were also consistent with the triumph of democracy represented by the Allied victory. See generally WINSTON S. CHURCHILL, *THE SECOND WORLD WAR: THEIR FINEST HOUR* (1949).

<sup>11</sup> The phrase appears in the *Universal Declaration of Human Rights*, G.A. Res. 217, U.N. GAOR, 3d Sess., pt. 1, at 71, U.N. Doc. A/810 (1948) [hereinafter *Universal Declaration*].

<sup>12</sup> *Id.* (stating that "[i]t is essential . . . that human rights should be protected by the rule of law").

<sup>13</sup> U.N. CHARTER art. 55, ¶¶ 1, 3 (stating that "the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction"). "All Members pledge themselves to take joint and separate action in cooperation with the [United Nations] for the achievement of the purposes set forth in Article 55." *Id.* at art. 56.

more detailed but still aspirational.<sup>14</sup> It was not until the late 1960s that the U.N. divided the Universal Declaration into two more specific legal instruments, the International Covenant on Civil and Political Rights (the "Civil Covenant")<sup>15</sup> and the International Covenant on Economic, Social and Cultural Rights (the "Economic Covenant").<sup>16</sup> The Civil Covenant assures familiar "negative" rights, similar to those in the U.S. Constitution.<sup>17</sup> The Economic Covenant assures less familiar "positive" rights, which are not protected under the U.S. Constitution.<sup>18</sup> The Covenants

<sup>14</sup>Declarations in international law, like the Declaration of Independence in domestic law, are not considered legally binding, in contrast to treaties. The Universal Declaration is not, by its terms, a treaty instrument. U.N. Secretary-General, *1971 Survey of International Law*, at 85, U.N. Doc. A/CN.4/245 (1971).

<sup>15</sup>International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171. The United States ratified the Civil Covenant in 1992.

<sup>16</sup>International Covenant on Economic, Social and Cultural Rights, Jan. 3, 1976, 993 U.N.T.S. 3. As of May 1995, 131 States had ratified the Economic Covenant. Christina M. Cerna, *Human Rights Letter From Geneva*, HUM. RTS. INTEREST GROUP NEWSL. (Am. Soc'y for Int'l L., New York, N.Y.), Spr. 1995, at 11. The United States is the only major industrialized democracy that has not yet ratified the Economic Covenant. It is also the only State in the world that has ratified the Civil Covenant but not the Economic Covenant. Ambassador J. Kenneth Blackwell, *Howard Tolley's The U.N. Commission on Human Rights*, 14 HUM. RTS. Q. 485, 498 (1992) (book review). For a general discussion of U.S. ratification of human rights treaties, see NATALIE KAUFMAN, *HUMAN RIGHTS TREATIES AND THE SENATE: A HISTORY OF OPPOSITION* (1990).

<sup>17</sup>Negative rights generally prohibit the State from doing something, such as arbitrarily arresting or detaining people, or restricting freedom of religion. Such rights are outlined in the text of the Resolution of Ratification of the Civil Covenant. Mar. 24, 1992, 31 I.L.M. 648, 658.

<sup>18</sup>Positive rights generally refer to rights imposing an affirmative obligation on the State. Federal programs, such as Social Security, Medicaid, and Food Stamps, address positive rights, but they do not purport to meet a "minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights . . ." UNITED NATIONS CENTRE FOR HUMAN RIGHTS & UNITED NATIONS INSTITUTE FOR TRAINING AND RESEARCH, *MANUAL ON HUMAN RIGHTS REPORTING: UNDER SIX MAJOR INTERNATIONAL HUMAN RIGHTS INSTRUMENTS* at 45, U.N. Doc. HR/PUB/91/1 (1991) [hereinafter *MANUAL*]. See generally Lynn A. Baker, *The Myth of the American Welfare State*, 9 YALE L. & POL'Y REV. 110 (1991) (book review). See, e.g., Edmund P. Dandridge v. Linda Williams, 397 U.S. 471 (1970) (holding no right to welfare); William P. Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) (holding no right to sleep in public places); Patricia R. Harris v. Cora McRae, 448 U.S. 297 (1980) (holding no right to Medicaid funding for abortion); Donald Lindsey v. Dortha M. Normet, 405 U.S. 56, 73-74 (1972) (holding no right to housing).

As I have explained elsewhere, we have had a sometimes vigorous, if uneven, jurisprudence of economic rights on the domestic state level. See Barbara Stark, *Economic Rights in the United States and International Human Rights Law: Toward an Entirely New Strategy*, 44 HASTINGS L.J. 79, 91-103 (1992). Even before the Reagan and Bush administrations, states' provision of economic rights was undermined by the Social Security Act of 1935: "By dividing responsibility for welfare between the Federal and state governments, the Social Security Act . . . allowed both the states and Federal government to abdicate leadership and responsibility for administering welfare programs fairly." MARTHA F. DAVIS, *BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT 1960-1973*, at 9 (1993).

are intended to serve as binding law through which ratifying States enable their own people to assert rights against the States themselves.<sup>19</sup>

Although some scholars have criticized international human rights law for failing to protect human rights effectively, the international community has never provided the political support and other resources which might have enabled it to do so.<sup>20</sup> Instead, responsibility has remained with the States themselves. Legal commentators widely recognize that human rights are best assured through incorporation in a State's own domestic law.<sup>21</sup>

This does not mean that international human rights are worthless. On the contrary, the "human rights idea"<sup>22</sup> has swept across national and cultural boundaries; it has contributed to the downfall of powerful governments in South Africa and Eastern Europe.<sup>23</sup> Human rights do not prevail everywhere, of course. Although gross violations occur every day, the increasing exposure of these violations proves the growing influence of human rights. Despite its growing influence, however, the human rights movement remains the quintessential self-help movement. It identifies its subjects broadly and requires its subjects to step forward,

---

<sup>19</sup> Together, the Covenants and the Universal Declaration comprise the International Bill of Rights, which States recognize as the definitive law of international human rights. See *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, U.N. ESCOR, 43d Sess., Annex, at ii, U.N. Doc. E/CN.4/1987/17 (1987), reprinted in Symposium, *The Implementation of the International Covenant on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 122 (1987) [hereinafter *Limburg Principles*]; HENKIN, *supra* note 9, at 596.

Most scholars agree that two Covenants evolved from the Universal Declaration "because of the East-West split and a disagreement over the value of socioeconomic rights." David P. Forsythe, *Book Rev.*, 8 HUM. RTS. Q. 540, 540 (1986); accord HUMPHREY, *supra* note 10, at 144. Another scholar justified the bifurcation of rights into two Covenants, citing differences in "the nature of the legal obligations and the systems of supervision that could be imposed." D.J. HARRIS, *CASES AND MATERIALS ON INTERNATIONAL LAW* 666 (4th ed. 1991). While it is a mistake to overstate the distinction between positive and negative rights, States must use different approaches (recognition and enforcement) to secure the rights. The States accordingly agreed to recognize positive, economic rights (which would be achieved through "progressive realization") and to enforce the negative rights set out in the Civil Covenant. See *Limburg Principles, supra*.

<sup>20</sup> See LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS, VALUES AND FUNCTIONS* 265-67 (1990).

<sup>21</sup> DAVID P. FORSYTHE, *THE INTERNATIONALIZATION OF HUMAN RIGHTS* 119 (1991) ("Despite the development of a considerable corpus of international law on human rights and despite the growing proportion of time that public international organizations devote to human rights, nation-states remain the key to promoting and protecting human rights."); accord Bilder, *supra* note 9, at 15; Bayefsky, *supra* note 3, at 353.

<sup>22</sup> For a description of the global explosion after World War II of the "human rights idea," see LOUIS HENKIN, *THE AGE OF RIGHTS* 1 *passim* (1990).

<sup>23</sup> See *id.* at 23-24; Burgers, *supra* note 10; HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY (Louis Henkin & John Lawrence Hargrove eds., 1994) [hereinafter AGENDA]; THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL (Philip Alston ed., 1992) [hereinafter A CRITICAL APPRAISAL].

identify themselves, and claim human rights law as their own. As the civil rights movement did in this country in the 1950s, the subjects, themselves, must take the initiative to use international human rights to support claims within their own domestic legal systems.<sup>24</sup>

## II. FEMINIST JURISPRUDENCE

Domestic feminist jurisprudence, similarly, seeks to enable women to identify themselves as active subjects in American law.<sup>25</sup> Women's awareness that they have *not* been active subjects, that "they belong to a subordinate group, and that, as members . . . they have suffered wrongs"<sup>26</sup>

---

<sup>24</sup> The civil rights movement drew on international opinion in the 1950s. As Mary Dudziak has explained, the spreading human rights idea that nations could not abrogate the rights of their own people was an important catalyst:

At a time when the U.S. hoped to reshape the postwar world in its own image, the international attention given to racial segregation was troublesome . . . U.S. government officials realized that their ability to sell democracy to the Third World was seriously hampered by continuing racial injustice at home.

Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 62-63 (1966). The Third World was appalled by media coverage of civil rights struggles in the South. See Vicki Goldberg, *Remembering the Faces in the Civil Rights Struggle*, N.Y. TIMES, July 17, 1994, at H31. The crucial leverage provided by international human rights helped the domestic civil rights movement obtain desperately needed federal support. In fact, the Justice Department brief in *Oliver Brown v. Board of Education* explicitly described how segregation at home hurt the United States abroad. Brief for the United States as Amicus Curiae at 4-6, *Oliver Brown v. Board of Educ.*, 347 U.S. 483 (1954); see also Barbara Stark, *Urban Despair and Nietzsche's "Eternal Return": From the Municipal Rhetoric of Economic Justice to the International Law of Economic Rights*, 28 VAND. J. TRANSNAT'L L. 185 (1995) (discussing the utility of the Economic Covenant for urban African Americans).

In still too many situations, raising human rights claims is impossible or will cost those unnamed subjects their lives. Such individuals have no choice but to rely on support from the larger human rights community. Refugees, for example, have no State against which to assert a claim. See GIL LOESCHER, *BEYOND CHARITY: INTERNATIONAL COOPERATION AND THE GLOBAL REFUGEE CRISIS* (1993).

<sup>25</sup> See JOHN BERGER ET AL., *WAYS OF SEEING* (1977) (describing "the male gaze": How women as well as men see women from a male perspective thereby reinforcing the relentless pressures on women to look in mirrors and objectify themselves); IRIS M. YOUNG, *THROWING LIKE A GIRL AND OTHER ESSAYS IN FEMINIST PHILOSOPHY AND SOCIAL THEORY* 150, 153-56 (1990) ("explor[ing] the implications of the basic fact of the woman's social existence as the object of the gaze of another, which is a major source of her bodily self-reference."). See generally FEMINISTS THEORIZE THE POLITICAL xiii, xiv (Judith Butler & Joan W. Scott eds., 1992) ("There appears to be a belief that without an ontologically grounded feminist subject there can be no politics.").

<sup>26</sup> LERNER, *supra* note 6, at 274. Feminists have explained how social, psychological, political, economic, and linguistic constructs obscure women's gendered subordination so that women, themselves, are unaware of it. See, e.g., SUSAN M. OKIN, *JUSTICE, GENDER AND THE FAMILY* (1989) (positing that a "gendered" family is implicitly assumed by prevailing theories of justice); Martha Minow, *The Supreme Court, 1986*

is a necessary precondition for "feminist consciousness," according to Lerner.<sup>27</sup> Like the "human rights idea,"<sup>28</sup> this awareness is a starting point that enables women to construct active concepts of "self"<sup>29</sup> and thus to become "'subjects' capable of acting upon the world rather than [objects] upon whom others act."<sup>30</sup> Feminist jurisprudence both reflects this feminist consciousness and shows how the law impedes or supports it.<sup>31</sup>

---

*Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 13 n.15 (1987) (stating that assumptions about race and gender are embedded in the "very structure of our language"); JESSICA BENJAMIN, *THE BONDS OF LOVE: PSYCHOANALYSIS, FEMINISM AND THE PROBLEM OF DOMINATION* (1988) (providing a psychoanalytic account of gendered subordination, drawing on Habermas's concept of "intersubjectivity").

<sup>27</sup> LERNER, *supra* note 6, at 274.

<sup>28</sup> See HENKIN, *supra* note 22.

<sup>29</sup> See David M. Engel, *Origin Myths: Narratives of Authority, Resistance, Disability, and Law*, 27 LAW & SOC'Y REV. 785, 789–90 (1993) (asserting that narratives construct concepts of self and society in the context of law). For an application of this insight in a concrete legal context, see Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991).

Peter Brooks has compared the process of structuring experience into a coherent narrative, or story, with the psychoanalytic process. See generally PETER BROOKS, *READING FOR THE PLOT: DESIGN AND INVENTION IN NARRATIVE* (1984). The feminist community, accordingly, creates its subjects and is, at the same time, created by those subjects. Each member is "engaged in a process of earning-making and community-building of which . . . she is in part the subject." JAMES B. WHITE, *HERACLES' BOW: ESSAYS IN THE RHETORIC AND THE POETICS OF THE LAW* 39–40 (1985). See also CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* 36 (1989). ("[T]here are moments when I cannot clarify what I feel until I talk about it with certain special partner(s) . . . . The full definition of someone's identity thus usually involves not only his stand on moral and spiritual matters but also some reference to a defining community."). Cf. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 584 (1990) ("[W]e are not born with a 'self,' but rather are composed of a welter of partial, sometimes contradictory, or even antithetical 'selves.'").

<sup>30</sup> Charles Lawrence III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. CAL. L. REV. 2231, 2252 (1992). There has been considerable scholarly interest in the "problem of the legal subject" in recent years. See, e.g., Pierre Schlag, *The Problem of the Subject*, 69 TEX. L. REV. 1627 (1991); J.M. Balkin, *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence*, 103 YALE L.J. 105 (1993). By "subject" I do not mean he who creates and interprets the law, I mean she who must first create a voice with which to participate in that process. Professors Schlag and Balkin discuss legal subjects so ancient, so long-swathed in power, that they take their legitimacy for granted. (Although to their credit, Professors Balkin and Schlag do not.) The subjects I am talking about have been so far removed from power for so long that they view their legitimacy as a miracle. See generally Christine Overall, *Feminism, Ontology, and "Other Minds,"* in *FEMINIST PERSPECTIVES: PHILOSOPHICAL ESSAYS ON METHODS AND MORALS* 89 (Lorraine Code et al. eds., 1988).

<sup>31</sup> Examples of American feminist jurisprudence include: CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989); *FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER* (Katharine T. Bartlett & Rosanne Kennedy eds., 1991) [hereinafter *FEMINIST LEGAL THEORY*]; *AT THE BOUNDARIES OF LAW* (Martha A. Fineman & Nancy S. Thomadsen eds., 1991); *FEMINIST JURISPRUDENCE* (Patricia Smith ed., 1993). See also Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617, 619 (1990) (describing three "central commitments" of feminist critical theories); Joan Williams,



Lerner links the emergence of feminist consciousness to women's economic independence.<sup>32</sup> One of her central observations is that economic dependence on men historically has been most women's only alternative to poverty in the West. Repeatedly, small communities of women have identified themselves as subjects by becoming economically self-sufficient—and repeatedly reinventing feminism—only to be forgotten as the privileged few die off and the next generation of women struggles with economic dependence and poverty. As Lerner notes, "Fully developed feminist consciousness rests on the precondition that women must have an economic alternative for survival other than marriage and that there exist large groups of single, self-supporting women."<sup>33</sup> When there are large groups of single, self-supporting women, feminism is miraculously reinvented.

Feminist economists<sup>34</sup> and others<sup>35</sup> have linked women's economic dependence on men to women's nurturing work, the mostly unpaid cooking, cleaning, feeding, clothing, and general housekeeping work they do for the children and men with whom they live.<sup>36</sup> Women are the

---

*Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559, 1572 n.64 (1991) ("Our goal as feminists is to reformulate ideas of 'real' man- and womanhood in less stunted ways that do not track and reinforce current power inequities and stunted notions of human potential."); Patricia A. Cain, *Feminist Legal Scholarship*, 77 IOWA L. REV. 19, 20 (1991) ("Feminist legal scholarship seeks to analyze the law's effect on women as a class. Furthermore, the analysis is formed by a distinctly feminist point of view, a point of view that is shaped by an understanding of women's life experiences."). For a nuanced and insightful discussion of the difficulties presented by the use of "feminist" as a descriptive label, see Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 833-36 (1990).

For groundbreaking work by international feminists, see *supra* notes 2-4.

<sup>32</sup> LERNER, *supra* note 6, at 192 *passim*.

<sup>33</sup> LERNER, *supra* note 6, at 276; see also VICTOR R. FUCHS, WOMEN'S QUEST FOR ECONOMIC EQUALITY 11 (1988) (quoting Simone de Beauvoir as stating that "[i]t is through gainful employment . . . that woman has traversed most of the distance that separated her from the male; and nothing else can guarantee her liberty in practice"); ADRIENNE RICH, *Resisting Amnesia: History and Personal Life* (1983), in BLOOD, BREAD, AND POETRY 136, 147 (1986):

[W]omen have been writing women's history—and feminist history—for several centuries; it is *not* a new invention, but it has been ignored, buried, erased over and over. Each new generation of feminists has been forced to document the most elementary exposition of the oppression of women yet again and also to repeat mistakes made by sisters of an earlier era.

<sup>34</sup> See, e.g., MARILYN WARING, IF WOMEN COUNTED: A NEW FEMINIST ECONOMICS (1988); FUCHS, *supra* note 33.

<sup>35</sup> See, e.g., N. FRASER, *supra* note 3 (sociologist); Martha A. Fineman, *The Concept of the Natural Family and the Limits of American Family Law*, 4 INT'L REV. COMP. PUB. POL'Y 15 (1992) (family law scholar); Annamay T. Sheppard, *Paying for Women's Work: The Unfinished Business of the American Family Law Revolution*, 4 INT'L REV. COMP. PUB. POL'Y 1 (1992) (family law scholar).

<sup>36</sup> Of course, some women do not live with men and/or children and do not provide

major source of unremunerated nurturing work at every income level of American society.<sup>37</sup> Nurturing work is so deeply internalized that women do it unconsciously<sup>38</sup> and so deeply embedded in the culture that no one sees them doing it.<sup>39</sup> Nurturing work remains "women's work" that is not only unpaid but also unrecognized by the market. As a result, not only do women work an uncompensated "second shift,"<sup>40</sup> but also a market structure that refuses to recognize other demands on women's time limits women's access to better-paying, higher-status jobs.<sup>41</sup>

Nurturing work is not the only cause of women's poverty, but it is almost always a substantial factor.<sup>42</sup> The notoriously low wages for paid nurturing work, such as childcare or nursing, leave many of the women in these fields hovering dangerously near the poverty line.<sup>43</sup> Because of

---

nurturing services. But even these women are adversely affected by employers' perceptions of them as potential primary caretakers. See FUCHS, *supra* note 33, at 4 (showing "why even women who never marry and/or never have children are disadvantaged in the labor market by the same set of forces [that affect women who do]").

<sup>37</sup> See ARLIE HOCHSCHILD & ANNE MACHUNG, *THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* 8 (1989); FUCHS, *supra* note 33. I feel strongly that men can and should do "women's work," see Barbara Stark, *Divorce Law, Feminism and Psychoanalysis: In Dreams Begin Responsibilities*, 38 UCLA L. REV. 1483 (1991), but this is not my focus here. See also Karen Czapansky, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 UCLA L. REV. 1415, 1415 (1991).

<sup>38</sup> See Williams, *supra* note 31, at 1571; BENJAMIN, *supra* note 26.

<sup>39</sup> It may become briefly visible when there is a gap between cultural and personal expectations, as there may be between immigrants and natives or sometimes between generations. See generally AMY TAN, *THE KITCHEN GOD'S WIFE* (1991). The law contributes to its invisibility. The Gross National Product does not include women's work, for example. Maria Odum, *If the G.N.P. Counted Housework, Would Women Count for More?* N.Y. TIMES, Apr. 5, 1992, at E5. Nor does the United Nations System of National Accounts (UNSNA), the international system for measuring value. For a cogent and provocative analysis of the consequences of this omission, see WARING, *supra* note 34; see also MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* xxii (1989) ("[T]he concepts and categories with which we orient ourselves in the world are internalized in a process of *socialization*").

<sup>40</sup> HOCHSCHILD & MACHUNG, *supra* note 37.

<sup>41</sup> See FUCHS, *supra* note 33, at 4. These demands come not only from their families, but from their communities, where unpaid women "volunteers" run food banks, coordinate clothing drives, and play an increasingly vital role in the public schools. For a collection of essays providing an historical overview of women's volunteer work, see LADY BOUNTIFUL REVISITED: WOMEN, PHILANTHROPY, AND POWER 1-115 (Kathleen D. McCarthy ed., 1990) [hereinafter LADY BOUNTIFUL REVISITED]. At the same time, feminists have pointed out that volunteerism has been an important avenue to politics for many women. See Susan Ware, *American Women in the 1950s: Nonpartisan Politics and Women's Politicization*, in WOMEN, POLITICS, AND CHANGE 281, 292 (Louise A. Tilly & Patricia Gurin eds., 1990) ("Women came to politics through voluntarism and community activity more than through such traditional male routes as business and law."). See generally ALICE KESSLER-HARRIS, *A WOMAN'S WAGE: HISTORICAL MEANINGS AND SOCIAL CONSEQUENCES* (1990).

<sup>42</sup> See N. FRASER, *supra* note 3, at 152 *passim*; FUCHS, *supra* note 33, at 58 *passim*.

<sup>43</sup> For a chart showing occupations primarily held by women and their median weekly pay in comparison with men in the same occupation, see Peter T. Kilborn, *More Women Take Low-Wage Jobs Just So Their Families Can Get By*, N.Y. TIMES, Mar. 13, 1994, § 1, at 24.

their unpaid nurturing work at home, moreover, women earn substantially less than men, and their attachment to the labor force is weaker.<sup>44</sup> While the majority of women are not poor, the majority of the poor are women.<sup>45</sup> Even those who are not currently poor are far more likely to have been poor and to become poor than are men.<sup>46</sup> Women are the most economically vulnerable, if they become sick, and when they become old.<sup>47</sup>

These economic realities pose an ongoing threat both to women's economic independence and to their feminist consciousness (their ability to identify themselves as subjects). Lerner argues that because of the "intellectual emancipation of women . . . [,] patriarchal hegemony over [Western] culture has come to an end."<sup>48</sup> I hope that she is right, but feminist jurisprudence demonstrates the need for law to recognize, confirm, and secure this "emancipation."<sup>49</sup> In the context of nurturing work, such law would spread the costs of nurturing work throughout society so that women would not bear all the costs. If Lerner's reliance on "intellectual emancipation" is misplaced, such law is necessary and must be strenuously pursued to provide some protection for struggling feminist consciousness. If Lerner is correct,<sup>50</sup> its enactment should not be too difficult.

As I have explained elsewhere, law that spreads the cost of nurturing work is already recognized as part of international human rights law.<sup>51</sup> The Economic Covenant<sup>52</sup> recognizes the right of every human being to

<sup>44</sup>FUCHS, *supra* note 33, at 58-74. This remains true notwithstanding the increasing incidence of women holding multiple jobs: "37 million [women] are working for lower wages as clerks and cashiers, nurses' aides and bank tellers, secretaries and maids. Their wages serve as a cushion between welfare and getting by." Kilborn, *supra* note 43.

<sup>45</sup>See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *POVERTY IN THE UNITED STATES*: 1992, at 60-185 T.5 (1992); N. FRASER, *supra* note 3, at 144-45; Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986).

<sup>46</sup>As Professor MacKinnon has pointed out, women at virtually every income level have the job of keeping their partners happy. "What distinguished the bourgeois woman from her servant is that the latter is paid (if barely) while the former is kept (if contingently)." MACKINNON, *supra* note 31, at 9.

<sup>47</sup>According to the U.S. Department of Health and Human Services, the median income of widowed women over 60 is \$6,300, compared to \$26,202 for retired couples in their late 60s. Doris Wild Helmering, *Economics of Retiring: He Says Yes, She Says No*, KNOXVILLE NEWS-SENTINEL, May 27, 1995, at B1.

<sup>48</sup>LERNER, *supra* note 6, at 283.

<sup>49</sup>See Ann Scales, *The Emergence of Feminist Jurisprudence: An Essay*, in FEMINIST JURISPRUDENCE, *supra* note 31, at 94-95.

<sup>50</sup>While Lerner's argument on this point is persuasive, feminist jurisprudence itself is an essential element of the "intellectual emancipation" on which she relies. The need for a rigorous focus on the law's impact on gender, moreover, has never been more urgent. See *infra* text accompanying notes 115-118 (cutbacks in public spending), 146-148 ("engendering" of economic rights).

<sup>51</sup>Barbara Stark, *Nurturing Rights: An Essay on Women, Peace, and International Human Rights*, 13 MICH. J. INT'L L. 144 (1991).

<sup>52</sup>See *supra* note 16.

be nurtured—to be housed, fed, clothed, healed, and educated. These “nurturing rights” are inverted descriptions of women’s work—what American women actually do.<sup>53</sup> I am not suggesting complete congruence, a perfect fit. Women obviously do not, and could not, assume sole responsibility for assuring all of the rights set forth in the Economic Covenant. The nurturing work actually performed by individual women varies as a function of age, class, family status, and other factors.<sup>54</sup> In addition, not all women’s work necessarily promotes the objectives of the Economic Covenant. Much that does, moreover, is consistently ignored under international human rights law.<sup>55</sup>

Nevertheless, the overlap where women’s work satisfies obligations imposed by the Economic Covenant is substantial. By requiring States to “take steps to progressively realize” nurturing rights, the Economic Covenant shifts responsibility from women to the State for some nurturing work.<sup>56</sup>

---

<sup>53</sup> ADRIENNE RICH, *OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION* xviii (10th anniversary ed. 1986) (“Most of the labor in the world is done by women: that is a fact. Across the world, women bear and care for children, raise, process, and market food, work in factories and sweatshops, clean the home and the office building, engage in barter, create and invent group survival.”). For a global overview, see *WOMEN WORKERS AND GLOBAL RESTRUCTURING* (Kathryn Ward ed., 1990). See also Stark, *supra* note 51 (describing the relationship between these nurturing rights and peace).

The rights set out in the Economic Covenant correspond to the duties imposed on and assumed by women. See Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 *YALE L.J.* 710 (1917) (explaining how rights correspond to duties). “Hohfeld demonstrated that any supposed connection between liberties and duties . . . is ultimately a question of justice and policy . . .” Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence From Bentham to Hohfeld*, 1982 *Wis. L. Rev.* 975, 1053 (1982).

<sup>54</sup> For a scholarly collection of papers analyzing household resource distribution issues from the perspectives of anthropology, economics, and psychology, see *INTRA-HOUSEHOLD RESOURCE ALLOCATION: ISSUES AND METHODS FOR DEVELOPMENT AND PLANNING* (Beatrice L. Rogers & Nina P. Schlossman eds., 1990).

<sup>55</sup> Waring, *supra* note 2, at 182 (“[I]t seems to me that one of the most glaring tools of continual enslavement of more than half of the human species finds its focus in the inadequate international patriarchal concept of ‘work.’”).

<sup>56</sup> For example, one State may begin to meet its obligation by allocating blocks of housing to State employees. *Report on the Sixth Session*, Committee on Economic, Social & Cultural Rights, U.N. ESCOR, 6th Sess., Supp. No. 3, at 21, U.N. Doc. E/1992/23, E/C.12/1991/4 (1992) (reporting on steps taken by Afghanistan). Another State may comply by providing snacks for school children. *Id.* at 29 (reporting on steps taken by Panama).

Parties to the Economic Covenant already include benefits to women and families under article 10 in their reports. See, e.g., *Report on the Second Session*, Committee on Economic, Social & Cultural Rights, U.N. ESCOR, 2d Sess., Supp. No. 4, at 26, U.N. Doc. E/1988/14, E/C.12/1988/4 (1988) (referring to high Swedish outlays in social and health sectors). Similarly, States routinely take into account activities of private citizens providing for their own needs. See *id.* at 17 (noting construction of residences by private citizens in Mongolia); *id.* at 21 (noting visits by priests to the sick in Romania). States also regularly report State support of such private efforts.

By linking nurturing rights to legal entitlements, and explicitly requiring States to "recognize" them, the Economic Covenant also makes women's work more visible, less women's personal concern and more a subject for public debate.<sup>57</sup> Ratification of the Economic Covenant, even as a non-self-executing treaty,<sup>58</sup> would trigger and support a national discussion of women's work.

Even as feminists learn more about their predecessors,<sup>59</sup> their ability to build on their work is limited "as long as the vast majority of women

<sup>57</sup> This, in turn, makes such work a more likely subject for future claims and for further State support. It may also, however, *increase* women's work by requiring them to deal with State bureaucracy. See, e.g., Fineman, *supra* note 3. See generally Waring, *supra* note 2, at 187 (arguing that "non-definition in international law is clarified by the use of the 'norm' that is, the insertion of the word 'patriarchal' before the word 'family'"); Shelley Wright, *Economic Rights and Social Justice: A Feminist Analysis of Some International Human Rights Conventions*, 12 AUSTL. Y.B. INT'L L. 241, 263 (1992) (arguing that the protection of the family under the analogous provision of the Universal Declaration is not synonymous with the protection of individual women and children within the family; rather, such protection is presumed to be unnecessary).

Moreover, it does not answer the question posed by Professors Dahlberg and Taub: Why are women doing this work? Anita Dahlberg & Nadine Taub, *Notions of the Family in Recent Swedish Law*, 4 INT'L REV. COMP. PUB. POL'Y 133, 147 (1992). But it could, over time, help alter this pattern. "This is part of the feminist claim that the 'personal is political' . . . [W]hat was formerly borne as one's private misery is now understood . . . as caused and transformable by a pattern of human decisions and practices." JANE FLAX, *DISPUTED SUBJECTS: ESSAYS ON PSYCHOANALYSIS, POLITICS AND PHILOSOPHY* 111, 126 (1993).

<sup>58</sup> On June 24, 1994, the Senate ratified the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). International Convention on the Elimination of All Forms of Racial Discrimination, Jan. 4, 1969, 660 U.N.T.S. 195. Both the ICERD and the Civil Covenant, *see supra* note 15, have been ratified as "non-self-executing." This means that while they are technically law, and their violations are violations of international law, domestic legislation is required to implement them domestically. See Alfred de Zayas, *The Potential for the United States Ratification and Enforcement of the Covenants on Civil and Political Rights and Economic, Social and Cultural Rights: The Potential for the United States Joining the Covenant Family*, 20 GA. J. INT'L & COMP. L. 299, 304 (1990) ("[I]t is intrinsic in a covenant that is to be implemented progressively that it is *not* self-executing."). Under U.S. constitutional practice, "treaty-making officials, as a unilateral matter, will control the determination of 'self-executing' in the domestic legal system." John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT'L L. 310, 329 (1992). See generally Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760 (1988) (examining the history of the judicial distinction between self-executing and non-self-executing treaties and analyzing its continuing implications).

American courts have held human rights provisions of the U.N. Charter to be non-self-executing. See, e.g., *Lois Frolova v. U.S.S.R.*, 761 F.2d 370 (7th Cir. 1985); *Sei Fujii v. State*, 242 P.2d 617 (Cal. 1952). But see Bert B. Lockwood, Jr., *The United Nations Charter and United States Civil Rights Litigation: 1946-1955*, 69 IOWA L. REV. 901 (1984) (explaining that other state courts have found circumstances under which provisions were self-executing). See generally Charles W. Stotter, *Self-Executing Treaties and the Human Rights Provisions of the United Nations Charter: A Separation of Powers Problem*, 25 BUFF. L. REV. 773, 773 (1976).

As Professor Henkin has recently observed, human rights treaties, in general, can and should be considered self-executing. Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341 (1995).

<sup>59</sup> LERNER, *supra* note 6. For an account of the earliest feminist politics of women's

[depend] for their economic existence and that of their children on the support of a man."<sup>60</sup> Instead, they remain stuck in recurring cycles of self-sufficiency and feminist consciousness, poverty and oblivion, no more aware of the feminism that came before them "than an ant crawling round the rim of a crystal chandelier knows that it will return to where it began."<sup>61</sup> Feminist consciousness only emerges when enough women become economically independent of men and only survives when enough women remain economically independent of men.<sup>62</sup> Without State support for economic rights, nurturing work remains unpaid women's work, women remain economically dependent on men, and feminist consciousness again recedes.<sup>63</sup>

### III. NIETZSCHE'S "ETERNAL RETURN"

#### A. *Reclaiming the Past*

What if, as suggested above,<sup>64</sup> Lerner is right about the recurring cycles of feminist consciousness but wrong about the impact of intellectual emancipation?<sup>65</sup> What if women grow tired of banging their heads against the "glass ceiling" and trying to lift themselves up from the "sticky floor?"<sup>66</sup> What if single motherhood becomes even more

---

work, see Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 YALE L.J. 1073 (1994).

<sup>60</sup> LERNER, *supra* note 6, at 276.

<sup>61</sup> ALAN LIGHTMAN, EINSTEIN'S DREAMS 9-10 (1992).

<sup>62</sup> LERNER, *supra* note 6.

<sup>63</sup> I am not suggesting that feminist consciousness is *now* receding, although others have. See, e.g., RENE DENFELD, *THE NEW VICTORIANS: A YOUNG WOMAN'S CHALLENGE TO THE OLD FEMINIST ORDER* (1995) (stating that younger women are repelled by feminist "stridency" and "intolerance"). There is a small community of economically self-sufficient women, *see supra* text accompanying note 33, including women lawyers, but that community is still small. Whether it will survive the growing backlash, including the attacks against affirmative action, is an open question. *See infra* text accompanying notes 144-146.

<sup>64</sup> *See supra* text accompanying notes 32-33.

<sup>65</sup> Lerner's notion of transcending these recurring cycles through intellectual emancipation, resonates with Nietzschean "self-overcoming." *See infra* text accompanying notes 85-86. Lerner, however, refers to the group while Nietzschean overcoming refers to the individual—and only a few, rare, individuals. *See infra* note 77.

<sup>66</sup> The "sticky floor" refers to *all* limits on women's mobility past low-level management. The "glass ceiling" refers to limits on women's mobility past an invisible, but solid, upper limit. *See* Felice Schwartz, *Management Women and the New Facts of Life*, 67 HARV. BUS. REV. 65 (1989); JILL ABRAMSON & BARBARA FRANKLIN, *WHERE ARE THEY NOW?: THE STORY OF THE WOMEN OF HARVARD LAW* 1974 (1986); Tracy Anbinder Baron, *Keeping Women Out of the Executive Suite: The Courts' Failure to Apply Title VII Scrutiny to Upper-Level Jobs*, 143 U. PA. L. REV. 267 (1994). *See generally* Paulette Thomas, *Success at a Huge Personal Cost*, WALL ST. J., July 26, 1995, at B1.

Affirmative action in connection with racial classifications has recently been held to a strict scrutiny standard. *Adarand Constructors Inc. v. Federico Pena*, 115 S. Ct. 2097

difficult?<sup>67</sup> What if women retreat, voluntarily or involuntarily, to economic dependence on men and feminist consciousness again recedes?

Friedrich Nietzsche<sup>68</sup> describes similar recurring cycles in his doctrine of the "eternal return".<sup>69</sup>

[T]he knot of causes in which I am entangled recurs and will create me again. I myself belong to the causes of the eternal recurrence. I come again, with this sun, with this earth, with this eagle, with this serpent—not to a new life or a better life or a similar life: I come back eternally to this same, selfsame life, in what is greatest as in what is smallest, to teach again the eternal recurrence of all things . . . .<sup>70</sup>

(1995). The extension of this standard from African American women to all women is hardly far-fetched.

<sup>67</sup> See, e.g., MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* (1991); LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION* 36 *passim* (1985).

<sup>68</sup> Professor Nussbaum calls Nietzsche a postmodern hero. Martha C. Nussbaum, *Valuing Values: A Case for Reasoned Commitment*, 6 *YALE J.L. & HUMAN.* 197 (1994). While Nietzsche may be a peculiar authority for feminists and human rights advocates, using Nietzsche in this context may be seen as part of the deconstructionist project of liberating a text from its author. See Balkin, *supra* note 1, at 772–77. Nietzsche has been relied on, moreover, by feminists and others who recognize him as the consummate outsider. See, e.g., DRUCILLA CORNELL, *BEYOND ACCOMMODATION: ETHICAL FEMINISM, DECONSTRUCTION AND THE LAW* (1991). But see SEYLA BENHABIB, *SITUATING THE SELF: GENDER, COMMUNITY AND POSTMODERNISM IN CONTEMPORARY ETHICS* 214–15 (1992) ("Feminist appropriations of Nietzsche on [the question of the Death of the Subject] can only be incoherent."). Relying on Nietzsche, finally, illustrates the possibility of reclaiming the past by reconceptualizing it. Even Nietzsche's work can be appropriated. He, in fact, appropriated the work of others. See *infra* note 70. I appropriated Nietzsche in this context in an earlier Article, see Stark, *supra* note 24, at 207–12, in which I used the eternal return to support a different, but not inconsistent, proposition.

In any case, I am unrepentant. As Hilary Charlesworth responds to criticism that feminists use elements from incompatible theories: "We remain unrepentant. The feminist project in law is less a series of discrete interpretations than, in Ngarie Naffine's words, 'a sort of archeological dig.' Different techniques are appropriate at different levels of the excavation." Hilary Charlesworth, *Alienating Oscar? Feminist Analysis of International Law*, 25 *STUD. IN TRANSNAT'L LEGAL POL'Y* 1, 3 (1994).

<sup>69</sup> The eternal return (also called the "eternal recurrence") of the same events is a key concept in Nietzsche's work. Walter Kaufmann, *Preface* to *FRIEDRICH NIETZSCHE, THUS SPOKE ZARATHUSTRA: A BOOK FOR ALL AND NONE* (1892), reprinted in *THE PORTABLE NIETZSCHE*, at 103, 111 (Walter Kaufmann ed., 1954) (citing Nietzsche's characterization in *ECCE HOMO* of the eternal recurrence as "the basic conception of the work").

<sup>70</sup> *FRIEDRICH NIETZSCHE, THUS SPOKE ZARATHUSTRA: A BOOK FOR ALL AND NONE*, reprinted in *THE PORTABLE NIETZSCHE*, *supra* note 69, at 103, 333. Nietzsche chose Zarathustra as the literary *persona* to articulate his philosophy because the historical Zarathustra (Zoroaster) was the first to argue that moral values were objective features of the universal. Nietzsche thought Zoroaster himself should rectify what Nietzsche considered his "mistake." ARTHUR C. DANTO, *NIETZSCHE AS PHILOSOPHER* 196 (1965). Cf. LIGHTMAN, *supra* note 61, at 8 (1993) ("Suppose time is a circle, bending back on itself . . . . For the most part, people do not know they will live their lives over:").

Nietzsche scholars and other philosophers have focused on the psychological significance of the eternal return, although their interpretations vary.<sup>71</sup> According to Arthur Danto, Nietzsche felt "this to have been his most important teaching, and a terrifying idea . . .".<sup>72</sup> It represented Nietzsche's rejection of the idea of progressive history, of humankind learning from the preceding generation, of humankind advancing.<sup>73</sup> Hannah Arendt suggests that Nietzsche's point was that the world view of "one day follow[ing] upon the next, season succeed[ing] season by repeating itself in eternal sameness [is] much 'truer' to reality as we know it than the world view of the philosophers."<sup>74</sup> Walter Kaufmann explains that although the eternal recurrence reflected Nietzsche's basic misconception that science had discovered that time repeated itself, it nevertheless had crucial "personal meaning" for him.<sup>75</sup>

To accept the eternal return as a valid description of reality is to abandon hope,<sup>76</sup> to accept unbearable despair.<sup>77</sup> What is the point of acquiring feminist consciousness, or of any other endeavor, if all lead eternally to this *same* self, *same* life? The eternal return is a doctrine of nihilism,<sup>78</sup> a psychological nightmare that Nietzsche captures in a repul-

<sup>71</sup> Nietzsche prudently refrained from trying to prove the eternal return as a formal philosophical proposition. Kaufmann, *supra* note 69, at 111; accord ALEXANDER NEHAMAS, *NIETZSCHE: LIFE AS LITERATURE* 142 (1985) (explaining that the "psychological use to which [Nietzsche] so crucially puts the eternal recurrence presupposes only a weaker view"). Cf. Rorty, *infra* note 85.

<sup>72</sup> DANTO, *supra* note 70, at 203.

<sup>73</sup> *Id.* at 12. See also WILL DURANT, *THE STORY OF PHILOSOPHY* 454 (1926) ("The possible combinations of reality are limited, and time is endless; some day, inevitably, life and matter will fall into just such a form as they once had, and out of that fatal repetition all history must unwind its devious course again.").

<sup>74</sup> HANNAH ARENDT, *THE LIFE OF THE MIND: WILLING* 166 (1971). It is certainly truer to Western women's historical experience of reality. See, e.g., JOSEPHINE DONOVAN, *FEMINIST THEORY: THE INTELLECTUAL TRADITIONS OF AMERICAN FEMINISM* 174 (1985) ("[T]he home-bound woman experiences time as stasis—either as a perpetual repetition or 'eternal return' . . ."). See generally KATHRYN ALLEN RABUZZI, *THE SACRED AND THE FEMININE: TOWARD A THEOLOGY OF HOUSEWORK* 129 (1982) (describing housework in positive opposition to male questor model).

<sup>75</sup> Kaufmann, *supra* note 69, at 111; accord DANTO, *supra* note 70, at 203.

<sup>76</sup> Cf. FLAX, *supra* note 57, at xiii-xiv ("Full disenchantment would not be nearly as dangerous or as paralyzing as is the inability of the modern unhappy consciousness to abandon its hope. The hope is that the monsters and gods it now recognizes as its own flawed and powerless creations will finally and nevertheless carry out the projects assigned to them.").

<sup>77</sup> See TRACY B. STRONG, *FRIEDRICH NIETZSCHE AND THE POLITICS OF TRANSFIGURATION* 365 (1975).

<sup>78</sup> See Brian Leiter, *Intellectual Voyeurism in Legal Scholarship*, 4 YALE J.L. & HUMAN. 79, 89 n.33 (1992) ("Nietzsche is clearly a critic of one sort of nihilism—the inability to believe or value that comes in the wake of the collapse of metaphysical and transcendent foundations. Yet Nietzsche is a 'nihilist' only if one regards (and Nietzsche does not) the rejection of transcendent foundations as nihilistic."). Cf. CORNEL WEST, *RACE MATTERS* 22-23 (1994) ("[The nihilism that increasingly pervades black communities] is to be understood here not as a philosophic doctrine that there are no rational grounds for legitimate standards for authority; it is, far more, the lived experience of



sive image: "A young shepherd I saw, writhing, gagging, in spasms, his face distorted, and a heavy black snake hung out of his mouth. Had I ever seen so much nausea and pale dread on one face?"<sup>79</sup>

The shepherd cannot resist this nausea, and no one save him from it.<sup>80</sup> He can either succumb to despair or literally "bite" into it. "The shepherd . . . bit with a good bite. Far away he spewed the head of the snake—and he jumped up. No longer shepherd, no longer human—one changed, radiant, *laughing!*"<sup>81</sup> Nihilism is overcome not by some external power, but by affirming that meaning is a human construct, and that the only meaning there is is that which we create. As a corollary, only by accepting the nihilism of the eternal return can we recognize the critical importance of "what we eternally do, the joy in overcoming . . . the meaning we give to our lives."<sup>82</sup> As Zarathustra<sup>83</sup> explains:

I taught them to work on the future and to redeem with their creation all that *has been*. To redeem what is past in man and to re-create all "it was" until the will says, "Thus I willed it! Thus I shall will it!"—this I called redemption and this alone I taught them to call redemption.<sup>84</sup>

According to Professor Richard Rorty, Nietzsche thinks that a person can free herself from history, from someone else's version of the past, only by creating her own.<sup>85</sup> Nietzschean "self-overcoming" is the process

---

*coping with a life of horrifying meaninglessness, hopelessness, and (most important) lovelessness."*)

<sup>79</sup> NIETZSCHE, *supra* note 70, at 271. As Kaufmann observes, "The theme of Zarathustra's nausea is developed *ad nauseam* in later chapters." Kaufmann, *Editor's Notes on the Second Part of NIETZSCHE*, *supra* note 70, at 191-92.

<sup>80</sup> Not even Zarathustra can save him. "My hand tore at the snake and tore it in vain; it did not tear the snake out of his throat." NIETZSCHE, *supra* note 70, at 271. See also FLAX, *supra* note 57.

<sup>81</sup> NIETZSCHE, *supra* note 70, at 272. Zarathustra urges, "Then it cried out of me: 'Bite! Bite its head off! Bite!' Thus it cried out of me—my dread, my hatred, my nausea, my pity, all that is good and wicked in me cried out of me with a single cry." *Id.* at 271. According to Kaufmann, "Zarathustra's first account of the eternal recurrence . . . is followed by a proto-surrealistic vision of a triumph over nausea." Kaufmann, *Editor's Notes on the Third Part of NIETZSCHE*, *supra* note 70, at 260.

<sup>82</sup> DANTO, *supra* note 70, at 212. See generally Karl Jaspers, *Man as His Own Creator*, in NIETZSCHE: A COLLECTION OF CRITICAL ESSAYS 148 (Robert C. Solomon ed., 1973) [hereinafter CRITICAL ESSAYS] ("When one gives up the moral universe that makes its demands with logically inflexible unconditionality, no return is possible . . . . The loss of the resistance afforded by immutable moral laws may as easily be followed by abandonment to caprice and accident as by emergence . . . .").

<sup>83</sup> See *supra* note 70.

<sup>84</sup> NIETZSCHE, *supra* note 70, at 310.

<sup>85</sup> "It is the difference between thinking of redemption as making contact with something larger and more enduring than oneself and redemption as Nietzsche describes it: 'recreating all "it was" into a "thus I willed it."'" RICHARD RORTY, CONTINGENCY, IRONY AND SOLIDARITY 29 (1990). As Kathleen Higgins states:

through which she accepts responsibility for her own life, rather than blaming history or God, and claims the past for her own use:

[T]o see one's life, or the life of one's community, as a dramatic narrative is to see it as a process of Nietzschean self-overcoming. The paradigm of such a narrative is the life of the genius who can say of the relevant portion of the past, "Thus I willed it," because she has found a way to describe that past which the past never knew, and thereby found a self to be which her precursors never knew was possible.<sup>86</sup>

As Professor Rorty recognizes, self-overcoming<sup>87</sup> necessarily takes place in a larger social context, a community.<sup>88</sup> Rorty's "genius" philosopher or poet can take such community for granted; it is institutional-

---

Nietzsche's skeptical analysis of the modern quest for historical knowledge is itself directed toward immediate experience. The danger he observes in his contemporaries' obsessive concern with history is a danger to their subjective condition. Excessive preoccupation with history, he argues, can damage a person's sense of self and of immediate connection with a larger world.

Kathleen Higgins, *Nietzsche and Postmodern Subjectivity*, in NIETZSCHE AS POSTMODERNIST: ESSAYS PRO AND CONTRA 187, 194 (Clayton Koelb ed., 1990) [hereinafter NIETZSCHE AS POSTMODERNIST].

<sup>86</sup>RORTY, *supra* note 85, at 29. Charles Taylor finds an analogous paradigm in Proust:

In the scene in the Guermantes' library, the narrator recovers the full meaning of his past and thus restores the time which was "lost" . . . the formerly irretrievable past is recovered in its unity with the life yet to live, and all the "wasted" time now has a meaning, as the time for preparation for the work of the writer who gave shape to this unity.

TAYLOR, *supra* note 29, at 51. See also Jaspers, *supra* note 82, at 131 ("Man's 'freedom' means that . . . he is responsible for his own transformation."). See also Charles E. Scott, *The Mask of Nietzsche's Self-overcoming*, in NIETZSCHE AS POSTMODERNIST, *supra* note 85, at 217 ("The first step in understanding the mask of self-overcoming is to follow not the concept of self-overcoming but the self-overcoming process in Nietzsche's writing.").

<sup>87</sup>Such self-overcoming, or self-invention, is familiar to most Americans. Indeed, we expect our politicians to reinvent themselves on a regular basis. See Michael Wines, *The Nation: Cramming, So Many Minds to be Changed, So Little Time*, N.Y. TIMES, Sept. 11, 1994, § 4, at 1. ("Nobody disputes that Mr. Clinton, already adept at the quick change, needs to reinvent himself, not just his government."). It happens all the time in domestic politics and law. See, e.g., Michael Ariens, *A Thrice-Told Tale, or Felix the Cat*, 107 HARV. L. REV. 620, 624-25 (1994) (describing "Justice Frankfurter's revisionist history of Justice Roberts's actions in 1937" and explaining why "[t]he constitutional crisis of 1937 remains important less because of what really happened and more because the subsequent explanations and analyses of the crisis tell us much about our desire to shape the past for use in the present"). We only notice it when it is clumsily done and the strings show, as they did, for example, when President Bush claimed, "We won the Cold War." But see PETER SCHWEIZER, VICTORY: THE REAGAN ADMINISTRATION'S SECRET STRATEGY THAT HASTENED THE COLLAPSE OF THE SOVIET UNION (1994).

<sup>88</sup>RORTY, *supra* note 85, at 29.

ized.<sup>89</sup> But for the marginalized, those who can create and sustain a self only by creating and sustaining a community, self-overcoming is necessarily a community activity. As bell hooks has observed, "We have known, and continue to know, the rewards of struggling together to change society so that we can live in a world that affirms the dignity and presence of . . . womanhood."<sup>90</sup> International human rights law links such communities of resistance together and moves them "outward, into the world."<sup>91</sup>

### B. Reconstructing Contexts

As Nietzsche reminds us, context is a human construct. By asserting themselves as active subjects,<sup>92</sup> American feminists can reconstruct the contexts that have constructed women. In Professor Rorty's words, they can find "a way to describe that past which the past never knew" and find selves "to be which [their] precursors never knew [were] possible."<sup>93</sup> By reconstructing the context in which domestic feminism is situated, using international human rights, American feminists can draw on the hard work already done and the blackletter human rights law already drafted. By reconstructing the context in which international

<sup>89</sup> Cf. *supra* note 30 (asserting that the "legal subjects" described by Professors Schlag and Balkin similarly can take "community" for granted). See also Joan Williams, *Rorty, Radicalism and Romanticism: The Politics of the Gaze*, 1992 WIS. L. REV. 131, 146-48 (1992) (describing Rorty's infatuation with the "strong poet").

<sup>90</sup> BELL HOOKS, *SISTERS OF THE YAM: BLACK WOMEN AND SELF-RECOVERY* 6 (1993).

<sup>91</sup> It does so, in part, by providing them with a common language, set out in legal instruments ratified by the overwhelming majority of States. Thus, Haitian refugees, Mexican Indians, and inner-city African Americans can describe their oppression in terms that the rest of the world can understand. See Stark, *supra* note 24; Connie de la Vega, *The Right to Equal Education: Merely a Guiding Principle or Customary International Legal Right?*, 11 HARV. BLACKLETTER L.J. 37 (1994). It also makes otherwise invisible oppression visible domestically, as shown in Dudziak, *supra* note 24; accord FORSYTHE, *supra* note 21, at 122. Finally, international human rights law provides enforcement mechanisms; i.e., courts, committees, and international organizations, including NGOs, although the efficacy of these mechanisms has been seriously questioned. See, e.g., HENKIN, *supra* note 22; AGENDA, *supra* note 23. See generally ADRIENNE RICH, *Going There and Being Here* (1983), in BLOOD, BREAD AND POETRY, *supra* note 33, at 156 ("It has seemed important to me that as a movement we gain some conscious perspective on [North American, Euro-American chauvinism], allowing us to see ourselves as a self-respecting and self-critical part of one great movement for freedom among others, all interdependent").

<sup>92</sup> See *supra* note 23.

<sup>93</sup> See *supra* note 85. By "reconstructing context," I mean reconceptualizing the context in which analysis is rooted and acting on the resulting new analysis. Like feminist consciousness and the human rights idea, see *supra* notes 22-23, both of which these reconstructed contexts incorporate, reconceptualization is a starting point. In part IV, I suggest that feminists can act on the resulting analysis by pressing for ratification of the Economic Covenant.

human rights law is situated, using domestic feminist jurisprudence, American feminists can explain why this blackletter law is so crucial to American women and why the domestic human rights community cannot be depended on to make it a priority.

## 1. Domestic Feminism in the Context of International Human Rights

Feminists and others have already noted the links between the "re-birth" of feminism in the 1960s<sup>94</sup> and the spreading human rights idea.<sup>95</sup> Feminists learned about politics from the civil rights and peace movements.<sup>96</sup> These drew on the independence movements of the formerly colonial Third World States,<sup>97</sup> which, in turn, were part of a larger human rights movement challenging the historical privileging of State values over "human" values.<sup>98</sup>

By situating domestic feminism in the context of international human rights, feminists can identify themselves as subjects of international human rights law, and claim it as their own.<sup>99</sup> Even as feminists struggled in the 1960s to articulate women's needs within the framework of male jurisprudence,<sup>100</sup> international human rights law was considering human dignity from new perspectives and formulating needs in new terms.<sup>101</sup> Like American women who nurture and the feminists who

<sup>94</sup>The phrase "rebirth of feminism" has been independently used by several commentators. See, e.g., Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520, 522 (1992); Carrie Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education or "The Fem-Crits Go to Law School,"* 38 J. LEGAL EDUC. 61, 62 (1988). For a cogent social history, see *id.* at 62-66. This rebirth, in turn, gave rise to a multiplicity of communities. *Id.* at 64.

<sup>95</sup>HENKIN, *supra* note 22; SARA EVANS, *PERSONAL POLITICS: THE ROOTS OF WOMEN'S LIBERATION IN THE CIVIL RIGHTS MOVEMENT AND THE NEW LEFT* (1979).

<sup>96</sup>For an incisive and comprehensive account, see EVANS, *supra* note 95.

<sup>97</sup>Malcolm X, for example, described how South Africa and Angola "were taken to the U.N. for [violating human rights]" and said that "the entire [domestic] civil rights struggle" should be taken there as well. *Morning Edition: U.N. Will Scrutinize USA's Civil Rights Performance* (NPR radio broadcast, Sept. 9, 1994) (Transcript #1430-11 available in LEXIS). See also Etheridge Knight, *Ilu, the Talking Drum*, in 2 THE HEATH ANTHOLOGY OF AMERICAN LITERATURE 2428 (1990). For a discussion of the Justice Department's decision to file a brief in *Oliver Brown v. Board of Education*, see Dudziak, *supra* note 24, at 62.

<sup>98</sup>For an analysis of the radical change represented by the human rights movement and its "commitment to human values rather than to State values, even when the two conflicted," see LOUIS HENKIN, *supra* note 20, 215-26 (1989). See also Barbara Stark, *The "Other" Half of the International Bill of Rights as a Postmodern Feminist Text*, 25 STUD. IN TRANSNAT'L LEGAL POL'Y 19 (1993) (arguing that both halves of the International Bill of Rights invert the historical hierarchy privileging State values).

<sup>99</sup>See *supra* text accompanying notes 18-20. See generally KOSKENNIEMI, *supra* note 39, at 2 ("Law-creation is a matter of subjective, political choice.").

<sup>100</sup>See *supra* note 94.

<sup>101</sup>See *supra* text accompanying notes 10-18.

support them, international human rights law recognizes the importance of human needs—to be housed, fed, clothed, healed, and educated.<sup>102</sup> While American women found little support in domestic law and politics, the international human rights movement was able to draw on the Universal Declaration to articulate these needs as 'rights' in the Economic Covenant. The United States has already signed the Economic Covenant and President Clinton, in response to international political pressure, has already promised to press for ratification.<sup>103</sup> As the human rights community has long recognized, and as the civil rights movement proved, international pressure is useful to the extent a domestic group can use it.<sup>104</sup> Nonetheless, it has been sufficient to elicit public promises from the Administration.<sup>105</sup> By pressing for ratification of the Economic Covenant, American feminists can use international human rights as leverage to obtain broad legal support for the nurturing work American women already do.<sup>106</sup>

As explained above,<sup>107</sup> human rights law grew out of the States' recognition that neither their own domestic laws nor their own domestic political processes could be depended upon to assure the bottom line of human dignity to which they all agreed.<sup>108</sup> International human rights

<sup>102</sup> See *supra* text accompanying notes 51–53.

<sup>103</sup> David B. Ottaway, *Universality of Rights Is Defended by U.S.*, WASH. POST, June 15, 1993, at A15 (reporting that Secretary of State Warren Christopher said that the Clinton administration "plans to move promptly for Senate action on the four unratified treaties"). According to Patricia Rengel, Chief Legislative Officer for Amnesty International, Christopher's statement was intended to pre-empt anticipated international criticism. Patricia Rengel, Remarks at the ASIL Annual Meeting (Apr. 9, 1994). As of Dec. 1, 1994, ICESCR was not being seriously considered for ratification. *Status of Ratification of Other Conventions*, INT'L HUM. RTS. L. UPDATE (Aspen Inst. Justice and Soc'y Project, New York, N.Y.), Fall 1994, at 3. See also *infra* note 130.

<sup>104</sup> International pressure is very different today than it was during the Cold War when the Soviets sought to exploit the civil rights struggles. The Soviet Union broadcast 1400 pictures abroad. The international community was appalled by media coverage of civil rights struggles in the South: "Those pictures of dogs and fire hoses were published in Europe, Africa, India, Japan. Photographs were especially powerful in countries where large parts of the population could not read." Vicki Goldberg, *Remembering the Faces in the Civil Rights Struggle*, N.Y. TIMES, July 17, 1994, at H31.

<sup>105</sup> See *supra* note 103. See also A. Fraser, *supra* note 3 (stating that the Clinton Administration has submitted CEDAW to the Senate and the Foreign Relations Committee recommended ratification). Senator Jesse Helms has blocked further action on CEDAW, as well as other treaties, until the Administration heeds his unilateral demand to drastically reduce executive offices and expenditures in connection with foreign policy. See Elaine Sciolino, *Awaiting Call, Helms Puts Foreign Policy on Hold*, N.Y. TIMES, Sept. 24, 1995, at 1.

<sup>106</sup> Feminists are not the only domestic constituency for whom economic rights are a vital concern. See Stark, *supra* note 24; Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, 84 AM. J. INT'L L. 365, 392 (1990) (asserting that groups dealing with homelessness, child abuse, malnutrition, and access to education should support ratification).

<sup>107</sup> See *supra* part I.

<sup>108</sup> See *supra* text accompanying notes 10–11.

law provides the basic legal framework for those human rights neglected by domestic law.<sup>109</sup> In the United States, as feminists such as Robin West and Mary Becker have pointed out, economic rights are the human rights neglected and American women and their children are the ones who suffer.<sup>110</sup>

As the Supreme Court consistently has held, the Constitution does not assure economic rights, even those necessary to human dignity.<sup>111</sup> Nor can the American political process be depended upon to do so, as commentators have argued,<sup>112</sup> as history has shown,<sup>113</sup> and as the November 1994 election again confirmed.<sup>114</sup> The frenzied cutbacks in public spending,<sup>115</sup> the attacks against legal as well as illegal immigrants,<sup>116</sup> and the

<sup>109</sup> In fact, Justices Marshall and Brennan cited Art. 25 of the Universal Declaration in their dissent in *Edmund P. Dandridge v. Linda Williams*, 397 U.S. 471 (1970).

<sup>110</sup> Robin West, *Reconstructing Liberty*, 59 TENN. L. REV. 441 (1992); Mary E. Becker, *Politics, Differences and Economic Rights*, 1989 U. CHI. LEGAL F. 169, 172-78 (1989). See also Hester Lessard, *Relationship, Particularity, and Change: Reflections on R. v. Morgentaler and Feminist Approaches to Liberty*, 36 MCGILL L.J. 263 (1991).

<sup>111</sup> See *supra* note 18.

<sup>112</sup> See *infra* note 164.

<sup>113</sup> *Dandridge*, 397 U.S. at 484-85 ("In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect."). If positive rights were not contemplated by the Framers, they must be left to the political process, even if those who have the greatest need for economic rights—the homeless, the disabled, the very old, the very young, the uneducated, the non-English speaking—are those least able to participate in that process.

Many have questioned the legitimacy of the American political process for precisely this reason. See, e.g., *The Constitution as an Economic Document: A Symposium Commemorating the Bicentennial of the United States Constitution*, 56 GEO. WASH. L. REV. 1 (1987). But see Akhil Reed Amar, *Some Comments on "The Bill of Rights as a Constitution"*, 15 HARV. J.L. & PUB. POL'Y 99, 100 (1992) ("[F]rom the perspective of 1787, the process by which the Constitution became the supreme law of the land was more fundamentally participatory and democratic than anything that had ever preceded it . . .").

<sup>114</sup> William Buckley's *National Review* viewed the November 1994 election as a popular rejection of Clinton, the Democrats, and liberalism in general. See Rich Lowry, *Renovating the House*, NAT'L REV., Dec. 19, 1994, at 37, 37. *Mother Jones* says that America is having a "religious crisis," that "freely chosen and meaningful" work is our real religion, and that we are "scared to death about the future of work." Jeffrey Klein, *Why Now?*, MOTHER JONES, Mar./Apr. 1995, at 3, 3. Others suggest that the election is, perhaps, better read as a rejection of party politics. See, e.g., STANLEY B. GREENBERG, *MIDDLE CLASS DREAMS: THE POLITICS AND POWER OF THE NEW AMERICAN MAJORITY* (1995); Steven V. Roberts et al., *Sea Change*, U.S. NEWS & WORLD REP., Nov. 21, 1994 ("Behind the Republican tide lie warnings from America to both parties."); President Clinton, *We Must Forge a New Social Compact*, WASH. POST, Jan. 25, 1995, at A30 (State of the Union Address, 1995).

<sup>115</sup> See Jonathan Alter, *Decoding the Contract*, NEWSWEEK, Jan. 9, 1995, at 26, 27 (reporting on Republican proposal promises to prohibit welfare for welfare mothers and to deny increased AFDC for additional children born while on welfare); Robert S. McIntyre, *Taxing the Poor*, NEW REPUBLIC, Jan. 30, 1995, at 15; Robert B. Reich, *Drowning in the Second Wave*, N.Y. TIMES, Apr. 2, 1995, § 4, at 15 (asserting that Republican proposals to cut federal funding for education and job-training and to shift responsibility to the states "won't help the millions of Americans who risk drowning in the new economy").

<sup>116</sup> Jim Impoco & Mike Tharp, *California Tries to Give Back the Tired and the Poor*,

hysterical threats to take children away from their mothers<sup>117</sup> are precisely the kinds of human rights violations, carried out by the government and unchecked by domestic controls, contemplated by the international human rights community.<sup>118</sup> The Economic Covenant was enacted thirty years ago to deal with these violations.<sup>119</sup>

Like human rights activists, feminists recognize the limitations of domestic law. As Audre Lorde put it, "The master's tools will not dismantle the master's house."<sup>120</sup> Just as those in other countries need a new language, a new legal framework, for the civil liberties<sup>121</sup> that many take for granted here,<sup>122</sup> the United States needs a new language, a new legal framework, for economic and social rights.<sup>123</sup> Economic rights

---

U.S. NEWS & WORLD REP., Nov. 21, 1994, at 42 (reporting that voters approve Proposition 187, which "cuts off education and all but emergency health care for illegal aliens and requires . . . teachers and doctors to turn illegals [in]"); *Don't Panic*, NEW REPUBLIC, Nov. 21, 1994, at 7 ("In a truly dark twist," student/citizens would also be required to turn in their illegal parents.); Robert Pear, *Deciding Who Gets What in America*, N.Y. TIMES, Nov. 27, 1994, at E5 (describing Republican proposals to eliminate benefits for legal aliens); Peter Schrag, *Son of 187*, NEW REPUBLIC, Jan. 30, 1995, at 16 (describing the California Civil Rights Initiative, an anti-affirmative action initiative).

<sup>117</sup> See, e.g., *The Orphanage*, NEWSWEEK, Dec. 12, 1994 (reporting that a half million children are in "government funded substituted care, 75% in foster homes"). But see Hillary Rodham Clinton, *The Fight Over Orphanages*, NEWSWEEK, Jan. 16, 1995, at 22 (noting that the law recognizes that "a child should be with his or her parents unless there is convincing evidence [of] abuse or neglect").

<sup>118</sup> See generally RUSSELL, *supra* note 10, at 323-29 (describing economic and social rights in the U.N. Charter).

<sup>119</sup> *Id.*

<sup>120</sup> Audre Lorde, *The Master's Tools Will Not Dismantle the Master's House*, in THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR (2d ed. 1983). But see Linda McClain, *Inviolability and Privacy: The Castle, the Sanctuary and the Body*, 7 YALE J.L. & HUMAN. 195, 197 n.4 (1995) (criticizing feminist tendency to discount the usefulness of such tools in the context of privacy).

<sup>121</sup> Many newly emerging States have sought guidance from American constitutional law and American constitutional lawyers in drafting their own Constitutions. See AMERICAN CONSTITUTIONALISM ABROAD (George Ethan Billias ed., 1990); William J. Brennan, Jr., *The Worldwide Influence of the U.S. Constitution as a "Charter of Human Rights"*, 15 NOVA L. REV. (1991); Akhil Reed Amar, *Some New World Lessons for the Old World*, 58 U. CHI. L. REV. 483 (1991). But see Preface, *Approaching Democracy: A New Legal Order for Eastern Europe*, 58 U. CHI. L. REV. 439, 440 (1991) ("Eastern Europe must consult many models, not just the American, as it goes about the business of constitution-making . . ."). See also Christopher Osakwe, *Introduction: The Problems of the Comparability of Notions in Constitutional Law*, 59 TUL. L. REV. 875 (1985). See generally Eric Stein, *Uses, Misuses—and Nonuses of Comparative Law*, 72 NW. U. L. REV. 198 (1977).

<sup>122</sup> See KOSKENNIEMI, *supra* note 39, at xx n.6 (summarizing Derrida's proposition that "the unprivileged conceptual opposite—"that dangerous supplement"—will, under analysis, always show itself as the dominating one"). Here, the right to a decent standard of living, the "unprivileged" conceptual opposite of our constitutional civil and political rights, the rights actually set out in the Economic Covenant, in fact dominates. Those who claim a higher priority for civil and political rights are those who take their own social and economic rights for granted. See Stark, *supra* note 24, at 224-26.

<sup>123</sup> MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991).

represent the real contribution of international human rights law to domestic jurisprudence. Americans generally think of human rights law as protection for oppressed people in distant places, people denied their civil and political rights.<sup>124</sup> The Economic Covenant offers protections for the oppressed in this country, including the growing numbers of women and children denied basic economic rights taken for granted in every other Western industrialized democracy.<sup>125</sup>

## 2. International Human Rights in the Context of Domestic Feminism

International human rights law is not a panacea for women. International feminists have criticized international human rights law, as domestic feminists have criticized liberalism,<sup>126</sup> for neglecting women's experience and conflating "male" with "human."<sup>127</sup> They have pointed out that the law, as applied, fails to take women's work into account and that its protection of the family leaves patriarchal norms intact.<sup>128</sup> They note that the committee responsible for international implementation of the Covenant, like almost all U.N. machinery, is male-dominated.<sup>129</sup>

By asserting themselves as active subjects within the context of international human rights law, American feminists can reconstruct the context of international human rights, from the context of international law to the context of domestic feminism. They can show how human rights discourse represents the subordinated half of a larger international discourse and how the domestic human rights community has internalized and replicated its own subordination. Although American feminists can assume that the community will support ratification of the Economic

---

<sup>124</sup> See, e.g., *Human Rights Watch Looks Within*, NEW YORKER, Dec. 13, 1993, at 53.

<sup>125</sup> This does not mean that the Economic Covenant is effectively implemented in these States. See Philip Alston, *Economic and Social Rights*, in *AGENDA*, *supra* note 23, at 137.

<sup>126</sup> See Martha C. Nussbaum, *Aristotle, Feminism, and Needs for Functioning*, 70 TEX. L. REV. 1019, 1021 (1992) ("[F]eminism has frequently wished to draw attention to aspects of ethical theory and practice that have not been sufficiently discussed in liberal political thought.").

<sup>127</sup> See *supra* note 2.

<sup>128</sup> Shelley Wright, *Economic Rights and Social Justice: A Feminist Analysis of Some International Human Rights Conventions*, 12 AUSTL. Y.B. INT'L L. 241 (1992).

<sup>129</sup> In 1991, only 2 of the 18 members of the Economic, Social and Cultural Rights Committee were women. Charlesworth et al., *supra* note 2, at 624 n.67. For a feminist critique of the Commission on Human Rights and the Human Rights Committee, see Laura Reanda, *Human Rights and Women's Rights: The United Nations Approach*, 3 HUM. RTS. Q. 11 (1981). But see Andrew Byrnes, *Women, Feminism and International Human Rights Law—Methodological Myopia, Fundamental Flaws or Meaningful Marginalisation?: Some Current Issues*, 12 AUSTL. Y. B. INT'L L. 205, 219 (1992) (stating that the Committee which oversees the Economic Covenant seems genuinely concerned with supporting at least some of the unpaid nurturing work done by women).



Covenant, they should not depend on the domestic human rights community to make it a priority.<sup>130</sup>

Human rights represents the "soft," non-technological, subordinated, *feminine* half of the international regime agreed upon by the world powers in 1945.<sup>131</sup> Just as women have historically been relegated to the private sphere of the home and family, human rights governs *intrastate* relations between the State and its own people in the private sphere of the State's own law.<sup>132</sup> The U.N. Charter prohibition on the use of force, in contrast,<sup>133</sup> represents the militarized, technological, dominant *masculine* half.<sup>134</sup> The prohibition on the use of force governs relations among member States in the public sphere of international law. By the subordination of human rights, I refer to a broad range of acts, omissions, and sentiments involving an equally broad range of State as well as non-State actors.<sup>135</sup> The subordination includes the pervasive perception that human rights *within* the United States are superfluous<sup>136</sup> and that State resources must be allocated accordingly.<sup>137</sup> During the Cold War, for

<sup>130</sup> See Alston, *supra* note 106 (stating that the human rights community is not the Economic Covenant's "natural constituency"). But see Louis Henkin, *Preface* to AGENDA, *supra* note 23 (urging ratification of the Economic Covenant). Many in the domestic human rights community have spent years working for economic, civil, and political rights against obstacles now inconceivable. This is not intended to detract from their efforts or their achievements. See, e.g., *supra* notes 21–22; Bert Lockwood, *Toward the Economic Brown: Economic Rights in the United States and the Possible Contribution of International Human Rights Law*, in WORLD JUSTICE?: U.S. COURTS AND INTERNATIONAL HUMAN RIGHTS 149 (Mark Gibney ed., 1991). But the emphasis remains on civil and political rights.

<sup>131</sup> I have developed this thesis in more detail in Stark, *supra* note 98.

<sup>132</sup> See, e.g., Charlesworth et al., *supra* note 2; Celina Romany, *Woman as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law*, 6 HARV. HUM. RTS. J. 87 (1993); HUMAN RIGHTS OF WOMEN, *supra* note 2. Human rights law, however, was a radical departure from traditional international law. States remained reluctant to criticize other States' treatment of their own people. They were even more reluctant to listen to the criticism of other States. As Professor Henkin has observed, "Despite the divisions of the Cold War, the international system developed fine human rights standards; it has not done well in achieving respect for those standards." Henkin, *supra* note 130, at xvii.

<sup>133</sup> U.N. CHARTER art. 2, ¶ 4. This half of the regime is supported by unprecedented powers delegated to the Security Council. *Id.* at art. 39–51. For a thoughtful analysis of the "Post-cold war revival of the United Nations (UN) Security Council[,] see Jose E. Alvarez, *The Once and Future Security Council*, WASH. Q., Spring 1995, at 3.

<sup>134</sup> Judith Gail Gardham, *The Law of Armed Conflict: A Gendered Regime?*, 25 STUD. IN TRANSNAT'L LEGAL POL'Y 171 (1993); Christine M. Chinkin, *Peace and Force in International Law*, *id.* at 203; Stark, *supra* note 51. See also Christine Chinkin, *Women and Peace: Militarism and Oppression*, in HUMAN RIGHTS IN THE TWENTY-FIRST CENTURY: A GLOBAL CHALLENGE 405 (Kathleen E. Mahoney & Paul Mahoney eds., 1993); Christine Chinkin, *A Gendered Perspective to the International Use of Force*, 12 AUSTL. Y.B. INT'L 279 (1992).

<sup>135</sup> See generally Rebecca J. Cook, *State Responsibility for Violations of Women's Human Rights*, 7 HARV. HUM. RTS. J. 125 (1994).

<sup>136</sup> Civil and political rights are presumably eclipsed by domestic law, and economic rights are pre-empted by opportunity. See *infra* text accompanying notes 140–143.

<sup>137</sup> See, e.g., Thomas L. Friedman, *Cold War Without End*, N.Y. TIMES, Aug. 22, 1993,

example, policymakers justified civil defense drills and a soaring defense budget with the ubiquitous rhetoric of national security.<sup>138</sup> They banished the rhetoric of human rights and the rhetoric of empathy and care to the private sphere, the *women's* sphere of the home and family.<sup>139</sup>

Domestic human rights discourse replicates this gendered division. Civil and political rights, governing relations among those who move in the public sphere of law and politics and drawing on a robust domestic jurisprudence, represent the privileged, "male" half of human rights discourse.<sup>140</sup> Civil and political rights so dominate human rights discourse in the United States that legal theorists often use the term "human rights" to refer to these rights alone, just as social scientists use "human" to refer to male experience alone.

In contrast, American commentators still relegate economic and social rights to the private sphere.<sup>141</sup> Economic and social rights are virtually unknown outside of international law classes.<sup>142</sup> Indeed, American com-

---

(Magazine), at 28 (documenting 1993 expenditures of approximately \$116 billion to "fight the commies").

<sup>138</sup>For a general discussion of rights rhetoric during wartime and the Cold War, see SUSAN GRIFFIN, *A CHORUS OF STONES: THE PRIVATE LIFE OF WAR* (1992); DAVID HALBERSTAM, *THE FIFTIES* (1993). For a provocative argument that civil defense could not—and was never intended to—protect Americans from the bomb, see GUY OAKES, *THE IMAGINARY WAR: CIVIL DEFENSE AND AMERICAN COLD WAR CULTURE* (1995).

<sup>139</sup>See Ware, *supra* note 41, at 288–89. See generally WINI BREINES, YOUNG, WHITE, AND MISERABLE: *GROWING UP FEMALE IN THE FIFTIES* (1992).

For a general overview of the increasing, but still limited, post-Cold War integration of the use of force and human rights regimes, see *Conference on Changing Notions of Sovereignty and the Role of Private Actors in International Law*, 9 AM. U. J. INT'L L. & POL'Y 1 (1993).

<sup>140</sup>See HURST HANNUM, *MATERIALS ON INTERNATIONAL HUMAN RIGHTS AND U.S. CONSTITUTIONAL LAW* (1985); Oscar Schachter, *The Charter and the Constitution: The Human Rights Provisions in American Law*, 4 VAND. L. REV. 643, 646 (1951); Louis Henkin, *The Constitution, Treaties, and International Human Rights*, 116 U. PA. L. REV. 1012, 1012 (1968); Louis Henkin, *Rights: American and Human*, 79 COLUM. L. REV. 405, 405 (1979); Richard B. Lillich, *The Constitution and International Human Rights*, 83 AM. J. INT'L L. 851, 852–53 (1989); Richard B. Lillich & Hurst Hannum, *Linkages Between International Human Rights and U.S. Constitutional Law*, 79 AM. J. INT'L L. 158, 158–63 (1985).

<sup>141</sup>See *supra* text accompanying notes 37–41.

<sup>142</sup>The major American international law texts, with the notable exception of HENKIN ET AL., *supra* note 9, at 641–44, barely mention these rights. See, e.g., BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 901–02 (1995); BURNS H. WESTON ET AL., *INTERNATIONAL LAW AND WORLD ORDER: A PROBLEM-ORIENTED COURSEBOOK* 740 (2d ed. 1990); COVEY T. OLIVER ET AL., *CASES AND MATERIALS ON THE INTERNATIONAL LEGAL SYSTEM* 768–79 (4th ed. 1995).

The large and growing jurisprudence on domestic poverty practice generally avoids any reference to international economic rights. This may be attributed, in part, to the factors described in *infra* note 147. But see *supra* note 109; Mary E. Becker, *The Politics of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective*, 59 U. CHI. L. REV. 453 (1992).

The United States has repeatedly endorsed economic and social rights in international instruments. The United States recognized economic rights, for example, when it signed the Vienna Declaration of 1989. Alston, *supra* note 106, at 365. See also *Conference on Security and Co-Operation in Europe: Charter of Paris for a New Europe and Supple-*

mentators have appropriated the term "economic rights" to refer to individual economic autonomy or freedom of capital.<sup>143</sup>

As American feminists have argued for years, it is precisely because nurturing work is valuable to the economy and because women's economic independence threatens the status quo economic hierarchy, that women's economic rights have been so thoroughly erased.<sup>144</sup> The "feminization of poverty"<sup>145</sup> both reflects and reinforces the engendering<sup>146</sup> of economic rights. While this trend is not the only reason for the hostility toward economic rights in the United States,<sup>147</sup> this hostility has grown as the links between women's unpaid nurturing work, economic rights,

---

*mentary Document to Give Effect to Certain Provisions of the Charter*, 30 I.L.M. 190, 194 (1991) (affirming that everyone "has the right . . . to enjoy his economic, social and cultural rights"); *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE*, 29 I.L.M. 1306 (1991) (follow-up meeting to the Helsinki Accords); *United Nations World Conference on Human Rights: Vienna Declaration and Programme of Action*, 32 I.L.M. 1663 (1993).

<sup>143</sup> See, e.g., Richard E. Levy, *Escaping Lochner's Shadow: Toward a Coherent Jurisprudence of Economic Rights*, 73 N.C. L. REV. 329 (1995).

<sup>144</sup> See ADRIENNE RICH, *Blood, Bread, and Poetry: The Location of the Poet* (1984), in BLOOD, BREAD, AND POETRY, *supra* note 33, at 167, 182 ("We pointed out that women's unpaid work in the home is essential to every economy . . .").

Because economically independent American women are a major threat to male prerogatives, they have been the target of a major attack. They have been blamed for the breakup of the American family, the crisis facing American children, and the lack of jobs for American men. See SUSAN FALUDI, *BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN* 3 *passim* (1991); SUSAN M. OKIN, *JUSTICE, GENDER, AND THE FAMILY* 25 *passim* (1989); see generally N. FRASER, *supra* note 3; Fineman, *supra* note 35.

Martha Fineman has described how poverty discourse draws on sexist stereotypes to condemn single mothers even as it undermines them. Fineman, *supra* note 3, at 276. For a general, historical discussion of single motherhood and welfare, see LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE 1890-1935* (1994).

<sup>145</sup> See, e.g., N. FRASER, *supra* note 3, at 147 ("Today, in fact, women have become the principal subjects of the welfare state").

<sup>146</sup> See generally Minow, *supra* note 26.

<sup>147</sup> In part, this hostility can be attributed to the rhetoric of opportunity, the rhetoric of the "American Dream." Barbara Stark, *Postmodern Rhetoric, Economic Rights and an International Text: "A Miracle for Breakfast,"* 33 VA. J. INT'L L. 433, 438 (1993). In part, it can be attributed to the Cold War, to what Professor Henkin has referred to as the "blind confusion of ideological communism . . . with commitment to the welfare of individual human beings . . ." Henkin, *supra* note 130, at xx. See generally DAVID M. OSHINSKY, *A CONSPIRACY SO IMMENSE: THE WORLD OF JOE MCCARTHY* (1983); THOMAS C. REEVES, *THE LIFE AND TIMES OF JOE MCCARTHY: A BIOGRAPHY* (1982).

After World War II, domestic groups concerned with economic rights, moreover, prudently steered clear of the Economic Covenant with its troublesome associations with foreign policy. Instead, loose and shifting coalitions of grassroots organizations have championed economic rights, usually functioning on a local, community level. See THOMAS A. KRUEGER, *AND PROMISES TO KEEP: THE SOUTHERN CONFERENCE FOR HUMAN WELFARE 1938-1948*, 139-58 (1967) (discussing postwar labor organizing in the South); ANTHONY DUNBAR, *AGAINST THE GRAIN: SOUTHERN RADICALS AND PROPHETS 1929-1959* 199 *passim* (1981) (explaining why "[r]adicals . . . did not emerge as leaders in human rights causes after the war"); LADY BOUNTIFUL REVISITED, *supra* note 41, at 1-115 (describing the responsibilities historically assumed by American women through volunteer organizations).

and women's economic independence from men have become increasingly clear.<sup>148</sup> Women are economically dependent on men because of women's unpaid nurturing work.<sup>149</sup> Economic rights, by assuring affordable and dependable child care, for example,<sup>150</sup> shift at least some of the burden of women's nurturing work to the broader society. This enables women to support themselves better and, at the same time, decreases individual women's economic dependence on individual men. Thus, recognition of economic rights not only requires men in general to assume more of the costs of unpaid nurturing work, but also imposes more of the actual burden of nurturing work on individual men because it makes nurturing work a social issue, not merely a woman's issue. Economic rights directly challenge the gender-based division of labor and resources. This is why a "war against poor women is a war against all women,"<sup>151</sup> and economic rights are a critical feminist issue.<sup>152</sup> The subordination of economic rights in this country reflects and perpetuates women's subordination.

---

In part, one may attribute hostility to economic rights to deep, pervasive racism. *See generally* DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993). But "opportunity" has increasingly less meaning. *See, e.g.,* Peter T. Kilborn, *Up From Welfare: It's Harder and Harder*, N.Y. TIMES Apr. 16, 1995, § 4, at 1 (reporting that "[f]or all but the most skilled or best educated new workers, wages and hours are the stingiest since President Franklin D. Roosevelt created the welfare system").

<sup>148</sup> Broad-based support for certain economic rights has not eroded. *See* THEODORE R. MARMOR ET AL., *AMERICA'S MISUNDERSTOOD WELFARE STATE: PERSISTENT MYTHS, ENDURING REALITIES* 47-48 (1990) (noting widespread public support for the Medicare, Food Stamp and Social Security programs). *See generally* WALLACE C. PETERSON, *SILENT DEPRESSION: THE FATE OF THE AMERICAN DREAM* (1994) (describing the paradox of a growing economy and increasing hardships for most of the population). KEVIN PHILLIPS, *THE POLITICS OF RICH AND POOR: WEALTH AND THE AMERICAN ELECTORATE IN THE REAGAN AFTERMATH* (1990) (arguing that the widening gap between rich and poor, along with greater concentration of wealth, is likely to lead, as it did in the 1930s, to a resurgence of populism). *But see* Nicholas Lemann, *The Myth of Community Development*, N.Y. TIMES, Jan. 9, 1994, § 6, at 54, 60 ("Voters are absolutely certain that social services cost a lot and don't work, so political support for them is hard to come by . . . . Everybody involved in antipoverty work . . . fear[s] that public hostility to Government social-service programs is too strong."); Jason DeParle, *In Welfare Debate, It's Now Not 'How?' But 'Why?'*, N.Y. TIMES, May 8, 1994, § 4, at 1, 8 ("At least 30 [states] have experimental programs under way, designed to prod or pull people from welfare, a pattern that critics regard as a piecemeal dismantling of the system.").

<sup>149</sup> *See supra* notes 34-42.

<sup>150</sup> For other examples, *see supra* note 56.

<sup>151</sup> This is the motto of the Women's Committee of One Hundred. There are approximately 500 women on this Committee. *Why Every Woman in America Should Be Aware of Welfare Cuts*, N.Y. TIMES, Aug. 8, 1995 (advertisement).

<sup>152</sup> This engendering of economic rights has a broad impact and threatens even those who may not feel threatened by race or charges of "un-Americanism." Even Daniel Patrick Moynihan, staunch liberal and civil rights supporter, questions welfare for single mothers. *See* Fineman, *supra* note 3.

IV. *TURNING THE WHEEL*

The road to the great canyon always feels  
 like that road and no other  
 the highway to a fissure to the female core  
 of a continent  
 Below Flagstaff even the rock erosions wear  
 a famous handwriting  
 the river's still prevailing signature

Seeing those rocks that road in dreams I know  
 it is happening again as twice while waking  
 I am travelling to the edge to meet the face  
 of annihilating and impersonal time  
 stained in the colors of a woman's genitals  
 outlasting every transient violation  
 a face that is strangely intimate to me

Today I turned the wheel refused that journey  
 I was feeling too alone on the open plateau  
 of piñon juniper world beyond time  
 of rockflank spread around me too alone  
 and too filled with you with whom I talked for hours  
 driving up from the desert though you were far away  
 as I talk to you all day whatever day<sup>153</sup>

I draw on Adrienne Rich's powerful poem here because she explicitly links the themes of the preceding section—reclaiming the past and reconstructing contexts—together in a feminist project. *Turning the Wheel* is the eighth, and final, section of a longer poem of the same title. The first seven sections explore the ways in which women have been constructed in the history of the American Southwest. By taking history apart—as myth, as nostalgia, as process<sup>154</sup>—Rich's dazzling deconstruction shows how women can free

<sup>153</sup> RICH, *supra* note 8, at 59.

<sup>154</sup> CRAIG WERNER, ADRIENNE RICH: THE POET AND HER CRITICS 156–58 (1988). See also RICH, *supra* note 33, at 145:

But you do have a choice to become *consciously* historical—that is, a person who tries for memory and connectedness against amnesia and nostalgia, who tries to describe her or his journeys as accurately as possible . . . Historical amnesia is starvation of the imagination; nostalgia is the imagination's sugar rush, leaving depression and emptiness in its wake.

themselves from history, from someone else's version of the past, by creating their own.<sup>155</sup>

*Turning the Wheel* evokes an archetypal image, the "turn of the wheel" suggesting an inevitable cosmic order,<sup>156</sup> if not the eternal return itself. But Rich playfully reconstructs the context by transforming the wheel into a mundane, human-scale steering wheel. With a clever twist, she transforms that which must be passively endured into that which can be actively grasped and turned to feminist ends.

Rich turns away from abstraction, toward a concrete, reconstructive project. As critic Craig Werner has pointed out, "The primary concern of the poem . . . is with the problem of transforming this potential into actuality."<sup>157</sup> Rich acknowledges deconstruction as a necessary and ongoing part of feminist practice. Because she fully appreciates the enormous amount of deconstructive work remaining to be done, she urges feminists to begin reconstruction even as it continues.<sup>158</sup>

The poem not only suggests why feminist jurisprudence should adopt a similar reconstructive focus, but *how* it might do so.<sup>159</sup> In section five of *Turning the Wheel*, subtitled *Particularity*, Rich instructs: "[D]o not pursue the ready made abstraction, do not peer for symbols."<sup>160</sup> Feminists can move toward reconstruction, even as they continue their deconstructive work, by rejecting abstraction and focusing instead on real women's particular needs.

<sup>155</sup> See *supra* note 85.

<sup>156</sup> In Greek mythology, human destiny was determined by the three Fates and their spinning wheel. BULFINCH'S MYTHOLOGY 9 (1947). Cf. T.S. Eliot, *Preludes*, in *THE WASTE LAND AND OTHER POEMS* 11, 15 (Harcourt Brace 1962) ("The worlds revolve like ancient women/ Gathering fuel in vacant lots.").

<sup>157</sup> WERNER, *supra* note 154, at 156. See also RICH, *supra* note 33, at 146 ("Feminist history charges us, as women committed to the liberation of women, to know the past in order to consider what we want to conserve and what we want not to repeat or continue.").

<sup>158</sup> WERNER, *supra* note 154, at 157-58:

"Turning the Wheel" differs sharply from [earlier poems] in its willingness to build gradually toward a reconstructive statement in the final sections . . . . The final section of the poem, in which Rich turns the wheel of her car away from the Grand Canyon, responds to Colter's prototypical example [Mary Jane Colter was an architect who designed eight buildings near the Grand Canyon at the beginning of the 20th century] by emphasizing her realistic engagement, rather than her symbolic association, with the archetypal power of "the female core of a continent."

<sup>159</sup> "In place of the generalized commitment to the reconstructive process in her earlier deconstructive poems, Rich makes specific suggestions concerning the process in 'Turning the Wheel' . . . [i]ntimating the need for continual deconstruction of any mode of thought which abstracts feminine power from the body which urinates, scratches, snores . . . ." *Id.* at 157.

<sup>160</sup> RICH, *supra* note 8, at 56.

Many feminists in the American legal community have been reluctant to reject abstraction because of the continuing importance to women of abstract rights. Nancy Fraser has described the social value of rights: "[Rights-bearers] are in the main not stigmatized."<sup>161</sup> Sylvia Law has noted their practical appeal: "Vulnerable people have good reason to prefer the harder edge of rights to the hope that others whose lives are very different will be able to empathize with them."<sup>162</sup> As Patricia Williams has pointed out, rights have crucial symbolic and psychological significance: "For the historically disempowered, the conferring of rights is symbolic of all the denied aspects of their humanity: rights imply a respect that places one in the referential range of self and others, that elevates one's status from human body to social being."<sup>163</sup>

Like domestic law, international human rights law recognizes these benefits of "rights talk."<sup>164</sup> Unlike domestic law, it confers these benefits in the "concrete" context of positive rights as well as in the "abstract" context of negative rights.<sup>165</sup> As international lawyers have long recognized,<sup>166</sup> and as many American scholars have argued,<sup>167</sup> abstract nega-

<sup>161</sup> N. FRASER, *supra* note 3, at 151.

<sup>162</sup> Sylvia A. Law, *Some Reflections on Goldberg v. Kelly at Twenty Years*, 56 BROOK. L. REV. 805, 816 (1990). See also Nussbaum, *supra* note 126, at 1027; cf. Catherine W. Hantzis, *Kingsfield and Kennedy: Reappraising the Male Models of Law School Teaching*, 38 J. LEGAL EDUC. 155, 161 (1988):

To call rights talk empty rhetoric and to blame it for legitimating an oppressive ideology is to belittle the experience of people for whom rights have played an important role . . . [T]here is no surer way to disempower people than to tell them that nothing can improve their present situation short of total reorganization of the social structure.

Cf. Nussbaum, *supra* note 68, at 209-15 (stating that abstract values are crucial tools for oppressed groups, including Third World women).

<sup>163</sup> PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 153 (1991). But see Symposium, *A Critique of Rights*, 62 TEX. L. REV. 1361 (1984).

<sup>164</sup> I refer here to actual legal rights recognized in domestic and international law. Professor Glendon refers more narrowly to a specific dialect of rights in the United States, which she argues effectively precludes a crucial discourse of responsibility. See GLENDON, *supra* note 123. Much of what she describes as responsibilities are considered rights under the Economic Covenant. Our theses are different, but not incompatible.

<sup>165</sup> This situates Rich's emphasis on the concrete rather than the abstract, in a legal context. "Housing" is more abstract than "apartment" or "cottage," but it is less abstract than "freedom of religion." Negative rights, however, may also require concrete, positive grants, as suggested by the recent Supreme Court decision, *Ronald W. Rosenberger v. Rector of University of Virginia*, 115 S. Ct. 2510 (1995) (holding that a University cannot discriminate against a student religious publication by refusing to provide a financial subsidy available to other student publications).

<sup>166</sup> The indivisibility of the two Covenants, their necessary interdependence, and the fallacy of asserting the primacy of either one, is now well-established in international law. See *Indivisibility and Interdependence of Economic, Social, Cultural, Civil and*

tive rights and concrete positive rights are better conceptualized along a continuum than as polar opposites. Economic rights are *rights* and carry with them the benefits of "rights talk." At the same time, economic rights are concrete; they refer to the actual housing, food, healthcare, work, and education available to a particular person or group in a particular place and time.<sup>168</sup> The Economic Covenant is a concrete legal structure through which feminists can transform the potential of rights talk into reality<sup>169</sup> for American women.<sup>170</sup>

---

*Political Rights*, G.A. Res. 44/130, U.N. GAOR, 44th Sess., Supp. No. 49, at 209, U.N. Doc. A/Res/44/130 (1989) (accepted Dec. 15, 1989). Some American legal organizations have recognized the linkage. While the ACLU has not endorsed the rights set forth in ICESCR, it has "recognized that there may be links between economic status and civil liberties. Accordingly, the ACLU has insisted that government action may not cause or perpetuate poverty . . . ." Nadine Strossen, *What Constitutes Full Protection of Fundamental Freedoms?*, 15 HARV. J.L. & PUB. POL'Y 43, 48-49 (1992).

<sup>167</sup> See, e.g., Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); Charles L. Black, Jr., *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103, 1105 (1986) (discussing "the derivation of a constitutional right to a decent material basis for life"); Paul Brest, Symposium, *The Republican Civic Tradition: Further Beyond the Republican Revival: Toward Radical Republicanism*, 97 YALE L.J. 1623, 1627 (1988) ("[M]inimum protections' for the necessities of life . . . are preconditions for civic republican citizenship."). For a persuasive argument that "nonelectoral activity" has played the "predominant role . . . in the erstwhile success of the poor[,] see Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277, 1329 (1993).

<sup>168</sup> Most of those living below the poverty line are single women and their children. See *supra* note 45. The Economic Covenant establishes a "minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights . . . ." MANUAL, *supra* note 18, at 45. "Minimum essential levels" may mean health at certain times and in certain places and subsistence in others. Whether there is consensus as to minimum standards for human dignity in this country is an open question.

International standards are available for comparison. The World Food Council, for example, has promulgated workable, globally accepted standards regarding human nutritional needs. See, e.g., *Food Consumption and Supply*, in UNITED NATIONS DEPARTMENT OF INTERNATIONAL ECONOMIC AND SOCIAL AFFAIRS, 1989 REPORT ON THE WORLD SOCIAL SITUATION 18-35 (1989) (discussing global malnutrition problems). But see Steven L. Winter, *Human Values in a Postmodern World*, 6 YALE J.L. & HUMAN. 233, 234 n.4 (1994) (asserting that the need to "eat and to maintain bodily integrity" provides no basis for "definite, universal norms").

<sup>169</sup> This is Rich's focus in the poem. See *supra* text accompanying notes 154-155. See also ADRIENNE RICH, "Going There" and Being Here (1983), in BLOOD, BREAD AND POETRY, *supra* note 33, at 156, 158:

The Sandinistas are committed to providing all citizens with basic nutrition, have cut the illiteracy rate in half, have wiped out polio and made a huge dent in the infant mortality rate. *These elementary things change women's lives.* Food, health, literacy, like free contraception and abortion, are basic feminist issues.

<sup>170</sup> For a description of the range of processes through which economic rights may be assured, see Stark, *supra* note 147. For a proposal for integrating these processes into federal and state domestic law, see Stark, *supra* note 18.



