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ESSAY

Feminism and International Law: A Reply

FERNANDO R. TESÓN*

I. INTRODUCTION

Over the past several years, legal scholars have extended feminist theory to many areas of the law, and legal discourse has been enriched by feminist jurisprudence. Until recently, however, international law had not undergone a sustained feminist critique. This gap is now slowly being filled; a notable contribution to that effort is a recent article by Hilary Charlesworth, Christine Chinkin, and Shelley Wright.¹

This Essay presents a reply to the Charlesworth-Chinkin-Wright critique. Although much of this reply engages more general issues in feminist theory, it would be impossible, within the scope of this work, to address every important political, cultural, biological, epistemological, and metaphysical issue raised by the various feminist critiques of traditional jurisprudence. I therefore confine the analysis to arguments directly relevant to international law, focusing on the analogies

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and contrasts between the differing feminist approaches to international law and the Kantian theory of international law defended in my previous writings.\(^2\)

The feminist critique of international law contains many disparate strands of theory that must be disentangled. A central difficulty with the article by Charlesworth and her associates is that it conflates divergent arguments from very different (and often irreconcilable) camps within feminist theory. The most important such mismatch is between liberal and radical feminism, which coexist in uneasy tension throughout the article. Much of the analysis in this essay is therefore devoted to separating, analyzing, and ultimately evaluating these interwoven but uncongenial threads of feminist thought.\(^3\)

In examining the liberal and radical feminist approaches to international law, as manifested in the Charlesworth article, I distinguish three different levels of criticism. The first level concerns the processes of international lawmaking, the second addresses the content of international law, and the third attempts to derive a critical theory from the (purported) "nature" or "inherent qualities" of liberal international legal institutions. These critiques are treated differently, in complex ways, by radical and liberal feminism. Yet on all three critical dimensions, my conclusion is the same: although liberal feminism has important things to say about international law and relations, radical feminism is inconsistent both with the facts and with a view of international law rooted in human rights and respect for persons.

II. KANTIAN LIBERALISM AND FEMINISM

Liberal, or Kantian, international legal theory is founded on the idea of the individual as rational and autonomous. Liberal theorists

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3. There are other schools of thought within the feminist movement. Particularly noteworthy is relational, or cultural, feminism, inspired by Carol Gilligan. Carol Gilligan, In A Different Voice: Psychological Theory and Women's Development (1982); see also Suzanna Sherry, Civic Virtue and the Feminine Voice in Constitutional Adjudication, 72 Va. L. Rev. 543 (1986). In this article, however, I will discuss only liberal and radical feminism, in part because they seem to me the two alternatives that are truly irreconcilable. Moreover, Charlesworth and her associates do not rely on relational feminism as part of their critique of international law. Cf. Charlesworth et al., supra note 1, at 615-16 (discussing sympathetically Gilligan's work but refusing to adopt the "different voice" premise).
regard individuals as capable of rational choices, possessed of inherent
dignity, and worthy of respect. Liberal states in international rela-
tions, or members of the liberal alliance, are those nation-states with
democratically elected officials, where human rights are generally
respected. Liberal internationalism assumes a right to democratic
governance, and holds that a state may not discriminate against indi-
viduals, including women. This principle is, of course, a centerpiece
of the international law of human rights. A corollary of the Kantian
thesis is that illegitimate governments may not be embraced as mem-
bers of the liberal alliance.

Liberal feminists rely on liberal principles of domestic and interna-
tional law to end abuses against women. Very succinctly, liberal femi-
nism is the view that women are unjustly treated, that their rights are
violated, and that political reform is needed to improve their situa-
tion, thereby allowing them to exercise autonomous choices and enjoy
full equal status as free citizens in a liberal democracy. The gov-
erning international principles are the imperatives of human rights,
nondiscrimination, and equal opportunity for women, as envisioned
in articles 1(3), 8, and 55 of the United Nations Charter. When a
state discriminates or deprives women of these human rights, it com-
mits an injustice, a violation of international human rights law for
which it is responsible.

Radical feminists agree with liberal feminists that the situation of
women must be improved. They believe, however, that liberal institu-
tions are themselves but tools of gender oppression, and that women
are exploited by men in even the least suspecting ways.

5. See generally Thomas M. Franck, The Emerging Right to Democratic Governance, 86
6. See Convention on the Elimination of All Forms of Discrimination Against Women,
Women’s Convention]; Convention on the Political Rights of Women, opened for signature
Inter-American Convention on Granting of Political Rights to Women, opened for signature
7. See The Kantian Theory, supra note 2, at 69-72.
8. For a useful survey of liberal feminism, see Alison M. Jaggar, Feminist Politics and
Human Nature 27 and passim (1983). For two excellent examples of modern liberal feminist
scholarship, see Susan Moller Okin, Reason and Feeling in Thinking about Justice, in
Feminism and Political Theory 15 (Cass R. Sunstein ed., 1990); Diana T. Meyers, Personal
Autonomy and the Paradox of Feminine Socialization, 84 J. Phil. 619 (1987).
10. Id.
11. For examples of characteristic radical feminist legal theory, see Catharine A.
MacKinnon, Feminism Unmodified (1987) [hereinafter Feminism Unmodified]; Catharine A.
feminists believe that existing states are hierarchically structured according to gender, and that gender hierarchy necessarily infects the process of legal reasoning itself. Radical feminists hold that the “actual choices” of women only seem to be autonomous and free; in reality they are socially determined. Human beings are not, as liberals would have it, separate, rational entities capable of individual decision-making, but rather beings to some degree defined and determined by their social—and particularly gender—relationships. Under radical feminist theory, no woman is truly free, not even in the “freest” of societies.

III. THREE FEMINIST CRITIQUES OF INTERNATIONAL LAW

In light of the differences in feminist theory it will be convenient to set forth three feminist critiques of international law, and the central claim associated with each: (A) the processes of international lawmaking exclude women; (B) the content of international law privileges men to the detriment of women; and (C) international law, as a patriarchal institution, inherently oppresses women, marginalizes their interests, and submerges their experiences and perspectives. I will address each of these critiques in turn.

A. The Processes of International Lawmaking Exclude Women

Feminists criticize the international lawmaking process for depriving women of the access and opportunity to take part in lawmaking in two important ways. First, feminists argue that women are underrepresented in international relations, that is, in high positions in international organizations, in diplomatic services, and as heads of state and government. Second, they contend that because of this underrepresentation, the creation of international law is reserved almost exclusively to men. Women are thus effectively prevented from participating in the processes of international lawmaking.
Central to the claim of exclusion is the fact that women are underrepresented in international relations. There is no doubt that there are relatively few women heads of state, diplomats, or international organizations officials. Is this state of things, however, an injustice? And how can the statistical underrepresentation (whether or not it is an injustice) be redressed? It is useful, in addressing these issues, to distinguish, first, between legitimate and illegitimate governments, and second, between governments and international organizations.

Let us consider first the case of illegitimate, undemocratic governments. Plainly, it does not make sense to criticize a dictator, say, for not appointing enough women to his government or diplomatic corps. To do so would constitute a contextual category mistake: blaming a dictator who has taken and held power by means of torture and murder for not appointing a woman as ambassador to the United Nations is like blaming a burglar ransacking our home at gunpoint for not having asked our permission to use the telephone. The normative context of a burglary is one in which it does not make sense to insist on compliance with the norms of courtesy. Likewise, the normative context of a tyrannical state is one in which it does not make sense to ask the tyrant to appoint more women (or men, or blacks, or Catholics).

In such a case, the government is illegitimate in the first place, so its appointments are morally invalid regardless of the sex of the appointees. If an illegitimate government consists of a group of men systematically excluding women, this is of course an injustice, but it is one that is subordinated to the greater injustice of tyranny, which by definition includes the illegitimacy of origin and the violation of human rights. It is true that discriminating against women aggravates the injustice of tyranny; it therefore makes sense to put pressure on all governments to refrain from sexist practices. The analysis, however, does not work the other way round: tyranny is not cured by the tyrant’s celebration of diversity, as it were. Even in cases where human rights abuses (other than exclusion from government) are primarily directed at women, suggesting that what we need is more women as international representatives of dictators is absurd on its face. The only remedy, here as elsewhere, is to get rid of the tyrants and secure human rights.

16. See id. at 16 n.56.
17. By illegitimate governments I mean governments that do not respect basic human rights and are, for that reason, unrepresentative. The Kantian Theory, supra note 2, at 60-74.
Put differently, in a tyrannical state the agency relationship between people and government, the vertical social contract, has broken down. Therefore, the tyrant cannot legitimately address the question of the sex of his political appointees because he does not represent anybody. The women he decides to appoint to office to achieve gender balance are likewise blighted by the original illegitimacy. A partial reply to the complaint by Charlesworth and her associates about women's being underrepresented in international relations, then, is that it is not sensible to start addressing that issue globally without addressing also the issue of democratic legitimacy.

More interesting is the case of full members of the liberal alliance, states with democratically elected officials where human rights are generally respected. Assuming a right to democratic governance, a state may not discriminate against women in their exercise of that right. The governing principle, then, is the imperative of nondiscrimination and equal opportunity for women, along the lines suggested by the pertinent international instruments, themselves inspired in articles 1(3), 8, and 55 of the U.N. Charter. Therefore, if the underrepresentation of women results from states' preventing them from exercising their right to political participation, that is an injustice, a violation of international human rights law for which the state is responsible. A similar analysis holds for a state that discriminates against women in its processes for admission to the diplomatic service. Such discrimination is contrary to the mandates of international human rights law. This conclusion follows from both liberal feminism and the Kantian theory of international law.

Radical feminists, however, seem to believe that there is a global

20. See generally Franck, supra note 5.
21. See id.
23. The case law of the European Court of Human Rights applies the test of reasonableness and objectivity to determine whether a governmental distinction between groups is justified under article 14 of the European Convention on Human Rights. European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221 (1950); see Belgian Linguistic (No. 2), 1 Eur. H.R. Rep. (ser. A) (1980) at 252; see also Marekx v. Belgium, 2 Eur. H.R. Rep. (ser. A) (1979) at 330. Thus, a regulation prohibiting the government from sending a female diplomat to a country where women are much more likely to be assaulted or killed may be justified. General discrimination against women in the admission to the foreign service, however, is not. An interesting case is whether a government is justified in refusing to send women diplomats to countries where host governments dislike seeing women in any public positions primarily because they deny the women in their state access to such positions. In principle, democratic nations should refuse to honor the illegal discriminatory practices of other governments.
injustice even where, as a result of democratic elections held in independent, rights-respecting states, it is mostly men who are elected to government, or if in such states mostly men traditionally seek admission to the diplomatic service. An example is the discussion by Charlesworth and her associates of the Women's Convention. They strongly criticize the Convention for assuming that men and women should be treated alike, which is the liberal outlook. The Charlesworth view is that sexism is "a pervasive, structural problem." Further, it is male dominance which lies at the root of the structural problem and which must be addressed as a means to reach the structural issues. But what are the authors' suggestions? If we descend from the abstract slogan that liberal equality is just the men's measure of things, how do they suggest rewriting each of the rights recognized by the Convention to meet their concerns? Take article 7, for example, which directs states to eliminate all discrimination against women in the political and public life of the country. Would a radical feminist rewriting of this article require states to appoint women, regardless of popular vote? These are not just rhetorical questions: given the radical fem-

24. Charlesworth et al., supra note 1, at 631-34.
25. Id. at 631-32.
26. Id. at 632 (citing Difference and Dominance, supra note 12, at 34 ("[M]an has become the measure of all things")).
27. See Women's Convention, supra note 6, art. 7.
28. This sort of global affirmative action suggestion is untenable and impracticable. The problem with such a global requirement becomes quickly apparent. Imagine the United Nations requiring a country preparing to hold a democratic election to choose a female president, under threat of sanctions. This is completely different from the question of the permissibility under international law of domestic affirmative action programs designed to redress de facto inequalities of women. See Women's Convention, supra note 6, art. 4 (allowing temporary affirmative action programs provided they do not result in states maintaining separate standards). Whatever the laws of individual states on this issue, international law allows for such programs through the margin of appreciation left to states, at least when the programs are not extreme.
29. Cf. Charlesworth et al., supra note 1, at 623 (discussing the 50% figure for "professional jobs held by women" in international organizations and agencies). Interestingly, the authors use expressions such as the "silence" or "invisibility" of women instead of the term "injustice." Id. Analogous criticism was heard in the United States during the recent Clarence Thomas hearings when critics pointed out that the Senate Judiciary Committee was made up entirely of white males and that the U.S. Senate itself was 98% male. Whatever the other faults of the individual senators involved or the hearings might have been, this criticism is misguided. Each participating senator had perfectly democratic credentials, having been elected to the Senate by a free democratic choice of the electorate. I cannot, therefore, see any real injustice, unless feminists are suggesting that women are being prevented from voting. It is also unclear how radical feminists intend to address this problem. A perfectly sensible way would be to mobilize the electorate to get more women elected (politically, this requires convincing voters that the
inists' rejection of rights discourse and formal political equality, it is difficult to imagine what a radical list of international women's rights would look like.

That said, the Kantian theory of international law does not preclude domestic electoral arrangements designed to heighten the probability of electing women in a given state. This is no different from gerrymandering for the purpose of strengthening the vote of minorities or other groups in some states.\(^3\) Here again, international law cannot go beyond mandating democratic governance and nondiscrimination in a general way. Local conditions will vary, and in states where women have been previously excluded from politics it may be permissible and desirable to adopt preferential electoral arrangements. Such measures, when properly tailored, do not do violence to the international law principle of nondiscrimination and the right of all citizens to participate in public life.

This analysis holds with even more force for the permanent staffs of international organizations. There would be nothing wrong with the United Nations, for example, attempting to achieve a gender balance in the composition of its administrative staff, much in the way the organization attempts to maintain a geographical and even ideological balance.\(^3\)\(^1\) In this case there is no competing legitimate sovereignty principle, and the organization would not be impairing individual or collective choices in legitimate states (i.e., liberal democracies)\(^3\)\(^2\) if it attempted to hire officials under such a scheme.

In sum, imposing on states the duties of nondiscrimination and equal opportunity, including affirmative measures where appropriate, is the only way to redress the underrepresentation of women as state agents consistent with full respect for democratic and individual choices.\(^3\)\(^3\) Likewise, in international organizations it may make sense, depending on the circumstances (past discrimination, goals of the organization), to push to achieve a gender balance in the composition of the organization's personnel.

candidate's sex is an important consideration). The impracticality of other alternatives, such as a constitutional amendment imposing a 50% quota for women in the Senate, is self-evident.\(^3\)\(^0\) I am indebted to Lea Brilmayer for calling my attention to this point.

\(^3\)\(^1\) Thus, Charlesworth and her associates seem to be correct on this point. Charlesworth et al., supra note 1, at 625.

\(^3\)\(^2\) Again, I purposefully confine this discussion to legitimate states, because in my view envoys of illegitimate governments should not be allowed to represent their states, come what may. See The Kantian Theory, supra note 2, at 100 (recommending that the United Nations require democratic legitimacy of representatives before admitting them to the organization).

\(^3\)\(^3\) Radical feminists do not accept even the possibility of free individual or collective choice in today's society. I address this issue below. See discussion infra § III(C)(2).
B. The Content of the Rules of International Law

In addition to criticizing the processes of international lawmaking, many feminists argue that the content of international law privileges men to the detriment of women.\textsuperscript{34} The claim that the content of international law favors the interests of men may incorporate either or both of the following arguments: first, international law rules in general are "gendered" to privilege men;\textsuperscript{35} and second, international rules such as sovereign equality and nonintervention protect states, and states are instrumental in disadvantaging or oppressing women.\textsuperscript{36} The latter claim, in turn, may intend either or both of the following: first, international law is too tolerant of violations of women's rights by governments;\textsuperscript{37} and second, international law is too tolerant of violations of the rights of women by private individuals within states, such as physical abuse by men in the home.\textsuperscript{38}

1. "Gendered" Rules

In response to the first point, I find little plausibility in the claim of some feminists that the specific content of international law rules systematically privileges men. Positive international law is a vast and heterogeneous system consisting of principles, rules, and standards of varying degrees of generality, many of a technical nature. Rules such as the principle of territoriality in criminal jurisdiction, or the rule that third states should in principle have access to the surplus of the entire allowable catch of fish in a coastal state's exclusive economic zone are not "thoroughly gendered"\textsuperscript{39} but, on the contrary, gender-neutral. It cannot be seriously maintained that such norms operate overtly or covertly to the detriment of women. The same can be said of the great bulk of international legal rules.\textsuperscript{40}

2. Overprotecting States

Feminists are correct, however, on their second claim that interna-

\textsuperscript{34} See Charlesworth et al., supra note 1, at 625.
\textsuperscript{35} Id. at 621-22.
\textsuperscript{36} Id. at 622 (citing Betty Reardon, Sexism and the War System 15 (1985)).
\textsuperscript{37} Charlesworth and her associates do not make this point expressly. See infra notes 72-75. For an account of violations of women's rights, see generally Amnesty International, Women in the Front Line: Human Rights Violations Against Women (1991).
\textsuperscript{38} Charlesworth et al., supra note 1, at 629.
\textsuperscript{39} Id. at 614 (stating that "international law is a thoroughly gendered system").
\textsuperscript{40} By the assertion that international law rules are gendered, feminists, especially radical feminists, may also mean that in virtue merely of being part of the liberal state system, international law rules are bound up with patriarchy, and therefore inherently oppress women. This line of reasoning is considered and rejected in § III(C)(1).
tional law overprotects states and governments. International law, as traditionally understood, is formulated in exaggeratedly statist terms. Statism, the doctrine that state sovereignty is the foundational concept of international law, repudiates the central place accorded to the individual in any liberal normative theory; and, by extension, it often results in ignoring the rights and interests of women within states.

This criticism is identical to the one made by the Kantian theory of international law.41 The Kantian thesis insists upon disfranchising illegitimate governments, that is, governments that fail to respect basic human rights and are unrepresentative.42 Likewise, there is little doubt that the government of a state that denies women status as equal citizens is illegitimate, just as the apartheid régime in South Africa is (or was) illegitimate.43 Feminists are right in challenging statism.

On the other hand, radical feminists also attack liberalism. Insofar as this attack is predicated on the perception that liberal philosophy and the liberal state oppress women, it must be met with a philosophical and political defense of the liberal vision. But if the feminist attack on liberalism is predicated on the belief that statism, as an assumption of international law, is necessarily entailed by liberalism, the answer is simply that this is a mistaken inference. Statism is at odds with liberalism. The human rights theory of international law (certainly the most liberal international legal theory) rejects statism because it protects illegitimate governments and is thus an illiberal theory of international law.44 The whole point of the liberal theory of international law is to challenge absolute sovereignty as an antiquated, authoritarian doctrine inhospitable to the aspirations of human rights and democratic legitimacy.45

Liberal feminism and the Kantian theory of international law join

41. I developed this thesis in The Kantian Theory, supra note 2; see also International Obligation, supra note 2.
42. The Kantian Theory, supra note 2.
44. See generally International Obligation, supra note 2.
45. Feminists here make the same mistake as critical legal scholars in confusing legal formalism (which certainly international legal discourse inherited from Western legal thought) with liberal political philosophy, which need not (and should not) endorse a legal formalism devoid of moral content. Liberals do believe in formal constraints of rational discourse, but their political philosophy is built around the substantive Kantian notion of the inherent equal worth of persons and their entitlement to equal respect and basic human rights. See, e.g., The Kantian Theory, supra note 2.
in rejecting statism. Indeed, one of the most valuable contributions of feminist international legal theory is the attempt to disaggregate states, to pierce the sovereignty veil and inquire about real social relations, relations among individuals and between individuals and government within the state. This is also the thrust of the Kantian theory of international law. When the veil of state sovereignty is lifted, liberal feminists find that women are unfairly treated (i.e., their rights are violated) in most or all states. This injustice is compounded by the fact that it often takes place in spheres shielded from the reach of domestic and international law.

a. Rights Violations by Governments

Beneath the sovereignty veil, two different situations become relevant: violation of women's rights by the government, and violation of women's rights by private persons; notably, abuse by men in the home and the workplace. From the standpoint of the international law of human rights, the violation of women's rights by governments does not present difficulties distinct from the violation of other human rights. Liberal and radical feminists are at one here in condemning discrimination against women. Discrimination is a violation of international human rights law for which the state is internationally responsible.

b. Rights Violations by Private Parties

The violation of women's rights by private persons or groups raises more difficult issues because, as feminists rightly point out, the boundaries between public and private action are blurred. Indeed, radical feminists contend that the very distinction between public or state action and private action is indefensible because it is male biased and harmful to women. I discuss below the broader implications of the feminist critique of the public-private distinction.

It will be convenient here to treat separately what seems to me one of feminism's most persuasive points: the modern state affords excessive legal protection to the family. Family "autonomy," as the legal

46. See sources cited supra note 2.
48. For further discussion of governments' violations of women's rights, see infra § III(B)(2)(c).
49. See infra notes 90-97 and accompanying text.
50. See, e.g., Catharine A. MacKinnon, Privacy v. Equality: Beyond Roe v. Wade, in
basis of the private social domain, has legitimized the domination of women and children by men. This oppression ranges from outright brutality to subtler ways of socializing women within the family; for example, by more or less coercively convincing women that their place is in the home, and thus preventing them from pursuing other options.

For some feminists, the fact that the family is legally treated as a semi-enclosed unit to a greater extent than other legal relationships, and the fact that modern governments are, consequently, slow in intervening in internal family affairs, make states, in different degrees, accomplices in this injustice. International law, in turn, protects states by imposing a strong duty of nonintervention in internal matters. So there are two layers of legal immunity enjoyed by men who oppress women: domestic law, which treats the family as the man’s castle; and international law, which likewise leaves the state (with its many men’s castles) largely shielded from external scrutiny.

I think that feminists, radical and liberal, are right in decrying the excessive prerogatives enjoyed by men within the family. The law should punish the victimization of women, and culprits should not be allowed to hide behind the “family unit,” a politically defined space where men may unjustly dominate and sometimes even victimize women and children. Toleration of this sort of abuse does not, however, arise from liberalism, for group autonomy (state sovereignty, family autonomy) is an illiberal notion. Kantian liberalism insists that our moral principles derive from individual dignity and autonomy. Every person holds individual rights which are not forfeited by membership in the family group. Therefore, a liberal state must recognize and enforce the rights of women and children within the family and protect their rights. Just as the principle of state sovereignty must be set aside to protect citizens whose rights are violated by their government, so the principle of family autonomy must be set aside to protect the rights of members of the family.

At this point, the international lawyer may raise an objection. Why cannot domestic law address the question of abuse of women? Why should international law provide a remedy for the acts of private indi-

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Feminism Unmodified, supra note 11, at 93, 100-02 [hereinafter Privacy v. Equality] (maintaining that the law of privacy, conceived as promoting women's bodily autonomy, paradoxically protects activities tending toward the subjection of women).

51. See Charlesworth, supra note 1, at 625, 627.

52. Cf. Humanitarian Intervention, supra note 2 (presenting the thesis that, normatively, governments may justifiably provide aid to individuals being deprived of their basic human rights in other countries).
Surely many offenses (e.g., murder or rape), heinous as they are, are not criminalized by international law. International law, the traditionalist would claim, is primarily concerned with rules of state behavior. These rules do include human rights standards, but these standards can only be violated by state officials. Crimes committed by private individuals against their fellow citizens fall instead within the purview of the ordinary criminal law. It is true that, in special circumstances, certain crimes committed by private individuals are directly regulated by international law: piracy and genocide are examples. Most common offenses, including men’s offenses against women, however, belong, it is argued, in the province of the state. It is the state, through its criminal and civil legislation, that possesses the power to prevent and redress those injustices.

This reply, however, is too hasty, because it begs the question of why international law should be content with a few injunctions against governmental coercion, and why it should not instead impose some positive obligations on states to criminalize certain actions. To take an extreme example, imagine a state where rape is not criminalized. Unscrupulous men could go about taking advantage of women and terrorizing them; everyone would live in constant fear. I am not sure we would even call this Hobbesian jungle a state; it would certainly not be a civilized state in any meaningful sense, and it would be ludicrous for the government to escape international scrutiny by arguing that the legally permitted acts of rape are not being perpetrated by state officials. Liberal theory must therefore postulate an affirmative obligation in international law on the part of the state to have a reasonably effective legal system in which assaults against life, physical integrity, and property are not tolerated. Thus a state is in breach of its international obligations not only if it violates human rights in the traditional sense, but also if it fails adequately to protect its citizens—if it fails to punish enough, as it were.


54. The classic statement of the argument for criminalizing violent acts, as opposed to making them compensable only, is Robert A. Nozick, Anarchy, State, and Utopia 65-71 (1974). Nozick contends that if violent, wrongful acts were simply compensable, people would constantly fear violence against them. Compensating for this fear would not be possible, and, therefore, states instead forbid and punish violent acts criminally to alleviate general apprehension. Id.
In this regard, the case *X and Y v. The Netherlands*,\(^\text{55}\) decided in 1985 by the European Court of Human Rights, is instructive. The litigation arose from an unintended gap in Dutch criminal procedure which left a sixteen-year-old mentally retarded victim of rape unable to initiate criminal proceedings.\(^\text{56}\) The legal guardian of the victim brought the case to the Court alleging violation of her right to privacy under article 8 of the European Convention. The applicant claimed that the loophole in Dutch law amounted to a failure to protect the mentally handicapped woman's right to privacy (in this case, against sexual assault). The Dutch government responded, *inter alia*, that article 8 could not be interpreted to require a state to legislate specific rules of criminal procedure in cases where the applicant had been victimized, not by state officials, but by a private individual, and where civil remedies were available.\(^\text{57}\) The government argued that the Convention accorded to the states the task of determining the appropriate mix of civil and criminal penalties for a wrongful act.\(^\text{58}\) Nevertheless, the Court agreed with the applicant, reasoning that the European Convention entailed positive as well as negative obligations on the part of the state.\(^\text{59}\) The loophole in Dutch criminal law, while unintentional, amounted to an omission by the Dutch state that resulted, in this case, in the violation of the right to privacy of the applicant, and tort remedies were insufficient.\(^\text{60}\) The Netherlands was thus held in breach of article 8 of the Convention and ordered to pay reparation.\(^\text{61}\)

This decision by the oldest and most effective international human rights court demonstrates that it is possible for international law to mandate that states within the liberal alliance provide remedies for violations of human rights by private individuals. The international law of human rights need not be concerned only with direct human rights violations by public officials. Feminists are therefore right to criticize the international law rule of state attribution according to which only acts by public officials implicate the international respon-

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56. Under Dutch law, initiating criminal proceedings in statutory rape cases required the filing of a complaint by victims over the age of 12. For victims under 12 years old, a parent could file the complaint. Dutch law, however, had no provision allowing a parent of a mentally incompetent victim *over* the age of 12 to file a complaint on the victim's behalf. See id. at 9-10.
57. Id. at 11-12.
58. Id.
59. Id.
60. Id. at 13-14.
61. Id. at 16.
sibility of the state. Such a rule does not properly protect human rights because it does not account for the failure of states to enact or enforce domestic legislation protecting women from abuse within the family. To the extent that such acts of violence are treated by domestic law as purely internal family matters, a state, by putting women at an unfair risk within the home, fails to treat them with respect and dignity and thus violates the central tenet of the Kantian theory of international law. The state, in that case, finds itself in a situation virtually identical to that of the Dutch government in \textit{X and Y v. The Netherlands}.\footnote{Id. at 8.} This is not for the dubious conspiratorial reason that the state is an inherently oppressive patriarchal entity and thus is, in some convoluted way, an active accomplice of the wife beater, but rather because the government has failed in its duty to protect a group of citizens (women) against serious assault, thus putting them at an unfair risk.

c. Government Complicity in Private Rights Violations

There are also cases where governments openly encourage or tolerate groups of private individuals who violate the rights of women or other groups. In some countries, for example, religious guards patrol the streets to ensure that women, under the threat of severe physical punishment, abide by a set of strict rules that reinforce and help to perpetuate women's official status as inferior citizens.\footnote{See Middle East Watch, \textit{Empty Reforms: Saudi Arabia's New Basic Laws} 36-37 (1992); cf. Amnesty International, \textit{Iran: Women Prisoners of Conscience} (1990) (concerning imprisoning Iranian women for nonviolent political activities).} Unlike the Dutch case of an unintentional loophole, here the state sanctions the inferior status of women and encourages the squads in their actions. In such a case, the situation is even more closely analogous to direct human rights violations by state officials.\footnote{Cf. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 29 (May 24) (holding that the Iranian government's approval of the seizure of the U.S. embassy makes Iran internationally responsible).} In both cases there is a positive, affirmative breach of an international obligation. There is, however, an important moral, if not legal, difference between active governmental complicity in human rights violations by individuals and mere negligent failure to enact appropriate protective legislation. In the first case there might be reasons for declaring a government morally illegitimate; in the second case the state is merely out of compliance with an international obligation. Although the boundaries between direct governmental action and mere omission may be hard
to draw, there is nothing to prevent international law from establishing standards that states must meet in the enactment and enforcement of their criminal law.

Feminism and Kantianism thus agree that international law, in addition to imposing traditional negative constraints on governmental coercion, must impose affirmative duties of legislation and enforcement in order to deter and punish private individuals (e.g., men in their homes) who violate the rights of others (including, but not limited to, women).65

d. Defending the Convention Against Torture

It is in the light of these considerations that one must evaluate the criticism of the Convention Against Torture put forth by Professor Charlesworth and her associates. They deplore the fact that the Convention is limited to official torture, that is, torture by governments or under color of government authority.66 By imposing this requirement, they argue, the convention does not reach affronts to women’s dignity (e.g., battery) typically sustained by them in the home.67

In one sense, this objection misses the point of the Convention. It is one thing to assert, properly, that governments have a duty, through legislation, to punish the violation of their citizens’ physical integrity by private individuals. It is a very different thing to imply, as the authors seem to do, that because the Torture Convention is concerned with official torture it therefore permits states to leave private crimes unpunished.

Official torture is a worthy object of prohibitive legislation in its own right, as anyone who has witnessed government oppression will agree.68 Governments have been among history’s most egregious culprits in violating human rights. There is ample reason for human rights conventions to deal specifically with official torture. There is something particularly evil in governmental violations of human rights, for in those cases the government has turned its awesome coercive power against the very citizens who have entrusted their protec-

65. Cf. Women’s Convention, supra note 6, arts. 2, 3 (mandating legislation to eliminate gender discrimination).


67. Id. at 629.

68. See generally Comision Nacional Sobre La Desaparicion De Personas, Nunca Mas (9th ed. 1985) (documenting human rights abuses in Argentina).
tion to it. This is the age-old evil that most human rights conventions, including the Convention Against Torture, are meant to address; and radical feminists are wrong, I think, in drawing the alarmist inference that a hidden purpose or effect of these conventions is to free states from their other international obligations, including the obligation to protect the rights of women against invasion by private individuals.

On the other hand, the point that state complicity or inaction in the face of private torture should have been included in the Convention is unexceptionable. As I indicated above, under the liberal theory of international law, governments that tolerate the violation of women’s rights by private individuals should not be allowed to hide behind the claim that such conduct is outside the purview of the international law of human rights.69

e. State Obligations to Criminalize Rights Violations

The question then returns to the issue of which acts or omissions amount to state complicity. The broad radical feminist claim is that the reluctance of a government to intervene in internal family affairs amounts to complicity. We saw that if domestic law fails to criminalize or punish the behavior of husbands who torment their wives the state should be held accountable by international law.70 There are, of course, degrees of government negligence, and lines must inevitably be drawn. Nevertheless, the traditional international law requirement that states take reasonable steps to prevent and punish crimes seems to me an entirely appropriate standard.

Although even the most liberal states may have been remiss in the past in this regard (and there is surely much yet to be done, especially in the Latin American democracies), most democratic, rights-respecting states have laws that prohibit and punish the abuse of women. Where that legislation is enforced in good faith, holding such states nonetheless internationally responsible for the instances of abuse of women that still occur is like holding states internationally responsi-

69. The same situation occurs when death squads operate in face of a government’s inaction or complicity. See Amnesty International, Amnesty International Report 1990 86-89 (1990) (describing death squad activities in El Salvador). Here again, one cannot avoid this problem by defining “human rights violation” as a behavior that can be carried out only by a state official. Not only is it impossible to draw normative conclusions from definitions, but, from the standpoint of political theory, a private citizen may violate an individual’s rights as much as the government. In fact, under social contract theory, it is precisely the danger of rights invasions by individuals that motivates persons in the state of nature to create the state.

70. See supra notes 63-65 and accompanying text.
ble for, say, murders that are committed every year notwithstanding the states' good faith efforts at crime prevention. It is one thing to hold a state in breach of international human rights law if it knowingly tolerates the behavior of wife-beaters (or death squads, or the Mafia), or if it fails to enact or enforce appropriate protective legislation, as in the Dutch case. It is a very different thing to hold a state responsible when, despite reasonable legislation and law enforcement, crimes are still committed by private persons.

I would go further: from a human rights standpoint, it is actually counterproductive to strive for perfect (or even near-perfect) crime control. For in such a system, effective deterrence would be achieved by criminal codes imposing harsh punishments, such as death, for even minor offenses, and the law would be enforced by an aggressive and intrusive police force with broad powers of arrest and seizure. Citizens of a liberal democracy, concerned with limiting rather than enlarging state power, would rightly reject legislation so severe and law enforcement machineries so efficient as to ensure the punishment of all wife beaters, just as they would a system that ensured the punishment of all murderers. Even granting that the problem today lies in too little, rather than too much, state intervention against the abuse of women, there is surely a point at which the costs of more intervention will outweigh the benefits. But where should the line be drawn? What do radical feminists propose? When the rhetorical dust settles, it is difficult to tell exactly how radical feminists intend to deter private violence against women while curtailing the power of the (putatively) oppressive patriarchal state.

f. Conclusion

Both radical and liberal feminists generally agree that the statist orientation of traditional international legal theory tends to the detriment of women. A truly liberal theory of international law, on the Kantian model, rejects statism as impermissibly solicitous of rights violations by states, and unresponsive to the justified claims of all persons, including women, to dignity and equal treatment. The rejection of statism entails scrutiny not only of the official acts of states, but also of their complicity and even omissions in the protection of human rights. The notion that liberalism entails statism is therefore misconceived; the logic of liberal internationalism requires that international law limit absolute sovereignty to improve the situation of

women, insofar as women remain deprived of equal respect and dignity.

C. The Radical Claim of Inherent Oppressiveness

I will now respond to the third feminist critique of international law, the claim that international law is inherently oppressive of women. Some feminists argue that because current international law derives from European, male, liberal legalism, its very form and structure are inherently patriarchal and oppressive. In response to this contention, I first argue that the foundations of the "inherent oppressiveness" thesis are faulty, that nothing in the philosophic "nature" of a state makes it oppressive or non-oppressive, and that the radical feminists' nominalism only serves to obscure differences between states that defenders of women's interests ought to care about. I then examine and defend two institutions of liberal political thought professed by some radical feminists as constitutive of "inherent" liberal oppression: the public-private distinction, and the liberal emphasis on individual autonomy. Against these philosophical attacks, I offer a positive justification of the Kantian premises, viewing them as normative commitments rather than deductions from some arcane masculinist metaphysics. In the final subsection, I examine the methodological strictures entailed by the Kantian normative commitments and criticize radical feminists for abandoning them, and with them, the liberal norms of objectivity and intellectual integrity.

1. States as "Inherently" Oppressive

A number of radical feminists argue that states are inherently patriarchal entities—again, bothering little with distinctions between liberal and illiberal governments. Perhaps radical feminists believe that the governments of liberal democracies are, to paraphrase Marx, mere committees to handle the interests of men. If an interest of men were to secure the continuing oppression of women, and if the state were now and forever a property of men, then the international law principles of sovereign equality and nonintervention would indeed operate systematically to the detriment of women. Of course, under these assumptions no truly legitimate state or government currently exists; all appear in this light as simply men's devices to perpetuate their domination of women. Under this view, states are patriarchal entities; governments (even formally democratic ones) represent the male élites of those entities; and international law abets this tyranny by securing the sovereignty of states. These assertions hold true—equally true—for all states.
It is significant, in this regard, that Charlesworth and her associates do not emphasize violations of women's rights by particular governments, even though in many countries women are officially discriminated against, and sometimes even horribly mutilated with official endorsement or complicity.\textsuperscript{72} This omission is related, I believe, to the inherent oppressiveness thesis. Identifying and opposing egregious human rights practices simply holds less \textit{philosophic} interest for the radical feminist than unmasking patriarchal oppression as a pervasive (albeit often "invisible") evil. Moreover, defending the \textit{rights} of the oppressed against their government already presupposes the acceptance of rights discourse, and runs the risk of treating women as equal citizens, something radical feminists expressly refuse to do.\textsuperscript{73} Their obsession with male dominance leads radical feminists to the grotesque proposition that the oppression of women is as serious in liberal democracies as in those societies that institutionally victimize and exclude women.\textsuperscript{74} For feminists to try to improve the condition of women in even the freest societies is a commendable goal, since liberal democracies are not free of sexist practices. This is very different, however, from claiming that liberal democracies and tyrannical states are morally equivalent in the way they treat women. Such an assertion not only perverts the facts; it does a disservice to the women's cause.\textsuperscript{75}

The sweeping radical thesis that states are inherently oppressive is not only politically counterproductive, but also philosophically untenable. The assertion that a social arrangement is unjust or oppressive

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\item See, e.g., Kay Boulware-Miller, Female Circumcision, Challenges to the Practice as a Human Rights Violation, 8 Harv. Women's L.J. 155 (1985).
\item See Charlesworth et al., supra note 1, at 631-32 (criticizing the Women's Convention for assuming that men and women are the same). Charlesworth and her associates do not want to be treated "equally" if such treatment is judged against a male standard. Id. Charlesworth and her associates rely extensively on the work of MacKinnon for this point.
\item See Charlesworth et al., supra note 1, at 616-21 (arguing that although women's situations differ in the Third and First Worlds, they are united by the common phenomenon of male domination).
\item Another reason for this "moral equivalence" thesis stems from a curiosity in the history of radical thought. Radical feminists are leftists, and one of the mottoes of the left is solidarity with the Third World. Therefore, radical feminists feel more comfortable in criticizing the "imperialist" West than in acknowledging that in many Third World societies women are seriously mistreated. The anti-Western bias of Charlesworth and her associates is clear in their brief reference to female circumcision. They delicately refer to "the tension between some First and Third World feminists over the correct approach to the issue of female genital mutilation." Charlesworth et al., supra note 1, at 619 n.39. The extraordinary practice of criticizing the liberal West while offering solicitude for genital mutilation suggests the root of the "tension" all too well: one cannot at the same time be a feminist and be sentimental about the Third World.
\end{enumerate}
is contingent; it depends not only on the theory of justice that is presupposed, but on the facts as well. "Oppression" does not follow from the definition of "state"; it is not therefore inherent in the social organization we know as the modern state. Oppression may be defined as occurring when an individual or a group unjustly prevents others from exercising choices, and this may or may not occur in a particular case. Viewing oppressiveness as a necessary rather than contingent property of states is undoubtedly an epistemological convenience for the radical; there is no need to bother with scrutinizing the political practices of actual states. Unfortunately, the product of this sort of inquiry can be nothing more than nominalism: metaphysics in, metaphysics out.

The problem with the claim that states are inherently patriarchal entities is that it is not subject to empirical disconfirmation. It is true that some radical proponents of the patriarchy thesis believe in the (perhaps utopian) possibility of a non-patriarchal world. Short of utopia, however, the patriarchy thesis holds the oppressiveness of states beyond the need of empirical validation. To be sure, not all propositions have to be testable to retain philosophical credibility. Metaphysical statements, definitions, or moral assertions, for example, may be validly non-testable. But the claim that states are inherently oppressive structures is neither an analytic truth, a pure deontic ought-statement, nor a transparently metaphysical claim with no apparent referent in the world of facts. Rather, the claim purports to be descriptive of actual social relations, and as such, it must be subject to interpersonal methods of empirical validation. As we have seen, the radical's metaphysics attempts precisely to avoid such validation: the thesis admits no contrary proof.

The inherent oppressiveness thesis is connected with a radical notion of social determinism; that notion, too, admits of no degree or gradation, and lies beyond dispute. For at least some radical feminists there may be a possible future world in which women will be emanci-

76. See Toward a Feminist Theory, supra note 11, at 249 (envisioning a theory of the state based on "a new relation between life and law").

77. Metaphysical statements, roughly speaking, are those without any referent in the physical world; for example, statements about a transcendent God may be metaphysical. Analytic truths are circular statements in which the predicate can be logically derived from an analysis of the subject; hence, the statement "all bachelors are male" can be derived from the definition of "bachelor" (an unmarried adult male), and no empirical confirmation is necessary. Finally, "ought" statements, commands, questions, and other utterances that do not assert a state of the world may not require verification.

78. For a classic rejection of metaphysics in legal and social thought, see Felix S. Cohen, Transcendental Nonsense and the Functional Approach, 35 Colum. L. Rev. 809 (1935).
pated, but there is presently no society, no marriage, no relationship, in which women are free in any meaningful sense. Even in the freest societies (the Western liberal democracies) where most choices by women are apparently autonomous in the liberal sense, radical feminists insist either that such choices are not really autonomous because women have been socialized to make them, or that there is no such thing as autonomy anyway. Indeed, even consensual sexual intercourse is regarded by some of them as oppressive. Accordingly, every social fact is interpreted in the light of this premise, which is itself immune to challenge. Like Marxists before them, radical feminists see their theory of gender oppression and hierarchy confirmed in every single social event, for the good reason that no single fact counts as a counterexample. No improvement in women's condition counts as a move toward liberation; states remain patriarchal entities, and women remain oppressed, regardless of progressive legislation or significant advances for women. No amount of mere reform will placate the radical feminist.

So the sweeping definition of the state as inherently oppressive of women is, in my view, factually false because there are or could be states where women are not oppressed, and morally irresponsible because it trivializes tyranny. States come in many moral shapes. In some states women are oppressed; in some others blacks are oppressed; whites are persecuted in a few; in yet other states members of a particular religion, speakers of a certain language, or foreigners may be mistreated; and in some states almost everyone is oppressed. The radical feminist's insistence on the inherent oppression of women by the state succeeds only in blurring the distinction between freedom and tyranny; for the purposes of the "inherent oppressiveness" thesis, a state where the government murders and tortures women is in the same moral category as one where there is a statistical gender imbalance in the public employees roster.

A final problem with the theory of inherent patriarchal oppressiveness is that, even in skilled hands, it tends to stray dangerously close to a deservingly discredited form of social thought: conspiracy the-

80. See Desire and Power, supra note 11, at 60; see also Andrea Dworkin, Intercourse (1987).
81. See, e.g., Difference and Dominance, supra note 12, at 40, 42.
82. If a non-oppressive state is even imaginable, then "oppression" cannot follow from the definition of "state"; for a non-oppressive state would be a contradiction in terms, like a square circle.
A feminist conspiratorial theory of the state attempts to explain social phenomena by suggesting that men, interested in preserving patriarchy, have in some manner devised and implemented a plan to perpetuate the subjugation of women. Of course, one cannot deny that there is something exhilarating in postulating a total explanation of society, or the universe: every occurrence can be effortlessly explained by reference to the One Great Conspiratorial Premise, and we are relieved of trying to discover and understand complex causal chains of social events. But an explanation of the complexities of human history by reference to a pervasive, sinister, trans-genera-

83. In a passage as much reminiscent of Hobbes, Locke, and Rousseau as it is of the Book of Genesis, MacKinnon announces a quasi-conspiratorial radical feminist creation story:

Here, on the first day that matters, dominance was achieved, probably by force. By the second day, division along the same lines had to be relatively firmly in place. On the third day, if not sooner, differences were demarcated, together with social systems to exaggerate them in perception and in fact, because the systematically differential delivery of benefits and deprivations required making no mistake about who was who. Comparatively speaking, man has been resting ever since. Difference and Dominance, supra note 12, at 40 (emphasis in original). The idea that (even physical) sex differences precede gender differentiation is called into question. MacKinnon presents our perceptions of differences between the sexes as merely ideological constructs designed to legitimate oppression: "if gender is an inequality first, constructed as a socially relevant differentiation in order to keep that inequality in place, then sex inequality questions are questions of systematic dominance, of male supremacy, which is not at all abstract and is anything but a mistake." Id. at 42.

Of course, not all feminists endorse (or even flirt with) a conspiratorial explanation of the state. I follow here, mutatis mutandis, Karl R. Popper, The Open Society and Its Enemies 94-95 (2d ed. 1966). Popper views conspiracy theories as secular echoes of the superstitious belief that Homeric gods determine the outcome of battles.

84. Thus, MacKinnon writes,

Speaking descriptively rather than functionally or motivationally, the strategy is first to constitute society unequally prior to law; then to design the constitution, including the law of equality, so that all its guarantees apply only to those values that are taken away by law; then to construct legitimating norms so that the state legitimates itself through noninterference with the status quo. Then, so long as male dominance is so effective in society that it is unnecessary to impose sex inequality through law, such that only the most superficial sex inequalities become de jure, not even a legal guarantee of sex equality will produce social equality.

Toward a Feminist Theory, supra note 11, at 163-64. Speaking descriptively, MacKinnon's strategy seems to be to hide the careful qualifiers in the sweep of language (note the introductory phrase), and reap the rhetorical benefits of the conspiratorial assertion not quite made.

85. In radical feminist theory, men play the role that the capitalists, the Learned Men of Zion, the imperialists, the communists, etc., have played in various other conspiracy theories. Conspiracy theories, however, do become important when people who hold them are in power, for in that case they will spend most of their energies in a counter-conspiracy against nonexistent conspirators. Popper, supra note 83, at 95. For an almost pristine example of a conspiracy theory, the military Junta in Argentina (1976-1984) believed that the world's outrage over their human rights violations was the result of a "well-orchestrated anti-Argentine campaign" waged by communists led by Amnesty International.
tional, yet invisible cabal surely need not, and ought not, be taken seriously.

There are two fast and effective ways to undermine a conspiracy theory. One is simply to deny that such a conspiracy ever took place, shifting the (rather weighty) burden of persuasion to the conspiracy theorist. The second is to observe that, even if a conspiracy actually took place, conspirators on the social stage very rarely consummate their designs—let alone effect their ends over the course of centuries. As Sir Karl Popper has perceptively shown, this is often the case with social action, conspiracy or no conspiracy, because of the *effets pervers* (the unintended consequences) of social action.\(^86\) Even if men in fact conspired to achieve the present world, they could not possibly have anticipated every consequence of their machinations.

A conspiratorial explanation of the modern state is not only impoverished and simplistic;\(^87\) it also overlooks both the magnitude and the direction of the social forces unleashed when the universality of human rights was proclaimed by the "bourgeoisie."\(^88\) Feminists, radical and liberal, are correct that many of the architects (and stewards) of liberalism have intended the exclusion of women from many of the benefits of liberty. This, however, was the precipitate of a mistaken anthroplogy, not a mistaken ethics.\(^89\) Once the prejudice against women was exposed as such, the universality of liberal moral theory, logically entailed by the belief in the inherent dignity of *all* persons, acquired, as it were, a life of its own, and resulted in an astonishing improvement of the predicament of women in free societies. Given the egalitarian consequences of the Enlightenment and the liberal revolutions that it inspired, one is hard pressed to describe the modern liberal state and the international alliance of liberal states as inherently oppressive of women. More plausibly, they have been the matrix of women's liberation.

2. *The Public-Private Distinction Revisited*

Radical feminists have sought support for the idea that liberal institutions are inherently oppressive in the fact that much of liberal the-

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86. See id.


88. The use of the term "bourgeoisie" by Marxists and their progeny to refer to liberals is already derisive. It portrays those who have struggled and died to secure the liberties we enjoy as merely greedy merchants intent on peddling their wares.

89. See Barbara Herman, Integrity and Impartiality, 66 Monist 233, 234-40 (1983); see also infra note 120.
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ory and law has relied on a distinction between public and private spheres of society. Feminists have contended that the public-private distinction is something of a fake, an ideological construct designed to devalue women and their work by confining them to the (less prestigious) private domain. Insofar as feminists seek access for women to markets, politics, and other areas of the public sphere, their efforts fully accord with the imperatives of Kantian liberalism. But when radical feminists reject a person's free choice of a life in the public or private sphere, from a liberal perspective they merely seek to impose their own preferences upon others, and should be resisted in the interest of the Kantian ideal of equal dignity, which mandates respect for the considered choices of other rational persons.

Feminists rightly criticize the coercive confinement of women to the (presumably less valued) private sphere. From making this valid observation, however, to rejecting wholesale the distinction between public and private law there is an expansive logical gap, and the latter assertion seems to me misguided. Radical feminists, having discovered that the identification of women with the private domain is unjust, conclude that we should give up altogether the distinction between private and public law.

A first reply is that the concept of family privacy makes some sense (notwithstanding the justified feminist critique already discussed) insofar as it remains derivative of individual rights and autonomy, in the same way that state sovereignty is derivative of individual rights and autonomy. Liberals, unlike communitarians, ground family privacy in individual autonomy and freedom, not in the primacy of the group over the individual. The duty of the state not to interfere with the family (provided the rights of their members are protected) is thus a simple extension of the duty to respect voluntary arrangements entered into by individuals. Even a radical feminist, I assume, would agree that if the state sent agents to take children away for re-education, or to make sure that sexual intercourse was practiced in the officially sanctioned manner, it would violate a private familial space. A consequence of accepting an autonomy-based family privacy is that

90. Charlesworth et al., supra note 1, at 625-27; see also Privacy v. Equality, supra note 50, at 99-102; Carole Pateman, Feminist Critiques of the Private/Public Dichotomy in Public and Private Social Life 231 (Stanley I. Benn & Gerald F. Gaus eds., 1983).
91. See Charlesworth et al., supra note 1, at 625-30.
92. See, e.g., Toward a Feminist Legal Theory, supra note 11, at 193-94.
93. See supra notes 63-65 and accompanying text.
94. Indeed, this is the position taken by many feminists on abortion and other matters of reproductive autonomy.
the distinction between private and public may well reflect in many cases a rational division of labor between the sexes achieved through non-coercive, voluntary arrangements (radical feminists notwithstanding.)

More generally, individual freedom requires separation between the private and public spheres, because the distinction is simply the legal consequence of the moral imperative of individual privacy required by any but the most totalitarian theories of law. For liberals, the power of the state is always limited, and individuals should be legally allowed to make choices in their personal and economic lives free of governmental coercion. This elementary idea (and not some conspiracy to oppress women), lies at the basis of the much maligned public-private distinction. Far from being "an ideological construct rationalizing the exclusion of women from the sources of power," the public-private distinction is a centerpiece of any constitutional system that protects human rights. The problem is not the public-private distinction, but the confinement of women to the private sphere.

In the light of this obvious and, in my view, conclusive reply, why must radical feminism insist upon such an extreme account of the public-private distinction? The answer, again, lies in the ideology. The private, autonomous sphere that radicals challenge is but a travesty of liberalism's insistence on individual self-determination free from governmental coercion. Radical feminists align liberal autonomy with a conception of the family as a Dantesque place where the physically stronger husband victimizes weaker family members. Calling wife abuse an instance of "family autonomy" is as offensive as calling Saddam Hussein's genocide of the Kurds an instance of Iraqi "self-determination." Family autonomy is the least liberal part of the "liberal" theory that radical feminists believe they are challenging.

Just as the human rights-based theory of international law is unsympathetic to absolute international nonintervention in the domestic affairs of the state, so it is unsympathetic to absolute government non-intervention in family affairs (or church affairs, or school affairs) when the individual rights of members of the community in question are threatened. Genuine liberal theory refuses to tolerate a private domain in which the strong can victimize the weak with impunity.

95. Charlesworth et al., supra note 1, at 629.

96. What should we put in the place of a law that distinguishes between private and public spheres? Should all law be public law? One shudders at the prospect of such a world.

97. See Humanitarian Intervention, supra note 2, at 26-31 (discussing such spurious use of self-determination).
3. Individual Autonomy and the Normative Bases of Kantianism

Another fertile source of speculation about the idea of inherent oppressiveness is the liberal emphasis on individual autonomy. A number of radical feminists have attacked the notion, some believe that women do not relate to autonomy but instead to "connectedness," and that abstractions about sovereignty, states, governments, and even human rights therefore ignore women's experiences and exclude their perspectives. This position is common to feminists and communitarians, but where feminists use it to recommend an ethics of care instead of, or alongside, an ethics of justice, communitarians use it instead to exalt communities—including those that, from a liberal or feminist standpoint, oppress people.

What is distinctively feminist about this radical critique is the view that the law's reliance on concepts such as autonomy, rights, and justice is a fundamentally masculine trait. As one commentator describes the radical feminist position, "[I]liberalism has been viewed as inextricably masculine in its model of separate, atomistic, competing individuals establishing a legal system to pursue their own interests and to protect them from others' interference with their rights to do so." The argument, analogous here to the communitarian critique, is that this masculine jurisprudence has unduly emphasized rights over responsibilities, autonomy over "connectedness," and the individual over the community. The radical implication seems to be that the basis of liberalism is unsound, that its foundation rests upon an unsupported masculinist metaphysics.

a. Individual Autonomy and Kantianism

It is true that the idea of the self as rational and autonomous is central to the Kantian theory of international law. The Kantian theory regards individuals as capable of independent, rational choice. It also regards them as possessed of inherent dignity and worthy of respect. These propositions together form the cornerstone of the

98. See, e.g., Charlesworth et al., supra note 1, at 617 (citing Sandra G. Harding, The Science Question in Feminism 165-71 (1986)). For a discussion on the point of "separateness" versus "connectedness," see generally Minow, supra note 13. For an excellent reply, compare McClain, supra note 79, at 1171 (arguing that the feminist view supporting "connectedness" inaccurately portrays contemporary liberalism).

99. West, supra note 11; Minow, supra note 13.

100. See Marylin Friedman, Feminism and Modern Friendship: Dislocating the Community, 99 Ethics 275, 277-81 (1989).

101. McClain, supra note 79, at 1173.

102. See The Kantian Theory, supra note 2, at 62-66.
theory. The Kantian theory therefore happily concedes the charge by radical feminists and communitarians that it exalts the individual over the community—this is indeed the central tenet of liberalism.103

These Kantian premises also form the basis of international human rights law; indeed, it would be difficult to make sense of that body of law if they were discarded.104 In the international arena, legitimate states are the ones that recognize and honor individual autonomy, and a just international legal system is likewise one that embodies a basic respect for human rights, that is, an imperative to treat people with dignity and respect.

b. Autonomy as a "Masculine" Concept

I will first respond to the claim that the autonomous self is a distinctively masculine concept and should therefore be rejected as biased. Two things may be meant by this assertion: that the theory of autonomy was created by men, or that it is a reflection of how men typically think or feel, and thus excludes women.105

Neither version of the claim defeats the liberal commitment to individual autonomy; both confuse the context of origin with the context of justification of a theory. It is perfectly possible to concede that the concept of autonomy is masculine in origin or mental make-up, but that it is also the correct position to hold. Who created the theory or how it came about or whether men or women think more about it may

103. It is a gross caricature to portray liberalism as encouraging an ethics of selfishness and lack of concern for others. See infra notes 119-20 and accompanying text.

104. For example, the U.N. Charter has a remarkably Kantian emphasis on the "dignity and worth of the human person." U.N. Charter Preamble.

105. See generally Minow, supra note 13. For the view that women think differently about morality, see generally Gilligan, supra note 3.

Some feminists argue that women, because of their nurturing nature, are more pacific than men, and that international law would therefore be more effective in curbing war if women had a greater role in its creation and implementation. See Charlesworth et al., supra note 1, at 628. For a survey of the literature, see Micaela Di Leonardo, Morals, Mothers, and Militarism: Antimilitarism and Feminist Theory, 11 Feminist Stud. 599 (1985); cf. Barbara Stark, Nurturing Rights: An Essay on Women, Peace, and International Human Rights, 13 Mich. J. Int'l L. 144 (1991) (correlating international recognition of basic economic, social, and cultural rights with women's increased participation in public life and with the promotion of peace). Professor Stark's suggestion, however, is distinct from the "women are more peaceful" thesis because, for her, peace is promoted by the recognition of certain "nurturing rights." Id. at 147. Her views are thus closer to liberal feminism.

The view that women are more peaceful is arguable. Women can be as ruthless and belligerent as men. The curious reader may consult Jessica A. Salmonson, Encyclopedia of Amazon: Women Warriors from Antiquity to the Modern Era (1991). Indeed, feminine war prowess is assumed by some feminists when arguing for allowing women to participate in combat.
be interesting historical or anthropological questions, but they are irrelevant to whether or not the theory is justified. Dismissing liberalism as distinctively masculine because it was formulated by men or because it is a masculine way of thinking is like dismissing the theory of relativity as distinctively Jewish because it was formulated by Albert Einstein. Indeed, if I were persuaded by radical feminists that the feminine way of thinking about political philosophy is illiberal, I would do my best to keep women from power. But of course, the claim that women think about morality in less liberal ways is as false as the claim that men think about morality in more liberal ways.106 Liberals, it seems, give women more credit than do their radical defenders.

Radical feminists, like communitarians and other radicals, believe that the liberal assumption of autonomy is mistaken because the self is not autonomous but rather socially constituted.107 This point (which for some reason has become almost undisputed among radicals and even among many of their detractors) is overdrawn. Among other things, it overlooks the undeniable capacity of human beings to overcome the constraints of history, tradition, and social pressures, including state coercion, to challenge existing values and follow their own lights.108 In addition, the claim is self-refuting, because if choices are socially constituted, presumably the choices of illiberal dissenters who challenge liberalism (the latter being the predominant philosophy in the West) are not excepted from this deterministic postulate. Radical feminists cannot just say that liberal society conditions everybody's choices except the radicals' own choices. One cannot hold a theory whose very formulation contradicts its central premise. The radicals' theorizing would not be possible if values and choices were entirely socially constituted: only people in Teheran, not in Berkeley, would be able to challenge liberalism.109

106. Again, I am aware that perhaps there is no way of proving this, because every example of a "liberal" woman, the majority of women in the West, is dismissed by the radical feminist. For some radical feminists, neither liberal nor conservative women "speak" for women. See, e.g., Difference and Dominance, supra note 12.

107. There are sharp differences among radical feminists about the import of this claim. MacKinnon believes that this condition is unacceptable because women's apparently free choices are not really free but coerced. Feminism Unmodified, supra note 11. West, however, contends that the biological fact of material connectedness (a form of biological determinism) grounds the feminine way of thinking about ethics. West, supra note 11.

108. See Bernard Williams, Ethics and the Limits of Philosophy 113 (1985).

109. The current revolt against liberal values in the academic West shows that people can challenge tradition and cherished societal values—vindicating, ironically, the liberal view. The point is that people are capable of making choices that are not socially determined.
c. Kantian Liberalism as a Normative Theory of Autonomy

Kantian liberalism is a normative, not a metaphysical, proposition. Even if, *gratia argumentandi*, the claim that choices are socially determined is conceded, the concession need not affect the moral force of liberalism. The normative injunction to respect autonomy amounts to this: people make choices, they care about them, and we must respect them (within the framework of the coercion presupposed by the social contract), *even* if those choices are, in a Laplacean sense, biologically or socially determined. Liberals claim that, regardless of the response to the ultimate metaphysical question of social or biological determinism, a distinctive characteristic of human beings is their capacity for what for all purposes look like rational choices, and that such a capacity *must be respected* by fellow citizens and by the government. This is a moral, not a metaphysical claim.\(^{110}\)

Another way of making the same point is this: we *don't know* the right answer to the old philosophical controversy about the extent to which our choices are socially or biologically determined. *Morality*, however, requires us to act *as if* people were rational and autonomous. Freedom of the will is thus postulated as a logically necessary pre-requisite of the best principles of individual and political morality.\(^{111}\) Therefore, in attempting to answer the metaphysical question, we risk error on the side of liberty, as it were: if we treated persons *as if* they were social or biological robots (and we do not have a positive proof that they are robots) the set of moral and political principles constructed on such an assumption would be truly terrifying.\(^{112}\) We must treat people as if they possessed free will because that is the right thing to do, and this requires the rejection of radical determinism. On a Kantian analysis, our belief in treating persons with dignity and respect should determine our answer to the controverted metaphysical question, and not the other way round. Liberal theory thus rejects radical determinism for *moral* reasons.

Radical feminists, by contrast, ignore, disparage, or assume away the actual choices of women when it is convenient for them to do so;

\(^{110}\) See Ronald Dworkin, Law's Empire 441 n.19 (1986) (arguing that liberals are tolerant because it is the right thing to do, not because of a belief in psychological "separateness"); see also McClain, supra note 79.

\(^{111}\) See Immanuel Kant, Groundwork of the Metaphysics of Morals 115-16 (H.J. Paton trans., 3d ed. 1965). I am indebted to Jeff Murphy for calling my attention to this point.

\(^{112}\) Radical feminists could reply that the principles built on the assumption of freedom have themselves been terrifying for women in practice. The only recourse is to the facts, and the facts suggest that terror travels with illiberalism. See Amnesty International, supra note 37.
for example, the choice of some women to stay in the home.\textsuperscript{113} Because radical feminists believe homemakers' choices to be degrading, they conclude that those are not real choices, but are rather forced by socialization.\textsuperscript{114} Leaving aside the disdain for family, motherhood, and heterosexuality associated with this claim,\textsuperscript{115} the form of argument itself is highly suspect. One cannot just pick those choices that one approves of ideologically as being "real" choices, and discount those that do not fit our preferred utopia as merely "apparent." From a Kantian standpoint, there is an imperative to respect people's rational, autonomous choices. If the individual's autonomy has been impaired by coercion or fraud, then of course it will not be a real choice in the Kantian sense. Absent coercion or fraud, however, the choice of a homemaker to devote herself to the family ought to be valued and honored.\textsuperscript{116}

A liberal feminist, however, might reply as follows: the Kantian theory insists that choices be rational, and the Kantian idea of rationality is indeed complex.\textsuperscript{117} It would certainly be a mistake to portray Kant's categorical imperative as a command to respect any preference: irrational choices are not deserving of respect. Hence, the liberal feminist may conclude, the choices of the homemakers are irrational, comparable perhaps to the choices of people who knowingly surrender their rights to a tyrant. Such a view, however, depends on the \textit{a priori} decision that the family is a less valued and important domain—a most controversial premise, especially for feminists.

There is a good case to be made for the proposition that choosing to stay in the home is a rational choice for many women.\textsuperscript{118} What should be rejected is the superstitious prejudice that the woman's role, predetermined by God or by Nature, must be the home. There is

\begin{itemize}
\item \textsuperscript{113} On this, see the excellent discussion in Meyers, supra note 7.
\item \textsuperscript{114} See, e.g., Catharine A. MacKinnon, \textit{Not by Law Alone: From a Debate with Phyllis Schlafly}, in Feminism Unmodified, supra note 11, at 21-31.
\item \textsuperscript{115} See id.
\item \textsuperscript{116} See Meyers, supra note 7, at 621-24.
\item \textsuperscript{118} It would be pointless to cite support for this proposition because its truth depends upon a definition of free will which radical feminists will not accept, regardless of how many instances one provides of actual homemakers who are happy with their choices and are fulfilled by their life plans. Nevertheless, uncoerced choices by homemakers ought to be valued. Failure to do so strips countless homemakers of their dignity and fails to account for "the sensitivity and imagination that childcare requires." Meyers, supra note 8, at 621. Suggesting that working in the home may be a rational choice for many women is totally different from suggesting that women are biologically inclined to make such choices. Kantian liberalism regards the latter idea as either false or irrelevant.
\end{itemize}
nothing in the liberal account of morality or human nature that a priori excludes or mandates home, factory, or Parliament as the place where a woman finds her self-realization.

d. Autonomy and Compassion

While some radical feminists accuse liberalism of promoting socially determined choices in the guise of autonomy, others claim that the liberal emphasis on respect and autonomy does not leave room for an ethics of care and compassion.119 This is an unjustified charge against liberalism. As many commentators have shown, rights-based liberalism is perfectly consistent with the flourishing of human emotions such as love and compassion.120 The very idea of inherent dignity and respect for persons requires us to put ourselves in the place of other people, thus understanding their claims as equal moral beings.121 In this way, the empathetic consideration of other "selves" and the understanding of the circumstances of others are intrinsic to moral and political reasoning.122 Difference is not discarded, but rather factored into our normative judgments.

What Kant was justly concerned about was the fact that people often do terrible harm to others out of love. He claimed, consequently, that duty is a surer guide to moral behavior.123 For Kant, inclination and emotion are just biological natural facts, and as such contingent and unreliable.124 Duty, on the contrary, can be dispas-

119. For a thoughtful article on this issue, see Sally Sedgwick, Can Kant's Ethics Survive the Feminist Critique?, 71 Pac. Phil. Q. 60 (1990).
120. For an excellent defense of Kant against radical objections, see Herman, supra note 89, at 234-40; see also McClain, supra note 79. Professor Sedgwick concludes that although it is true that radical feminists have mischaracterized Kant, Kant's categorical imperative universalizes the male identity, causing feminist doubts to remain. Sedgwick, supra note 119. This claim assumes too narrow an interpretation of the categorical imperative, however. The categorical imperative is above all an injunction to treat others with dignity and respect, not a simple logical requirement of universalizability of moral judgments. See John Rawls, A Theory of Justice 251 n.29, 257 (1971) (contending one should avoid interpreting Kant's writings as merely providing formal requirements for moral judgments); see also Jeffrie G. Murphy, Kant: The Philosophy of Right 65-86 (1970) (stating that Kant's morality is not only formal, but also includes ends, purposes, and values); cf. The Kantian Theory, supra note 2, at 60-74 (concluding that Kantian political theory should provide for positive socioeconomic rights).
121. See Okin, supra note 8, at 29-32.
122. Modern liberals expressly disavow an interpretation of liberalism that would exclude care and concern for others. See, e.g., John Rawls, Kantian Constructivism in Moral Theory, 77 J. Phil. 515 (1980); see also Dworkin, supra note 110, at 441-44 n.20 (finding sympathy for tort victims is consistent with liberalism).
123. See Kant, supra note 111, at 61-67.
124. Id. at 63-64.
sionately (though not infallibly) ascertained by the exercise of reason, and is as such accessible to every human being regardless of his inclinations. This position does not exclude love and compassion; it just refuses to make them the foundation of morality. The Kantian cautionary message is quite plausible: until that time when universal love (mandatory love?) is achieved, civil society will rest on firmer ground in mandating simply respect.

Liberalism does not espouse any particular theory of psychological personality. People make choices (even if they are, in some general sense, determined), and care about them. The categorical imperative directs us, and governments, to respect those choices, at least when they are rational (where "rational" means both universalizable and respectful of the dignity of others). The arguments against liberalism, therefore, need to focus on this normative thesis; that is, they must show why individual autonomy ought not be respected, at least under specified circumstances. Certainly radical feminist critics of international law would have to support at least a significant dismantling of international human rights law, because, as I already indicated, that body of law relies expressly on the principles of liberal autonomy and the equal dignity of all persons, men and women. My suspicion (although this may be unduly optimistic) is that these critics do not want to take us all the way in this direction.

4. Science, Method, and Objectivity

The radical abandonment of the normative premises of liberalism must inevitably raise questions of method, because the intellectual values that guide research and debate in the Western world arose, and exist, within liberalism. For the liberal, questions of intellectual ethics are vital, and the commitment to intellectual integrity is fundamental. These values have been challenged by radical feminism: for example, some feminists reject the "objective standpoint" as nothing more than a masculine posture, and the scientific method as merely a set of "male" verification criteria. This sort of methodological rejection-

126. These are the two first versions of Kant's categorical imperative. See Sullivan, supra note 117, at 149-211.
127. See, e.g., Desire and Power, supra note 11, at 54 (rejecting the scientific method as a "specifically male approach to knowledge"). Charlesworth and her associates seem to accept this idea. See Charlesworth et al., supra note 1, at 613 (emphasizing "the permanent partiality of feminist inquiry" (quoting Harding, supra note 98, at 194)); see also id. at 617 (challenging male "epistemology" and calling for a more emotive approach to science (citing Harding, supra note 98, at 165)).
ism deserves our most determined opposition. It represents an obscurantist, pre-Galilean repudiation of even the most elementary ground rules for testing the validity of empirical claims. It is a troubling commentary on the radical feminists' dogmatic irrationalism, and should have no place in any serious debate about these issues.

Rejecting the scientific method wholesale is not simply bad epistemology, however; it has political consequences. In the radical's world, because there is nothing even approaching objective truth, rational argument becomes simply another means to achieve one's objectives. In its most extreme form, anti-liberal radicalism views people (and governments) as relieved from constraining rational argument, and therefore free even to suppress knowledge in the pursuit of "higher" ends. The world is just an arena for struggle; there is no independent value in truth or objectivity. Even in its lesser forms, the radicals' self-consciously partisan method allows them to cite data supporting their position (thus showing deference to empirical validation), but ignore contrary data. The sole objective of radical feminism is the emancipation of women; truth is a value insofar as it contributes to that effort.

In contrast, liberals regard free intellect as the engine of human progress, and intellectual integrity as an unconditional ethical commitment—rather than a political value to be weighed against others. Honesty for the Kantian is part of the categorical imperative to respect other rational beings by not using them manipulatively as means to other ends. The liberal commitment to rational discourse encompasses both science and morality. If we abandon it, as radicals urge, we jeopardize not only the path to knowledge and scientific progress, but also our most precious freedoms.

The moral predicament ensuing from such radical relativism is also illustrated by the radical feminist attitude toward rights discourse. Even while endorsing a thoroughgoing attack against rights, some radical feminists nevertheless recommend that international human

128. During the military dictatorship in Argentina, the Junta prohibited the teaching in schools of the set theory of numbers on the ground that it was "collectivist."
130. Thus, even though Professor MacKinnon's "critique of the objective standpoint as male" disavows the scientific method and the "male criteria of verification" it embodies, Desire and Power, supra note 11, at 54, MacKinnon is rather fond of citing statistics and empirical research to support her arguments. See, e.g., id. at 1, 41.
rights discourse be preserved because it is an “accepted” means of challenging existing law.\textsuperscript{132} They may mean two different things by this assertion. They may hold the hypocritical view that they do not really believe in human rights but that rights discourse is a strategically expedient means to persuade power-holders to relinquish their power. Not the least of this view’s difficulties is that the feminist will not be terribly effective in persuading the power-holder to relinquish his power if he knows that she is insincere in her appeal to rights. The radical cannot convince the power-holder \textit{at the same time} of the truth of the radical theory and of the existence of the injustice, so she has to fake a belief in justice and rights, knowing that a liberal power-holder is committed to recognizing the rights of the intolerant as long as they are kept from actually destroying liberal society.\textsuperscript{133} At the very least, this advocacy of rights for purely strategic purposes calls into question the integrity of the theory upon which such advocacy is predicated.

The far preferable view is the one defended by liberal feminists: rights discourse is “accepted,” not for strategic reasons, but for the \textit{moral} reasons supplied by the Kantian theory of international law. Individuals should be respected and allowed to flourish autonomously. The liberal theory of international law rejects male privilege and insists that women be treated with equal dignity, much in the way promised by the United Nations Charter.\textsuperscript{134} Legitimate states are those that honor that categorical moral imperative as an essential constitutional principle, and individual moral action consists in treating other rational persons as worthy of respect in every realm of human endeavor—including the practices of public research and debate.

5. \textit{Conclusion}

The theory of inherent patriarchal oppression is both philosophically untenable and politically counterproductive. By positing a category into which all states equally fall, radical feminists diminish (or, indeed, erase) the differences between relatively oppressive and rela-

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  \item \textsuperscript{132} See Charlesworth et al., supra note 1, at 634-38.
  \item \textsuperscript{133} See Rawls, supra note 120, at 216-21.
  \item \textsuperscript{134} Charlesworth and her associates, apparently ignoring their earlier disparagement of this liberal assumption as male biased, end their article with the following Kantian sentence: “To redefine the traditional scope of international law so as to acknowledge the interests of women can open the way to reimagining possibilities for change and may permit international law’s promise of peaceful coexistence and \textit{respect for the dignity of all persons} to become a reality.” Charlesworth et al., supra note 1, at 645 (citing the U.N. Charter pmbl.) (emphasis added).
\end{itemize}
tively humane states. By proceeding on metaphysical grounds, they insulate their theory from empirical inquiry and criticism. Kantian liberalism, by contrast, is not a hermetically sealed conceptual system, but rather a set of normative commitments based on individual autonomy and respect for freely chosen social arrangements. Nothing in liberalism militates against human solidarity in voluntary social arrangements, nor compels solicitude for abusers of human rights. Liberalism strives toward an ideal of universal human flourishing, and does so by methods respectful of individual autonomy, human dignity, and the right to equal treatment.

IV. CONCLUSION: DEFENDING THE LIBERAL VISION

Legal theory has been much enriched by feminist jurisprudence. Feminists have succeeded in drawing attention to areas where uncritically received legal theories and doctrines have resulted in injustices to women. International law should be no exception, and the contribution of Charlesworth and her associates will rightly force international lawyers to re-examine features of the international legal system that embody, actually or potentially, unjust treatment of women.

Much of the radical critique is commendably compatible with a committed liberal feminism. For example, radical feminists are correct to urge international organizations to try to achieve gender balance in their internal appointments. Radical feminists are also right in challenging statism and a notion of “family autonomy” that countenances state complicity or inaction in the face of mistreatment of women by private individuals. Privacy and state sovereignty must be wedded to democratic legitimacy and respect for individual human rights, including the rights of women. All of these goals are easily justified under the Kantian theory of international law.

Yet the basic assumptions of the radical feminist critique are untenable and must be rejected with the same energy and conviction that we reserve for the rejection of other illiberal theories and practices. Radical feminism exists at a remove from international reality because it exempts itself, by philosophical fiat, from critical examination and empirical verification. It wrongly assumes that oppression belongs to a category of thought accessible to pure philosophic speculation, and thus renders scrutiny of real human rights practices superfluous. Perhaps most ominously, radicalism “unprivileges” the imperatives of objectivity, placing the demands of intellectual integrity and responsible political dialogue on a normative par with other, more political agendas.

When we move from the philosophical domain to global political
realities, there is even more reason to resist the radical feminist agenda. Radical feminists have joined other radicals in attacking liberalism; indeed, their whole case rests upon the supposed bankruptcy of liberal society, on the moral inadequacy of the kind of civil society mandated by the Kantian theory of international law. But is the oppression of women correlated to liberal practices? The answer is, emphatically, “no.” The feminist claim that male domination is an inherent part of liberal discourse and that liberal institutions are therefore inevitably oppressive of women is both politically counter-productive and patently false.

The truth is that the situation of women is immeasurably better in liberal societies, Western or non-Western. The most sexist societies, in contrast, are those informed and controlled by illiberal theories and institutions. These societies are much more exclusive of women than liberal societies (and most of the Western societies are liberal). Thus, naive assertions such as that “decisionmaking processes in [non-Western] societies are every bit as exclusive of women as in Western societies” merely reflect the warped starting premise that free societies and tyrannical ones are, in some “deep” reality, morally equivalent. As we have seen, this sort of “depth” only obscures. The failure to reckon with the facts on record by those claiming to be concerned with the plight of women amounts to serious moral irresponsibility.

The situation of women in liberal societies plainly reveals that liberalism has not yet fulfilled its promise to women of equal dignity. Liberalism is an ideal only partially realized, and its progress can at times seem painfully slow. Yet notwithstanding its imperfections, liberalism remains the most humane and progressively transformative system of social organization known to our time. Its aspiration to universal human flourishing is worthy; its principles of respect, equal treatment, and human dignity are sound. The great, pervasive injus-

135. Or, as Charlesworth and her associates put it, “European, male discourse.” Charlesworth et al., supra note 1, at 619. The frequency with which radicals use the adjective “European” derisively is bewildering. I suspect this is a renewed form of the sentimental prejudice that the Third World is simple, noble, and oppressed, while the First World is sophisticated, evil, and imperialistic.

136. See generally Amnesty International, supra note 37.

137. Charlesworth et al., supra note 1, at 618 (emphasis added).

138. Of course, I am far from suggesting a correlation between Third World and tyranny. While there may be now a very high correlation between Western societies (including here most of the former Soviet republics) and liberalism, the reverse is not true: a rapidly growing number of Third World states are liberal. Also, some culturally Western states are part of the Third World in terms of their economic development.
tices of the present arise not from liberalism, but from illiberal alternatives, and, sometimes, from the lack of resolve to press the liberal vision to its ultimate resolution. Those who would dispirit that resolve, even while wrapped in banners of liberation, deserve our most wary and searching scrutiny.