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

Recommended Citation
Available at: 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.
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;¹ 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.² 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.

¹ 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).

usefulness, especially for women in the United States. This Article is part of an emerging reconstructive project. 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. 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 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" 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 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.


5 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.


7 Seeinfra text accompanying notes 68-86.

8 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. States endorsed the radical notion of universal human rights in horrified response to the human rights atrocities of World War II. For the first time in history, States recognized a bottom line of human “dignity.” 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.

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

---


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).


12Id. (stating that “[i]t is essential . . . that human rights should be protected by the rule of law”).

13U.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. 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") and the International Covenant on Economic, Social and Cultural Rights (the "Economic Covenant"). The Civil Covenant assures familiar "negative" rights, similar to those in the U.S. Constitution. The Economic Covenant assures less familiar "positive" rights, which are not protected under the U.S. Constitution. The Covenants

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

\[\text{15} \text{International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171. The United States ratified the Civil Covenant in 1992.}\]


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


are intended to serve as binding law through which ratifying States enable their own people to assert rights against the States themselves.\textsuperscript{19}

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.\textsuperscript{20} 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.\textsuperscript{21}

This does not mean that international human rights are worthless. On the contrary, the “human rights idea”\textsuperscript{22} has swept across national and cultural boundaries; it has contributed to the downfall of powerful governments in South Africa and Eastern Europe.\textsuperscript{23} 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,


\textsuperscript{20}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, \textit{Book Rev.}, 8 Hum. RTS. Q. 540, 540 (1986); accord \textit{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, \textit{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 \textit{Limburg Principles}, supra.


\textsuperscript{22}David P. Forsythe, \textit{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 Bildner, supra note 9, at 15; Bayefsky, supra note 3, at 353.

\textsuperscript{23}For a description of the global explosion after World War II of the “human rights idea,” see \textit{Louis Henkin, The Age of Rights} 1 passim (1990).

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.\textsuperscript{24}

II. FEMINIST JURISPRUDENCE

Domestic feminist jurisprudence, similarly, seeks to enable women to identify themselves as active subjects in American law.\textsuperscript{25} 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"\textsuperscript{26}

\textsuperscript{24} 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.


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).

\textsuperscript{25} 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.").

\textsuperscript{26} 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) (posing 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.\textsuperscript{27} Like the "human rights idea,"\textsuperscript{28} this awareness is a starting point that enables women to construct active concepts of "self"\textsuperscript{29} and thus to become "subjects" capable of acting upon the world rather than [objects] upon whom others act.\textsuperscript{30} Feminist jurisprudence both reflects this feminist consciousness and shows how the law impedes or supports it.\textsuperscript{31}


\textsuperscript{27} Lerner, supra note 6, at 274.

\textsuperscript{28} See Henkin, supra note 22.


Peter Brooks has compared the process of structuring experience into a coherent narrative, or story, with the psychoanalytic process. \textit{See generally} PETER BROOKS, \textit{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). \textit{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, \textit{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'.").

\textsuperscript{30} Charles Lawrence III, \textit{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, \textit{The Problem of the Subject}, 69 Tex. L. Rev. 1627 (1991); J.M. Balkin, \textit{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 MÔRALS 89 (Lorraine Code et al. eds., 1988).

Lerner links the emergence of feminist consciousness to women's economic independence.32 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."33 When there are large groups of single, self-supporting women, feminism is miraculously reinvented.

Feminist economists34 and others35 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.36 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 woman- hood 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.

32 LERNER, supra note 6, at 192 passim.
33 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.

34 See, e.g., MARILYN WARING, IF WOMEN COUNTED: A NEW FEMINIST ECONOMICS (1988); FUCHS, supra note 33.
36 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. Nurturing work is so deeply internalized that women do it unconsciously and so deeply embedded in the culture that no one sees them doing it. 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," 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.

Nurturing work is not the only cause of women's poverty, but it is almost always a substantial factor. 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. 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]").


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.").

See Hochschild & Machung, supra note 37.

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 Politicalization, 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).

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 substan-
tially less than men, and their attachment to the labor force is weaker.  
While the majority of women are not poor, the majority of the poor are 
women. Even those who are not currently poor are far more likely to 
have been poor and to become poor than are men. Women are the most 
economically vulnerable, if they become sick, and when they become 
old.

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.” I hope that she is right, but 
feminist jurisprudence demonstrates the need for law to recognize, confirm, 
and secure this “emancipation.” 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 strenu-
ously pursued to provide some protection for struggling feminist con-
sciousness. If Lerner is correct, 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. The 
Economic Covenant recognizes the right of every human being to

44Fuchs, 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.

45 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 Move-

46 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.

47 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 

48 Lerner, supra note 6, at 283.

49 See Ann Scales, The Emergence of Feminist Jurisprudence: An Essay, in Feminist 
Jurisprudence, supra note 31, at 94–95.

50 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).

51 Barbara Stark, Nurturing Rights: An Essay on Women, Peace, and International 

52 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.\[^{53}\] 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.\[^{54}\] 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.\[^{55}\]

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.\[^{56}\]

\[^{53}\] 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).


\[^{55}\] 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.’”).


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. Ratification of the Economic Covenant, even as a non-self-executing treaty, would trigger and support a national discussion of women’s work.

Even as feminists learn more about their predecessors, their ability to build on their work is limited “as long as the vast majority of women

---

57This, 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).


59Lerner, 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.\textsuperscript{60} 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."\textsuperscript{61} Feminist consciousness only emerges when enough women become economically independent of men and only survives when enough women remain economically independent of men.\textsuperscript{62} Without State support for economic rights, nurturing work remains unpaid women's work, women remain economically dependent on men, and feminist consciousness again recedes.\textsuperscript{63}

III. NIETZSCHE'S "ETERNAL RETURN"

A. Reclaiming the Past

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

---

\textsuperscript{60}Lerner, supra note 6, at 276.

\textsuperscript{61}ALAN LIGHTMAN, EINSTEIN'S DREAMS 9-10 (1992).

\textsuperscript{62}Lerner, supra note 6.

\textsuperscript{63}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.

\textsuperscript{64}See supra text accompanying notes 32-33.

\textsuperscript{65}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.


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
What if women retreat, voluntarily or involuntarily, to economic dependence on men and feminist consciousness again recedes? Friedrich Nietzsche describes similar recurring cycles in his doctrine of the "eternal return." 

The 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 . . . .

—FRIEDRICH NIETZSCHE

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, 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. According to Arthur Danto, Nietzsche felt "this to have been his most important teaching, and a terrifying idea . . ." It represented Nietzsche's rejection of the idea of progressive history, of humankind learning from the preceding generation, of humankind advancing. 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." 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.

To accept the eternal return as a valid description of reality is to abandon hope, to accept unbearable despair. 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, a psychological nightmare that Nietzsche captures in a repul-

---

71 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.

72 Danto, supra note 70, at 203.

73 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.").


75 Kaufmann, supra note 69, at 111; accord Danto, supra note 70, at 203.

76 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 own powerless creations will finally and nevertheless carry out the projects assigned to them.").

77 See Tracy B. Strong, Friedrich Nietzsche and the Politics of Transfiguration 365 (1975).

78 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?" 79

The shepherd cannot resist this nausea, and no one save him from it. 80 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!"81 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." 82 As Zarathustra 83 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. 84

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. 85 Nietzschean "self-overcoming" is the process

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

79 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.

80 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.

81 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.

82 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 . . . . ").

83 See supra note 70.

84 Nietzsche, supra note 70, at 310.

85 "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.86

As Professor Rorty recognizes, self-overcoming necessarily takes place in a larger social context, a community. 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.


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.”).

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).

Rorty, supra note 85, at 29.
ized. 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.” International human rights law links such communities of resistance together and moves them “outward, into the world.”

B. Reconstructing Contexts

As Nietzsche reminds us, context is a human construct. By asserting themselves as active subjects, 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.” 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

---

89 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”).


91 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.”).

92 See supra note 23.

93 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 "rebirth" of feminism in the 1960s94 and the spreading human rights idea.95 Feminists learned about politics from the civil rights and peace movements.96 These drew on the independence movements of the formerly colonial Third World States,97 which, in turn, were part of a larger human rights movement challenging the historical privileging of State values over "human" values.98

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.99 Even as feminists struggled in the 1960s to articulate women's needs within the framework of male jurisprudence,100 international human rights law was considering human dignity from new perspectives and formulating needs in new terms.101 Like American women who nurture and the feminists who

---

94The 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.


96For an incisive and comprehensive account, see EVANS, supra note 95.

97Malcolm 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, Ili, 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.

98For 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).

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

100See supra note 94.

101See 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. 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. 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. Nonetheless, it has been sufficient to elicit public promises from the Administration. 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.

As explained above, 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.

---

102 See supra text accompanying notes 51–53.
103 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.

104 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.

105 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.

106 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).

107 See supra part I.

108 See supra text accompanying notes 10–11.
law provides the basic legal framework for those human rights neglected by domestic law.\textsuperscript{109} 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.\textsuperscript{110}

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

\begin{itemize}
\item \textsuperscript{109} 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).
\item \textsuperscript{111} See supra note 18.
\item \textsuperscript{112} See infra note 164.
\item \textsuperscript{113} 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.
\item 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 . . .”).
\item 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 Newt 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).
\item 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”).
\item Jim Impoco & Mike Tharp, California Tries to Give Back the Tired and the Poor,
hysterical threats to take children away from their mothers\textsuperscript{117} 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.\textsuperscript{118} The Economic Covenant was enacted thirty years ago to deal with these violations.\textsuperscript{119}

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.”\textsuperscript{120} Just as those in other countries need a new language, a new legal framework, for the civil liberties\textsuperscript{121} that many take for granted here,\textsuperscript{122} the United States needs a new language, a new legal framework, for economic and social rights.\textsuperscript{123}


\textsuperscript{118} See generally RUSSELL, supra note 10, at 323–29 (describing economic and social rights in the U.N. Charter).

\textsuperscript{119} \textit{Id.}


\textsuperscript{122} 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.

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. 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.

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, for neglecting women's experience and conflating "male" with "human." 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. They note that the committee responsible for international implementation of the Covenant, like almost all U.N. machinery, is male-dominated. 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 Covenant, they recognize that to achieve real change, they must draw attention to aspects of ethical theory and practice that have not been sufficiently discussed in liberal political thought.

---

125 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.
126 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.").
127 See supra note 2.
Covenant, they should not depend on the domestic human rights community to make it a priority.\textsuperscript{130}

Human rights represents the "soft," non-technological, subordinated, feminine half of the international regime agreed upon by the world powers in 1945.\textsuperscript{131} 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.\textsuperscript{132} The U.N. Charter prohibition on the use of force, in contrast,\textsuperscript{133} represents the militarized, technological, dominant masculine half.\textsuperscript{134} 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.\textsuperscript{135} The subordination includes the pervasive perception that human rights within the United States are superfluous\textsuperscript{136} and that State resources must be allocated accordingly.\textsuperscript{137} During the Cold War, for

\textsuperscript{130}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.

\textsuperscript{131}I have developed this thesis in more detail in Stark, supra note 98.

\textsuperscript{132}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.

\textsuperscript{133}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.


\textsuperscript{135}See generally Rebecca J. Cook, State Responsibility for Violations of Women’s Human Rights, 7 HARV. HUM. RTS. J. 125 (1994).

\textsuperscript{136}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.

\textsuperscript{137}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. 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.

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. 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. Economic and social rights are virtually unknown outside of international law classes. Indeed, American com-

(footnotes)

138 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).

139 See Ware, supra note 41, at 288–89. See generally Wini Breines, Young, White, and Miserable: Growing Up Female in the Fifties (1992).


141 See supra text accompanying notes 37–41.

142 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.\textsuperscript{143}

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.\textsuperscript{144} The "feminization of poverty"\textsuperscript{145} both reflects and reinforces the engendering\textsuperscript{146} of economic rights. While this trend is not the only reason for the hostility toward economic rights in the United States,\textsuperscript{147} this hostility has grown as the links between women's unpaid nurturing work, economic rights,
and women’s economic independence from men have become increasingly clear. Women are economically dependent on men because of women’s unpaid nurturing work. Economic rights, by assuring affordable and dependable child care, for example, 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,” and economic rights are a critical feminist issue. 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”). 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.”).

See supra notes 34–42.

For other examples, see supra note 56.

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).

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

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—Rich's dazzling deconstruction shows how women can free

---

153 Rich, supra note 8, at 59.
154 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.\textsuperscript{155}

\textit{Turning the Wheel} evokes an archetypal image, the "turn of the wheel" suggesting an inevitable cosmic order,\textsuperscript{156} 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."\textsuperscript{157} 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.\textsuperscript{158}

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

\textsuperscript{155}See supra note 85.
\textsuperscript{156}In Greek mythology, human destiny was determined by the three Fates and their spinning wheel. BULFINCH'S MYTHOLOGY 9 (1947). Cf. T.S. Eliot, \textit{Preludes, in The Waste Land and Other Poems} 11, 15 (Harcourt Brace 1962) ("The worlds revolve like ancient women/ Gathering fuel in vacant lots.").
\textsuperscript{157}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.").
\textsuperscript{158}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."

\textsuperscript{159}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 . . . " \textit{Id.} at 157.
\textsuperscript{160}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.” 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.” 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.”

Like domestic law, international human rights law recognizes these benefits of “rights talk.” Unlike domestic law, it confers these benefits in the “concrete” context of positive rights as well as in the “abstract” context of negative rights. As international lawyers have long recognized, and as many American scholars have argued, abstract nega-

---

161 N. Fraser, supra note 3, at 151.

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).
164 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.
165 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).
166 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. The Economic Covenant is a concrete legal structure through which feminists can transform the potential of rights talk into reality for American women.


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").

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.

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.