Spring 2000

Bottom Line Feminist Theory: The Dream of a Common Language

Barbara Stark
Maurice A. Deane School of Law at Hofstra University

BOTTOM LINE FEMINIST THEORY: THE DREAM OF A COMMON LANGUAGE

BARBARA STARK*

> No one lives in this room without living through some kind of crisis .... Without contemplating last and late the true nature of poetry. The drive to connect. The dream of a common language.
>
> —Adrienne Rich, Origins and History of Consciousness[1]

> [The] bottom line of feminism is that the oppression of women exists, and its normative project is to make the world better for women.
>
> —Regenia Gagnier[2]

Feminists[3] working in the law need theory. First, we need theory as an intellectual tool, to critique the ways in which existing laws, as well as proposed reforms, perpetuate gendered norms. As Catharine MacKinnon insists, "Theory is not a luxury .... We need to analyze critically and systematically create new approaches together."[4] Second, but equally important, feminists need theory as a political tool, to identify common goals and to generate consensus about how to achieve them. As Angela Harris reminds us, "Even a jurisprudence based on multiple consciousness must categorize; without categorization each individual is ... isolated ... and there can be no moral responsibility or social change."[5]

---

* Professor of Law, University of Tennessee. B.A., Cornell; J.D., New York University; LL.M., Columbia. I am grateful to Katharine Bartlett for her cogent criticism of an early version of my argument; to Nadine Taub for her encouragement; to June Carbone, Judy Cornett, Grayfred Gray, Carrie Hartley, Mary Manning, Mary Ellen O'Connell, and Andrea Santoriello for their helpful comments; to Susan Geist for her diligent research assistance; to Pat McNeil for her skill in preparing the manuscript; and to the College of Law for its generous support.

[1] ADRIENNE RICH, *Origins and History of Consciousness, in* THE DREAM OF A COMMON LANGUAGE 7 (1978).

[2] Regenia Gagnier, *Feminist Postmodernism: The End of Feminism or the Ends of Theory?, in* THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE 21, 24 (Deborah L. Rhode ed., 1990). Gagnier continues, "On this point feminists agree, although many of us would extend the emancipatory project beyond women." *Id.*

[3] This includes students, teachers, paralegals, lawyers, and judges. I draw on bottom line feminist theory itself to define "feminists." *See infra* note 39. While feminists working in other disciplines surely need theory as well, their reasons are necessarily different from those examined here.

[4] Catharine A. MacKinnon, *Comment: "Theory is Not a Luxury," in* RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW 83 (Dorinda G. Dallmeyer ed., 1993).

[5] Angela P. Harris, *Race and Essentialism in Feminist Legal Theory,* 42 STAN. L. REV.

Feminists need theory, in short, to build on each other's work, or, in Regina Gagnier's words, to draw on each other's efforts to show that "the oppression of women exists" and to "make the world better for women."[6]

But feminists are justifiably wary of theory, especially "grand theory"[7] that fails to recognize phrases like "make the world better for women" as problematic.[8] Feminists have shown how such theory conflates diverse experience, reducing women to an essential "Woman" without race, class, age, or sexual orientation.[9] Theory's claim to objectivity, moreover, has repeatedly been shown to incorporate a white male perspective.[10] As Martha Minow succinctly explains, "In established academic institutions, what has counted as theory meets criteria of coherence, value neutrality, and abstraction that themselves may embody the false universalism that feminists criticize."[11]

Feminist skepticism about theory, however, has its costs. Too often such skepticism has led to paralysis and even, ironically, the erasure of feminism itself. Feminists' commitment to diversity[12] makes it increasingly difficult to identify the feminist position on a particular issue because, in fact, there may well be innumerable feminist positions.[13] Be-

---

581, 586 (1990).

[6] Gagnier, *supra* note 2, at 24.

[7] *See, e.g.*, Jennifer Nedelsky, *The Challenges of Multiplicity,* 89 MICH. L. REV. 1591, 1605 (1991); Frances Olsen, *Feminist Theory in Grand Style,* 89 COLUM. L. REV. 1147, 1178 (1989) (book review) (endorsing MacKinnon's "powerful challenge" to the view that feminist scholarship should be "objective").

[8] This wariness is grounded in the understanding that making the world better for some women might make it worse for others. *See, e.g.*, Symposium, *Feminism and Globalization: The Impact of the Global Economy on Women and Feminist Theory,* 4 IND. J. GLOBAL LEGAL STUD. 1, 4 (1996) (noting that while globalization has benefited some women, the participants in the symposium "generally agree on [its] overall negative effects . . . on women"); Francis Lee Ansley, *Standing Rusty and Rolling Empty: Law, Poverty, and America's Eroding Industrial Base,* 81 GEO. L.J. 1757 (1993) (discussing the impact of globalization on women, including the industrial workers in the United States who have lost jobs and the women working in the *maguiladoras* in Mexico who have found jobs).

[9] See ELIZABETH V. SPELMAN, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT (1988); Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics,* 1989 U. CHI. LEGAL F. 139; Harris, *supra* note 5.

[10] *See, e.g.*, Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning,* 64 NOTRE DAME L. REV. 886 (1989) (explaining how the language and reasoning of the law are gendered).

[11] Martha Minow, *Feminist Reason: Getting It and Losing It,* 38 J. LEGAL EDUC. 47, 55 (1988).

[12] See Anne C. Dailey, *Feminism's Return to Liberalism,* 102 YALE L.J. 1265, 1279 (1993) (book review) ("Many feminists now locate 'the source of community in its diversity.'"); *see also* KATHARINE T. BARTLETT, GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY xxviii (1993); MARY BECKER ET AL., CASES AND MATERIALS ON FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY v (1994); MARY JOE FRUG, WOMEN AND THE LAW vii (1992). This commitment to diversity has not always been the case. *See* Kathryn Abrams, *Songs of Innocence and Experience: Dominance Feminism in the University,* 103 YALE L.J. 1533, 1533 (1994) (book review) ("Mainstream feminists first decried the race critique as freighting their efforts with 'extra baggage' . . . .").

[13] As Deborah Rhode explains, "Who can claim to represent the interests of women when

cause no one can claim to speak for *all* feminists, work is carefully qualified as "*a* feminist perspective" or simply subjective "narrative."[14] While most feminists would not want it any other way,[15] this means that even as feminist voices proliferate, there is less of a coherent feminist presence in the law.[16] Instead there is growing cacophony, and sometimes we cannot hear each other through the din.

Alternatives to this no-win grand theory/cacophony dichotomy have already been suggested. Martha Fineman has called for "middle range theory,"[17] and Nadine Taub has described the need "for women to work together in concrete ways as we struggle to clarify our views . . . [so that] we will be more effective as our multiple voices meld to make change and not just to cancel each other out."[18] As they and others have noted, there is a vast and fertile middle ground between the extremes of grand theory and personal narrative.[19]

This Essay suggests a language with which to describe this middle ground and a method for mapping it. Drawing on international law, it enables us to describe the degree of consensus achieved in feminist theory in connection with a particular issue at a particular time and to ascertain the "lowest common denominator" of feminist theory, the level of generality at which substantial consensus may be found. I refer to theory

---

women themselves disagree about what those interests are, when their perceptions may be constrained by systemic inequalities, and when their concerns vary substantially across race, ethnicity, class, sexual orientation, and so forth?" Deborah L. Rhode, *Feminism and the State,* 107 HARV. L. REV. 1181, 1189 (1994); *see also* Tracy E. Higgins, *Anti- Essentialism, Relativism, and Human Rights,* 19 HARV. WOMEN'S L.J. 89, 91 (1996).

[14] *But see* Anne M. Coughlin, *Regulating the Self: Autobiographical Performances in Outsider Scholarship,* 81 VA. L. REV. 1229 (1995); Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives,* 45 STAN. L. REV. 807 (1993) (questioning the methods and value of such narratives). *See generally, e.g.*, LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW (Peter Brooks & Paul Gewirtz eds.) (1996); ROBIN WEST, NARRATIVE, AUTHORITY, AND LAW (1993); Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991).

[15] "Coherence, or unity, is possible only when feminism's underlying assumptions speak the truth for many, not a privileged few." Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 849 (1990).

[16] This is not, of course, the only explanation for what many describe as the limited impact of contemporary feminism. *See, e.g.*, Tracy E. Higgins, *Democracy and Feminism,* 110 HARV. L. REV. 1657, 1657 (1997) (explaining how "feminist legal theory's emphasis on the importance of constraints on women's choices has led to a neglect of questions of citizenship and sovereignty within a democratic system"); Ginia Bellafante, *It's All About Me!*, TIME, June 29, 1998, at 54, 57 (The cover asks, "Is feminism dead?" The article answers, "[F]eminism at the very end of the century seems to be an intellectual undertaking in which the complicated, often mundane issues of modern life get little attention . . . .").

[17] Martha Albertson Fineman, *in* AT THE BOUNDARIES OF LAW: FEMINISM AND LEGAL THEORY xi, xii (Martha Albertson Fineman & Nancy Sweet Thomadsen eds., 1991).

[18] Nadine Taub, *Thoughts on Living and Moving with the Recurring Divide,* 24 GA. L. REV. 965, 969 (1990).

[19] *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 (1992); *see also* Bartlett, *supra* note 15, at 880–81 (describing "positionality"); Higgins, *supra* note 13, at 125.

which most feminists would find mostly acceptable, in a particular context at a particular time,[20] as "bottom line feminist theory."[21]

The language and method drawn upon here evolved more than 300 years ago, when independent nation states emerged in Europe.[22] Since unifying institutions (such as the Holy Roman Empire) had collapsed, it became necessary to devise a method with which to ascertain emerging consensus, the agreed-upon rules for governing relationships among the new states. Treaties were one mechanism, of course, but they were not enough.[23] States also recognized that they were governed by customary international law ("CIL"), an informal system that nonetheless bound them all and, in an important sense, defined their community.[24] For example, the unwritten "bottom lines" of CIL governed a state's treatment of diplomats[25] and its right to freely navigate the high seas.[26] As explained below, CIL has obvious limits. It is often indeterminate, and its bottom lines are not as stable as some critics think law should be.[27] Where there is no consensus, moreover, there is no CIL. Nevertheless, CIL remains a vital component of international law today.[28]

The welcome proliferation of feminist theory makes a similar method necessary here.[29] Just as the state system outlived the Holy Roman Em-

---

[20] Internationalists will recognize this as a paraphrase of Louis Henkin's famous observation, "Most nations observe most international law most of the time." LOUIS HENKIN, HOW NATIONS BEHAVE 47 (2d ed. 1979).

[21] *But see* Heather Wishik, *To Question Everything: The Inquiries of Feminist Jurisprudence,* 1 BERKELEY WOMEN'S L.J. 64 (1985) (urging feminists "to question everything").

[22] *See* J. STARKE, INTRODUCTION TO INTERNATIONAL LAW 7–14 (9th ed. 1984). Customary international law has been used elsewhere to illuminate domestic contexts. *See, e.g.,* David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 COLUM. L. REV. 1375, 1451–52 (1996).

[23] All international law is basically derived from two major sources: treaties and custom. Treaties are explicit agreements between nation states governed by international law. *See, e.g.,* Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969). Customary international law is explained in text accompanying *infra* notes 24–28.

[24] For a useful introduction to "interpretive communities," see INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER (Sanford Levinson & S. Mailloux eds., 1988); ROBIN WEST, *The Meaning of Equality and the Interpretive Turn, in* PROGRESSIVE CONSTITUTIONALISM 73 (1994); JAMES B. WHITE, JUSTICE AS TRANSLATION (1990).

[25] *See* STARKE, *supra* note 22, at 34–35; RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 Cmt. A (1987) [hereinafter RESTATEMENT (THIRD)].

[26] *See* BARRY CARTER & PHILLIP TRIMBLE, INTERNATIONAL LAW 978 (2d ed. 1995); HUGO GROTIUS, MARE LIBERUM (1609); MARK JANIS & JOHN NOYES, CASES AND COMMENTARY ON INTERNATIONAL LAW 532–34 (1997).

[27] *See, e.g.,* Anthony D'Amato, *Trashing Customary International Law,* 81 AM. J. INT'L L. 101 (1987); Phillip Trimble, *A Revisionist View of Customary International Law,* 33 U.C.L.A. L. REV. 665 (1986).

[28] *See* Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998).

[29] Articulating bottom line feminist theory is a pragmatic project. As Joan Williams explains, "The pragmatist's search for a workable society is a search not for universal principles but for strategies through which a population, inevitably divided by differences over a very broad range of their affairs, can seek a series of necessarily transient and provisional understandings." Joan C. Williams, *Culture and Certainty: Legal History and the Reconstructive Project*, 76 VA. L. REV. 713, 735 (1990). It is consistent with and conducive to

pire, feminism has outgrown whatever unifying institutions might have claimed to speak for women.[30] Just as states needed a method with which to ascertain emerging consensus, feminists need a method to ascertain the tacit, agreed-upon "bottom lines" that they generally accept and that in an important sense define the feminist community, albeit contingently.[31] Just as states relied, in part, on explicit treaties, feminists have tried to make some of their shared norms explicit in symposia or conferences.[32] Like states, however, feminists need a more organic approach to incorporate the unwritten bottom lines that shape feminist approaches to law.

This Essay explains how such an approach can be drawn from the method by which CIL is determined. Bottom line feminist theory, like CIL, has its limits. As explained below, however, the implications for theory are very different than those for law. The notion of an unstable bottom line is troubling in CIL, for example, but it is precisely what makes this method so useful for feminist theory. The Essay concludes with a concrete example, locating bottom line feminist theory in the context of divorce mediation. This example shows how bottom line feminist theory can help feminists realize what Adrienne Rich describes as "the *dream* of a common language"[33]—not a "common language," importantly, but the "*dream*" of one. That is, the point is not to develop

---

Professor Bartlett's proposition that "the primary impulse for social change seeks reconciliation between the familiar and an evolving sense of what is just and good, rather than a radical break from the past." Katharine T. Bartlett, *Tradition, Change, and the Idea of Progress in Feminist Legal Thought*, 1995 WIS. L. REV. 303, 305 (1995).

[30] The National Organization for Women (NOW), for example, was organized to "oversee the treatment of women's [EEOC] complaints and generally to push for sexual equality." BECKER ET AL., *supra* note 12, at 21. In the early 1970s, NOW seemed to many to "speak for women." For a gripping account of the politics of the women's movement, see Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. Rev. 589 (1986); *see also* Ruth Bader Ginsburg & Barbara Flagg, *Some Reflections on the Feminist Legal Thought of the 1970s*, 1989 U. CHI. LEGAL F. 9 (1989).

[31] Bottom line feminist theory is necessarily contingent because the "fact of oppression" results in a "double bind . . . [A]ll roads thought to be progressive can pack a backlash." Margaret Jane Radin, *The Pragmatist and the Feminist*, *in* BECKER ET AL., *supra* note 12, at 98–100; *see also* Higgins, *supra* note 13, at 119 ("False consciousness should be measured not against true consciousness (objective, absolute, pre-political) but against feminist consciousness (subjective, contested, political)."); Herma Hill Kay & Christine A. Littleton, *Feminist Jurisprudence: What Is It? When Did It Start? Who Does It?*, *in* SEX-BASED DISCRIMINATION: TEXT, CASES AND MATERIALS 1127, 1130 (Herma Hill Kay & Martha West eds., 4th ed., 1996).

[32] *See, e.g.*, Symposium, *Divorce and Feminist Legal Theory*, 82 GEO. L.J. 2119 (1994); Symposium, *Feminism, Sexual Distinctions, and the Law*, 18 HARV. J.L. & PUB. POL'Y 321 (1995); Symposium, *Under-represented Women in the Law: Looking to the 21st Century*, 10 BERKELEY WOMEN'S L.J. 11 (1995); Symposium, *Women's Rights as International Human Rights*, 69 ST. JOHN'S L. REV. 1 (1995). Exploring perspectives and exchanging views may well be more important than achieving consensus in these symposia, but the same may often be said of the treaty process. Symposia are like the treaty process in that they are explicit. They are unlike the treaty process, of course, in that they are not binding.

[33] *See* RICH, *supra* note 1, at 7 (emphasis added).

some politically correct "common language," but to find ways to retain our distinctive voices without forgetting our common goals.

I. HOW TO FIND BOTTOM LINE FEMINIST THEORY

CIL is determined by a two-pronged test: one, the actual practice of nation states; and two, *opinio juris*, or nation states' belief that such practice is legally mandated.[34] The usefulness of this test in the context of feminist theory is far from obvious. What is feminist "practice"? Who are the "feminists" whose practice matters? What does it mean to say that such practice is "mandated"? These questions can be answered by focusing on the purpose of CIL and, more specifically, the function of each of the two prongs.

The purpose of CIL is to determine the consensus in which sovereign states join and by which they consider themselves bound. In international law, a "state" is defined as "an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities."[35] As Louis Henkin has pointed out, state autonomy is one of the first principles of international law.[36] States view each other as independent and equal; no state recognizes the will of another as superior to its own. The practice of a poor, small state contributes to the formation of CIL just as the practice of a rich, large state does. The latter may well have greater influence and greater political clout, and other states may be more likely to follow its lead,[37] but in a community of autonomous states there are numerous counterexamples.[38]

---

[34] *See* RESTATEMENT (THIRD), *supra* note 25, at § 102(2). The United States Supreme Court has recognized CIL as "part of our law." *See* The Paquete Habana, 175 U.S. 677 (1900). For a provocative, but ultimately misguided, critique of CIL as binding law, see Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997). For a sharp analysis of precisely *how* misguided this critique is, see Koh, *supra* note 28.

[35] RESTATEMENT (THIRD), *supra* note 25, at § 201. Historically, it had been argued that a state is an entity recognized by other states. *See* 1 LASSA OPPENHEIM, INTERNATIONAL LAW, § 71 (1st ed. 1905).

[36] LOUIS HENKIN, INTERNATIONAL LAW: POLITICS, VALUES AND FUNCTIONS 27 (1993).

[37] When President Harry Truman claimed the continental shelf off the Eastern seaboard as United States property, for example, the other coastal states enthusiastically made similar claims, establishing the CIL of the continental shelf. *See* Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, Proclamation No. 2667, 3 C.F.R. 67 (1943-1948). While Truman's Proclamation was not itself CIL, since it was accompanied by no sense of legal obligation, at some point subsequent declarations acquired that status. Now, the continental shelf regime is well-established in CIL and has been codified in the United Nations Convention on the Law of the Sea, Dec. 10, 1982, arts. 77–78, 1833 U.N.T.S. 3.

[38] The United States has been unable to generate the necessary support for its views regarding compensation for nationalized property, for example, as recognized by the Court in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

The purpose of bottom line feminist theory, similarly, is to determine the consensus in which feminists join and by which they consider themselves bound. What is a feminist? This is itself an apt question for the method developed here. For present purposes, feminists are simply those women and men who recognize "the oppression of women" and are committed to "making the world better for women."[39] Just as CIL is based on the practice of all States, bottom line feminist theory would be based on the practice of all feminists. As in CIL, the more compelling views, those which generate the most support in the feminist community, would emerge over time as bottom line feminist theory.

The first prong of CIL, state practice, is ascertained by looking at states' laws, their judicial decisions, their administrative regulations and other sources irrelevant here.[40] Self-serving statements of state policy, such as General Assembly speeches or press releases, may be evidence of state practice but are not in themselves sufficient to prove state practice.[41] Rather, international law requires the state to "put its money where its mouth is," that is, to make some kind of tangible investment in the practice. International law pragmatically recognizes that states make statements and issue press releases for reasons of political expediency. Law based on such statements would be law written in sand. In addition, the requirement of actual practice assures some accountability on the part of the state, either through its own domestic law[42] or through pressure from the international community.[43]

---

[39] Gagnier, *supra* note 2. Bottom line feminist theory accepts some form of the two elements of feminism identified by Gagnier. Both are implicit in Frug's project of "undermining the effect of gender on the lives of women and men," FRUG, *supra* note 12, at vii; in Bartlett's critique of the "separate spheres ideology," BARTLETT, *supra* note 12, at 1–2; and in "the participation of women as genuine equals in our society," BECKER ET AL., *supra* note 12, at v. Significantly, bottom line feminist theory problematizes the second prong of Gagnier's test, recognizing that "making the world better for women" may require different measures for different women. *See supra* note 8.

[40] In *The Paquete Habana*, 175 U.S. 677 (1900), for example, the Court also considered executive decrees and the acts of military commanders.

[41] It has been argued that "practice" should not always require state action. Would it not be better if a letter of protest was considered practice, for example, rather than requiring a state to use force to protest? *See* Michael Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT'L L. 1 (1974–75). For an astute analysis of the demarcation between practice and evidence of practice, see OSCAR SCHACHTER, *Resolutions of the United Nations General Assembly as Evidence of Law*, *in* INTERNATIONAL LAW IN THEORY AND PRACTICE, 178 RECUEIL. DES COURS 111–21 (1982-V).

[42] In a democratic state with a vigorous free press, for example, an act of aggression is likely to generate considerable public debate. *See, e.g.*, James C. Hathaway, *Can U.S. Bombs Police the World?*, *Letter to the Editor*, N.Y. TIMES, Aug. 23, 1998, at 14 (explaining that under international law, "[n]o state has the right to exact retribution through an armed attack"); *The System Strikes Back*, WALL ST. J., Aug. 21, 1998, at A14 (endorsing U.S. bombings in the Sudan and Afghanistan and urging "follow-through"). *See generally* Case Act, 1 U.S.C. § 112b (1994) (requiring the Secretary of State to transmit to Congress copies of all international agreements).

[43] The United States violated CIL when federal agents had a Mexican doctor kidnapped and brought to trial in the United States. The Supreme Court held that the violation of CIL

In order to ascertain bottom line feminist theory, accordingly, we should look for the same kind of investment and accountability provided by the indicia of state practice. The time and energy required for legal writing and research, especially longer pieces, surely shows the requisite investment.[44] The checks to which such writing is subject, moreover, assure some accountability. In the case of scholarly writing,[45] for example, accountability is assured not only by the common practice of multiple edits, but also by the scrutiny of knowledgeable readers, both before and after publication. Briefs, similarly, are subject to the rigors of the adversary system, in which any weakness is likely to be exploited by the other side. Judicial opinions are subject to appellate review, and legislation to the scrutiny of multiple committees, and ultimately, to the scrutiny of the courts as well as that of the voters. Thus, legal writing—including scholarly articles, briefs, judicial opinions and legislation[46]—reflects the same kind of investment and accountability provided by the indicia of state

---

did not provide the doctor with a defense to jurisdiction. United States v. Alvarez-Machain, 504 U.S. 655 (1992). Foreign governments throughout the world expressed their outrage, ranging from "expressions of concern" from Argentina, Bolivia, Brazil, Chile, Paraguay, and Uruguay, to Jamaica's characterization of the decision as "an atrocity," to a draft law passed in the Iranian parliament "giving the president of Iran the right to arrest anywhere Americans who take action against Iranian[s] . . . anywhere in the world and bring them to Iran for trial." CARTER & TRIMBLE, *supra* note 26, at 808–12. On remand, the *Alvarez-Machain* case was dismissed for lack of evidence. United States v. Alvarez-Machain, 971 F.2d 310 (1992). In a meeting with Mexican President Carlos Salinass in 1993, President Clinton criticized the kidnapping and said that "the U.S. must not take such actions when there is no evidence that another nation is not following its own laws." CARTER & TRIMBLE, *supra* note 26, at 812.

[44] While this excludes feminist work appearing in non-legal publications, it does not necessarily exclude feminist work in other disciplines. As June Carbone points out, such work is vital not only to inform but to correct feminist legal theory. *See* E-mail from June Carbone, Professor of Law, Santa Clara University School of Law, to author (Aug. 14, 1998) (on file with author). Bottom line feminist theory is simply limited to that interdisciplinary work which has been appropriated by legal feminists to the extent necessary to show consensus. *See infra* notes 53–56 and accompanying text (showing appropriation of psychologist Carol Gilligan's work by legal feminists).

[45] This would include books, chapters, and articles published in general law reviews as well as those specialized law journals that focus on gender issues, without attempting to assign any weight to the author or the publication.

[46] Although my friend Grayfred Gray tells me that "courts and legislatures aren't feminists," in fact, feminists write in all of these modes. Examples of feminist opinions include *Reed v. Reed,* 404 U.S. 71, (1971) in which Ruth Bader Ginsburg, then-counsel for the Women's Rights Project of the ACLU, persuaded the court to strike a statute that preferred men to women for purposes of serving as executors of estates. *See also* BARBARA ALLEN BABCOCK ET AL., SEX DISCRIMINATION AND THE LAW: HISTORY, PRACTICE, AND THEORY 1502 (2d ed. 1996); BARTLETT, *supra* note 12, at 89; BECKER ET AL., *supra* note 12, at 24; FRUG, *supra* note 12, at 83; KAY & WEST, *supra* note 31, at 23. For an example of feminist legislation, see the MODEL ANTI-PORNOGRAPHY CIVIL RIGHTS ORDINANCE drafted by Andrea Dworkin and Catharine A. MacKinnon in BABCOCK ET AL., *supra,* at 1426; BECKER ET AL., *supra* note 12, at 321; FRUG, *supra* note 12, at 681; KAY & WEST, *supra* note 31, at 172; *see also* BARTLETT, *supra* note 12, at 578–81 (excerpting article in which MacKinnon justifies such ordinances). *See generally* Christine A. Littleton, *Whose Law Is This Anyway?,* 95 MICH. L. REV. 1560, 1564 (1997) (describing the author's participation in "litigation, public education, and advocacy").

practice. For present purposes, therefore, all these writings by feminists[47] will be considered "practice."

Assessing all of these writings in a particular area will often be a daunting task. Because of the range of activities included in state practice, similarly, ascertaining CIL is laborious and often onerous. In response to this problem, the Statute of the International Court of Justice provides that "the teachings of the most highly qualified publicists" may be relied upon "as subsidiary means for the determination of [CIL]."[48] The publication within the past few years of several first-rate texts on feminist jurisprudence makes a similar approach possible here.[49] Thus, feminist practice in many areas may be determined by diligent review of these texts.[50]

The second requirement for CIL is *opinio juris*—the belief of states that their practice is legally mandated. The function of *opinio juris* is to transform state practice into binding law; that is, states' belief that a particular practice is actually law is necessary to make that practice law. State practice without *opinio juris* may be unilaterally changed by a state without legal consequences and usually without protest from the international community. The practice of calling an ambassador "Your Excellency," for example, is not legally binding because no state views it as a legal obligation.[51] This is a rigorous standard, and only practice that meets it is legally binding. Once a particular practice is recognized as CIL, it can be changed only by deliberately flouting it. If other states protest, the state seeking to make new law becomes a pariah state. If other states acquiesce, however, new CIL emerges.[52]

In the context of bottom line feminist theory, the function of *opinio juris* would be served by the shared belief within the feminist community that a particular position was no longer problematic; rather, it was a gen-

---

[47] This assumes that they are writing to further feminism, as defined in the text accompanying *supra* note 29. A feminist can write in a non-feminist capacity just as a state can act in a non-state capacity. *See, e.g.*, Victory Transp. v. Comisaria Gen., 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965) (holding that a state is not entitled to sovereign immunity in connection with a contract for the sale of grain).

[48] ICJ Statute, art. 38. The United States, like all member states of the United Nations, is a party to the statute. Reliance on the "teachings of the most highly qualified publicists" was specifically endorsed by the U.S. Supreme Court in *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895).

[49] I refer here to the five "casebooks apparently used most often in major law schools," as listed in Littleton, *supra* note 46, at 1560 n.1 (i.e., BABCOCK ET AL., *supra* note 46; BARTLETT, *supra* note 12; BECKER ET AL., *supra* note 12; FRUG, *supra* note 12; and KAY & WEST, *supra* note 31).

[50] In accordance with this approach, the citations supporting bottom line feminist theory are primarily to these texts to show that the bottom lines in question are recognized by the "most highly qualified publicists." *See, e.g.*, *supra* note 49 and *infra* note 53. The omission of a particular text in a citation indicates that that text is silent as to that "bottom line."

[51] This example is from CARTER & TRIMBLE, *supra* note 26, at 144.

[52] "A practice initially followed by States as a matter of courtesy or habit may become law when States generally come to believe that they are under a legal obligation to comply with it. It is often difficult to determine when that transformation into law has taken place." RESTATEMENT (THIRD), § 102, Cmt. b (1987).

erally accepted tenet of feminist theory, at least for the moment. In the 1970s, for example, "equality" was bottom line feminist theory; i.e., it no longer had to be argued that women were "equal" to men. This truism was challenged in the 1980s by "different voice" feminism[53] which suggested that women and men were, in fact, different in crucial ways[54] but these differences did not mean that women were inferior. Legal theorists such as Robin West and Carrie Menkel-Meadow argued that equality presupposed a male norm, i.e., that women could be "equal" to men only by becoming *like* men.[55] Martha Fineman showed that the promise of equality had been illusory for women at divorce,[56] who, because of caregiving responsibilities and workplace discrimination, were often left impoverished after divorce. There was protest, but there was also acquiescence. The notion that women might value relationships more than men, and value abstract principles less, resonated for many feminists. It also renewed what many considered the promise of feminism; that is, women might radically transform the public sphere they were now entering in droves. "Equality" was no longer bottom line feminist theory, rather it was recognized as problematic.

The notion of some "essentially" feminine voice was, in turn, vigorously challenged. Feminists such as Kimberlé Crenshaw and Elizabeth Spelman argued that just as liberals had assumed that "human" meant "man," white feminists had assumed that "woman" meant "*white* woman."[57] Anti-essentialism emerged as a new norm in bottom line feminist theory.[58]

---

[53] This phrase is taken from the ubiquitous CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982). *See also* BARTLETT, *supra* note 12, at 589–670 (discussing women's "Different Voice(s)"); BECKER ET AL., *supra* note 12, at 60–63; FRUG, *supra* note 12, at 41–46. *But see* BECKER ET AL., *supra* note 12, at 78; FRUG, *supra* note 12, at 128 (citing MacKinnon's inimitable reply, "Take your foot off our necks, then we will hear in what tongue women speak"). Equality feminists were also challenged by "dominance" feminists. *See, e.g.*, CATHARINE A. MACKINNON, *Difference and Dominance: On Sex Discrimination in* FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 32 (1987) (*cited in* BECKER ET AL., *supra* note 12, at 71–79); Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279 (1987).

[54] Gilligan showed, for example, how Kohlberg's famous scale of moral reasoning valued hierarchical reasoning ("Jake's Ladder") over reliance on relationships ("Amy's Web"). GILLIGAN, *supra* note 53, at 25–33.

[55] *See* Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988) (*cited in* BARTLETT, *supra* note 12, at 590–92; BECKER ET AL., *supra* note 12, at 95). *See also* FRUG, *supra* note 12, at 807–25 (excerpt from West's 1987 article, *The Difference in Women's Hedonic Lives*); Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Woman's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985) (*cited in* BARTLETT, *supra* note 12, at 595–96; BECKER ET AL., *supra* note 12, at 828 n.19; FRUG, *supra* note 12, at 40–52).

[56] See MARTHA A. FINEMAN, THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM (1991).

[57] See Crenshaw, *supra* note 9 (*cited in* BABCOCK ET AL., *supra* note 46, at 1371; BECKER ET AL., *supra* note 12, at 229; FRUG, *supra* note 12, at 276–84); SPELMAN, *supra* note 9 (*cited in* BARTLETT, *supra* note 12, at 878–84).

[58] *See supra* notes 8, 9, 57; *see also* BECKER ET AL., *supra* note 12, at 118–34; FRUG, *su-*

The strength of a particular CIL norm depends on the degree of consensus it has achieved among states. More general norms, such as the norm against torture, are widely accepted and thus considered strong CIL. This is not to say, of course, that no state engages in torture. But no State claims it has a legal right to torture.[59] Instead, it does so secretly or it carefully distinguishes its actions from "torture."

More specific norms, such as a norm condemning a particular act of torture, are less widely accepted, and thus considered weak CIL. Feminists have argued, for example, that rape should be considered an act of torture, but this has not achieved the requisite consensus to qualify as CIL.[60] Indeed, there is no CIL norm against gender discrimination, although a substantial body of treaty law exists against it.[61] While there is a relatively stable core of CIL, such as the general norm against racial discrimination, much of CIL is "weak," not very well-established, or under attack.

The strength of a particular norm in bottom line feminist theory similarly depends on the degree of consensus it has achieved. More general norms, such as the rejection of "gender as a proxy for need" in determining alimony, have received wide acceptance, including the endorsement of the Supreme Court.[62] More specific norms, such as the circumstances under which a homemaker spouse is entitled to half the marital property (presumably acquired with the breadwinner spouse's earnings), are less widely accepted, and thus would be considered weak bottom line feminist theory.[63]

---

pra note 12, at 65 *et seq.* Anti-essentialism revitalized feminist theory. Feminists now routinely focus on the "margins"; that is, they ask how their analysis affects the least privileged women. As a corollary, for white or middle class or heterosexual feminists, questioning their own privilege has become very much a part of bottom line feminist theory.

[59] *See, e.g.*, LOUIS HENKIN ET AL., HUMAN RIGHTS 319 (1999) (describing "virtually universal" acceptance of the Universal Declaration of Human Rights, which bars torture, "even if only in principle") (citing the Reporters of the RESTATEMENT OF FOREIGN RELATIONS LAW, § 701, Reporters' Note 2 (1986)).

[60] *See generally* BECKER ET AL., *supra* note 12, at 896 (citing Charlotte Bunch for the proposition that "torture" of women is not recognized).

[61] *See, e.g.*, Convention on the Elimination of All Forms of Discrimination Against Women, Sept. 3, 1981, 1249 U.N.T.S. 13. For an insightful analysis, see Rebecca Cook, *Accountability in International Law for Violations of Women's Rights*, *in* RECONCEIVING REALITY, *supra* note 4, at 93–116.

[62] *See* Orr v. Orr, 440 U.S. 268 (1979) (*cited in* BARTLETT, *supra* note 12, at 91–95; KAY & WEST, *supra* note 31, at 290; FRUG, *supra note* 12, at 309 n.1). Some of the feminist texts give "two cheers" for *Orr*, although for differing reasons. *See* BABCOCK ET AL., *supra* note 46, at 208 (arguing that *Orr* establishes a "'weak version' of the less-restrictive-alternatives doctrine"); BECKER ET AL., *supra* note 12, at 513 (questioning whether "desirable social change [will] be fostered by making caretaking economically risky"). *But cf.* CATHARINE A. MACKINNON, *supra* note 53 ("confess[ing] a sincere affection" for formal equality, while pointing out that it has mostly benefited men) (*cited in* BECKER ET AL., *supra* at 73).

[63] *See* Patricia E. Edwards, *Gender Issues in Family Law: A Feminist Perspective*, 35 FAM. & CONCILIATION CTS. REV. 424, 429 (1997) (pointing out that the "promot[ion] [of] unequal distribution in favour of women can be misconstrued as another form of gender bias," i.e., discrimination against men). Some strong bottom line feminist theory is not

The substance of CIL changes and evolves as normative consensus changes and evolves. Thus, in addition to characterizing CIL as "strong" or "weak," commentators refer to norms that are on their way in as "emerging CIL," and to norms that are on their way out as "superceded CIL."[64] Bottom line feminist theory similarly is in flux. The showing required to justify an award of a husband's separate property to a corporate wife at divorce, for example, is just emerging in a few high profile cases.[65] Like CIL, moreover, bottom line feminist theory is always subject to change by explicit challenge.[66]

This ongoing process of change results in an inevitable circularity and indeterminacy in CIL.[67] How does it originate? How can a state engage in practice for the first time and believe that practice is legally compelled?[68] How can the multi-faceted, complex practice of states, taking place in different political and historical contexts, be determined, let alone com-

---

reflected in the law. For example, strong bottom line feminist theory against the marital rape exemption appears in BABCOCK ET AL., *supra* note 46, at 1384–85; BARTLETT, *supra* note 12, at 520–25; BECKER ET AL., *supra* note 12, at 242–44; FRUG, *supra* note 12, at 466 *passim*; KAY & WEST, *supra* note 31, at 1152–61 (citing People v. Liberta, 474 N.E.2d 567 (N.Y. 1984), *cert. denied*, 471 U.S. 1020 (1985), in which the state Court of Appeals struck the marital exemption from the New York Penal Law). However, while most states in the U.S. have rescinded laws which do not recognize spousal rape, many states still have partial exemptions. *See* BECKER ET AL., *supra* note 12, at 241. Indeed, some states still fail to recognize rape by a spouse as a crime. *See, e.g.*, TENN. CODE ANN. § 39-13-507(b)(1) (1998) (stating that spousal rape is only a crime when the "defendant is armed with a weapon," causes "serious bodily injury," or if the spouses are living apart and one of them has filed for divorce). *See generally* Lisa R. Eskow, Note, *The Ultimate Weapon? Demythologizing Spousal Rape and Reconceptualizing Its Prosecution*, 48 STAN. L. REV. 677 (1996) (examining the history of the marital rape exemption).

[64] There does not seem to be a specific term for norms that are on their way out because of desuetude.

[65] *See* Linda Hirshman, *Wives: Learn to Drive a Hard Bargain*, NAT'L. L.J., Dec. 22, 1997, at A17; *The Wendt Case* (editorial), NEW JERSEY L.J., Jan. 19, 1998, at 26 (analyzing a Connecticut Supreme Court divorce case).

[66] Some CIL norms are not subject to change, such as the norms against genocide and torture. These are referred to as *jus cogens*. Whether there should be *jus cogens* norms in bottom line feminist legal theory is beyond the scope of this Essay. *See generally* Hilary Charlesworth & Christine Chinkin, *The Gender of* Jus Cogens, 15 HUM. RTS. Q. 63 (1993).

[67] *See* CARTER & TRIMBLE, *supra* note 26, at 144 (suggesting the circularity of *opinio juris*).

[68] Custom may also begin by *naming* a practice that has actually gone on for some time. For example, for many years, feminists have engaged in the practice described in this Essay; i.e., many feminists have situated their work in the context of a larger feminist community. *See, e.g.*, Karen Engle, *International Human Rights and Feminism: When Discourses Meet*, 13 MICH. J. INT'L L. 517 (1992) (describing major feminist approaches to international law); Karen Engle, *Female Subjects of Public International Law: Human Rights and the Exotic Other Female*, 26 NEW ENG. L. REV. 1509 (1992) (describing approaches of Western feminists to female genital surgeries); Linda McClain, *"Atomistic Man" Revisited: Liberalism, Connection, and Feminist Jurisprudence*, 65 S. CAL. L. REV. 1171 (1992) (describing feminist uses of liberalism); Barbara Stark, *Guys and Dolls: Remedial Nurturing Skills in Post-Divorce Practice, Feminist Theory, and Family Law Doctrine*, 26 HOFSTRA L. REV. 293, 327–59 (1997) (describing bottom line feminist theory at a general level in connection with empathy, autonomy, and problem solving). While many already approach their work from a feminist perspective, this Essay simply seeks to make that process explicit.

pared? The answer to these questions is necessarily a pragmatic one. While we may not be able to say with certainty when a particular norm originates, at some point we can say with considerable certainty that a norm has emerged.[69] Indeed, as Harold Koh has pointed out, CIL is recognized as law by all three branches of the U.S. government.[70]

Like CIL, bottom line feminist theory is inevitably circular and indeterminate. This is less problematic in the context of theory, however, than in the context of law. In law, for example, circularity is criticized as "boot-strapping."[71] In theory, in contrast, circularity suggests consensus-building. The inability to bind, fatal in law, makes theory appealingly flexible. In law, lacunae can be exploited by opportunistic states.[72] In feminist theory, on the other hand, as June Carbone points out, "there are any number of topics characterized by [feminist] silence, including politically strategic ones."[73] Finally, difficulty in ascertaining the substance of CIL makes it impossible to comply with the law as a practical matter. In the context of theory, however, difficulty in ascertaining substance simply indicates the need for more clarifying theory.

---

[69] For a thoughtful argument that "behavior is pervasively a function of norms . . . [and that] norm management is an important strategy for accomplishing the objectives of law," see Cass Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 907 (1996).

[70] Koh, *supra* note 28, at 1824–25.

[71] *See* Bradley & Goldsmith, *supra* note 34, at 821.

[72] There is little CIL regarding terrorism, for example, because of the difficulty in achieving consensus on this politically charged issue. *But see* Richard B. Lillich & John M. Paxman, *State Responsibility for Injuries Occasioned by Terrorist Activities*, 26 AM. U. L. REV. 217 (1977) (arguing that states should be held liable under traditional norms of state responsibility for harboring terrorists).

[73] E-mail from June Carbone, *supra* note 44. For example, Robin West broke feminist silences in her frank discussion of the erotic appeal of sexual submission. Robin West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Theory*, 3 WIS. WOMEN'S L.J. 81, 129 (1987). More recently, Martha Fineman, as Director of the Feminism and Legal Theory Project at Cornell Law School, attempts to broach feminist silences in a series of "uncomfortable conversations" on discrimination and inequality. Memorandum from Martha A. Fineman, Director, Feminism and Legal Theory Project, Cornell Law School, to Friends of the Feminism and Legal Theory Project (Feb. 2000) (on file with author). Feminist silences, like bottom line feminist theory itself, are contingent and always subject to change. Consensus may appear impossible, until a new perspective reveals new common ground.

II. AN EXAMPLE: MEDIATION AT DIVORCE[74]

The usefulness of bottom line feminist theory, and the method for ascertaining it, can be shown by examining a particular practice in a particular context. The example considered here, divorce mediation, has been chosen for three reasons. First, it is an example of "middle level theory"; that is, it provides a concrete context in which a more abstract theoretical debate among "feminisms" plays out.[75] Second, from a practical perspective, as divorce mediation programs proliferate,[76] it becomes increasingly important to assess their impact, particularly on economically vulnerable women.[77] Third, because mediation, like CIL, has roots in international law,[78] an in-depth analysis of mediation suggests some of the deep structural reasons why the methods of international law may be so useful for feminists.[79]

Mediation is an alternative to judicial process and approaches disputes more as problems to be solved cooperatively than as conflicts to be won or lost. As Roger Fisher and William Ury explain in their groundbreaking book, *Getting to Yes*, the objective is to "change the [adversarial] game"[80] by taking the following steps:

[1.] Separate the *People* from the Problem
[2.] Focus on Interests, Not Positions
[3.] Invent *Options* for Mutual Gain

---

[74] Mediation, or negotiation facilitated by a neutral third party with no authority to bind the parties, is the most common form of alternative dispute resolution ("ADR") at divorce. ADR, of course, encompasses a broad range of processes, from informal negotiation to binding arbitration. *See* ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (2d ed. 1991); JOHN S. MURRAY ET AL., PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS (2d ed. 1996); *see also* LEONARD L. RISKIN & JAMES E. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS 7–10 (1987) (explaining confusion about ADR processes). While there is a vast and growing literature on mediation, for present purposes, authority will be restricted to explicitly feminist legal writings, for the reasons set out in *supra* note 47.

[75] This theoretical debate demonstrates the rich multiplicity of feminist approaches in the law. *See* sources cited *supra* note 12. For an insightful discussion of the tensions between feminists, see Wendy W. Williams, *Notes From A First Generation*, 1989 U. CHI. LEGAL F. 99 (1989).

[76] *See* BABCOCK ET AL., *supra* note 46, at 1287 (noting that "the vast majority of jurisdictions have grown increasingly receptive" to divorce mediation programs).

[77] Feminist scholars have championed mediation since the 1980s. *See, e.g.*, BARTLETT, *supra* note 12, at 634 (explaining "'feminist practical reasoning' which means probing the context of a legal problem to identify factors that ought to be relevant to its resolution that abstract legal principles may otherwise leave unexamined") (citing Bartlett, *Feminist Legal Methods*, *supra* note 15, at 836–37); Menkel-Meadow, *supra* note 55.

[78] *See* FISHER & URY, *supra* note 74, at xi.

[79] *See infra* note 111 and accompanying text (explaining how CIL, like mediation, enables parties to generate their own norms).

[80] *See* FISHER & URY, *supra* note 74, at 13.

[4.] Insist on Using Objective *Criteria*[81]

As the feminist texts explain, this approach appealed to feminists eager to change what they perceived as a "male game."[82] Thus, feminist practice[83] was receptive to this new approach, at least initially. Feminists had criticized the judicial process for failing to take emotions and personalities into account; mediation makes these explicit. Feminists had criticized the judicial process for failing to take women's interests into account,[84] and they appreciated mediation's focus on those interests.[85] Feminists had criticized the judicial process for incorporating "male" criteria; the insistence on agreed-upon objective criteria seemed to offer an alternative.[86]

As the feminist texts point out, however, while many feminists were enthusiastic about mediation, others had doubts.[87] Thus, mediation did not satisfy the second prong for finding bottom line feminist theory, i.e., the shared belief within the feminist community that a particular position was no longer problematic. Some pointed out that mediation had to be considered in context; that is, the nature of the dispute had to be taken

---

[81] *Id.*, *supra* note 74, at 15. Although the authors refer to "negotiation," their methods have been adapted for use in mediation. *See id.* at 199 (stating that the Harvard Negotiation project "develops and disseminates improved methods of negotiation and mediation").

[82]

> The basic structure of our legal system is premised on the adversarial model, which involves two advocates who present their cases to a disinterested third party who listens to evidence and argument and declares one party a winner . . . . The conduct of litigation is relatively similar (not coincidentally, I suspect) to a sporting event—there are rules, a referee, an object to the game, and a winner is declared after the play is over.

Menkel-Meadow, *supra* note 55, at 50–51.

[83] As explained above, this includes writings by feminists as summarized by "highly qualified publicists" in the texts referenced *supra* note 49. *See supra* notes 48–50 and accompanying text.

[84] Robin West, for example, has pointed out that "separation of the individual from his or her family, community, or children is not understood to be a harm, and we are not protected against it." Robin West, *Jurisprudence and Gender, supra* note 55, at 59.

[85] *See* Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1506 (1992) (noting that mediation proponents view divorce as "the restructuring of an ongoing personal and family relationship"); *cf.* BARTLETT, *supra* note 77, at 634 (explaining "'feminist practical reasoning'"). Many feminists also liked the notion that "two apparently conflicting positions can both be simultaneously legitimate, and there need not be a single victor." Menkel-Meadow, *supra* note 55, at 45. *See also* Edwards, *supra* note 63, at 427 (finding that "[m]ediation offers a place for spouses to discuss creative ways of determining what is realistically feasible for both parties").

[86] *See, e.g.*, Edwards, *supra* note 63, at 431–32 (citing M. Benjamin & H.H. Irving, *Towards a Feminist Informed Model of Therapeutic Family Mediation*, 10 MEDIATION Q. 129 (1992)).

[87] *See* BECKER ET AL., *supra* note 12, at 827–28 (citations omitted); *see also* Penelope Eileen Bryan, *Reclaiming Professionalism: The Lawyer's Role in Divorce Mediation*, 28 FAM. L.Q. 177, 189 (1994) (discussing the "sober reassessment" of divorce mediation).

into account, as well as the identity of the participants[88] and the specific procedures utilized.[89] Other feminists reiterated the value of "rights talk"[90] for the subordinated.[91] Still other feminists looked at the actual impact of mediation on women,[92] especially risk-averse women.[93]

In response to these challenges, two important caveats emerged in the bottom line feminist theory of mediation.[94] First, feminists generally reject ADR in cases involving abuse.[95] The major concern is that power imbalances will resurface, and remain uncorrected, in the less formal mode.[96] The absence of process protections, a third party decisionmaker,

---

[88] Considering mediation in context necessarily includes "the hard and disruptive work entailed in making difference central." Nedelsky, *supra* note 7, at 1605; *see* June R. Carbone, *A Feminist Perspective on Divorce*, 4 FUTURE OF CHILDREN 183 (1994) ("Feminism generally is defined . . . by an insistence that women's experiences, varied as they are, be taken into account.")

[89] In some states, for example, lawyers are not allowed to represent their clients in mediation. *See* Bryan, *supra* note 87, at 209 n.89 (citing Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1554 n.30 (1991)).

[90] *See, e.g.*, Sylvia Ann Law, *Some Reflections on* Goldberg v. Kelly*: A Twenty Year Perspective*, 56 BROOK. L. REV. 805, 816 (1990). *But see* MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991).

[91] *See* BABCOCK ET AL., *supra* note 46, at 1288; BECKER ET AL., *supra* note 12, at 866 (citing Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution,* 1985 WIS. L. REV. 1359 (1985), to explain how "informal procedures such as mediation place persons of color at a disadvantage in general").

[92] In a New York study, women received a somewhat larger share of major assets in mediated settlement. Carol Bohmer & Marilyn L. Ray, *Effects of Different Dispute Resolution Methods on Women and Children After Divorce*, 28 FAM. L.Q. 223, 230–31 (1994). Mediated agreements, however, "contained a child support obligation proportionally less frequently than did other mechanisms." *Id.* at 232. *See* Edwards, *supra* note 63, at 431–32 (referring to "current research indicat[ing] that 'women found that mediation afforded them a greater opportunity to express their views, put aside their anger, focus on their children, and develop confidence in their ability to stand up for themselves; they were much more satisfied with the process'") (quoting M. Benjamin & H.H. Irving, *supra* note 86, at 138).

[93] Bryan, *supra* note 87, at 197. For a compelling explanation of why women, in general, may do worse than men in negotiation, see CAROL M. ROSE, *Women and Property: Gaining and Losing Ground*, *in* PROPERTY AND PERSUASION 233, 238–47 (1994).

[94] *Cf.* text accompanying notes 64–66 (explaining how CIL "changes and evolves as normative consensus changes and evolves").

[95] *See* BABCOCK ET AL., *supra* note 46, at 1288 (citing Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441 (1992)); BARTLETT, *supra* note 12, at 536–37 (discussing battered women's advocates' opposition to domestic violence mediation); FRUG, *supra* note 12, at 554 n.1 (discussing the inferiority of mediation in treating domestic violence); *see also, e.g.*, Lisa G. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57 (1984) (critiquing domestic violence mediation); MYRA SUN & LAURIE WOODS, A MEDIATOR'S GUIDE TO DOMESTIC ABUSE (1989); Andree G. Gagnon, *Ending Mandatory Divorce Mediation for Battered Women*, 15 HARV. WOMEN'S L.J. 272 (1992) (criticizing mandatory divorce mediation when there has been a history of domestic violence). Statutes mandating mediation at divorce increasingly allow victims of domestic abuse to opt out. *See* NANCY H. ROGERS & CRAIG A. MCEWEN, MEDIATION: LAW, POLICY, PRACTICE 45–46 (1989); Gagnon, *supra*, at 283. *But see* Bryan, *supra* note 87, at 209 n.87 (presenting anecdotal evidence that judges are predisposed "to ignore abuse and mandate mediation").

[96] *But see* STANDARDS OF PRACTICE FOR LAWYER MEDIATORS IN FAMILY DISPUTES § 5

and clear guidelines make it too easy for victims of domestic violence to be further victimized.[97]

Second, even if there has been no abuse, feminists generally reject *mandatory* ADR.[98] As Trina Grillo explains, "[while] mediation can challenge the hierarchical, professionalized way that family law is usually practiced . . . [t]his dynamic is fundamentally altered when mediation is imposed rather than sought or offered."[99] The risks of mandatory mediation are especially great in the context of custody disputes.[100] First, many women will give up everything else in order to keep their children.[101] Second, research suggests that some mediators pressure divorcing couples to accept joint custody[102] and joint support obligations, although in fact women ultimately assume greater responsibility.[103] In addition, as Professor Grillo notes, the promise of mediation to contextualize problem solving is broken by mediators who "eliminat[e] discussion of the past."[104]

In terms of bottom line feminist theory, accordingly, normative consensus with regard to mediation has evolved from early enthusiasm—and distrust—to a much more nuanced, contextualized, and qualified accep-

---

(ABA 1984) (requiring mediators to "defuse any manipulative or intimidating negotiation techniques utilized by either of the parties") (*quoted in* BABCOCK ET AL., *supra* note 46, at 1287–88).

[97] *See, e.g.*, Gagnon, *supra* note 95, at 275–76 (arguing that "mandat[ing] a private process to resolve disputes between a batterer and his partner [sends] a message that assault and battery is not a criminal act when it occurs between intimates").

[98] Many states require mediation. *See* Bryan, *supra* note 87, at 208 n.84 (citing COLO. REV. STAT. § 13-22-311 (1993); WIS. STAT. § 767.081 (1991)).

[99] Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1581–82 (1991). *But see* Joshua D. Rosenberg, *In Defense of Mediation*, 33 ARIZ. L. REV. 467 (1991) (responding to Grillo's article).

[100] *See* BARTLETT, *supra* note 12, at 537.

[101] *See* BECKER ET AL., *supra* note 12, at 510; Mary Becker, *Maternal Feelings: Myth, Taboo and Child Custody*, 1 S. CAL. REV. L. & WOMEN'S STUD. 133 (1992); Jane W. Ellis, *Surveying the Terrain: A Review Essay of Divorce Reform at the Crossroads*, 44 STAN. L. REV. 471, 476 (1992) (noting that evidence suggests "that mothers felt more strongly about custodial arrangements than fathers did"); *see also* KAY & WEST, *supra* note 31, at 354 (discussing research showing that many mothers have custody of their children because many fathers do not want custody); West, *supra* note 55 (finding that women value relationships more); *cf.* FRUG *supra* note 12, at 379 (urging feminists not to "overlook" the role of class and "differing feminine cultures"). *See generally* Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559 (1991) (arguing that women are taught to be self-sacrificing).

[102] *See* Martha A. Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727 (1988).

[103] *See, e.g.*, Bohmer & Ray, *supra* note 92, at 236 (discussing research finding legal custody arrangements "significantly more likely to break down within a few months of the settlement for people who used mediation than it was for those who used [negotiation and judicial assistance]").

[104] Grillo, *supra* note 99, at 1564. Professor Grillo provides a chilling example: a father told a mother that their young child would be cared for in the home by his new wife, but in fact the child was placed in unlicensed daycare, where he was subject to corporal punishment. The mediator did not allow the mother to make these points because "the past is not to be discussed." *Id.*, at 1562–63. *See also* Singer, *supra* note 85, at 1544 (explaining how mediators' enthusiasm for joint custody devalues mothers' work).

tance. In general, feminists view mediation as a promising alternative to the adversarial model. It is not a necessarily gendered process, nor does it necessarily draw on gendered criteria.[105] Rather, mediation permits the parties to generate their own criteria.[106] Mediation may well work for some women,[107] but feminists have shown how seemingly neutral processes allow gendered norms to reassert themselves, especially in traditionally gendered contexts such as divorce.

In the more specific context of divorce, therefore, feminist consensus depends on the context in which mediation is to be used. Where there is a history of abuse, or where mediation is mandatory, bottom line feminist theory has strong reservations. That is, at this point, in this context, most feminists agree that either of these factors is likely to tip the scales against women.[108] While feminists are therefore likely to condemn programs that fail to recognize the risks of mediation in particular contexts, it remains an open question whether these risks can be effectively addressed through the manner in which mediation is implemented.[109]

CONCLUSION: THE DREAM OF A COMMON LANGUAGE

Contemporary international law is grounded in the paradox that while there is no "common language" among the people of the world, there must be at least a *dream* of such a language, the hope of functional

---

[105] *Cf.* Delgado et al., *supra* note 91 (arguing that ADR may draw on criteria prejudicial to persons of color).

[106] The relationship between mediation and CIL is beyond the scope of this Essay, but it should be apparent that they are often complementary. Specific norms that elude CIL may be agreed upon between the parties in a particular dispute through mediation or other forms of ADR. General norms that elude CIL may be negotiated through international treaty conferences. Neither process explicitly replicates power relations, but neither entirely neutralizes them. Feminists, recognizing this in the mediation context, have sought to exploit mediation's potential while recognizing its pitfalls. *See* Stark, *supra* note 68, at 355–59 (considering ADR-inspired guidelines for problem solving as "feminist metadiscourse").

[107] Mediation may, at least, be better than an adversarial system of family courts in which bias against women has been well documented. *See* BABCOCK ET AL., *supra* note 46, at 1289 (citing Carol S. Bruch, *And How Are the Children? The Effects of Ideology and Mediation on Child Custody Law and Children's Well Being in the United States,* 2 INT'L J. L. & FAM. 106, 108–22 (1988)).

[108] *Cf.* Bryan, *supra* note 87, at 193–207 (providing a checklist for identifying the "high-risk client," who should not participate in mediation under any circumstances).

[109] *See* BABCOCK ET AL., *supra* note 46, at 1287; BARTLETT, *supra* note 12, at 538 (citations omitted); *see also* Diane Neumann, *How Mediation Can Effectively Address the Male-Female Power Imbalance in Divorce,* 9 MEDIATION Q. 227 (1992) (illustrating how mediators can be sensitized to, and address, gendered power imbalances). *But see* Bryan, *supra* note 87, at 193 ("[M]ediators . . . cannot protect the at-risk spouse."). *See generally* Eve Hill, *Alternative Dispute Resolution in a Feminist Voice,* 5 OHIO ST. J. ON DISP. RESOL. 337 (1990) (analyzing the potential of mediation and its problems from a feminist perspective).

translation, if we are to share a planet.[110] CIL may be understood as one of the ways in which international law generates a transitory and contextualized "common language."[111] (Mediation, of course, is another.[112])

Contemporary feminist theory is grounded in a similar paradox. As Professor Bartlett and others have explained, feminist theory is necessarily subject to ongoing critical assessment, based on ongoing experience and critical reflection informed by that experience.[113] The process of articulating feminist theory is therefore an ongoing and necessarily interminable one. Feminist practice cannot wait, accordingly, until the theory is completed. Bottom line feminist theory makes it possible to incorporate ongoing feminist critique into practice by linking practice to a floating bottom line.[114]

By drawing on the method developed in CIL, feminists can acknowledge the limitation of grand theory, the impossibility of subsuming all women's experience in some "common language," without giving up "the drive to connect," the *dream* of a common language,[115] the piecemeal translations that enable us to live and work together.

This Essay has shown why feminists need bottom line theory, and how we can find it and use it to build on each other's work. It is not "a common language," but it makes "the dream of a common language" possi-

---

[110] Barbara Stark, *What We Talk About When We Talk About War*, 32 STAN. J. INT'L L. 91 (1996) (explaining some of the difficulties in doing so in the absence of shared metanarratives).

[111] CIL, as part of international law, has been criticized by feminists because of its deference to states and their usually male leaders and male legal systems. *See, e.g.*, Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613 (1991); Karen Knop, *Why Rethinking the Sovereign State is Important for Women's International Human Rights Law, in* HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 153 (Rebecca Cook ed., 1994). The process through which CIL emerges, however, is not necessarily gendered, nor does it necessarily draw on gendered norms. Rather, like mediation, it permits the parties to generate their own norms. Under my proposal, those generating bottom line feminist theory are feminists themselves, and the norms they draw on are explicitly feminist.

[112] *See supra* note 106 and accompanying text.

[113] *See* Bartlett, *supra* note 15. This need for ongoing critical assessment has been attributed, in part, to the larger social context of patriarchy. *See* Radin, *supra* note 31. This also reflects the feminist insistence on grounding theory in actual experience. *See* ALICE TEMPLETON, THE DREAM AND THE DIALOGUE: ADRIENNE RICH'S FEMINIST POETICS 78 (1994) (finding that "private experience will be untested and incomplete until it is integrated into the broader world"); *see also* Olga Broumas, *Review of* The Dream of a Common Language, *in* READING ADRIENNE RICH: REVIEWS AND RE-VISIONS, 1951–81 274, 277 (Jane Cooper ed., 1984) [hereinafter READING ADRIENNE RICH].

[114] As Professor Harris notes, feminists prefer to "make our categories explicitly tentative, relational, and unstable." Harris, *supra* note 5, at 586.

[115] RICH, *supra* note 1, at 7 (emphasis added). As critic Myriam Díaz-Diocaretz points out, Rich's "common language" echoes Wordsworth's Preface to the *Lyrical Ballads*; however, Wordsworth refers to a "'common language' in the life of men," while "Rich's common language is . . . a common language *for women* and *by women*." MYRIAM DÍAZ-DIOCARETZ, THE TRANSFORMING POWER OF LANGUAGE: THE POETRY OF ADRIENNE RICH 29 (1984); *cf.* Joanne Feit Diehl, *"Cartographies of Silence": Rich's Common Language and the Woman Poet, in* READING ADRIENNE RICH, *supra* note 113, at 92 (arguing that Rich's "common language" alludes to Virginia Woolf's introductory essay to *The Common Reader*).

ble. It recognizes that "the oppression of women exists,"[116] that women are "living through some kind of crisis,"[117] and that improving the lives of women depends on collective, political action—"the drive to connect."[118] Bottom line feminist theory suggests a process through which feminists can situate their work in the context of a larger feminist project and clarify the parameters of that project in the process of doing so.[119] By drawing on methods which have emerged through hundreds of years of CIL, feminists can use bottom line feminist theory to describe their own evolving normative consensus.

---

[116] Gagnier, *supra* note 2, at 24.

[117] RICH, *supra* note 1, at 7.

[118] *Id. See* Gertrude Reif Hughes, *Imagining the Existence of Something Uncreated, in* READING ADRIENNE RICH, *supra* note 113, at 152 (arguing that "the dream is to be more than a mere wish fulfillment . . . ; it is to be a waking dream, a vision that can engage and direct action").

[119] *See supra* note 68.