Intimate Matters: Discovery Avenues Towards Straight Women's Human Rights

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Discovering Avenues toward Straight Women’s Human Rights

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# Intimate Matters: Discovering Avenues Toward Straight Women’s Human Rights

## Table of Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Table of Contents</td>
<td>2</td>
</tr>
<tr>
<td>I. Why Sex?</td>
<td>5</td>
</tr>
<tr>
<td>A. Debating Sex and Seeking Empowerment</td>
<td>7</td>
</tr>
<tr>
<td>1. Dworkin and MacKinnon on Male Sexual Aggression</td>
<td>10</td>
</tr>
<tr>
<td>2. Halley, Cossman and West on Female Sexual Passivity and Pleasure</td>
<td>14</td>
</tr>
<tr>
<td>3. Pro-Sex Pop Culture</td>
<td>21</td>
</tr>
<tr>
<td>B. Intimate Strategies for Emancipation</td>
<td>25</td>
</tr>
<tr>
<td>II. The International Law of Women’s Human Rights</td>
<td>31</td>
</tr>
<tr>
<td>A. Unspeakable Sex and International Law</td>
<td>34</td>
</tr>
<tr>
<td>1. The Right to Equality</td>
<td>34</td>
</tr>
<tr>
<td>2. The Progressive Realization of Rights and the Right to Equal Protection</td>
<td>36</td>
</tr>
<tr>
<td>3. CEDAW’s Expansive Right to be Free from all Forms of Discrimination</td>
<td>37</td>
</tr>
<tr>
<td>4. The Right to the Highest Standard Attainable of Physical and Mental Health</td>
<td>41</td>
</tr>
<tr>
<td>B. American and Afghan obligations under international law</td>
<td>44</td>
</tr>
<tr>
<td>C. National law on women’s rights in relation to International Law</td>
<td>46</td>
</tr>
<tr>
<td>1. United States</td>
<td>46</td>
</tr>
<tr>
<td>2. Afghanistan</td>
<td>50</td>
</tr>
<tr>
<td>III. Recommendations</td>
<td>56</td>
</tr>
<tr>
<td>A. Making the Rights Argument</td>
<td>57</td>
</tr>
<tr>
<td>B. Relying on Precursors</td>
<td>56</td>
</tr>
<tr>
<td>ABSTRACT</td>
<td>61</td>
</tr>
</tbody>
</table>
This paper addresses heterosexual sex as a facet of women’s subjugation discussion of which is currently largely absent from the international human rights agenda. At issue is not overt sexual violence or sexual acts deemed illegal for one reason or another, but rather the broad spectrum of lawful sex between men and women. International human rights instruments legislate sexual equality and aim to prohibit inequality, and yet without explicit consideration of sex by those concerned with developing international human rights instruments, inequality will continue to re-emerge generation by generation. Enshrining women’s search for equality in august international treaties and conventions bears only oblique relation to women of all ages struggling to balance their sexuality with their other interests and aspirations. Advocates of women’s equality need to talk about private sexual lives, to honestly account for the power dynamics at work, and to theorize a way of connecting proclaimed ‘equality’ with a real equality in private lives. This requires a revisiting of the 1970s feminist mantra, the personal is political, a revisiting through a lens enlightened and empowered by the progress of the women’s movement in the intervening years and yet still humble before the mundane intimacies of daily life.

This paper advocates including sex in international women’s rights to sexual equality: it advocates the specific inclusion of sex as a route of subordination, sex as a route of empowerment, and sex as a locale through which strategies for emancipation can be fruitfully developed. Calling for intimate strategies for emancipation, this paper demonstrates why empowering women’s sexuality must be a central part of international women’s rights if we are to achieve the long sought goal of women’s emancipation.
We begin with an explanation for the rationale of this paper: why sex? Working with and through the feminist scholarship of Catherine MacKinnon, Andrea Dworkin, Robin West, Katherine Franck, Janet Halley and others, the impact of sex as a feature in women’s subordination is analyzed. We then relate these academic debates about women’s sexual empowerment to the generally pro-sex, American popular culture. The centrality of sexuality to modern identity is considered as a contributing factor to the perpetuation of inequality and insights are gleaned from history, cross-cultural comparisons and psycho-analysis. Section I concludes with a presentation of the project of intimate strategies for emancipation. In Section II, this paper provides an analysis of sex as addressed by international human rights protocols. This analysis reveals the unspokenness of sex-itself within human rights provisions. Backlit by this absence of sex within international law, a comparative evaluation of sex and sexual inequality is presented. In order to provide a concrete basis for discussing the obligations of states under current international law we focus on two particular states, the United States and Afghanistan. We chose to focus on the United States because of its prominence in world affairs. We chose to focus on Afghanistan both because of its extreme contrasts to the U.S. example and because of the special responsibility the U.S. – and, by extension all Americans—has toward Afghanistan by virtue of the on-going war and occupation. By analogizing to existing human rights provisions related to sex, this paper identifies practical benefits of a renewed women’s human rights agenda which includes sex as a persistent, though not necessary, source of inequality. The paper concludes with making recommendations for the creation of highly intimate strategies for emancipation.
I. Why Sex?

From a certain perspective it is all too obvious that sex lies at the root of women’s subordination.\(^1\) And yet, from another perspective, it might appear that sex itself – freed from ideologies and practices of female subordination—has no inherent relation to women’s subordination. Sexual liberation has a literal dimension, and the ability to freely develop one’s sex life is intrinsic to sexual equality. However there are dimensions to sex that can reassert female subordination, even in a sexually permissive culture and in a legal regime of sex equality.\(^2\) By sex we mean actual sexual acts, not gender or biological attributes. Our discussion is confined to heterosexuality.\(^3\) Heterosexual women engage in sex with men, which puts them at continued risk of subordination in intimate settings and via intimate relationships. This discussion in section one is also largely confined to American examples because the American example is not only highly influential, it is also a demonstration of how issues related to sexual emancipation develop when many legal and customary constraints on sexuality have been removed. This paper grapples with the on-going and intimate prospect of subordination, seeking to

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\(^1\) This is acknowledged at the roots of Western feminism, in such works as *MARY WOLLSTONECRAFT, A VINDICATION OF THE RIGHTS OF WOMAN* (Anne Mellor & Noelle Chao eds., Pearson Longman, 2007) (1792); and *JOHN STUART MILL, ON THE SUBJECTION OF WOMEN* (Broadview Press, 2000) (1869).


\(^3\) Arguably Queer Theory can inform feminist understandings of sex and empowered sexuality, but in order to keep this essay within a manageable zone, it will be considered in this essay only in relation to heterosexual practices. On Queer Theory informing feminism see, Brenda Cossman, *Sexuality, Queer Theory, and "Feminism After": Reading and Rereading the Sexual Subject* 49 MCGILL L.J. 847 (2004) [hereinafter Cossman, *Sexuality, Queer Theory, and "Feminism After"].
illuminate it and then to outline how human rights law provides leverage to women to free themselves.

Advocating for sexual freedom has a long history in Western cultures, with roots in the Romantic era, a revival in nineteenth-century radical movements, and a final breakthrough in the 1960s counterculture movement. The discovery and consequent mass-marketing of the birth control pill freed women with access to it from the natural consequence of heterosexual intercourse, and aided in developing a new normative vision in which women’s control of their reproductive life is integral to their full human rights. But even assuming such control is fully achievable – which for a wide variety of reasons it frequently is not – sex itself can persist as a feature in the subordination of women. Catherine MacKinnon pointedly criticized the ability to control reproduction, via birth control and abortion, as a means for men to have increased sexual access and control over women. However, notwithstanding MacKinnon’s heightened sensitivity to the dangers of hetero-sexual subordination of women, this paper takes a more sex-positive outlook. If we are to believe that women’s liberation is a real possibility, we have to believe that heterosexuality need not produce subordination. However, it seems that we—the collective we of humanity (or, at least, that collective minus a tiny elite of empowered independent women)-- are not yet in that place. Highly intimate strategies of empowerment must be developed to help women secure the promise of human rights.

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6 Under conditions of men's domination, MacKinnon argues, abortion "facilitates women's heterosexual availability" and "frees male sexual aggression.” CATHERINE MACKINNON, FEMINISM UNMODIFIED, 99 (1987) [hereinafter MACKINNON, FEMINISM UNMODIFIED].
A. Debating Sex and Seeking Empowerment

Sorting out what types of behavior count as “sex” and separating that from a broader cultural edifice of the “sexual” is an essential part of our discussion. For example, in some societies, any contact at all with men who are not family relatives is presumed to be implicitly and illicitly sexual. Insofar as forced or unwanted “sex” is the essence of rape (this assumption is itself problematic), the legal definition does center on various forms of genital contact and/or penetration. Jimmy Carter’s avowal that he had committed adultery because he had desired other women is evidence, however, of the indistinct borders of sex in the Western world. Likewise the chat rooms discussing the rape charges against Julian Assange are full of debates about when sex starts – that is, when the “green light” is definitively given and “sex” can legitimately happen.

All of this is just to say there is a certain degree of seemingly unavoidable slippage—or a fuzzy border-- between sex and not-sex. Both the power dynamic in the realm of sex, as well as in the indistinct border region, feature in this paper. Indeed, the varying ways in which the border region is defined – how big or small it is— implicates the relative degree of women’s liberty.

Sexual emancipation has literal and figurative dimensions: literally to be sexually emancipated is to be free of constraint or subordination, figuratively to achieve sexual emancipation is to be freed so as to allow self-actualization according to one’s own


\[9\] See on-line comments following Jessica Valenti, *What the Assange case says about rape in America*, WASH. POST, December 12, 2010, at B03 [hereinafter Valenti, *Assange and rape in America*].
proclivities and desires. The relationships and relatedness established in and through sex, however, reveals the complexity of this vision of emancipation. Sex—if we exclude masturbation from consideration—is a social experience. Heterosexual sex involves male and female (and thus is always implicated in whatever gender hierarchies carry currency) and can produce children. It is deeply, fundamentally, about relationships—relationships formed by (free and self-actualizing? or, culturally conditioned and constrained?) individuals. Sex and sexuality is also viewed as a route (sometimes the chief route) to self-expression and self-actualization via emancipated desire. The law defines some relationships as beyond the boundaries: sex with children, for example, is a serious violation of American law. However, many variations on sexual subordination continue to thrive despite the law of formal sexual equality. The technically free and technically equal individual can freely choose or mistakenly fall into drastically unequal, disempowering relationships.

Intimate strategies of sexual emancipation aim to provide the bridge between daily life and abstract legalism, so that the promise of sexual equality can be attained more easily by heterosexual women in their daily lives. While this paper is confined to theorizing the need for, and legal right to state support for, such strategies, we should

10 However, see, THOMAS WALTER LAQUEUR, SOLITARY SEX: A CULTURAL HISTORY OF MASTURBATION, 2003 (portraying the social dimensions to what is normally taken as a private act).
11 For an argument that these power dynamics make heterosexuality therefore more troubling than homosexuality see, Mary Becker, Problems with the Privatization of Heterosexuality, 73 DENV. U. L. REV. 1169, 1170 (1996).
12 Human rights activism around reproductive rights is often the chief venue for any discussion of human rights and heterosexuality. This link is so tight that it has produced a chorus of criticism focused on “repronormativity.” See for example, Katherine Franke, Theorizing Yes: An Essay on Feminism, Law, and Desire, 101 COLUM. L. REV. 181 at 199-200 (2001); David B. Cruz, Heterosexual Reproductive Imperatives, 56 EMORY L.J. 1157 (2007); and Rosalind Dixon, Feminist Disagreement (Comparatively) Recast, 31 HARV. J. L. & GENDER 277, 282-83 (2008). This paper advocates for staking out a human rights agenda specifically about sex, not about reproductive rights. For an indepth discussion of the need to avoid the conflation of reproductive rights and heterosexual sex see, Alice M. Miller, Sexual but Not Reproductive: Exploring the Junctions and Disjunctions of Sexual and Reproductive Rights, 4 HEALTH AND HUMAN RIGHTS, 68 (2000).
note here that these strategies should be developed inclusive of the broad and diverse feminist outlooks, they should incorporate and speak to diverse social, cultural and racial specificities, and should be adaptable to localized conditions and localized needs. As currently envisioned these strategies for sexual emancipation are largely process oriented, so as to provide routes (not a singular route but plural) to empowerment.

Western society locates sexuality at the center of the self, so that sexual expression is intimately tied to personal self-expression and self-actualization. Exploring this in relation to heterosexual women’s emancipation reveals several stumbling blocks: the prominence of male sexual aggression and dominance continually threatens to subordinate women in day-to-day relationships with men; the “emancipated” sexuality of women in the West bears witness to vocal advocates and practitioners of masochism; and finally, the law of sexual equality speaks only obliquely to the quality of women’s day-to-day lives.

In American culture pro-sex opinions dominate the cautionary, relatively anti-sex outlook. The pro-sex outlook, however, is frequently not feminist nor is it necessarily concerned in any way with women’s empowerment. In this paper, which is dedicated to theorizing a legal route to intimate empowerment, we restrict our consideration of pro-


14 Michel Foucault, History of Sexuality (Robert Hurley, trans., 1985). This point is also supported by the Supreme Court decision in Lawrence v. Texas, authored by Associate Justice Kennedy, in which sexuality is described as a critical aspect of private life for which liberty is preserved by constitutional right. Lawrence v. Texas, 539 U.S. 558, 562 123 S.Ct. 2472, 2474(2003). See also the criticism of the privatized family in, Martha Albertson Fineman, The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies, (1995).

15 For example, the outlook of the sex advice columnist Dan Savage as described by Mark Oppenheimer, Infidelity Keeps us Together, N. Y. Times Magazine, July 2, 2011, at 22.
sex outlooks to various feminist points of view. First we consider the “radical” feminism of Catherine MacKinnon and Andrea Dworkin as they grapple with the threat posed to women by male sexual aggression. Next we discuss the difficulties for the project of emancipation posed by relative female passivity and feminist advocacy of masochism. We consider how the divide between the law of equality and the quality of women’s lives can be bridged via West’s phenomenologically grounded feminist outlook. Women’s sexuality in popular culture raises similar issues of masculine aggression, women’s relative passivity, and what might be the nature of empowering emancipated sexuality.

1. Dworkin and MacKinnon on Male Sexual Aggression

Taking stock of the dangers posed by heterosexual sex to straight women is deftly accomplished through examining MacKinnon’s legal scholarship as it is complemented and enriched by Andrea Dworkin’s more personal grappling with the disempowering aspects of heterosexual sex. The mutual resonance of their outlooks is evidenced by their partnership in drafting pioneering—if ill-fated—anti-pornography legislation.17

The MacKinnon-Dworkin analysis of this dynamic points to the eroticization of sex via violence, the mutual imbrications of the two domains so that violence is nearly inherent in masculine sexuality, and the masculine urge to dominate. There is a “continuum” of heterosexual sex that ranges from,

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16 The goal in this discussion is to consider a spectrum of issues related to sexuality and women’s empowerment rather than to dissect or diagram the various schools of feminism. The divisions and debates within feminism serve a broader productive purpose of sharpening our insights and tools for advocacy; within this paper we aim to include the diverse points of view each on their own merits.

‘consensual sex (equally desired by woman and man), to altruistic sex (women do it because they feel sorry for the man or guilty about saying no), to compliant sex (the consequences of not doing it are worse than the consequences of doing it), to rape.’

According to MacKinnon, the slippage from assertive aggression to mere aggression, from erotically charged physicality to brute force and mere violence, is deeply characteristic of hetero-sexuality. Indeed, MacKinnon hinges her very definition of feminism on grappling with the pervasive heterosexual eroticization of violent domination, so that for her feminism is defined as “a theory of how the eroticization of dominance and submission creates gender, creates woman and man in the social form in which we know them.” Male sexual aggression is not only widely accepted, it is often applauded, and only rarely repudiated. This sexual aggression is compounded by the addition of race, with harassment and exploitation escalating in situations of racial hierarchy. The penumbra, or border region, around sex-itself threatens women’s liberty because—as an arena of charged sexuality—men enjoy a license to act with (sexual) aggression.

In many ways, dallying with MacKinnon is akin to revisiting the sharply confrontational feminism of the 1970s. The mantra of that era-- “the personal is political” – sought to break down the public-private divide, to encourage women to recognize the power operating within their family relations, and by recognizing it for what it was, to overcome it. The personal is political brings immediacy to the power

19 MACKINNON, FEMINISM UNMODIFIED, supra note 6, at 50.
20 See, for example, the argument in, Tanya Kateri Hernandez, Sexual Harassment and Racial Disparity: The Mutual Construction of Gender and Race, 4 J. GENDER RACE & JUST. 183 (2001).
struggle, it acknowledges that the intimate day-to-day events are consequential in a big way for women’s subordination or empowerment.

Andrea Dworkin brings home that promised immediacy and intimacy in her writings on sex. Rereading Dworkin (or, reading her for the first time if you are under a certain age) produces some surprising discoveries. Often characterized as strident and unsympathetic, in fact there is much sensitivity in her writings. “And so,” she writes, “we are inarticulate about sex, even though we talk about it all the time to say how much we like it … Nothing is one’s own, nothing certainly not oneself, because the imagination is atrophied, … and the dull repetition of programmed sexual fantasy has replaced it.”

Or, at another place, she writes, in sex “one’s insides are on the line; and the fragile and unique intimacy of going for broke makes communion possible, in human reach—not transcendental and otherworldly, but an experience in flesh of love.”

Brought within the domain of human rights, Dworkin’s analysis of intercourse, “the fuck” as she usually says, might be phrased as an interrogation of whether there is any right that women can assert to be loved. In legal documents (analyzed below in section II), there are rights concerning privacy, equality, the right to marry, and the right to have a family, but in no direct assertion of a right to love and be loved. Love, after all, is not a legal matter. For some the rights of marriage and family might entail love as an assumed dimension, and yet that is conjecture, a fantasy or ideal which often fails. As in Leo Tolstoy’s *Kreutzer Sonata*, in which the feminist young woman wants love, warmth, and intimacy in a marriage, and yet the dominant male voices reject the possibility of this, citing the imperatives of copulation and of male dominance, today’s realities of

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21 DWORKIN, INTERCOURSE, supra note 2 at 49.
22 Id., at 51.
family and marriage do not guarantee love or equality. Sex within a marriage far from guaranteeing love, in fact can be more disempowering for women than sex outside marriage.\textsuperscript{23}

The association of sex and love, indeed, is a fragile one. Yet the intimacy of sexual sharing provokes emotional attachment, itself most humanely lived via loving compassion. The rage expressed by Dworkin in the closing passages of \textit{Intercourse}—culminating with “a long chain of men—fathers, uncles, grandfathers, brothers, pimps, pornographers, and the good citizens who are the consumers; and men, who are, after all just family, are supposed to slice us up the middle, leaving us in parts on the bed”—this rage responds to a betrayal: what should have been love was violent aggression.\textsuperscript{24}

This rage is also now, in the West, largely derided. The gains women have made toward equality have loosened our claim on undiluted anger.\textsuperscript{25} If for centuries and centuries of subordination the expression of such anger would bring sure punishment for insubordination, by now, in the early twenty-first century, many perceive the anger as quaint, or overblown, if still disruptive enough of a more-or-less covert continuation of status quo male privilege to be annoying.

The negative affect which Dworkin portrays as dominating male sexual views of women—

\begin{flushright}
\textsuperscript{23} Research in many disciplines bears this out. See, \textsc{Judith Stacey}, \textsc{In the Name of the Family: Rethinking Family Values in the Postmodern Age} 49 & 68 (1996) (arguing that “stable” marriages have historically been based on coercion, inequality and patriarchy); Mary Frank Fox and Catherine A. Faver, \textit{Men, Women, and Publication Productivity: Patterns Among Social Work Academics}, 26 \textsc{Soc.Quarterly} 537, (demonstrating how marriage negatively impacts women’s careers and happiness). From a legal perspective see, Frehlich Appleton, \textit{Culturally Cliterate Family Law, supra note 7, 298-303. From a medical and psycho-analytic perspective see \textsc{Jonathan Metzl, Prozac on the Couch: Prescribing Gender in the Era of Wonder Drugs}, 78 (2003) and Alice Bullard, \textit{Prozac on the Couch}, in 80 \textsc{Bull.Hist.Med.} 799 (2005) (reviewing \textsc{Jonathan Metzl, Prozac on the Couch: Prescribing Gender in the Era of Wonder Drugs, (2003)}.\textsuperscript{Dworkin, Intercourse, supra note 2, at 194.}
\textsuperscript{24} But see the still compelling argument in Robin West, \textit{Love, Rage and Legal Theory}, 1 \textsc{Yale J.L. & Feminism} 101 (1989).
\end{flushright}
[the] repulsion is literal and linear: directed especially against her genitals, also her breasts, also her mouth newly perceived as a sex organ. It is a goose-stepping hatred of cunt. The woman has no human dimension, no human meaning. The repulsion requires no explanation, no rationalization. She has no internal life, no human resonance; she needs no human interpretation. Her flesh is hated; she is it without more. The hatred is by rote, with no human individuation, no highfalutin philosophy or pedestrian emotional ambivalence.26

— seems so out of touch, so out of tune with contemporary society. Look at the seemingly empowered character, Nancy Botwin, in Show Time’s popular series, Weeds. She likes a bit of rough sex, some slapping around, with hands or belts, only gets her hotter. She likes the bruises. Somewhere beyond Dworkin and the fictitious Botwin there is a promised land of female sexual empowerment.

2. Halley, Cossman, and West on Female Sexual Passivity and Pleasure

Feminist legal theorists who lift their gaze beyond the dangers of male sexual aggression to entertain the idea of sexuality as a route to female empowerment then take on the implications of relative female sexual passivity. The feminist conundrum is this: how can empowerment arise out of passivity? The extreme instance is masochism, which is frequently understood as inherently disempowering and has its advocates in the theorists Janet Halley and Brenda Cossman.27 Arguably, however, the day-to-day lives of most heterosexual women (not all of course, and not always for anyone) involves some degree of sexual passivity. The same is arguably true of men, but for women this seems to be more frequent and to more frequently lead to or enable passivity in other spheres of

26 DWORKIN, INTERCOURSE, supra note 2, at 8.
27 See, for example, JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM, 2008 [hereinafter HALLEY, SPLIT DECISIONS]; Janet Halley, Sexuality Harassment, in LEFT LEGALISM/LEFT CRITIQUE 80, 102 (Janet Halley & Wendy Brown, eds., 2002); and Cossman, Sexuality, Queer Theory, and “Feminism After,” supra note 3.
their lives. Robin West grappled with masochism as well as this more slippery and
certainly less spectacular dimension of passivity in *Women’s Hedonic Lives*.

Brenda Cossman finds cause to name a masochistic film character a feminist heroine. Cossman touts the work of the screenwriter, Erin Cressida Wilson, author of *Secretary*, who has explained how as a young woman in the 1980s she felt strait-jacketed by feminist dictates about sexuality. Wilson characterizes herself as “not a push-over, but as someone who likes to give it up in bed.”

Her screen play and film depict a masochistic woman finding sexual fulfillment via corporal discipline, bondage, and slave-like obedience to her boss. From Wilson’s perspective, the secretary she created is a type of heroine, one ready to endure degradation in the name of love. Cossman, who worked closely with Harvard Law professor Janet Halley for a time, interprets *Secretary* using Queer Theory and feminism, finding adequate grounds to agree that indeed, the deeply masochistic secretary is a post-modernist feminist heroine.

In a different context, Janet Halley observes that once masochism is admitted into the vocabulary of sexual pleasure, it is very difficult “to know that any particular social outcome involving sexuality broadly conceived is a cost or a benefit, a good or a bad. Even there, we must—constantly, existentially, pragmatically, and in uncertainty—decide.” Halley has famously called for “taking a break from feminism” in order to better comprehend the variations, permutations, and surprising inversions of sexual desire and power. Sex-cautious feminists, from the perspective of Halley and Cossman, indulge in rigid, binary analysis, ignore the more subtle workings of desire and gratification, and

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28 *Secretary* (2002), directed by Steven Shainberg, screenplay by Erin Cressida Wilson, distributed by Lions Gate Films. Wilson is quoted in Cossman, *Sexuality, Queer Theory, and “Feminism After,”* supra note 3, at 849-50.

29 Cossman, “*Sexuality, Queer Theory, and “Feminism After,”* supra note 3, at 850.

hence risk sliding into intellectual dishonesty. For all that, Cossman explicitly aligns herself with a feminist agenda exclaiming that, “Feminism after the critique of feminism has its work cut out for it. In the area of sexuality, it must struggle to displace the dominance of dominance feminism [i.e. MacKinnon’s outlook] in the popular imagination, and to carve out for itself a role in the analysis of sex and sexuality beyond the siren call of negativity and danger.”

The complexities of sexual desire are indeed boundless, and yet, certain home-truths still need to be acknowledged. Regarding the film, Secretary, for example, the film ends with the secretary and her boss married and living in suburbia, to all outward appearances a normal heterosexual couple. This ending, one would think, must be ironic or tongue-in-cheek. Revolutionary sexual indulgence that explodes the boundaries of self and looses unanticipated powers results in a life buried in suburbia? Why is this in any way revolutionary (let alone attractive for someone who aspires to bucking the trends)?

Second, playing at subordination in sexual encounters is not actually the same thing as subordination in sexual, social, economic, and political life. The realm of sexual fantasy and desire and the quest for their elusive satisfaction is a realm of freedom if and only if the ‘games’ can be played without re-world disempowerment. The subordination in Secretary is not limited to sex, rather it crosses the line into broader realms so that the secretary becomes a house-bound housewife subordinate in every way to her husband.

In her own grappling with masochism, Halley is willing to admit that perhaps such indulgence is an unaffordable luxury, “especially in times like these of acute consolidation of conservative power,” although she does not, for all that, abandon her

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31 Cossman, Sexuality, Queer Theory, and “Feminism After” supra note 3, at 874.
32 West, Women’s Hedonic Lives, supra note 17, at 185-203 (discussing masochism especially in relation to MARIA MARCUS, A TASTE FOR PAIN: ON MASOCHISM AND FEMALE SEXUALITY (1981)).
indulgence. From the perspective of an advocate for international women’s human rights, the indulgence seems naïve. If sexual masochism leads to social subordination, as in Secretary, then indulging it appears unwise. Halley hints at the “unaffordable luxury” of her theoretical speculations, but she confines her concerns to the current conservative retrenchment. I would look beyond the incidental politics of early twenty-first century America; I would look back to the long march of global history in which evidence of women’s subjugation is overwhelming and instances of women’s empowerment are preciously rare. Women around the world routinely suffer gender based violence. Women in Afghanistan self-immolate to escape their miseries.

Distinguishing actions that are symptomatic of suffering and disempowerment and actions freely chosen is a crucial dimension to understanding free and empowered sexuality. Only when this distinction is made can the more real question about gender and masochistic sexuality be posed: can female masochism really be dissociated from thousands of years of women’s subjugation by men? Halley and Cossman both inadvertently demonstrate the difficulty of making the distinction between freely chosen sexuality and victimization in their respective discussions of the divorce case, Twyman v. Twyman. Sheila and William Twyman married in 1969. In 1985 Sheila filed for divorce and charged William with negligent infliction of emotional distress because of

33 HALLEY, SPLIT DECISIONS, supra note 27, at 363.
34 MALALAI JOYA with DERRICK O’KEEFE, A WOMAN AMONG WARLORDS: THE EXTRAORDINARY STORY OF AN AFGHAN WHO DARED TO RAISE HER VOICE, 189-92 (2010) [hereinafter MALALAI JOYA, A WOMAN AMONG WARLORDS].
35 Twyman v. Twyman, 855 S.W.2d 619 Supreme Ct of TX, 1993, 61 USLW 2748. The trial court dissolved their marriage and awarded Sheila $15,000 for the tort. William appealed the tort claim, upon which the Texas Supreme Court finally ruled that negligent infliction of emotional distress is not a cognizable claim. The case was remanded for trial on a charge of intentional infliction of emotional distress.
how her husband coerced her into bondage-type sexual relations. Both Halley and Cossman interpret this marriage and divorce as a type of prolonged sado-masochistic encounter, in which Sheila all too willingly plays the victim while her husband, apparently the aggressor, is victimized in return by Sheila’s refusal to indulge his sexual fantasies. In Halley’s analysis, Sheila becomes an emblem of Nietzschean slave-morality. In Cossman, Sheila is transposed from straight wife to a Queer Theory subject. Halley in particular implies that Sheila too easily assumes the role of the victim, suggesting that in fact she is an active agent of her own masochistic desires. Halley follows an intricate and theoretically sophisticated route to work around, finally, to naming Sheila Twyman as “slave moralistic” and “not [one of] my allies”.

Such a reading of Sheila’s troubled sixteen year marriage attributes misfortune and suffering to Sheila’s own desires; it turns a jaundiced eye to studies that have demonstrated the disquietingly passive behavior that can afflict those who have suffered sexual traumas, a passivity so pervasive that they seem powerless to avoid abuse, or even

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36 Twyman v. Twyman, 855 S.W.2d 619 Supreme Ct of TX, 1993, 61 USLW 2748. See also, HALLEY, SPLIT DECISIONS, supra note 27, at 348-63 and Cossman, Sexuality, Queer Theory, and Feminism After, supra at note 3, at 857-65.

37 While both Halley and Cossman point out that their readings of the case documents are not necessarily reflective of the actual people, Sheila and Williman Twyman, it is difficult not to read their multiple, shape-shifting, and self-consciously theoretical readings as disrespectful of the actual people involved. Indeed, in the social sciences, to freely speculate on intimate details of living named individuals is wildly outside the bounds of academic propriety. Any research involving human subjects, in the social sciences, is subject to review by a university based compliance office. Conventionally names are changed to protect privacy. While perhaps the public records of the court house legitimately put the intimate details of the Twyman marriage into the public domain, nonetheless, Dworkin’s famous protest of the “third rape” surfaced as I read the transposition of the case facts from Sheila’s voice to the various projected voices of Halley and Cossman. ANDREA DWORKIN, LIFE AND DEATH, 55-59 (1997). The first rape is the actual event, the second is the legal process, and the third the media exposure. HALLEY, SPLIT DECISIONS, supra note 27, 353-362; Cossman, Sexuality, Queer Theory, and “Feminism After”, supra note 3, at 857-65.

38 HALLEY, SPLIT DECISIONS, supra note 27, at 348-63; and Cossman, Sexuality, Queer Theory, and “Feminism After”, supra note 3, at 855-65.

39 HALLEY, SPLIT DECISIONS, supra note 27, throughout her discussion in pages 353-62, & at 362.

40 HALLEY, SPLIT DECISIONS, supra note 27, at 362.
to consider it an avoidable part of a relationship. Halley’s point of view comes very close to saying that “she asked for it” or “she must have wanted it.” To foist this subject-position on Sheila is a classic case of victimizing the victim; it overlooks the predominate truth of how people live their lives. That is, that most are not in control of their fates and destinies, that they do not write their own scripts, that perhaps they make their own lives, but not in circumstances of their own choosing. In other words, we are not all privileged, highly empowered, and free of psychological constraints. Some, or perhaps most, of us need to learn strategies for empowerment in our intimate lives.

If sexuality can be a route to women’s subordination – via custom, via male sexual aggression and via women’s masochism – nonetheless it is also widely, intuitively recognized as a route to empowerment. Feminist legal theorists, however, have pointed out that the law of sexual equality rests on a false assumption of sameness between the sexes. Robin West steers a course between the liberal feminists (who would like to deny women’s difference) and the radical feminists (who seek to overcome women’s difference) to present a phenomenological view of empowerment in which women’s pleasure, including their sexual pleasure, grounds an ethic and a vision of the legal order. A law is a good law, West proposes, so long as it advances women’s pleasure. Women’s pleasure is poorly served by existing law, argues West, because it has been written to embody masculine goals and ideals. Women’s pleasure, she argues further, is deeply different from men’s pleasure. Women’s pain is largely unexpressed and remains

41 See, i.e., the discussion in Michael Penn and Rahel Nardos, Overcoming Violence Against Women and Girls: The International Campaign to Eradicate a Worldwide Problem, 149 (2003).
43 Id. 213.
unknown by men. The history of women’s subordination is such that at times the very vocabulary to express women’s true emotions is lacking, and, in instances when women do speak about their internal lives, there is frequently a strong incentive or predisposition to prevaricate.\textsuperscript{44} Urging women to speak the truth about their joys and their suffering, West hopes to ground a renewed legal order on this hedonic knowledge, writing a law that furthers women’s pleasure and joy, rather than their pain and suffering.

If the dangers of masculine sexual aggression still loom large among legal theorists, there are, beyond West, a handful of feminist legal theorists interested in heterosexual sexual empowerment of women. Katherine Franke, in \textit{Theorizing “Yes”} writes "It cannot be right that feminists should leave to queer theorists the job of providing an affirmative theory of sex that accepts and accounts for the complex ways in which denial, shame, context, prohibition, objectification, and power enable or capacitate desire and pleasure. Surely, a thick conception of gender, one that we would call feminist, should be brought to bear on this project"\textsuperscript{45} Franke argues that “it is time that feminists reclaim the body as a site of erotic pleasure and intimacy and move these issues [i.e. sexuality and intimacy] back into the center of our theories of sexual citizenship."\textsuperscript{46} Susan Frehlich Appleton moves beyond abstract theory to take a pro-sex view of sexual equality

\begin{footnotes}
\item[44] \textit{Id}. 214.
\item[46] Katherine Franke, \textit{Feminist Justice, at Home and Abroad: Women Imagining Justice}, 14 YALE J. L. & FEMINISM 307 at 311 (2002). Judith Butler has also argued that it may be that [Gayle Rubin’s] ‘long run’ has arrived, that it may be time “for feminism to offer a critique of gender hierarchy that might be incorporated into a radical theory of sex, and for radical sexual theory to challenge and enrich feminism. Judith Butler, \textit{Against Proper Objects, in Feminism Meets Queer Theory} at 18(Elizabeth Weed & Naomi Schor, eds. 1997). Butler is paraphrasing Gayle Rubin’s observation in "Thinking Sex" that "[i]n the long run, feminism's critique of gender hierarchy must be incorporated into a radical theory of sex, and the critique of sexual oppression should enrich feminism." But, it was part of an argument that in the short run, "[a]n autonomous theory and politics specific to sexuality must be developed." See also discussion by Cossman \textit{Sexuality, Queer Theory and “Feminism After,” supra note3, at 873-74}
\end{footnotes}
deep into the terrain of family law.\textsuperscript{47} Laura Rosenbury and Jennifer Rothman have also pursued a sex-positive feminist analysis—linked to \textit{Lawrence v. Texas}-- of sexuality in and out of intimate relations.\textsuperscript{48} This small collection of scholars provide a path forward in the project described at the onset of this paper: creating intimate guides to women’s empowerment.

\textbf{3. Pro-Sex Pop Culture}

The quaint era of the Dworkin-MacKinnon effort to outlaw pornography as sexual violence incarnate is now consigned to the dustbin of history, while the internet has opened up vast new frontiers for pornographers.\textsuperscript{49} Streamed directly into private homes around the globe, pornography is no longer an exclusive commodity, the production and dissemination of which was moderated by the constraints of finding a vendor and hiding the incriminating hard-copy from children and wives. Internet pornography—as Natasha Vargas-Cooper claims in her essay, \textquote{Hard Core}-- has changed the baseline expectations of partnered (if not strictly marital or monogamous) sexuality.\textsuperscript{50} Perhaps we can still hope that the hard-core porn so easily found on the internet is not indicative of a hard-core truth about humanity, but rather only a symptom about some current, malleable, human relationships. Vargas-Cooper sees the prominent double anal of broadband internet porn as a new normal with which women must contend in their sexual lives, rather than relegating it to the status of mere dross or excess of our culture. Her whole

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\textsuperscript{47} Frehlich Appleton, \textit{Culturally Cliterate Family Law}, supra note 7.
\textsuperscript{48} Laura Rosenbury and Jennifer Rothman, \textit{Sex In and Out of Intimacy} 59 EMORYLJ 809 (2010).
\textsuperscript{49} Catherine MacKinnon reflects on the anti-pornography legislation she wrote with Dworkin in \textit{MACKINNON, ARE WOMEN HUMAN?}, supra note 2, at 112-119.
\textsuperscript{50} Natasha Vargas-Cooper, \textit{Hard Core: The New World of Porn is Revealing Eternal Truths about Men and Women}, 307:1 THE ATLANTIC 97 (January/February 2011).
\end{flushright}
exercise of trying to locate her private sexual self within the maze of internet porn is
rather like watching someone try to make a home on a steep cliff. I found myself
thinking, why not find a more commodious location for your most private self? Then,
after exploring some internet porn sites, I found myself wondering if perhaps she is right?
Perhaps explicit, no-holds-barred porn is a new standard for our society, and women
intent on women’s empowerment must come to terms with it. Intimate strategies for
empowerment need not, after all, stop on the door step of the brothel, or of the porn
movie filming site.\textsuperscript{51}

Joining this parade of sexually experimental contemporary women seeking
empowerment, is the Duke University graduate of horizontal studies, Karen Owen, who
lets us know that girls who hook up with star athletes like to watch porn in groups of
young men.\textsuperscript{52} They watch, they laugh, and then they find the room of the guy they feel
like hooking up with that night and give good head. Excellent head with no gag reflex.
Head provocative of awe—how could you be so good at that?—and exuberant high-
fives. Owen is praised by many as a path-breaking post-modern feminist, a fact which I
would argue contributes to my contention that we need better intimate strategies for
empowerment. “‘I wish I had been taking control of male tools when I was that young,’”
wrote one commentator.\textsuperscript{53} The essayist Caitlin Flanagan demurs at this estimation,

\textsuperscript{52} Karen Owen, An Education Beyond the Classroom: Excelling in the Realm of Horizontal Academics (May 2010) (Duke University Mock Senior Thesis). Access Karen Owen’s mock senior thesis via googling “Karen Owen” and “Horizontal Studies”. It is on multiple websites, though most if not all sites have now been redacted out of privacy concerns for (and perhaps because of lawsuits by) the men pictured and discussed. See also Caitlin Flanagan, \textit{The Hazards of Duke: A Now Infamous Powerpoint Presentation Exposes a lot about Men, Women, Sex, and Alcohol—and about how Universities are Letting Their Female Students Down}, 307 THE ATLANTIC 87 (January/February 2011).
\textsuperscript{53} Flanagan, \textit{The Hazards of Duke}, supra note 45, at 92.
writing that “if what we are seeing in Karen Owen is the realization of female sexual power, then we must at least admit that the first pancake off the griddle is a flop.”

Flanagan compares Owen to Tucker Max, a law student at Duke who wrote a best-selling book recounting his sexual conquests after he realized that male sexual aggression, “not just in the act of sex, but in the way a man can choose to treat women, verbally and emotionally, is a force to which a huge number of educated, liberated young women are deeply attracted.” Flanagan is right in her observation that Owen and Max are similar in that they exposed their alcohol fueled one-night stands to the public, but Max still comes out on top because he is the aggressor. He capitalized aggressively yet again in writing his book for profit. Owen’s mock thesis is full of accounts of male sexual aggression, of which she is the recipient. She gave it away again by allowing her power-point essay to go viral on the internet.

Clearly the long ages of women’s sexual subordination are not so easily shed as Owen or Halley would like to believe. If we as a society would like to leave behind a view of sex as inherently sexist, that is, of sex as a function of male aggression and female passivity if not subordination, we are hampered by some stubbornly recurrent realities of which rape is the prime example. Consider the recent gang rape of an eleven year old girl by eighteen young men in a small town north east of Houston, Texas. Just an obscure bit of daily news, this sad event involved the son of a school board member and two members of the basketball team, as well as petty criminals and one man who had been convicted of manslaughter. The rapes were filmed with mobile phone cameras by

54 id. at 89.
55 id.at 92. Flanagan is discussing the book by TUCKER MAX, I HOPE THEY SERVE BEER IN HELL, 2010.
some of the participants, and then distributed around, including at the girl’s school. The events came to light when a co-student saw the video and brought it to a teacher’s attention. In classic blame-the-victim (and the victim’s mother) style, the Times reports, “Residents…said the victim had been visiting various friends there [at the site of the attack] for months. They said she dressed older than her age, wearing makeup and fashions more appropriate to a woman in her 20s. She would hang out with teenage boys in the playground, some of them said. ‘Where was her mother? What was her mother thinking?’ said Ms. Harrison, who was one of the handful of neighbors who would speak on record.”

Male sexual aggression—of which rape is an extreme if too common example-- is a stubborn feature of heterosexuality. It is part of the current erotic norm. Blaming the female victim is also a stubborn feature of our culture. If we are to truly achieve sexual equality, we need highly intimate strategies for emancipation to help bring the gap between legal equality and lived lives of inequality.

American popular culture and American academics are free to explore various sexualities with relatively little risk. Halley, after all, is a professor of law at Harvard; she is in a strong enough position that she can indulge her fantasies about other women’s (though not her own) masochism. Owen has suffered from the viral circulation of her thesis in horizontal studies, but only to the extent of being embarrassed. Vargas-Cooper, fascinated by the power dynamics of hard core porn depicting penetrated women, is earning her living by writing a book on the subject. If not entirely free from the stigma of female sexuality, nonetheless these women are free to engage and explore. Sexual

57 Id., reporting the (unnamed) girl attends Cleveland Middle School in Cleveland, Texas, which is a scant guarantor of her privacy.

58 Id.
exploration—misguided or not, theoretical and otherwise—is alive and well in the United States. Developing intimate strategies for emancipation can work with such

B. Intimate Strategies for Emancipation

This paper is dedicated to theorizing both the need for intimate strategies for emancipation and the legal obligation under international human rights law for states to support such programs. The long history of the struggle for women’s empowerment has revealed the multiple venues through which masculine sexual dominance has been enshrined— including religion, politics and law, medical norms, and cultural and family structures. If, in some parts of the world, these have been reshaped to some degree by women seeking empowerment, nonetheless the re-assertion of women’s subordination is stubbornly persistent. The framework of international human rights law grants quite strong entitlements to women, this platform for intimate strategies is intended as contributing to the effort to make these formal rights part of the reality of daily life.

The international Human Rights Community needs to grapple with sexual inequality and how it re-asserts itself generation by generation, and in doing so, it must come to terms with sex, eros, and male sexual dominance. Of course this is not a one-front campaign. Laws, religion, and other dimensions to sexual inequality are not rendered insignificant by this prioritization of sex and male sexual dominance. Rather, focusing in this instance on sex – sex acts, sexual attraction, emancipated sexuality—

59 A recently published story by Tessa Hadley renders the normal, everydayness of the deep link between violence and male sexual aggression, “People had mixed feelings about men’s violence against their families in those days (UK, circa 1955-1965): it was disgusting, but it was also, confusedly, part of the suffering essence of maleness, like the smell of tobacco and the beard growth. I think that sexuality itself was sometimes understood, by the women in my family, as a kind of violence that must be submitted to, buried deep in the privacy of domestic life. Presumably the implication of the case for the defense was that Auntie Andy had driven her husband to murder by frustrating him.” See, Tessa Hadley, Honor, THE NEW YORKER 67 at 70 (Feb. 7, 2011).
enables us in understanding subordination and in creating highly intimate strategies for emancipation.

Highly intimate strategies for emancipation can help forge a link between the international law of sexual equality and the lives of women that are suffused with inequality. The bonds of the family, of religious faith, of social belonging and rootedness, of love, and of motherhood are warm, full of life-blood, and alive with the rhythm of bodies. These bonds are also, often, subtly or overtly, disempowering for women. Whether re-enforced by national laws or not, heterosexual erotics can lure women into subordinate roles. Fleeing these bonds for the refuge of the law—that is, if such an option is available where a woman happens to live -- provides relatively cold-comfort. What is abstract equality if it destroys your marriage? If it removes you from your home, your religion, your culture? Intimate strategies for emancipation can help individuals to navigate between the legal promise of empowerment and the social reality of subordination. More than twenty years ago the legal theorist Robin West pointed out the relational identities of women are ill-suited to the American legal structure which prioritizes the self-directed decision maker. Intimate strategies for emancipation can

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60 For an example of women’s human rights activism that integrates sexuality into a broader human rights educational outreach see, Ipek Ilkkaracan & Gülsah Seral, Sexual Pleasure as a Woman’s Human Right: Experiences from a Grassroots Training Program in Turkey in WOMEN AND SEXUALITY IN MUSLIM SOCIETIES 187 (Pinar Ilkkaracan, ed., 2000). For a pro-sex argument concerning international human rights see also, Rosalind P. Petchesky, Sexual Rights: Inventing a Concept, Mapping and International Practice, in FRAMING THE SEXUAL SUBJECT: THE POLITICS OF GENDER, SEXUALITY AND POWER 81 (Richard Parker et al., eds., 2000). For an analysis of the complicated interplay between state power, culture, and female sexuality in the context of international human rights see, Yasmin Tambiah, Sexuality and Human Rights, in FROM BASIC NEEDS TO BASIC RIGHTS: WOMEN’S CLAIM TO HUMAN RIGHTS 369 (Margaret A. Schuler, ed., 1995).

61 The legal theorist Robin West has argued that the law is particularly unsuited to women, whose identities are often more relational than men’s. While whole-sale legal reform might be the preferred answer to the problems West points out, well developed intimate strategies of emancipation can help to fill. See, West, WOMEN’S HEDONIC LIVES, supra note 17, at 210-13. See also MARTHA FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY DISASTERS, (1995).
provide insights for working within the legal framework to maximize women’s empowerment.

The Western sexual self is conceived as a private self, a self that makes its own decisions, whether of what to wear, what to eat, or what type of sex to have. The real issue for Western women is how to integrate sexual passions—in which male sexuality is often more aggressive—in empowering ways into productive lives. The license for male aggressive sexuality not only serves them directly in routes to power, but serves them in subordinating their women to their own needs. Certain careers stand-out as allowing for feminine sexuality: actress, model, airline stewardess, glam T.V. reporters. Not all women, however, are cut out to play the diva, the competition is fierce, and the half-life is short (though aided these days by beauty-enhancing technologies). Other careers capitalize on the “emotive work” for which women are viewed peculiarly adept: teaching, nursing, secretaries. The poor pay and low status of these fields is legendary. When sex and sexuality bears material fruit—i.e. babies—the balancing act of individual women’s lives becomes intensely more difficult. Careers are derailed. Marriages fall apart under the stress. Women are left (relatively) impoverished, un- or under-employed, and largely removed from the reigns of power.


63 For a discussion of whether commercializing marriage can alleviate the financial strain on divorced homemakers see, Martha M. Ertman, Commercializing Marriage: A Proposal for Valuing Women’s Work though Premarital Security Agreements, 77 TEX. L. REV. 17 (1998). In a Canadian study, a leading cause
Intimate strategies for empowerment would aim to short-circuit the sexual subordination of women to men. These strategies could help all types of women as they struggle to balance their sexuality, their jobs, and their relationships. There are some lucky women who benefited from just the right set of circumstances, talents, education, and whatever else, who manage to truly come out on top. The vast majority, however, are derailed by myriad obstacles: whether it is religious authorities who preach subordination of women, parents who prioritize boys over girls, the demands of boyfriends and husbands, the demands of children, or a woman’s own internalized sense of inferiority and inability to compete. The intimate strategies for emancipation aim to provide guidance and emotional support in the decisions of day-to-day living that can add up to empowerment. Without such strategies, each successive generation of women will be left refight the battles for empowerment, to re-invent strategies for dealing successfully with male sexual aggression, and many will fall prey to various degrees of subordination.

The founding of villages for women socially outcast off because they were raped, both in Kenya and in the Democratic Republic of the Congo, offers a place for them to reconstruct their lives. This type of practical, life-building aid is evocative of the goal for the strategies of intimate emancipation. These villages are highly valuable achievements and perhaps the most some might ask or desire. And yet, without the ability to integrate men into their re-established lives, the women will inhabit a

comforting refuge. We must ask ourselves, why the places of refuge for women are so small; why most of the globe is ceded to male dominance. Through the intimate strategies for emancipation we will seek to broaden the areas of refuge by bringing empowerment into mainstream settings.

This paper is dedicated to theorizing the need for, and the legal right to state support for, such intimate strategies, but it seems essential to give at least a brief description of my vision for how such strategies will be developed and what they might (at least initially) look like. The first sketch for the strategies will be produced as the product of a small group of dedicated feminists dedicated to advancing women’s international human rights. The group will be designed as highly inclusive of diversity, with the primary criterion being dedication to women’s empowerment. A broad range of racial heritages, feminist perspectives, and life experiences will be actively sought. Legal and sociological expertise will be combined with psychological and spiritual expertise, so that a comprehensive vision of processes of empowerment can be developed. The group will have on-going meetings that are dedicated not just to articulating the greatest needs but also to focusing on processes of empowerment. The goal will be to produce a set of recommendations or guidelines toward empowerment for women facing day-to-day demands and decisions in their intimate lives. A chief working assumption will be that these are guidelines for women without any special access to power and living amidst social, religious, and legal institutions that are frequently (not always) disempowering for women.

This initial group will produce the prototype of the intimate strategies for emancipation. The proto-type will be used in a second series of seminars, both to teach
the strategies and in order to refine them through participant feedback. After a certain amount of such feedback seminars the strategies will be ready for further publication.

The highly intimate strategies for emancipation need to be translated into multiple languages, internet accessible, and pamphlet printable to ensure access by the broadest possible cross-section of women and girls. They need to move from the legal abstractions of CEDAW or other covenants that promise sexual equality into the fleshy world of sexual lives. Through seminars and NGO-outreach in different locations the strategies will be adapted and revised for specific cultures and specific political situations.

In the current vision, these strategies for sexual emancipation will (likely) be largely process oriented, so as to provide routes (not a singular route but plural) to empowerment. Highly intimate strategies for emancipation could be modeled in part on cognitive behavioral modification or on other mind-body strategies. Sexual emancipation is, after all, a mind-body problem of the highest order. Teaching the international law of women’s rights will feature in the strategies, as will consciousness raising, and how to build supportive networks and access community, national, and international resources. Strategies for empowerment within the context of religious authority will be developed. Strategies for negotiating within male dominated families and for preserving power when entering marriage will be developed. As these samples indicate, the intimate strategies will rework familiar feminist ground, creating an easily accessible and easy to read set of guidelines. Local strategies and wisdom will be incorporated, as will what innovations and path-breaking ideas we develop.
II. The International Law of Women’s Human Rights

Human Rights are often expressed in terms of dignity, as in the first sentence of the evocative Preamble to the Universal Declaration of Human Rights, “Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.” This term is useful because it simultaneously expresses the personal and socio-political aspects of possessing human rights. Women attaining dignity is a project that necessarily includes inner strength, inner resources, physical integrity, and the socio-political circumstances that foster and maintain these. As the Afghan women’s rights activist, Malalai Joya, repeats several times in her memoir, A Woman Among Warlords, women must actively pursue their rights. Rights are not simply thrust upon you by the state, rather they must be attained through active campaigns, struggles, and persistent pursuit.

Nonetheless, international human rights instruments, as described in this section, create positive state duties to implement, protect, and respect human rights. This paper investigates these state obligations insofar as women’s dignity is compromised in and through heterosexual sex. This paper argues that implementation must include a fostering of women’s intimate abilities to pursue human rights.

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65 Malalai Joya, A Woman Among Warlords, supra note 34, at 194, 236-38.
66 The AI site on ‘demand dignity’ highlights death rates during birthing; the link between indignity and women’s sexuality is made here in a surprisingly forthright manner.
67 We are mindful of the cautionary outlook of Rushmi Ramakrishna, Universal Rights, Non-Universal Process: Confronting Culturally Grounded Human Rights Abuses, 30 U. PA. J. INT’L L. 1383, 1387 (2009), and yet to allow cultural objections to deter us from the goal of women’s emancipation would derail the project around the globe. Western cultures, we should remember, also have cultural objections to women’s rights, even if some legal progress has been made against such objections.
International law explicitly upholds sexual equality through many treaties. Moreover, women’s international human rights are not a negative rights; in international law there is a positive duty on the state to respect and ensure the enumerated rights in human rights treaties. The Universal Declaration of Human Rights (UDHR), which is considered customary international law, concludes the preamble with a proclamation of the positive duties created in order to progressively develop human rights: the rights embodied in the UNDHR shall be pursued by “every individual and every organ of society” through “teaching and education.”


69 This duty was clarified, in relation to the ICCPR by General Comment 13, and in relation to the American Convention of Human Rights by the Velásquez Rodríguez Case heard by the Inter-American Court in 1988. Human Rights Committee, General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant on Civil & Political Rights, CCPR/C/21/Rev.1/Add.13 (May 26, 2004). Velásquez Rodríguez Case, Inter-Am Ct HR (ser. C) No. 4 (July 29, 1988).


71 The specific language is: “**THIS UNIVERSAL DECLARATION OF HUMAN RIGHTS** as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.” Universal Declaration of Human Rights (hereinafter UDHR), preamble, G.A. Res. 217A (December 10, 1948).
For each international treaty or convention discussed here, the status of signing and ratification or accession is noted, and, in the sections on USA and Afghanistan, the implications of that status are discussed. Also included in this discussion non-binding instruments such as declarations, general comments, and recommendations. Such documents possess persuasive power because they emanate from authoritative bodies and express the perspective of respected experts in the field. Such persuasive documents, woven together with the binding treaties and conventions, create the fabric of women’s international human rights law.

This present section (section II) first explains the international law and then looks specifically at the legal obligations and duties of the United States and Afghanistan. These legal obligations of the United States and Afghanistan are chosen both because of their high degree of contrast and because of the intertwining of U.S. state action with the Afghan government which creates a responsibility of the U.S. toward the Afghan people. Afghanistan, as we will see, is a full party to all the major human rights treaties, thus creating strong legal rights for Afghan women. The realities of Afghan women’s lives, however, are deeply constrained. Afghanistan is thus a prime example of a society where the gulf between the promises of the law and the reality on the ground needs to be bridged. The juxtaposition of laws, state action and societal norms, in this section, reveals the global and international dimensions of women’s struggle for empowerment. The intimate strategies for empowerment recommended in part III of this paper are grounded in law and power matrices that are both highly local and global. International law, if it can be implemented, can provide a route to women’s empowerment.
A. International Law on Sexual Equality

Women’s human rights in international law are enshrined in several treaties and reach across many political, social, and cultural domains. Women are entitled access to the full spectrum of human rights, usefully summarized in the General Assembly Declaration on the Elimination of Violence against Women as including:

(a) The right to life;\(^{72}\)
(b) The right to equality;\(^{73}\)
(c) The right to liberty and security of person;\(^{74}\)
(d) The right to equal protection under the law;\(^{75}\)
(e) The right to be free from all forms of discrimination;\(^{76}\)
(f) The right to the highest standard attainable of physical and mental health;\(^{77}\)
(g) The right to just and favourable conditions of work;\(^{78}\)
(h) The right not to be subjected to torture, or other cruel, inhuman or degrading treatment or punishment.\(^{79}\)

We focus this exploration on 1) the right to equality, 2) the right to equal protection under the law, 3) the right to be free from all forms of discrimination, and 4) the right to the highest standard attainable of physical and mental health.

1. The Right to Equality

Within the human rights treaties, the right to sexual equality is recognized even though masculine sexual dominance is not explicitly addressed. Important forms of

\(^{74}\) UDHR art. 6; ICCPR art. 9.
\(^{75}\) ICCPR art 26
\(^{76}\) ICCPR art 26.
\(^{78}\) UDHR art. 23; ICESCR art. 6 and 7.
\(^{79}\) UDHR art. 5; ICCPR art. 7; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, December 10, 1984, 23 I.L.M. 1027 (1984), as modified, 24 I.L.M. 535 (1985).
dominance peripheral to sex itself are present in international treaties, and these point to the central issue of masculine sexual dominance itself.

Articles one and two of the Universal Declaration of Human Rights establish sexual equality in unequivocal language.

Art. 1: “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Art. 2: Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.”

While the UDHR is a technically non-binding instrument, which can be construed as customary international law and yet might not be so construed by some tribunals, the many binding international human rights treaties enshrine sexual equality in similar terms. The United Nations Charter, arguably the most powerful of these treaties, provides for the protection of human rights in the third paragraph of article one, which pledges states to “achieve international cooperation … promoting and encouraging respect for fundamental freedoms for all…” Similarly article five pledges states to “promote respect for universal human rights.”

Member states of the United Nations must, according to article fifty-six, take joint and separate actions to promote United Nations goals and purposes.

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The right to equality between the sexes is asserted in article three of the International Covenant on Civil and Political Rights (the ICCPR), in articles two and three of the International Covenant on Economic, Social and Cultural Rights (ICESCR), and in article one, paragraph one, of the American Convention on Human Rights (ACHR). Each of these treaties are binding on states party to them. There is as well an oratory reference to equal sexual rights in the preamble to the Convention to Eliminate all forms of Racial Discrimination (CERD).

In the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), sexual equality is fundamental to achieving the treaty goal of non-discrimination. This is clear from the centrality of the equality of men and women to the treaty’s definition of “discrimination,”

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. \(^\text{81}\)

This expansive definition should include inequalities arising from sex-itself, even if sex \textit{per se} is not elaborated upon as an aspect of inequality. The intrinsic relation of sex \textit{per se} to sexual inequality is inarguable.

2. Progressive Realization of Rights and The Right to Equal Protection

Articles seven and eight of the UDHR establish the right to equality before the law, the right to equal protection of the law, and the right to an effective remedy in a national tribunal for violations of the fundamental rights granted him by…law.”

Art. 7: all are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”

Art. 8: Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Claiming one’s internationally guaranteed human rights within state tribunals (i.e. within domestic or “municipal” courts) is an enduring difficulty in the human rights project. The Preamble’s pledge to progressive pursuit of human rights, however, creates a state responsibility to facilitate such pursuit of individual rights. Enforcing this state responsibility is part of the on-going process of securing women’s human rights.82

Like the duties to respect and ensure discussed in relation to the UDHR, the ICCPR provides for enforcement via explicit duties to respect and ensure which are spelled out in detail in article two. Similarly, the non-binding but legally persuasive Beijing Platform for Action enjoins states to “Give priority to promoting and protecting the full and equal enjoyment by women and men of all human rights and fundamental freedoms…” 83 The Platform for Action calls for States not only to review their legislation, customary laws and legal practices but also to ensure “the practical realization” of sexual equality through “other appropriate means.” 84 Educative outreach to foster highly intimate strategies for emancipation are properly included in these “other appropriate means” of ensuring sexual equality.

82 On state responsibilities to ensure the enforcement of human rights law see Rebecca J. Cook, State Responsibility for Violations of Women’s Human Rights, 7 HARV. HUM. RTS. J. 125 (1994).
84 Beijing Declaration and Platform for Action 1.2, ¶232 c and d. It is painfully clear that states do not fulfill this legal obligation to uproot discriminatory customs and practices. For an analysis of the law of sexual equality and examples of discriminatory practices from Nigeria and Turkey see, Sarah Y. Lai & Regan E. Ralph, Female Sexual Autonomy and Human Rights, 8 HARV. HUM. RTS. J. 201 (1995).
3. CEDAW’s Expansive Right to Be Free from Discrimination

The right to be free from discrimination in the law, or in the pursuit of equality before the law, was enshrined already in article seven of the UDHR:

all are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”

CEDAW echoes this fundamental right of women to be free from discrimination under the law and in pursuit of justice, and yet it goes further “by recognizing the importance of culture and tradition in shaping the thinking and behavior of men and women and the significant part they play in restricting the exercise of basic rights by women.”85 In this language, CEDAW creates an obligation on States to modify social and cultural practices that create or sustain sexual discrimination and inequality. The prevalence of masculine sexual aggression and relative female passivity is arguably, as we have seen in section one of this paper, rooted in and encouraged by culture and tradition. These are susceptible to change, and, because of the obligations assumed by States party to CEDAW, governments are mandated to support such change.

As is common in human rights treaties, States that are party to CEDAW agree to positive duties, as enumerated in article two, regarding the achievement of the treaty objectives. However, CEDAW goes beyond the standard of progressive achievement of rights and guarantee of equal protection under the law, to “ensure, through law and other

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85 CEDAW Committee General Recommendation 20, ¶3 (11th Session, 1992), emphasis added http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom20>, (accessed July 12, 2011). In addition to the ICCPR and the ICESCR, the General Recommendation cites the Convention on the Nationality of Married Women (resolution 1040 (XI), annex), the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (resolution 1763 A (XVII), annex) and the subsequent Recommendation thereon (resolution 2018 (XX)) and the Nairobi Forward-looking Strategies for the Advancement of Women as texts in which it is rooted and from which it develops further.
appropriate means” the achievement of sex equality.86 States further agree to “take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.”87 Hence, CEDAW article two(f), creates a duty to modify customs and practices that constitute discrimination against women. This positive obligation speaks to the problem of sexual subordination via sex itself, a type of subordination that arises anew in each generation. Fulfilling this obligation, requires the state to dedicate resources to efforts such as the one proposed in this paper for highly intimate strategies of emancipation.

CEDAW articles three and five create further state obligations in the social and cultural fields to ensure that women can achieve equality with men. Article three requires that,

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

States therefore have an obligation to ensure the full development and advancement of women, taking all appropriate measures to ensure this in, inter alia, the social and cultural fields. Article 5(a) provides that State parties to CEDAW shall take all appropriate measures: To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

This article creates an obligation on State parties to actively modify social and cultural patterns of conduct of men and women. The State efforts at modifying patterns of conduct is to be aimed at eliminating prejudices, and customary and all other practices, which are based on sexual inequality, including sexually stereotyped behavior roles.

86 CEDAW art. 2(a).
87 CEDAW art. 2(f).
Overcoming the re-inscription of sexual subordination each generation requires the modification of the socialized sexuality and cultural patterns of conduct of men and women. The positive duty created by CEDAW article 5(a) provides grounds for requiring the state to sponsor activities that lead to a refashioning of intimate behaviors.

In a similar manner to CEDAW, the General Recommendations of the Human Rights Committee, which interprets the ICCPR, and the CEDAW Committee re-enforce women’s right to be free from cultural forms of sexual subordination. The Human Rights Committee emphasized Article 23, paragraph 4, of the ICCPR, which “provides that States parties shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution, extends to “all matters arising from their relationship.” Sexual practices that subordinate women are clearly part of “all matters” arising from the marital relationship. The CEDAW General Recommendation Number 19 ties gendered based violence to women’s more general subordination, and argues that the combination of these prevents women attaining their human rights. In acknowledging the connections between beliefs in women’s subordination and diverse practices of subordinating women through sexualized violence and coercion, the Committee emphasizes that “the underlying consequences of

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89 ¶6 and ¶8 Human Rights Committee General Comment No.19, *supra* note 78.
90 See especially ¶10 and 11 of CEDAW Committee Gen’l Rec No.19, *supra* note 78. Similarly, Article 4 of The Declaration on the Elimination of Violence against Women art. 4, G. A. Res. 48/104, U.N. Doc. A/RES/48/104 (December 20, 1993), states in part, “States should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination.”
these forms of gender-based violence help to maintain women in subordinate roles …”

Subordination in and through sex is discussed in this General Recommendation in terms of rape and child marriage, even if the habitual—if less extreme-- subordination of women in sex is not explicitly acknowledged. The general inculcation of subordination can happen through what is perceived as normal sex and can lead to subordination in sex, a dynamic the CEDAW committee has not yet noted. The duty to eradicate the practices and beliefs in women’s subordination which is a main point of this CEDAW Comment should reach the pervasive subordination in and through sex.

4. The Right to the Highest Standard Attainable of Physical and Mental Health

Sexuality is intimately tied to health, both physical and mental. Sexuality itself is often assimilated to reproductive health or the problems with sexually transmitted diseases. However sex itself is an integral part of women’s physical and mental health, so that the legal guarantees for sex equality in access to health care along with the right to the highest standard attainable of physical and mental health, can be interpreted to include health issues related to sex. CEDAW General Recommendation 24 and the Beijing Declaration, article seventeen, both emphasize women’s right to health and

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91 ¶11 CEDAW Committee Gen’l Rec. No. 19, supra note 77. Paragraph 11 in its entirety reads, “Traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse, forced marriage, dowry deaths, acid attacks and female circumcision. Such prejudices and practices may justify gender-based violence as a form of protection or control of women. The effect of such violence on the physical and mental integrity of women is to deprive them the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms. While this comment addresses mainly actual or threatened violence the underlying consequences of these forms of gender-based violence help to maintain women in subordinate roles and contribute to the low level of political participation and to their lower level of education, skills and work opportunities.” Paragraph 12 continues this discussion by linking violence against women to pornography and to women’s subordination.
access to medical care. In the Beijing Declaration, women’s control of their own health is recognized as a fundamental aspect of their empowerment. The emphasis in article seventeen is on the control of fertility, in which sexual intercourse is implied and intrinsic to the issue (if not completely inseparable from it because of the advent of technologically assisted procreation). Article 30 of the Beijing Declaration focuses on the need to “enhance women’s sexual and reproductive health as well as education.”

Perhaps the most explicit assertions of a right to sexual equality furthered through educational programs is in The Program of Action produced by the 1994 International Conference on Population and Development (also known as the Cairo Conference). Notably, Chapter Four provides an apparently comprehensive outline for achieving women’s emancipation with an implied element of sex or sexuality:

Chapter Four, A. Empowerment and status of women. The empowerment of women and improvement of their status are important ends in themselves and are essential for the achievement of sustainable development. The objectives are: to achieve equality and equity between men and women and enable women to realize their full potential; to involve women fully in policy and decision-making processes and in all aspects of economic, political and cultural life as active decision-makers, participants and beneficiaries; and to ensure that all women, as well as men, receive the education required to meet their basic human needs and to exercise their human rights.

By interpolating the written text we can construe Chapter Four (A) to encompass the empowerment of women in and through sex. That is, we can read this section as prescribing that women achieve their full potential and to encourage their full

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involvement as decision-makers in “cultural life,” with the understanding that sexual practices are a component of cultural life. Moreover, there is an emphasis on education here as a means of achieving rights, which is supportive of educative outreach regarding highly intimate strategies for emancipation as recommended in this paper. Part C of Chapter Four gives some content to the educational objectives, noting the desirability “that attitudes that are respectful of women and girls as equals are instilled in boys from the earliest possible age.” Sexuality figures directly in Chapter Seven, where we find an emphasis on “the development of responsible sexuality that permits relations of equity and mutual respect between the genders.” There is further advocacy of non-formal “integral sexual education” and community-based activities for men and women in order to achieve good sexual health both for women and men.94

The international human rights of women include the right to sexual equality, the right to equal protection of under the law, the right to be free from discrimination, and the right to the highest standard attainable of physical and mental health. These rights separately and together create responsibilities on States parties to these treaties to realize the promise of these rights, by enacting legislation, enforcing the legislation and protecting women against all violations of these rights. In particular, this section has

94 Id., Part D. Chapter Seven reads, “Human sexuality and gender relations. The objective is twofold: to promote the adequate development of responsible sexuality that permits relations of equity and mutual respect between the genders; and to ensure that women and men have access to information, education and services needed to achieve good sexual health and exercise their reproductive rights and responsibilities. Recommended actions include giving support to integral sexual education and services for young people, with the support and guidance of their parents and in line with the Convention on the Rights of the Child, that stress male responsibility for their own sexual health and fertility and that help them exercise those responsibilities. Educational efforts should begin within the family unit, but must also reach adults, in particular men, through non-formal education and a variety of community-based activities. Educational programmes should also encourage and support active and open discussion of the need to protect women, youth and children from abuse, including sexual abuse, exploitation, trafficking and violence. Governments and communities are advised to take steps urgently to stop the practice of female genital mutilation and protect women and girls from all similar unnecessary and dangerous practices.
shown how the international law obliges States to modify social and customary practices which subordinate women. Our project for intimate strategies of empowerment recognizes in these state duties an opportunity to secure recognition of the need for a program of intimate strategies for empowerment, and to secure official state and United Nations support for the project.

**B. American and Afghan Obligations under International Law**

Afghanistan and the United States have both ratified the UN Convention. Table One (p. 60) shows that Afghanistan has signed and acceded to the ICCPR, the ICESCR, and the CEDAW. The United States has signed and ratified the ICCPR (but with reservations stipulating that articles one through twenty-seven are non-self-executing). The United States has signed and yet not ratified both ICESCR and the CEDAW.

States that ratify or accede to treaties are bound, under international law, to observe the treaties. *Pacta sunt servanda* is the basic principle of treaty enforcement, which, as expressed in article 26 of the Vienna Convention on the Law of Treaties, is rendered, “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.” Hence, Afghanistan is bound by international law to recognize all the rights accorded to women under the ICCPR, ICESCR and CEDAW. The United States is bound only by the ICCPR, and within that obligation, it has stipulated that domestic legislation must be enacted to implement the rights.

Our interpretation of the state obligations, however, is informed as well by article 18 a of the Vienna Convention on the Law of Treaties which explains that,

[a] State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject
to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty.

Thus, for example, President George W. Bush withdrew the U.S. signature to the Kyoto Protocol to the United Nations Framework Convention on Climate Change in a deliberate showing of no intent to be bound and no obligation not to defeat the object and purpose of that treaty. U.S. signature to human rights treaties without ratification can and should be interpreted to carry an obligation to refrain from acts that would defeat the object and purpose of the treaty.

The United States has signed but not ratified or acceded to the Vienna Convention on the Law of Treaties. The United States does, however, accept the Vienna Convention as customary international law. However, even if the Vienna Convention is not CIL, the United States, by virtue of signing the Vienna Convention, obliges itself not to defeat the object and purpose of the Vienna Convention. Acting with disrespect for the fundamental objectives of the Vienna Convention, such as willfully disregarding treaty obligations, would defeat its object and purpose. Hence, by signing and not yet ratifying the Vienna Convention, both the United States is obligated nonetheless to follow the dictates of acting in good faith to observe the treaty, *pacta sunt servanda*. It follows, that any treaty signed by the United States—even if not ratified or acceded to-- must also be followed to the extent of not defeating its object and purpose.

In addition to the UN treaties to which the United States is subject, it is a signatory to the regional American Convention on Human Rights. The American Convention recognizes sexual equality in paragraph one of article one, and in that is substantially similar to the UDHR and the ICCPR. The United States has not ratified the

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95 Secretary of State William P. Rogers, in his letter that transmitted the Vienna Convention to the President of the United States wrote that it is “a generally agreed body of rules to govern all aspects of treaty making and treaty observance.” As cited in BARRY CARTER, *et al.*, eds., *INTERNATIONAL LAW*, 94 (2007).
American Convention, but insofar as sexual equality is concerned, it has incurred similar responsibilities under the ICCPR. As a signatory, however, the United States is obligated not to defeat the object and purpose of the treaty, which should entail a respect for sexual equality.

C. National Law of Women’s Rights in Relation to International Law

We focus on this section on the state obligations under international law in relation to national law. For the United States we will examine state responsibility within the United States and in the context of its special relation to Afghanistan. For Afghanistan we will look at state obligations on the national level.

1. The United States

Generally American culture is sexually permissive, so that there is a perception of the United States as a place where women enjoy a great degree of equality with men. However, recent legal history demonstrates distinct set-backs for women’s rights. The Equal Rights Amendment to the Constitution failed because the required number of states did not ratify it. The Dworkin-MacKinnon effort to proscribe pornography failed to pass a constitutional free-speech test. The civil rights remedy of the Violence Against Women act was found to exceed the Commerce Clause powers of Congress, and that portion of the statute was invalidated as unconstitutional.96

U.S. law on sexual equality is rooted in constitutional provisions of equal protection under the law. The constitutional jurisprudence disallows de jure sex discrimination. Statutes that have disparate impacts on men and women, however, will only be found unconstitutional if an intent to discriminate can be established. Positive duties of the state to educate or to combat sexual stereotypes are not recognized. The U.S. Declarations to the ICCPR indicate that articles 1-27 are non-self-executing; these articles include the article twenty-six provision for sexual equality under the law. This domestic interpretation, following constitutional jurisprudence, establishes a regime of proscribed de jure sex discrimination, but license in social and cultural de facto discrimination.

The United States has signed and yet not ratified ICESCR and CEDAW. Even in the remote chance that the US were to ratify these treaties, the Supreme Court held in Medellin v. Texas (2008) that treaties are presumed to be non-self-executing unless the text of the treaty explicitly states otherwise. Hence, there is only the remotest possibility of the US possessing a legal duty to implement programs, educative or otherwise, to change the social or cultural context that allows sexual inequality to flourish. Nonetheless, the United States has made a commitment to these treaties by signing them. This commitment exists between the federal government and its citizens, as well as between the government and the international community. The fabric of women’s human rights, woven from the binding treaties and the non-binding General

97 Carlos Vasquez argues that the Medellin decision can be limited to the relation of U.S. law to the International Court of Justice, but his opinion is not authoritative. Carlos Vazquez, The four doctrines of self-executing treaties 89 AM J OF INT’L LAW 695 (1995).
Comments, Declarations, and Recommendations, is one which the United States should tend with care.

Similar to the absence of legal obligation under the international treaties, within the U.S. domestic context were there is an absence of a duty to implement, and an absence of any legal duty to uproot social and cultural sources of inequality. The absence of such a legal obligation, however, does not imply an absence of a cultural and policy imperative to advance women’s rights.

There has been significant legal recognition of women’s sexual rights through the changing baseline on marital rape. In 1978 Daniel Morrison was the first man in the United States convicted of raping his wife.98 The Morrisons were living separately, and that separation helped to secure Daniel’s conviction. According to the family historian, Nancy F. Cott, in 1982 all but five states still had exemptions in their rape law for spouses.99 By 1989, fourteen states allowed prosecutions for marital rape.100 Iowa, like New Jersey, began to reform its marital rape exemption in the 1970s, first changing their statutes to allow charges of first or second degree rape.101 However, Iowa retained an

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98 State v. Daniel Morrison, 85 NJ 213 (1978). The Supreme Court has considered the issue of marital rape very briefly in Planned Parenthood of Southeast Pa v. Casey, 505 U.S. 833 (1992) in which it is mentioned in the findings of the District Court (findings 287 and 290) as a factor complicating women’s reproductive choices, and therefore one that weighs in favor of easily accessible reproductive services.


100 Martin D. Schwartz, To Have and To Hold: The Marital Rape Exemption and the Fourteenth Amendment, 99 HVLR 1255, at 1259 (1986). Schwartz reports further that “In Alabama, Illinois, and South Dakota, a husband is subject to prosecution for rape only if a final divorce decree existed at the time of the incident; a wife separated from her husband under agreement or court decree has no legal recourse,” id. at 1259-60. However, as of 1986 (the same year Schwartz’ article was published), the Alabama code was modified to excise the marital rape exemption as inconsistent with constitutional guarantees of equality, see ALA CODE § 13A-6-60 (1975).

exemption for spousal sexual assault until 1989.\footnote{Schwartz, The Spousal Exemption for Criminal Rape Prosecution, 7 VERMONT L. REV. 33-38 (1982).} Thirty-plus years after Morrison forced sex between a wife and husband now constitutes rape in many states.\footnote{Hicks v. Hicks, 733 So. 2d 1261 (La. Ct. App. 3d Cir. 1999) and State v. Smith, 85 N.J. 193, 426 A.2d 38, 24 A.L.R.4th 90 (1981).} In New York, the exemption of spouses from rape law was invalidated as a violation of equal protection.\footnote{People v. De Stefano, 121 Misc.2d 113, 467 N.Y.S.2d 506 (County Ct. 1983).} In South Carolina, however, marriage can still be a mitigating factor in rape charges.\footnote{State v. Bermudez, 297 S.C. 230, 376 S.E.2d 258 (1989).} The general prohibition on marital rape that has emerged in U.S. law in the past thirty years reveals a general expectation that sex must be mutually consensual even within marriage. And yet, the general difficulty in winning convictions against those charged with marital rape reveals that there is still a strong prejudice in favor of assuming consent.\footnote{For example see the discussion of case law and social beliefs in Barb Kiffe, Marital Rape, Minnesota Coalition Against Sexual Assault; Dakota County Sexual Assault Services (n.d.).}

The license for male sexual aggression is still fairly strong in the United States as evidenced by the North Carolina Supreme Court ruling in the 1979 case State v. Way, which held that if intercourse starts consensually, "no rape has occurred though the victim later withdraws consent during the same act of intercourse."\footnote{State v. Way, 297 N.C. 293, 296, 254 S.E. 2d 760, 761 (1979).} State v. Way is still good law in North Carolina. Relying on its precedent, in September of 2010 prosecutors dismissed a rape and sexual battery case against a high school football player because the events had begun with consensual sexual contact.\footnote{As reported by Valenti, Assange and rape in America, supra note 9. Valenti continued, “It was only two years ago that Maryland overturned an archaic court ruling stating that if a woman withdrew consent, any sex that followed wasn't rape. In 2007, the Maryland Court of Special Appeals justified this old ruling, explaining that anything after the initial 'deflowering' of a woman couldn't be rape because "the damage was done" to her virginity and she could never be "reflowered." In fact, the injured party, according to this ruling, wasn't even the assaulted woman, but the 'responsible male's interest' - that of her father or husband. It took until 2008 for the state's highest court to change this.”} In general rape laws in
the U.S. rely on a dimension of force, which contrasts, for example, with Swedish law in which rape is defined by non-consent.\textsuperscript{109}

The leverage provided by international human rights law within the United States is the leverage of persuasion. As detailed in the previous section, the United States has reservations on the applicable articles of the ICCPR, and it is not a party to the ICESCR or to the CEDAW. Nonetheless, as a signatory to CEDAW and as a powerful member of the international community the United States should be responsive to the international standards for women’s rights. The principles and standards set forth by CEDAW and the CEDAW committee should be recognized in U.S. law.

In the international arena, however, the United States is obligated not to defeat the object and purpose of CEDAW and ICESCR. The object and purpose of CEDAW, we can safely say, is to eliminate all forms of discrimination against women. The U.S. government supports the Afghan government and in providing such support it facilitates the deeply discriminatory treatment of women and the massive violation of their human rights (as described in the next section). This support of the Afghan state, we argue, defeats the object and purpose of CEDAW. We can thus recognize that the U.S. has an international legal obligation to not defeat the object and purpose of CEDAW and we can recognize that, in fact, the U.S. is in violation of this obligation. This gives us grounds for a legal argument that the U.S. must meet its international obligations.

2. Afghanistan

Afghanistan has acceded to the human rights treaties which guarantee sex equality (see table 1), including to the ICCPR, the ICESCR and CEDAW. Objection might be

\textsuperscript{109} Id.
raised, that the change in regimes in Afghanistan subsequent to accession to these various treaties obviates Afghanistan state obligation. This argument runs counter to the interpretation of human rights as adhering to territory rather than to governmental regime.\textsuperscript{110} Once a legitimate government of a territory has recognized human rights, no subsequent government can remove these rights from the people of that territory.

The Afghan Constitution, in article seven, pledges to adhere to the Universal Declaration of Human Rights (UDHR) and to the other international treaties and conventions to which is a party. Article 22.2 (Chapter Two, Article 1.2) of the Afghan Constitution provides for equality of men and women: “The citizens of Afghanistan – whether man or woman – have equal rights and duties before the law.”\textsuperscript{111} Education is a constitutional right in Afghanistan, and Article Forty-Four (Ch. 2, Art. 23), “The state shall devise and implement effective programs for balancing and promoting of education for women, improving of education of nomads and elimination of illiteracy in the country.”\textsuperscript{112}

\textsuperscript{110} Vienna Convention on the Interpretation of Treaties, Art. 56, if a treaty has no express provision regarding termination it is not subject to denunciation & withdraw unless 1) it is expressly provided or 2) there is implied terms for denunciation & withdrawal. ICCPR, supra note 64, art 41(2) allows withdrawal from Cttee oversight but not for termination, denunciation or w/d from the Covenant itself. The Human Rights Committee has consistently taken the view that once people are accorded the protection of the rights under the ICCPR, such protection devolves with the territory and continues to belong to them, notwithstanding change in government of the State, including dismemberment into more than one state, or State succession, or any subsequent action of a State party designed to divest them of the rights guaranteed by the Covenant. The Vienna Declaration and Program of Action affirmed that the promotion and protection of Human Rights and fundamental freedoms is the first responsibility of government. See World Conference on Human Rights, June 14-25, 1993, Vienna Declaration and Program of Action, §1.1, U.N. Doc. A/CONF.157/23 (July 12, 1993) [emphasis added].


\textsuperscript{112} “The state shall devise and implement a unified educational curriculum based on the provisions of the sacred religion of Islam, national culture, and in accordance with academic principles, and develops the curriculum of religious subjects on the basis of the Islamic sects existing in Afghanistan.” Afghan Const. art 45.
psychological well being of family, especially of child and mother, upbringing of children and the elimination of traditions contrary to the principles of sacred religion of Islam. Individuals in Afghanistan who feel their human rights have been violated are allowed to bring complaints to the Independent Human Rights Commission, which itself can refer cases to the legal authorities and has the power to defend the rights of complainants.\textsuperscript{113}

Despite the sixty-eight seats reserved for women in the Afghan parliament, in the spring of 2009 Hamid Karzai signed a law legalizing marital rape and confinement of Shi’a women.\textsuperscript{114} This legal assault on the rights of Shi’a Afghan women adds to the burden already imposed on all Afghan women by the pervasive violence and intimidation that women face. Afghan women who work outside the home, and especially those who seek to advance women’s rights or power in any way – for example through politics, through teaching or through medicine—are subject to threats, violence, and murder.\textsuperscript{115}

Rape is prevalent and is often perpetrated by men who hold positions of power and authority.\textsuperscript{116} Afghan culture operates with an honor system, so that a woman who has been dishonored is covered with shame. The Afghan penal code at Article 429 arguably criminalizes rape by providing for punishment, not exceeding seven years of imprisonment, for anyone who “through violence, threat, or deceit violates the chastity of another”.\textsuperscript{117} The crime of statutory rape, which protects girls under the age of consent, is

\textsuperscript{113} Afghan Constitution, art. 58 (Chapter 2 Art.37).
\textsuperscript{116} Id. at 2.
\textsuperscript{117} id.
unknown in Afghan law. The Penal Code does not contain any provisions regarding domestic violence.

Rape victims, however, usually do not complain to authorities out of fear of bringing further shame upon themselves, and out of fear of prosecution for unlawful sexual activity. The standard technique for obtaining physical evidence of rape is a virginity test. Only evidence from such a test along with witness statements are admissible in court. Aside from the fact that a virginity test can be its own form of trauma and affront to a woman’s sense of self, its exclusive use as physical evidence in a rape trial means that no woman who was not a virgin prior to the alleged rape can ever successfully file rape charges.

Women who have been raped and for whom that rape somehow becomes public knowledge are often prosecuted for extra-marital sex, or zina, and are denied any meaningful possibility of protection by the state or prosecution of the rapist. The social re-enforcement of shaming can subject women who have suffered rape to stigma throughout her life. Sexual violence is manifest as well through traditional practices “such as baad (the practice of handing over girls to settle disputes), or by insisting that a victim

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118 id.
120 id.
121 id.
marry the rapist.”122 Baad is criminalized, with a statutory punishment of up to two years established for those who give a woman in marriage in order to settle a dispute.123

The Afghan government is also mobilizing to close the shelters for battered women that are run by internationally funded NGOs, and to allow only shelters that are run by the Afghan government.124 This new animosity to the shelters arose at least in part because of the case of Bibi Aisha, a child bride whose nose was hacked off by her husband after she tried to run away from his home. She was photographed by Time magazine, which put her on its cover last year, while she was staying at a shelter run by Women for Afghan Women.

“Such publicity humiliates us in the eyes of the world,” Ms. Amina Afzali, Minister of Labor, Social Affairs, Martyrs and the Disabled and member of the commission on women’s shelters established by Harmid Karzai in 2009. Ms. Afzali’s sentiment reflects the concern for honor that is characteristic of Afghan culture. The commission on women’s shelters is chaired by a senior religious figure, Mullah Nematullah Shahrani. Senior officials at the Afghan Women’s ministry support the new rules on government management of women’s shelters. According to the New York Times some conservative members of parliament want the shelters closed altogether, such as Hajji Neyaz Mohammed, a lawmaker from Ghazni Province, who bluntly

condemned shelters as ‘the official places for increasing perversion in our country.’” Hajji Mohammed claimed that “the shelters motivate girls to flee from their houses” and that in 90% of the cases when girls return from the shelters they will not be accepted back into the community and that they will be suspected of having committed adultery.125

There is a vast chasm between the legal rights for women that are expressed in Afghanistan’s international commitments via the ICCPR, the ICESCR and CEDAW, and the actual conditions of women’s lives. The Afghan state is in flagrant violation of its duties to enforce and protect rights for Afghan women. The U.S. as a signatory to CEDAW and as a powerful military and governmental presence in Afghanistan is obligated to work to lessen this chasm.

The serious human rights violations in Afghanistan indicate that the intimate strategies could contribute significantly to improving Afghan women’s lives. Designed for small group experiences, the strategies can be taught and diffused through communities in relatively inconspicuous meetings. Education in women’s legal rights and consciousness raising techniques, linking women to resources, building solidarity networks and skills in advocacy could all bear fruit for Afghan women. While such programs will not solve all the difficulties Afghan women confront, they would make a contribution toward improving lives. Whereas in the United States, the intimate strategies will be one option—hopefully a distinctively feminist and particularly empowering option-- among myriad options for self-help, establishing such a program in Afghanistan would significantly enrich empowerment options for Afghan women.

125 Id. at 6.
III. RECOMMENDATIONS for Where to Go From Here

This paper recommends creating highly intimate strategies for emancipation (recall the discussion on pp.25-30). An archetype of these strategies will be created in a process-oriented series of meetings of individuals committed to achieving women’s equality. This archetype can then be distributed, and via NGO activity, seminars can held in diverse locations in order to produce localized versions that are tailored to local cultures and needs.

Achieving this recommendation and setting in motion a series of seminars which can then produce more such seminars, demands a strategy that relies on rights as well as on the paths already established by other programs and agendas. Making well construed rights arguments can generate financial and logistical support for the seminars. Relying on previous paths established by other successful programs will ensure that lessons previously learned and strategies developed will be adopted and modified. In this manner, this project will be better designed and reach more people.

A. Making the Rights Argument

The analysis of international law on women’s human rights in section II of this paper reveals strong legal foundations for this program. The duty of the states parties to international human rights treaties to ensure human rights by changing culture and by educating can be mobilized as a basis for advancing our program.

Once the proto-type set of strategies has been developed, the CEDAW committee can be approached with the request that a General Recommendation be made on the need
for intimate strategies for empowerment and the duty of states parties to support educative and cultural outreach on the topic.

In addition, the U.S. government should be pressured to live up to its obligation not to defeat the object and purpose of CEDAW in relation to Afghanistan. Malalai Joya, a former member of the Afghan parliament and a campaigner for Afghan women’s rights recommends that we demand a gendered account of the funds the U.S. government is spending in Afghanistan in order to establish what percent is directed to programs for women and girls.¹²⁶ This gendered accounting will help reveal short-comings in U.S. obligations to the CEDAW and provide grounds for advocating for the funding of this present program.

Bringing a complaint to the Afghan Human Rights Commission is another possibility, although it is not clear that it would be wise to expose an Afghan woman to the reprisals such a complaint would likely entail. Filing such a complaint should only be pursued if, after all risks are weighed, there is still sufficient reason to think that the complaint would have some productive outcome.

**B. Relying on Precursors**

Some notable models for this program are Eve Ensler’s work, Rebecca Cook and Simone Cusak’s work on state duty to combat stereotypes, the Authenticity Project, and the UNESCO sponsored program on teaching future generations about slavery. Each of these programs offer lessons for how to pursue our goals.

Eve Ensler’s success with V-Day, The Vagina Monologues, and the villages she has established in the Democratic Republic of Congo for victims of rape victims model

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variations of assertive female sexuality, and of providing for women’s empowerment even in situations of social ostracism. Ensler has also successfully partnered with the UN to create the village, City of Joy, which provides a supportive and healing home for women dishonored by rape.  

Rebecca Cook and Simone Cusack have pioneered work to enlist CEDAW to combat gender stereotyping. Their strategy of identifying stereotypes and how they infringe on women’s enjoyment of human rights, and then enjoining states to fulfill their obligations to combat these stereotypes is path breaking. Some difference in our visions is discernable. The intimate strategies focus directly on women’s empowerment through engaging them directly and is distinct from the type of culture-cleansing envisioned in ridding societies of sexist stereo-types. I propose here that those dedicated to achieving full equality between the sexes engage in a process of developing highly intimate strategies for emancipation. This is not a process that can be entrusted to governments, nor one that should be open initially to a random cross-section of society. Dedication to the emancipation of women is a prerequisite to engaging in developing the strategies. The route to emancipation in and through heterosexual sex needs to be envisioned and elaborated by those dedicated to women’s emancipation. Only when the process bears fruit should the strategies be made public, and a wider public discussion of the project be encouraged. This is sure to be a contentious cultural moment, as public discussions of women’s sexuality causes passions to rise and men’s dominance over women’s is deeply


128 Rebecca Cook & Simone Cusack, Gender Stereotyping; Transnational Legal Perspectives, (2010). For a program the introduces issues of sexual rights gradually and under the cover of broader rights issues see, İpek Ilkkaracan & Gülşah Seral, Sexual Pleasure as a Woman’s Human Right: Experiences from a Grassroots Training Program in Turkey in Women and Sexuality in Muslim Societies 187 (Pinar Ilkkaracan, ed., 2000).
entrenched in much of society. While the government cannot play a lead role in the
development of the strategies, nonetheless the duty of the government(s) (that is, of states
party to CEDAW without reservations to article 5 (a)) to eliminate stereotypes and
cultural and social roots of inequality—as theorized by Cook and Cusack -- indicates the
strength of the argument made in this paper, and that there is indeed a legal responsibility
to sponsor the project for intimate strategies.

The international NGO, The Authenticity Project, which runs programs in Russia,
provides a model for integrating psychological processes into programs that aim at
changing deeply established social practices. The Authenticity Project focuses on up-
rooting violence against women, and hopes to achieve this by sensitization and education
from a young age. Their program integrates depth psychology, processes of self-
discovery and growth, and principles of non-violence. Linking psychological
development closely to a rights based commitment to freeing women from gender based
violence, the Authenticity Project provides a model for the aims of this project.

Finally, the UNESCO Slavery Education for Future Generations Project provides
a model for developing an educative agenda that is long-term, that aims to re-educate
each successive generation, and that is rooted simultaneously in many different cultures.

This project relies on scholarship that took years to produce, which is then
disseminated via video-conference to teachers and other educators around the globe. The
projects’ directors aim to create a multiplier effect, so that each teacher involved in the
video-conference will take the information back to all the students in his or her


129 Michael L. Penn & Rahel Nardos, Overcoming Violence Against Women and Girls: The
International Campaign to Eradicate a Worldwide Problem, (2003). See their website at
130 See U.N. News, IRIN, Educators Learn Ways to Impart Lessons of Slavery to Future
Generations, Mar 23 2011 Available at www.UN.org/news. Direct link,
classroom. Teaching about slavery, according to Professor Sir Hilary Beckles of the University of West Indies, used to be dismissed or marginalized. The UNESCO project has brought the subject into the main stream, and will ensure that vital lessons are learned by the rising generations. If we could convince UNESCO to took this programmatic model and apply it to the program for intimate strategies, we could create a powerful tool for world-wide awakening to girls’ and women’s rights.
Intimate Matters: Discovering Avenues toward Straight Women’s Human Rights
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Abstract: This paper demonstrates the need, and the legal right under international human rights law to support, for developing and teaching intimate strategies for women’s emancipation. The international human rights agenda largely overlooks heterosexual sex is a facet of women’s subjugation; we argue here to correct that oversight, to integrate an understanding of the potential of heterosexual sex to (re)produce women’s subordination, and to sketch a program to combat this tendency. At issue is not overt sexual violence or sexual acts deemed illegal for one reason or another, but rather the broad spectrum of lawful sex between men and women. Obligations under international human rights law are analyzed, and the United States and Afghanistan are used as examples for the types of state obligations that ensue under international law to support intimate strategies for emancipation.