Waiting for credentials in the sweltering Saharan summer, I began to chat with a young Arabic woman, a journalist who had been trying for two days to obtain her press pass to cover the U.N. International Conference on Population and Development in Cairo, Egypt. Well educated, quick witted, and articulate, her English was perfect, which greatly facilitated the conversation as my Arabic is nonexistent. We chatted amiably about the heat, the lines, terrorist threats, security checkpoints, and the need for more women in positions of power before the conversation turned to the issues of the population conference.

*Professor of Law, New England School of Law. My thanks to Reed Boland, Judi Greenberg, Jennifer Jackman, Curt Nyquist, Joel Paul, Regan Ralph, and Michael Sharf for their helpful comments.


The Islamic Group advises all foreigners taking part in the licentiousness conference known as the population conference, which all sectors of the Egyptian people have rejected.

The Islamic Group, as its [sic] starts a new round of operations, urges all foreigners not to come to Egypt during the coming period for the sake of their own lives.

Id.

I was reading the Sunday paper, having my coffee when I saw that headline, most unexpectedly vivid in the normally sedate N.Y. Times. Having never attended a “licentiousness conference” before, I decide I had better head toward Cairo.

Attendance at the Population Conference was not seriously undermined by the threats. Over 20,000 people from around the world attended. There were no terrorist incidents.
"I don't think you American feminists should be insisting on this birth control. I don't understand why you want this. It is very bad for women."

Stunned, my first instinct was to deliver the standard law professor's lecture to a naive younger woman on the central importance of reproductive control as the material precondition for the freedom of women. I managed instead to bite my tongue and simply ask why.

"It is a terrible thing for women, this birth control. Why should the government decide how many children a woman has? Like in China, where the government limits the women to only one child. This is very sad for those women. Birth control is very bad for women."

I never ceased to be amazed by the variety of ways it is possible for two intelligent people who basically like each other to misunderstand. Commitment to "cross cultural communications" has the requisite high theory/politically correct chic, but there is nothing quite like the actual experience of two women having a good chat.

"To me, as an American, birth control means the contraceptive medical devices used to prevent pregnancy." I was relieved to be able to explain my meaning. "You know, birth control pills, condoms, IUDs, diaphragms. But it is not for the government to decide. It is for the woman to decide for herself, to control herself when to have children, not to be controlled by the government."

She too was deeply relieved. "Ah, yes. We call this family planning. It is very important to be able to decide the spacing between the children." Smiling warmly at each other, sitting on the hard bench, waiting for our credentials, we patted our hands together and shared cool water and mints.

"In our Koran, we respect the family planning. The Prophet Mohammed, Peace Be Unto Him, recognized the importance of spacing the children. But I would like to ask you a question, if I may?" She leaned forward, confidentially, and lowered her voice. She seemed very young to me. "The Prophet Mohammed recommends

3. See Mai-vân Clech Lâm, Feeling Foreign in Feminism, 1994 SIGNS 865 (accounting Thai student's encounters with American feminism). Lâm discusses the patterns of cultural dominance of white American feminism as involving four concepts: privilege, denial, individualism, and magic. Id. at 872-81; see also Isabelle R. Gunning, Arrogant Perception, World-Travelling and Multicultural Feminism: The Case of Female Genital Surgeries, 23 COLUM. HUM. RTS. L. REV. 189 (1992). Gunning advocates three steps for Western feminists confronting "culturally challenging practices" such as female genital mutilation. First, the Western feminist scouts out the limitations on her understanding by her own subjectivities and needs. Id. at 194, 204. Second, she acknowledges her status as an "heir" of colonial imperialism, and the meaning this has for women in subjugated societies. Id. at 212. Third, she trains herself to listen, rather than talk, to women living in these societies. Id. at 213.
the importance of breast feeding, to space the births of the children." Her voice became very hushed. "Will this work?"

I suppose I should have referred her to medical experts, to the literature assessing the statistical efficacy of various methods of family planning techniques. But I wanted to respond to her as one woman to another, in the immediacy of this moment. So I showed her the pictures of my children, my beloved daughter Erica, and my beloved son Rafael, born thirteen months apart.

"Breast feeding is very good for the health of the baby." I spoke with the authority of experienced motherhood. "It is a great joy for the mother to have the power to feed her child, to give her child comfort and strength flowing out of her own body. I have happy memories of nursing my baby."

"But it is not a reliable method of family planning. See? My children are spaced very close together, and we had serious health problems. My son is healthy now, and strong. But he and I both suffered. And we are lucky to have good food, good medical care in Boston. Not all people are so lucky."

She nodded smiling wryly. "So I have heard." She sighed, then straightened her shoulders. "Then we will explain that the women and children need family planning with medical devices. I am sure that we can explain this."

She bounded up from the bench, crackling with energy, and raced off to obtain those elusive press credentials. Darting, tiny but confident, through the seething mass of frustrated, aggressive, angry, Western journalists, she spoke a few words in Arabic to the door guard, and entered the inner sanctum of the credentials room. I wondered how she would manage with her editor and whether the authorities in her country would try to censor her.

I was left on the bench, wondering whether my own work as a lawyer committed to women would help at all. The legal language seemed to actually become a barrier between us, rather than a language of women's empowerment and connection. We had

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In a way, their [Arab Muslim women's] bodies seemed to be a battlefield where the cultural struggles of post-colonial societies were waged. On the one hand, the western attire which covered their bodies carried with it the "capitalist" construction of the female body: one that is sexualized, objectified, thingified, and so on. However, because capitalism never really won the day in post-colonial societies... these women's bodies were also simultaneously constructed "traditionally"; "chattelized," "propertized," and terrorized as trustees of family (sexual) honor.

*Id.* at 1528; see also *Regan E. Ralph, Women's Rights Project of Human Rights Watch, A Matter of Power: State Control of Women's Virginity in Turkey* (Dorothy Q. Thomas ed.,
worked it through together, but I had the sense that it was a near miss. Next time we might not be so lucky.

The language we use to describe our meanings can seem so simple and straightforward—so precise and scientific. The "right to birth control" embodies one of the clearest and least controversial aspects of reproductive freedom for most people in American culture.  

The language of "rights" is given a material presence in my worlds through law. "Rights" are physically embodied in court decisions or statutes, treaties, or conventions. They are made real through the languages of law, politics, and diplomacy, collectively, if ambivalently, believed.  In international law, collective belief of agreed upon rights is often manifested through U.N. conferences, which provide opportunities to discuss, debate, and clarify our meanings.

These conferences operate in some ways similar to the much venerated but little practiced ancestor of democracy, the American town meeting. With collective belief lying at the essence of rights, a critical goal is broad consensus. One way the U.N. conference mechanism could be understood is as a global performance of collective belief.

The Cairo population conference presented an historic opportunity to solidify a new consensus regarding issues of population, economic

1994).


It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. We have vindicated this principle before. Marriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th Century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in Loving v. Virginia, 388 U.S. 1, 12 (1976). . . . Similar examples may be found in . . . Griswold v. Connecticut . . .

Id. at 2805.


To say that blacks never fully believed in rights is true. Yet it is also true that blacks believed in them so much and so hard that we gave them life where there was none before; we held onto them, put the hope of them into our wombs, mothered them and not the notion of them. And this was not the dry process of reification, from which life is drained and reality fades as the cement of conceptual determinism hardens round—but its opposite. This was the resurrection of life from ashes four hundred years old. The making of something out of nothing took immense alchemical fire—the fusion of a whole nation and the kindling of several generations. The illusion became real for only a few of us; it is still elusive for most. But if it took this long to breathe life into a form whose shape had already been forged by society, and which is therefore idealistically if not ideologically accessible, imagine how long the struggle would be without even that sense of definition, without the power of that familiar vision.

Id.
development, the environment, and the roles of women. The new politics were made possible in part by the erosion of the old Cold War "blocks," which had aligned into relatively fixed positions based on the underlying economic forms of each government. Bringing down the Communist/capitalist/non-aligned nation walls opened up global politics, disclosing new spaces and new political playing fields.

The new Cairo consensus weaves together four previously separated strands of international discourses: population stabilization policies, sustainable economic development, environmental impact/consumption concerns, and the education, economic status, and empowerment of women. Each grouping represents major global political movements. Cairo, as the third in the U.N. series of population conferences, represented a landmark shift in the understanding of these policies. For the first time, population, poverty, the environment, and women are understood in the U.N. context as interrelated and interdependent.

In the first U.N. World Population Conference, held in Bucharest in 1974, the language used to describe the issues focused on the "population bomb," and the need to "control" the "exploding" population. The urgency of the militarist images were enhanced by the strong statements of impending population cataclysm facing us. The "developed" nations (United States, Canada, Western Europe, Japan, and others) urged the "under-developed" nations (most of the rest of the world) to "control" their births. The non-aligned nations (led by India), resisted the narrow focus on fertility rates, suggesting that economic "development was the best contraceptive."8

By 1984, when the second U.N. Conference on Population was held in Mexico City, the positions had shifted 180 degrees. The U.S. delegation, under President Ronald Reagan's administration, announced that population was a "neutral" factor, following an approach that advocated allowing the free market of each family's economy to determine the number and spacing of children.9 The "developing" or "Third World" countries, on the other hand, urgently sought assistance from the "over-developed," "First World" nations to

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7. See ICPD Programme of Action, infra doc. biblio., ¶ 1.5. "The 1994 Conference was explicitly given a broader mandate [on development issues] than previous population conferences, reflecting the growing awareness of the interlinkages among population issues, sustained economic growth and sustainable development." Id.


help in the implementation of population control policies. U.S. funding for international family planning was nevertheless significantly reduced.\(^\text{10}\)

The 1994 Cairo conference marks a historic shift. Even the title of the conference reflects a new approach; “International Conference on Population and Development” explicitly includes the issues of sustainable economic development as a significant aspect of the population topic.\(^\text{11}\)

Population, in the new consensus, is viewed as a complex, multifaceted issue. Emphasis is now placed on the context in which decisions about childbearing are made. For the first time in a U.N. conference on population, the role of women is seen as significant for examining childbearing and fertility rates. No longer are women seen as “contraceptive users” or “nonusers.” Women are featured as human beings with educational, economic, and power needs.\(^\text{12}\)

Despite this broader, more flexible, and realistic understanding, the Cairo conference did not recognize a fundamental right to reproductive freedom. “While the International Conference on Population and Development does not create any new international human rights, it affirms the application of universally recognized human rights standards to all aspects of population programmes.”\(^\text{13}\) The question of a fundamental right to reproductive freedom is thus left open, perhaps for further development at the 1995 U.N. Fourth World Conference on Women, to be held in Beijing, China. Another possibility is that formal declaration of such a new right is unnecessary because the core meaning of reproductive freedom can be implied from already existing international human rights.

Including reproductive freedom as an internationally recognized human right is deeply contested. Some are opposed to the very

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12. Principle 4 of the ICPD Programme of Action provides:

   Advancing gender equality and equity and the empowerment of women, and the elimination of all kinds of violence against women, and ensuring women’s ability to control their own fertility, are cornerstones of population and development-related programmes. The human rights of women and the girl-child are an inalienable, integral and indivisible part of universal human rights. The full and equal participation of women in civil, cultural, economic, political, and social life, at the national, regional and international levels, and the eradication of all forms of discrimination on grounds of sex, are priority objectives of the international community.

ICPD Programme of Action, infra doc. biblio., at princ. 4.

13. In addition, Chapter IV of the ICPD Programme of Action focuses on “Gender Equality, Equity and Empowerment of Women.” Id. ¶¶ 4.1-4.29.
14. ICPD Programme of Action, infra doc. biblio., ¶ 1.15.
notion of reproductive freedom based on religious or cultural grounds. Others contest only some portion of the idea, such as abortion, state-sponsored virginity examinations, child marriage, or female genital mutilation, while subscribing to other portions of reproductive self-determination. Yet others view the freedom to determine reproductive decisions as belonging to the male head of the family or group, not to the individual woman whose body is involved.

The problem of defining the substantive content encompassed in the idea of “reproductive freedom” is very difficult. It is addressed in depth in other papers presented in this symposium. Professor Rebecca Cook, in particular, has produced extensive substantive analyses of the legal frameworks throughout the world that allow such a specific right to be developed. In this Paper, I will address the question from a different perspective. Instead of focusing on the most difficult or contested substantive concepts included within reproductive freedom, I will focus on what I think is probably among the least controversial aspects of reproductive freedom, access to information about medical facilities—rights to speech and travel.

My project in this Paper is to examine how we could visualize or imagine providing remedies for and enforcing the concept of international human rights extended to family planning information. First, by the way of background, I will briefly sketch traditional international human rights debates about the creation of and remedies for a new category of human rights. In the second part of the Paper, I will outline some of the feminist approaches to enforcing human rights. My hope is that this will provide a starting point for ongoing discussions about implementing a broader concept of an international human right to reproductive freedom.

Traditional discussions about the enforcement of human rights often begin with recognition of the discrepancy between the statements of rights on paper and the reality of widespread abuses. The debate develops in a two-stage process. First, traditional human rights leaders debate whether a particular issue constitutes a recognizable human right at all. Second, the problem of remedies for violations of human rights is analyzed. In our specific case, the

14. See, e.g., Jan Martenson, The United Nations and Human Rights Today and Tomorrow, in HUMAN RIGHTS IN THE TWENTY-FIRST CENTURY, supra note 1, at 925. The “gap” between rights and remedies plays a central role in human rights theory, both in the traditional discussions and in the feminist theories. The traditional discussion is summarized below in the text accompanying notes 25-29. The feminist discussions are summarized in the text accompanying notes 45-48.
question is whether there should be a "new" international human right to reproductive freedom, and if so, what remedies could be developed.

An international human right to reproductive freedom could be found using traditional human rights analysis, drawing upon existing international treaties and charters. There are three basic principles of international law from which support for such an international right could be drawn: privacy, equality, and health. Each principle has a distinguished pedigree. Although none of these principles are self-executing law without further action at the national level, each one carries some weight.

Privacy has been recognized as a fundamental human right since at least 1948 when the Universal Declaration of Human Rights stated that "no one shall be subject to arbitrary interference with his privacy, family, home or correspondence." Equality policies can be found at the very origins of modern human rights in 1945 under the U.N. Charter's commitment to "promoting and encouraging human rights and for fundamental freedoms for all without distinction as to"


16. This problem is sometimes referred to as the "soft law" debate. See generally ANTHONY D'AMATO, INTERNATIONAL LAW ANTHOLOGY (1994). Human rights, in particular, can be viewed as "soft."

What we are observing in the international human rights field is certainly not the emergence of a general, extensive, uniform consistent, settled practice accompanied by the more or less gradual building up of an opinion juris. Rather, we have been witnessing the steady emergence and broadening through decades of international debate, innumerable expressions of international concern and an impressive number of soft law resolutions, declarations, and the like, of a strong international consensus on certain basic human rights obligations and standards.

Corresponding to these international developments, human rights law has flowered quite impressively in many domestic legal orders. . . . Is it in our context irrelevant that the history of international human rights law also has been a history of widespread, persistent violations of these rights, only too often committed by the very states that speak out in their favor? Against this reality, to confirm the existence of universal customary law is an exercise calling for optimistic emphasis on words and much less attention to deeds.

Id. at 154 (citing Bruno Simma, A Hard Look at Soft Law: Remarks, 82 PROC. AM. SOC'Y INT'L L. 372, 378 (1988)).


The European Convention on Human Rights also recognized, as early as 1950, a fundamental right of privacy. "Everyone has the right to respect for his private and family life, his home and his correspondence." European Convention, infra doc. biblio., art. 8(1).

Regulation of abortion is an intervention in private life under the European Convention according to the decision of the European Commission on Human Rights in the landmark case, Bruggemann & Scheuten v. Federal Republic of Germany, App. No. 6959/75, 10 Eur. Comm'n. H.R. Dec. & Rep. 100, 115 (1978). The central question in Bruggemann was whether such intervention in private life was justified as protecting the fetus' right to life. Id.
Health, like privacy, was recognized as fundamental in the 1948 Universal Declaration of Human Rights, which provided that "[e]veryone has a right to a standard of living adequate for the health and well being of himself [sic] and his [sic] family . . . including medical care." All three have been expanded and reaffirmed in subsequent treaties, charters, and conventions.

A right to reproductive freedom could draw upon any of these three principles, alone or in combination. Yet, even those deeply committed to enforcing international human rights raise concerns about "watering down" human rights with "social" issues. In this view, it is important to avoid confusion over the very notion of human rights caused by gliding too easily over the differences between civil and social rights. Civil rights require from the State essentially—but not exclusively—an abstention. Consequently, they must be observed immediately, totally and universally. On the contrary, social rights require an active intervention from the State. As a result, they may be implemented progressively, partially and selectively.

The narrower conception of human rights is generally not based on either opposition to the substantive concept of reproductive freedom or hostility to women. Most often, the narrower concept is explained in terms of the scarcity of human rights enforcement resources and the fragility of the current human rights system. Other commenta-

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20. M. Bossuyt, International Human Rights Systems: Strengths and Weaknesses, in HUMAN RIGHTS IN THE TWENTY-FIRST CENTURY, supra note 1, at 47. Professor Bossuyt is former Chair (1989) of the U.N. Commission on Human Rights. Professor Bossuyt has gone on to observe that "[t]his is also the reason why the control of the observance of civil rights can be entrusted to judicial bodies, while the control of the implementation of social rights is left to administrative or political bodies." Id. at 52. He concluded that "[a] careless utilization of the terms 'rights' and 'human rights' weakens the whole concept of human rights." Id. at 54.

21. See, e.g., Aryeh Neier, Remedial Human Rights Strategies, in HUMAN RIGHTS IN THE TWENTY-FIRST CENTURY, supra note 1, at 951. In a speech addressing a conference in which a broad range of possible new human rights were addressed, Mr. Neier cautioned against overloading the current human rights framework.

The difficulty I have with those calls [to broaden the framework of human rights], some of which I sympathize with individually, though not all of them, is that most existing institutions that try to protect human rights lack the capacity to do more than they are presently doing. They cannot cope with a larger number of issues than at present.

. . . I think the framework of human rights could collapse quite readily if it were broadened to the degree that has been suggested. The framework of human rights is so broad at this stage that the various institutions that operate in the field are not capable of dealing with those matters which fall within the present framework as human rights is most narrowly defined.

Id. at 951-52.
tors resist attempts to guarantee some human rights for women in the private sphere because of possible conflicts with other human rights such as privacy, cultural, associational, and religious rights.  

Within the traditional human rights discourse there are also advocates of a broader and more inclusive approach. This perspective views human rights as indivisible. "What is meant by universality is inclusiveness of human rights as opposed to exclusiveness, respect for cultural diversity without falling into cultural relativism, regional efforts supporting the world-wide effort in favor of human rights." Those advocating an expansion of human rights to include economic and social rights often stress the importance of those rights in positive law.

Regardless of whether the current human rights approach tilts toward a narrow definition of civil rights, or a broader conception of indivisible human rights, at least some portion of the notion of reproductive freedom could be included. For example, the most traditional views of civil rights include the right to speak and receive information, even though others may find that speech offensive or upsetting. The question then becomes whether a human right to speak about family planning could be enforced.

Much attention is traditionally given to the question of enforceability in international law. Indeed, some commentators question whether international law is in fact law at all, or merely "positive morality" in the absence of a police force. The response to this, not surprisingly, is for some to advocate increasing the international criminal justice processes, to make international law enforceable in modes similar to or through national or local law. Others perceive enforceability at the international level as a system of guidance for decisionmakers, indicating presumptive weights to be given to various factors, but


Mr. Leuprecht, as Director of Human Right Council of Europe, has further observed that "[W]hat is being advocated here is the broad concept of human rights already recognized by standards of international law." Id. at 964.


conceptualizing international law as essentially a process of policy communications. Between the polar extremes of guns and politics, a third enforceability theory focuses on the importance of reciprocity, emphasizing "compliance" with international norms. The reciprocity analysis itself raises questions about the proportionality of the response to a given noncompliance.

The questions of enforceability in traditional international law analysis could also be examined with some attention to the differences between enforcement and remedies. Questions of enforcement raise the problems of positive law, the lack of an executive branch, and the lack of a military or police force. To some extent these questions are distinct from the problems of creating specific remedies to address violations of international law, including international human rights.

The traditional human rights discussions regarding the availability of specific remedies can only be partially sketched in the confines of this Paper. The official U.N. Human Rights Commission processes include studies by the Commission or the General Assembly, as well as hearing petitions claiming patterns of human rights abuses. Some commentators focus on prevention of human rights abuses, either through economic development, or through analogy to the

27. Roger Fisher, Improving Compliance with International Law 20-22 (1981). Professor Fisher challenges the notion that the primary enforcement technique for international rules should be comparable to those of the criminal law—deterrence and the punishment of violations. Id. at 16. He suggests instead that law is best understood as a way of structuring political forces. Id.

Enhancing compliance for international rules through reciprocity is, in Professor Fisher's analysis, a multifaceted process. Self interest, reputation, concern with consequential action by other countries, fear of reciprocal noncompliance, as well as fear of adverse military reaction, are some of the significant factors. Id. at 127-40.

29. I am indebted to Joel Paul for this point.

Professor Van Boven critiques the structuralist approach on three grounds. First, it is stronger in analysis than in implementation. Second, the structuralist emphasis on international relations and the international economic order did not pay sufficient attention to patterns of injustice at the domestic level. Third, the structuralists ignored the fact that persistent violations of human rights also result from religious, national, and ethnic divisions between people. Id. at 941. I would suggest he also add gender to this list.
U.N. "peace-keeping" functions.\textsuperscript{32} Court enforcements at the international, regional,\textsuperscript{33} and national levels can play a significant role in making human rights enforceable for both non-state\textsuperscript{34} as well as state actions.

Nongovernmental organizations, such as Human Rights Watch, are influential in what Aryeh Neier has termed the truth-telling and justice phases of human rights enforcement.\textsuperscript{35} Nongovernmental organizations also play a crucial role in training women as political and diplomatic leaders, and in providing links between the (often


\textsuperscript{33} The case of Open Door & Dublin Well Woman v. Ireland, 246 Eur. Ct. H.R. (ser. A) (1992), presents an example of international human rights developed at the regional level. The European Court of Human Rights extended the guarantees of free speech to pregnancy counselling services that provided the telephone numbers of medical clinics in Great Britain where a full range of reproductive services, including abortion, are provided. \textit{Id.} at 27; see infra text accompanying notes 41 & 56 (discussing \textit{Open Door & Dublin Well Woman} case).


Professor Van Boven focuses on the landmark use of a regional human rights court to extend state liability for human rights violations by nonstate actors in the \textit{Velasquez Rodriguez} Case.

The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, impose the appropriate punishment and ensure the victim adequate compensation.

\textsuperscript{Van Boven, supra note 31, at 945 & n.21 (citing \textit{Velasquez Rodriguez} Case).}

An illegal act that violates human rights and is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.

\textsuperscript{Velasquez Rodriguez, ¶ 172, cited in Van Boven, supra note 31, at 946 n.25.}

The potential importance of regional human rights court enforcement as an effective technique can also be highlighted by examining the role of the European Court of Human Rights in the Irish abortion/speech case, \textit{Open Door Counselling}, discussed in depth below in the text accompanying notes 41, 56.

\textsuperscript{35} Neier, supra note 21, at 952-53.

The most important thing that a civilian, democratic government should try to do as a remedial strategy in the wake of a catastrophe is to provide some form of accountability. This accountability may be divided into at least two phases. One phase is the truth phase. In this phase, the level of victimization is made known. The identities of the victims are made known. The character of the abuses that they endured are made known. The identity of the victimizers is made known. This is the truth phase.

The other phase is the justice phase. In the justice phase one tries to see to it that at least those who have committed the most egregious abuses are punished for their abuses.

Unfortunately, the record thus far in achieving accountability, either in the truth phase or in the justice phase, is extremely poor worldwide. . . . [T]he principle reason is the fragility of civilian democratic governments.
female) field agencies implementing the policies and their (often male) governments.

One could spend considerable energy debating which of the three principles (privacy, equality, or health) is "best" for women, examining the strengths and weaknesses of each. One could add to the basic trilogy by searching international documents for additional power sources, arguing that some fourth, fifth, or sixth international human right would be a more direct or saleable route to reproductive freedom.\(^{35}\)

This conversation could reach a cooperative, inclusive, and harmonious conclusion\(^{36}\) by agreeing on a synergistic approach in which all three principles (plus any other good ones we find) are used together to advance the empowerment of women with respect to reproductive freedom. Strategic decisions about which of the three policies to emphasize in a given political context would be understood as exactly that—strategic—with full recognition that in a different political context a different strategy might be more efficacious.

My own questions are a bit different. I am troubled by the discrepancy between the longstanding agreement in international human rights documents about privacy, equality, and health for women, and the widespread and serious abuse of women with respect to reproduction.\(^{38}\) Even the simplest human right framed in the most traditional and reassuring terms, the right to free speech about medical information,\(^{39}\) continues to be deeply contested when the topic is reproduction and women.\(^{40}\)

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35. Slavery and indentured servitude are my personal favorites for additional rights-based discourses. For the U.S. domestic law version of this concept, see Reva Siegal, Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection, 44 STAN. L. REV. 261 (1992).

Since its decision in Brown v. Board of Education, the Court has employed the Equal Protection Clause to analyze class- or caste-based regulation of women's conduct. From a historical perspective it is clear that abortion-restrictive regulation is caste legislation, a traditional mode of regulating women's conduct, concerned with compelling them to perform work that has traditionally defined their subordinate social role and status. \(\text{Id. at 351.}\)

37. See generally CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982).

38. See infra text accompanying notes 44-48 (providing discussion of what Professor Engle calls the "gap" between law and the reality of women's lives).

39. The language, itself, in which scientific or medical information is described raises complex problems. For an exciting and insightful analysis of the gendered nature of medical language, see EMILY MARTIN, THE WOMAN IN THE BODY: A CULTURAL ANALYSIS OF REPRODUCTION (1987). Professor Martin examines the deeply gendered nature of the language used in standard medical textbooks. See id. at 27-67.

Why does my well-educated, young, Arabic friend lack basic information about breast feeding as an unreliable method of family planning? Why, for that matter, are my own adolescent children in a liberal Boston suburb denied education about their bodies, sexuality, and birth control? Why does Ireland fight so desperately to censor the publication of telephone numbers of British medical facilities?\textsuperscript{41}

I am troubled by suspicions that we expend our precious feminist energies fighting about language in seasonal cycles of international conference documents, furious sounds eventually signifying nothing. Are the promises of real human rights for women merely the sophisticated, educated, modern version of the myths of chivalry, in which an abused woman is rescued by the human rights knights in shining armor?\textsuperscript{42} Is the female role to sit like Penelope waiting for Odysseus, besieged by aggressive suitors anxious to possess her body and lands? Patient Penelope, spinning her rights by day, only to be unravelled by night, until her human-rights-questing hero returns to bring justice to her?

Sinking deeper into my cynical mode, I ask whether this is the latest trap to contain women's powers, safely channelling them into endless legal/diplomatic dispute loops. By emphasizing the legal framework, are we diverting women from other paths that may be more challenging to current holders of power? Perhaps we should be exploring other options to assist women in terms of economic, military, and political power.

Yet framing the issues in terms of human rights can also be a source of power for women, a language in which we reconceive ourselves beyond the limits of our particular cultural or historical moment. Thinking in terms of human rights helps stretch our self-concepts, helps us move beyond the old stories which limited our imaginations about possible roles for women. The rhetoric of human rights provides one way for us to break the old bad habits of thinking of ourselves primarily as victims—powerless, at the mercy of brutal men.

Conceptualizing women in terms of human rights can become self-empowering. It can serve as one way for women to envision male


\textsuperscript{42} For a charming, erudite, and always amusing account of the human rights activist as knight, with careful attention to the gendered nature of this work, see David Kennedy, \textit{Spring Break}, 68 Tex. L. REV. 1377 (1989) (accounting experiences in human rights mission in Uruguay).
authority as less than unified, less than univocal, less than universal. There are fissures in the patriarchy. Naming ourselves as rights-bearers, and fully human, helps us invent languages to imagine and claim our patrimony. Can we imagine ways to actually enforce an international human right to reproductive freedom?

Would we have U.N. peacekeeping forces delivering condoms and requiring the local men to actually wear them? Could we have teams of international experts from powerful official institutions sent as observers to “watch” reproductive practices in medical offices to ensure that women’s rights were not abused by doctors implementing coercive state policies?

Could we imagine international justice extending to criminal trials of those who use systematic rape, involuntary impregnation, or coerced childbirth as a tactic of war? What if it is a tactic of nationalism, for example, to increase the population, as in the former Communist regime in Romania? What if it is a tactic of religious propagation, a strategy to increase the membership of a given religion?

One of the classic errors of those not familiar with contemporary feminist theory is to attempt to find “the” feminist position, as if forty years of multidisciplinary, multicultural, theoretical development could be reduced to one easy lesson. There are many possible feminist approaches to any issue, and the question of an international human right to reproductive freedom is no exception. A full analysis of the variety and complexity of feminist approaches to human rights analysis would require more development than this Paper permits.

Professor Karen Engle has undertaken an in-depth review of feminist legal literature in international human rights. She classifies a variety of feminist approaches as doctrinalists, institutionalists, and external critics.

Doctrinalists generally describe a specific problem facing women in some or all parts of the world and then show doctrinally how the problem constitutes an international human rights violation. Institutionalists critically examine international legal institutions.
that are created to enforce human rights. They study both
mainstream human rights institutions and specialized women's
institutions.\textsuperscript{45}

\textit{[T]he first two assume and act upon the belief that women's rights
have and can be assimilated to the human rights structure. The
third approach [external critiques], on the other hand, questions
whether assimilation to the structure as it exists is possible... [and] tend[s] to believe that the structure itself will have to change
in order to accommodate women's rights.\textsuperscript{46}}

Professor Engle’s emphasis on the gap between the various
international human rights documents and the lack of progress in
improving the lives of women is, I believe, a landmark insight into
public international law analysis generally. Focusing on the gap helps
explain the different approaches between those who focus on
documents, treaties, conventions, and the like (doctrinalists), and
those who focus on the processes of international and regional
institutions (institutionalists). Doctrinalists tend to work their way
through the legal documents, then conclude with a chapter or section
addressing the problems of enforcement.\textsuperscript{47} Institutionalists begin at
the enforcement gap. "Institutionalists all begin by addressing the
same gap between existing law and the reality of women's lives that
the doctrinalists eventually confront. Thus, their works start at the
same point at which doctrinalists turn to strategies for implementa-
tion."\textsuperscript{48}

\textsuperscript{45.} Engle, \textit{supra} note 44, at 522.
\textsuperscript{46.} Engle, \textit{supra} note 44, at 523.
\textsuperscript{47.} In Engle’s view, doctrinalists
identify a gap between the existence of positive law and the reality of women’s lives. Most of the advocates respond to this gap by first showing that the law they cite is
authoritative—that it is legally or morally binding—and then working out strategies for
implementing the law. Engle, \textit{supra} note 44, at 540.
\textsuperscript{48.} In Engle’s view, institutionalists

\textit{[Q]uestions often arise about implementation and enforceability. The surfacing of
these questions is usually tied to a concern about cultural differences and disagree-
ments, and their impact on the law’s effectiveness. Thus, the works often drift into a
more strategic mode either when the advocates cannot claim absolute legal or moral
authority, or when they acknowledge that authority alone will not make women's rights
a reality.}
\textit{Id.} at 543.

\textit{The strategic approaches, then, seem to emerge out of a basic lack of faith in the
ability of positive law, on its own, to achieve change. This lack of faith initially
manifests itself in questions about the enforceability of international law. While
doctrinalists do not generally assume bad faith on the part of those entities that
monitor and enforce human rights law, they nevertheless recognize difficulties with
enforcing "universal" human rights.}
\textit{Id.} at 544.
\textsuperscript{48.} Engle, \textit{supra} note 44, at 555.
My own approach in this Paper also focuses on this gap between law and reality. Rather than review the legal literature, however, which Professor Engle has already ably undertaken, or analyze substantive human rights doctrines or institutions, I have taken a different approach. I have tried to look at a particular story about reproductive freedom, the story of Ireland’s recent struggles with censoring speech and restricting travel. Ireland refused to allow publication of the telephone numbers of British medical clinics, and attempted to prevent travel to Britain to obtain reproductive medical services, including abortion. These efforts to restrict reproductive freedom were abolished through a variety of international and domestic court decisions and a public referendum in Ireland.

In examining the Irish story, I will not follow the traditional human rights technique of separating the discussion into two distinct phases—substantive rights and remedies. I think it is more helpful to examine the interrelationships between rights and remedies, to view them as in a dynamic rather than a static relationship. I also differ from many feminist analysts in that my focus is not primarily on whether women’s rights such as abortion-related speech and travel should be integrated into existing human rights frameworks, or whether it is to our advantage to strengthen separate, specifically women-oriented institutions and remedies. Instead, I am trying to

49. Feminist approaches to enforcement can also follow a variety of strategies, which are not necessarily mutually exclusive. One path could be to seek inclusion of reproductive freedom issues through integration into already existing human rights legal frameworks. Defining systematic rape as a potential war crime, for example, or extending the right of free speech to include the telephone numbers of British medical clinics providing legal abortion services, would be to extend currently existing human rights law enforcement to include issues of reproduction that are important to women.

A second approach could be to encourage health organizations, such as the World Health Organization, medical associations, medical schools, and other similar institutions, to recognize and advocate a fundamental right to health that includes reproduction.

Integrationist approaches, whether by focusing on extending human rights to health, or extending health to human rights, present an attractive enforcement strategy because of the potential legitimacy derived from “hooking” powerful human rights languages together with medical expert/technology discourses. The combined powers of legal and medical enforcement appear very attractive.

It could be anticipated that the integrationist strategies will encounter some difficulties, particularly in light of the tensions between medical and legal professions, even before we reach the difficult questions of gender. The caring professions are often hard pressed for adequate resources to perform their work, and some policymakers may define the gender issues as peripheral to the central role of the particular profession.

50. Feminist approaches to enforcement of an international human right to reproductive freedom could also, perhaps simultaneously, explore more separatist enforcement strategies. The international legal mechanisms for enforcement would include the Convention on the Elimination of All Forms of Discrimination Against Women (Women’s Convention). Enforcement theory would focus on pressuring the United Nations and local governments to strengthen the Women’s Convention through allocating resources to the Commission on the Status of Women or the Committee for the Elimination of Discrimination Against Women.
articulate what I call a "transformative" notion of human rights by looking at a concrete, localized story of the struggle for reproductive freedom.51

My concept of transformative human rights is not fixed, nor is it a complete model that would apply universally to all situations. I do not really seek to define, confine, or contain the meaning of this phrase. Instead I would like to explore a notion of transformative human rights by articulating four factors, or threads, which seem to signal that major shifts in power relations are afoot. These signs of transformation are not always present, nor do I mean to imply a linear causal relationship between the factors and the potential for paradigmatic shifts in power relations. My project is more modest, an attempt to articulate these four threads and then follow them through one story of reproductive freedom in Ireland. The four factors to highlight are sources, targets, spaces, and moves.

When the media disclosed the refusal of the Irish government to allow the parents of a fourteen-year-old pregnant rape victim to take her to England for an abortion, the streets of Dublin spontaneously erupted with demonstrators. This case, known as the X case,52 transformed the Irish legal and political discourse about abortion, in part through traditional human rights languages about the "right to

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(CEDAW) equal to those given to the U.N. Commission on (general) Human Rights, or perhaps in proportion to the world’s male/female population statistics. Procedural enforcement mechanisms could also be made more formally equal to the men’s human rights enforcement mechanisms through extending the time of meetings under CEDAW or extending jurisdiction to include individual, group, and nongovernmental organization petitions.

In the United Nations the Human Rights Commission has more power to hear and investigate cases than the Commission on the Status of Women, more staff and budget, and better mechanisms for implementing its findings. Thus it makes a difference in what can be done if a case is deemed a violation of women’s rights and not of human rights.

Bunch, supra note 1, at 972.

A separate-but-equal strategy for enforcement has obvious pitfalls, most notably those of marginalization, political isolation, and vulnerability to economic cutbacks and political attacks. Despite these clear drawbacks, calls for equality have a certain political and moral power. If argued in combination with the integrationist strategy, the fundamental unfairness could be highlighted. Refusing either to permit women to integrate reproductive freedom into existing human rights/health frameworks or to permit women to develop separate but equally funded and powerful institutions leaves half the population with few viable options in reproductive matters that directly affect their bodies and identities.

51. This technique might be classified as "postmodern feminist," for those who need such signposts to help in their explorations of contemporary feminist theory. I am mostly content to be labeled in this way, although other postmodern feminists may be more ambivalent. I follow here, I hope, in the footsteps of my late colleague, Mary Joe Frug. See Frug, supra note 44. I'm also deeply influenced by Judith Butler, Gender Trouble (1990).

travel” within Europe and the “right to information” about medical services. But the transformation also occurred in the discourses among people. Ordinary citizens in Ireland broke their silence on the question of “going to England.”

The X case arose as the centerpiece in a trilogy of Irish abortion-related decisions. In the first case, Society for the Protection of Unborn Children Ireland Ltd. v. Grogan, the European Court of Justice had indicated a year before the X case (somewhat obliquely) that Europe's open trade borders protect the free flow of information about medical services, including abortion clinics, but declined to directly confront Irish censorship of British telephone numbers. In the second case in the Irish trilogy, the X Case, the Irish Supreme Court held that the provisions of the Irish Constitution that prohibit abortion contain an exception in cases which threaten the life of the pregnant woman, including the threat of suicide. The third case,
which was decided about six months after the opinion in the X case, was the decision of the European Court of Human Rights affirming a right to free speech, which included the dissemination of British medical clinics’ telephone numbers.\textsuperscript{57} Political victory in the Irish popular vote referendum on abortion information and the right to travel to obtain abortions came a few weeks later.

Abortion is now legal on the soil of Ireland for the first time since the mid-Victorian era,\textsuperscript{58} though only in cases that present a threat to the life of the pregnant woman, including the threat of suicide. Telephone numbers of British medical clinics should now be available according to the law. The right to travel freely across the internal borders of the European Community to obtain abortions is now recognized in Irish law. This occurred in a nation which takes its Roman Catholicism so seriously that the Irish Constitution itself recognizes Catholicism as the official religion.\textsuperscript{59} In fact, in 1983, Ireland adopted a constitutional amendment protecting the right to life of the fetus.\textsuperscript{60}

The Irish story provides a concrete context in which to explore the four factors that I believe present some of the characteristics of transformative notions of human rights. The first factor focuses on the sources of human rights activity. A transformative approach differs from a “trickle down” approach in which the source of human rights flow from international human rights doctrine through officials and institutions down to the oppressed masses of women. The Irish story did not present a situation in which the European Court of Human Rights forced Ireland to legalize abortion based upon interpretation of the notions of privacy, equality, or health in the European Convention on Human Rights. Transformative human rights also differ from a “bottom up” theory, in which the local customs or traditions are idealized or seen as immutable, unchangeable by law, and differences among local women are used to justify

\textsuperscript{57} Open Door & Dublin Well Woman v. Ireland, 246 Eur. Ct. H. R. (ser. A) at 27 (1992); see also Cole, supra note 41.

\textsuperscript{58} Irish criminal law, following that of their British overlords, banned abortion in 1861. See JAMES CASEY, CONSTITUTIONAL LAW IN IRELAND 345 (1992).

\textsuperscript{59} Id. at 536-57.

\textsuperscript{60} IR. CONST. art. 40.3.3.
the status quo based on a divide and conquer maneuver. The existence of some women in Ireland who oppose abortion, and the widely shared and deeply rooted Irish beliefs in Roman Catholicism, were not seen as an absolute defense to human rights for others in Ireland who do not share or care to practice those religious and customary beliefs.

The range of documentary sources was not limited in the Irish case trilogy to "public" international law (i.e., the European Convention on Human Rights). In the Irish cases, the local activists also claimed a right under "private" trade law, that of the European Economic Community.

The Treaty of Rome was the document from which the right to British telephone numbers was first claimed. The Treaty established the economic union of Europe, and the forum was the (much surprised) European Court of Justice, which had thought its jurisdiction was limited to trade issues and would not extend to (sticky, political) human rights issues. Medical services, however, constitute an aspect of trade protected under European Community laws.

The European Court of Justice did not immediately leap into the breach by telling Ireland to stop censoring British medical clinics' telephone numbers. Instead, the Court of Justice held that the right to information about medical services within the European Community was protected under Articles 59 and 60, but that the Irish student union lacked economic standing. This left Ireland some time to maneuver a graceful exit, without foreclosing future review by the Court of Justice. Thus, European regional economic law served as a powerful, cautionary device, warning Ireland of the outside limits on nationalism and local religious customs.

In the Irish story, examining the sources of human rights law is the first key factor. The story illustrates a dynamic relationship between international doctrine (public and private law) and local human rights activists, in which the local activists frame the scope of the immediate issue based on the range of potentials, or sources, presented in international law. Perhaps the Irish activists were too cautious, and should have sought outright legalization of abortion. Perhaps the European Courts (of Human Rights and Justice) were too slow to respond to the Irish complaints. Nevertheless, Irish law and culture ultimately underwent a "sea of change" on the difficult issues of abortion, free speech, and travel.

A transformative analysis focuses on a complex dynamic of relationships between the international human rights communities and the local human rights activists. The source of the rights involved
in the Irish story included international human rights law, such as the
European Convention on Human Rights as well as the incorporation
of human rights provisions into the European Economic Community
as interpreted by the European Court of Justice. But the decision
regarding which portions of the universal right to reproductive
freedom are to be targeted at a particular historical moment is made
at the local level, by the activists themselves.

If the sources of transformative human rights law are the first key
factor, the second factor to watch is the target. In the Irish story, the
local activists did not target international human rights establishments
to push for statements in documents recognizing rights to abortion,
abortion-related speech, or travel. Nor did the Irish activists allow the
lack of support from established human rights organizations to deter
them. One key aspect of this transformation was the refusal to wait
for permission from some authority or gatekeeper to define what is
or is not a human/women's rights issue. The targets chosen were the
specific and concrete legal impediments to specific needs of Irish
women seeking medical services (the British telephone numbers, and
the ability to travel to Britain).

Targeting the issues is left to the strategic sense of local human
rights activists. This is a local, not global strategy. Some human
rights activists might believe that the right to chose legal abortion
itself should be recognized as a fundamental human right. I certainly
agree personally with a substantive position allowing individuals to
chose safe, legal abortion. But the decision of how to frame the issue
in Ireland is made in the concrete context of local political activity,
not at an abstract legal or academic level.

The third factor, the spaces, involves an interesting deployment of
overlapping remedies. Listed in chronological order, four legal spaces
were ultimately involved: the European Court of Justice, the Irish
Supreme Court, the European Court of Human Rights, and an Irish
public referendum. The Irish activists used both public and private
international law remedies, but were ultimately successful at the
unexpected level of municipal law through an Irish Supreme Court
case and a public referendum in Ireland. The X case, involving the
fourteen-year-old pregnant rape victim, was the centerpoint of this
story, with the European Court of Justice and European Court of
Human Rights cases as the bookends.

The X case itself was decided at the Irish Supreme Court level. The
global furor over the X case occurred just as the free speech case was
pending in the European Court of Human Rights. The European
Court of Human Rights case was decided favorably to the human
rights activists just weeks before the popular referendum in Ireland. In the referendum, the Irish voters affirmed the right to free speech, including British abortion clinics’ telephone numbers, as well as the right to travel to Britain to obtain medical services for abortions.

I am not suggesting that any local activists had the brilliance to orchestrate this remarkable series of fortuitous events. I have met most of them, and while I think they are remarkably smart, flexible, and resilient, I do not think any human being could organize all this. There is clearly a large element of luck in this story. It is known as the “luck of the Irish.”

Yet to write this remarkable series of events off as merely “luck” is to foreshorten our analysis of transformative human rights. This story involves a series of moves, of strategic choices. These moves reflect the abilities of local activists to draw from a variety of international law sources, concretely target specific portions of reproductive rights, maneuver through a variety of international and municipal spaces, and respond to opportunities as they arise.

There are three “moves” which I think are representative of a range of feminist techniques in this field. I have chosen to articulate the variety within feminism as techniques, strategies, or moves, rather than as fixed identities (doctrinalists/institutionalists/externalists) because I believe that individual authors and players shift emphasis in strategies both over time and in differing political situations. I also believe that our larger feminist movements themselves change their emphases as they mature and in response to shifting political climates. Static categories of feminism, I think, are less useful than observing the flow of power, seeing feminists as active players, initiating, responding, and shifting in dynamics of transformation.

These three moves, or strategies, I describe as challenging, dissecting, and transforming. The first approach, challenging, confronts sharply and directly the construction of “human” rights as

61. See supra notes 44-48 and accompanying text (discussing Professor Engle’s landmark article).

62. I am also concerned that fixing notions of feminist thought through labelling or categorizing unwittingly assists lazy or hostile scholars unwilling to read, grapple with, and respond fully to the vitality of feminist intellectual and political movements that have so deeply shaped the latter half of the 20th century. This is the fear of reductionist, or cartoon, feminism. While I still feel concern about fixed labels within feminism, I also vividly remember a discussion in the Boston area fem/crits in which we read an early draft of a manuscript by my late colleague Mary Joe Frug. The manuscript involved re-reading contracts through the device of positing several imaginary readers.

Martha Minow and I both raised concerns about characterizing readers in such a sketchy way. Mary Joe, nevertheless, stuck to her guns and published the now very famous, landmark article. See generally Mary Joe Frug, Re-reading Contracts: A Feminist Analysis of a Contract Casebook, 94 AM. U. L. REV. 1065 (1985).
men's rights. Professor Shelley Wright of Australia, for example, points out the "resolutely and utterly male" language in which human rights are often discussed: the "Rights of Man" or "Mankind" or "les droits de l'homme." She points out that women's rights are "ghettoized" into their own convention, separate and unequal, segregated from the "human" issues raised in other rights conventions, and allocated less power in terms of money, staff, procedures, and length of meeting times. Finally, she argues that the very idea of equality itself is premised on the male norm, accepts the validity of a male standard as "human," and indirectly silences or subverts the value of specifically female experiences, such as maternity, which men do not share.

Challenging various institutions to take women's rights seriously, to treat women as if they too are human, can be performed in various styles. Some styles of challenging will be perceived as rude, abrasive, or unladylike. The institutional response to this style of challenging may be to dismiss the claims as well as the claimants. Other styles of challenging may be perceived as naive or ignorant, for example when feminists assume human rights apply to women and "don't understand" the fine legal nuances between "civil" and "social" law, or the significance of a "counter claim" based on local customary law. The institutional response may be patronizing, lecturing the naive little women on the serious technicalities of law, and then dismissing the claims as well as the claimants.

Challenging is a risky business, because whatever style the challengers deploy, there is a very substantial risk of rejection, accompanied by a tendency to "blame the victims" for rudeness or ignorance. Challenging is risky for feminists as well if we internalize the rejection and believe that it is our fault for not being smoother or better educated. It may reinforce notions that women are inferior, and that women's rights are subordinate to men.

Nevertheless, without challenging, there will be no gains for women. As African-Americans have long known, it is the Blacks who simply will not stay "in their place" who fuel the civil rights move-

64. Id. at 77.
65. Id. at 78.
66. Id. at 79-81.
ments. Issuing legal challenges through the frameworks of international legal institutions is one centrally important move available to feminists.

In the Irish story, the local activists challenged the Irish government and the European legal institutions to extend human rights already available to men into a context that is particularly female. Free speech to obtain information about trade and services that are legal within the member states of the European Community, and the freedom to travel within the borders of the European Community, are not normally difficult or contested human rights in the European context. The difficulty arises when the specifically female experience of unwanted pregnancy arises.

A second possible feminist strategic move, which I have labeled dissecting, analyzes the dichotomy between "civil" and "social" rights as a replication of the discredited public/private distinction.68 Professor Charlotte Bunch observes:

The division between public and private has largely been used to uphold a double standard *vis a vis* women. We accept that the State has a duty to intervene to counter human rights abuses even when privately committed, such as slavery or racial segregation which is not accepted by human rights advocates as a cultural practice in South Africa or in the South of the USA.69

Professor Frances Olsen's landmark Articles analyzing the public/private dichotomy remain the standard in the intellectual history of contemporary feminist legal theory. She too views the analytical distinction between civil and social law as a replication of the public/private dichotomy. The following excerpts from her works illustrate this concept.

Much of the recent legal scholarship criticizing the public/private distinction should be understood as a call to transcend the state/civil society dichotomy.... Some theorists have suggested that we are already entering into a postliberal corporate welfare state society in which the distinction between the state and civil society has become blurred.70

Although the woman's sphere has been described as "private" and contrasted with the "public sphere of the marketplace and government," such a characterization can be misleading. There are two different dichotomies involved in this contrast: on one hand,
a dichotomy between the market, considered public, and the family, considered private; on the other hand, a dichotomy between the state, considered public, and civil society, considered private. Both the market and the family are thought of as part of "private" civil society in opposition to the "public" state. Calling both the marketplace and the state "public" can thus confuse our thinking about the two dichotomies.\footnote{Id. at 1501.}

One of the main things a power-holder gains from successfully characterizing his power as "private" is a degree of legitimacy and immunity from attack. Thus it is predictable that people will try to characterize their use of power as "private" and to characterize power deployed against them as "not private"—that is, as public, oppressive, unjustified and unconstitutional. Struggles over power inform, fuel and permeate the debate over the public/private dichotomy. At issue is support for or opposition to the status quo.\footnote{Frances E. Olsen, Constitutional Law: Feminist Critiques of the Public/Private Distinction, 10 Const. Comment. 319, 319-20 (1993). Professor Olsen continues: An actor who can successfully characterize his activity as "private" may gain either of two quite different constitutional advantages. First, the designation of conduct as "private" relates to the state action doctrine. . . . Second, "privacy" may be invoked as a right which itself provides a substantive limit on state action permitted by the constitution. There is also a third important use of characterizing behavior as "private" . . . . Private may mean personal and domestic, as opposed to commercial; of the family rather than the marketplace; home rather than work. An actor who can successfully characterize his activity as "private" in this third sense may . . . be able to discourage state action that would inhibit his use of power, on the basis that domestic life should remain more free of government regulation than other aspects of life. Id. at 320-21; see also Frances E. Olsen, Unravelling Compromise, 103 Harv. L. Rev. 105, 109-17 (1989).}

In the Irish story, the local activists understood the artificial nature of the public/private dichotomy, and effectively deployed both types of international law to pressure the municipal government to allow free speech and travel for abortion-related purposes. Visualizing the speech and travel issues as "public" was the obvious move. What I believe was really creative, and turned out to be centrally important to the overall Irish story, was constructing the "private" or economic law move. By bringing the issue of abortion speech and travel into "hard" economic law, the local activists presented a very powerful but subtle threat to the Irish government. Participation in the European Economic Community is vitally important to Ireland, which is among the poorest nations in the EEC. Ireland receives substantial subsidies from other EEC nations. Thus the sophistication of the move to private law got the attention of the municipal government.

\footnote{See supra notes 16, 25-30 and accompanying text.
The move to economic law also sent a powerful message to the European Court of Human Rights, which had never taken an abortion-related case before.\textsuperscript{74} The European Court of Justice clearly signaled to the Court of Human Rights its preference that human rights issues be addressed through the European Human Rights Convention. Thus, the traditional human rights body received both support and an impetus from its more powerful counterpart on the economic-law side.

The third strategic move is what I term transformative. In this type of move, local activists extend the narrow boundaries of law and engage directly with the local and international cultures. Most often this transformative move involves media or education, as well as local political organizing. The arts, particularly music and visual arts, also present important and little-explored avenues for transformative human rights work.

My limited sense of the "cosmopolitan" world of international law and institutions is that the idea of transforming cultures is very attractive as long as the transformation "flows down" from the elevated, sophisticated, internationalists to the more earthbound, provincial, implicitly backwards corners of the globe. Conversely, my very limited sense of the "customary" or "traditionalist" local culture advocates is that they too would like to transform cultures, this time by accessing international law sources and institutional spaces to export and expand compliance with their (often religious) agendas.

Transformative cultural moves can also be deployed by human rights activists, as evidenced by the very successful strategies to combat South African apartheid through economic, diplomatic, and legal pressure, but also through the press, rock and roll, visual arts, novels and poetry, film, and educational courses. In the context of feminist moves, a transformative strategy was one key factor in the Irish story.

The use of the media was perhaps the most obvious transformative move. The local Irish press broke the story of the Irish government's attempts to bar travel to England by the fourteen-year-old rape victim and her parents. The global press picked up the story immediately and gave it substantial play. The international furor embarrassed the Irish government at a delicate moment in the process of ratifying an important economic treaty with the European Economic Community.

\textsuperscript{74} The prior abortion case in the European Human Rights system had only risen to the level of a Commission opinion. The Court of Human Rights itself had never addressed the question. \textit{See supra} note 17 (discussing German abortion case, Bruggemann).
It also conveyed feedback to the Irish public—information about how the rest of the world views efforts to restrict travel and speech related to abortion. Importantly, this international feedback legitimized and lent courage to local activists who were facing a barrage of religious pressure, including strong anti-abortion statements from Mother Theresa, the Irish Catholic hierarchy, and the Vatican itself.

The transformative moves were not limited to the press in the Irish story, nor were they solely centered around the dramatic facts of the X case. A broadly based cultural and political youth movement, centering around university student activists who had earlier published the British telephone numbers in the student directory, had ongoing transformative power. These brave young men and women had risked their paltry financial assets, as the Society for the Protection of Unborn Children moved to recover attorney fees from the students who lost their case in the European Court of Justice, and their future jobs in an attempt to secure the fundamental human rights to speech and travel for abortion-related purposes.

Portions of the local business community also participated in transformative moves. The local discotheques and youth-oriented bars in Dublin collectively and publicly defied Irish law restricting the sale of condoms by installing condom dispenser machines in their restrooms on Valentine’s Day. No prosecutions were filed by the Government.

The international business community, however, escaped responsibility. Two potential transformative moves that I unsuccessfully advocated were attempts to pressure the British medical clinics, which profit from the Irish trade, to at least fund a portion of the very expensive attorneys fees in these cases. A second avenue of international business that profits from Irish women, yet caved in to pressure, are the international women’s magazines, such as Vogue, Cosmopolitan, Elle, and others. These magazines carry advertisements for pregnancy medical services within Europe, including abortion services. They are normally relatively supportive of women’s rights. Under pressure (but not a court order) from the Irish government, these magazines nevertheless blacked out the British telephone numbers and allowed the local students and feminists to take all the expense and all the risk.

Notorious Irish rock star Sinead O’Connor participated in the transformations through appearing at public demonstrations in Dublin. She capped off her bad girl reputation by appearing on the widely viewed American television show Saturday Night Live, where she
ripped up a picture of Pope John Paul II in a stunning demonstration of the symbolic power of free political speech. The move was widely viewed as excessive and in poor taste in both the United States and Ireland.

Less flamboyant, and more substantively important to Irish women, were the transformative moves by local feminist human rights activists at the pregnancy counselling centers of Open Door Counselling and the Dublin Well Women Centre. Ruth Riddick, director of the Open Door center, continued to give the telephone number of British medical clinics to desperate Irish women who telephoned her at home. Risking a jail term if she lost her case in the European Court of Human Rights, Riddick had already sacrificed a promising career in arts administration to the urgent need for feminist reproductive activists in Ireland.

Sitting in her comfortable middle-class living room in Dublin, I flinched when the telephone rang and Ruth excused herself for a few minutes to take the call. When she returned, I asked her if she was afraid that she would be prosecuted and jailed for giving out the British telephone numbers. She shrugged eloquently, pulled down her mini-skirt and tossed back her mane of deep, red hair. “These women need help now. We can’t very well wait until next year, can we?”

CONCLUSION

A feminist approach to enforcing human rights, which I describe as transforming, views the notion of human rights itself as dynamic and not necessarily confined within the traditional limits of law. The premise is that as groups struggle to define their own visions of human rights, they bring new energy and vitality to the human rights movement itself.75 This transformative, feminist stance acknowledges that in struggling, “new actors” transform themselves through asserting human rights, while the human rights establishment and the various legal meanings of human rights are also transformed.

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75 Bunch, supra note 1, at 967, 968.

The success and strength of the vision of human rights is reflected in people’s growing identification with it and the desire to extend it to meet their basic needs for human dignity. The concept of democracy began as something for white Western propertied males, but the continuous struggles by the rest of us to extend that concept to include us has given democracy continued importance in the world for several centuries. So, too, expanding human rights to address the dignity of all people strengthens, not dilutes, the human rights movement.

Id. at 968.
A dynamic, transformative approach to human rights is not limited to "women's issues" such as family planning or reproductive freedom. Charlotte Bunch notes that twenty years ago there was no recognition of "disappearances" as a human rights abuse, nor were para-military or right-wing death squads recognized as violence for which a State might be held responsible. Through the actions of the women of the Plaza de Mayo in Argentina, these issues became part of the accepted human rights discourse.

Nor does what Professor Karen Engle terms the "counter claim" of cultural relativism always constitute an insurmountable barrier to transforming old notions of human rights. Racial slavery, apartheid, and racial segregation were also once defended as cultural practices, grounded in society and religion, or beyond official state policy as a matter of private (de facto) as opposed to public (dejure) practices. These practices are now widely viewed in both international and municipal law as violations of human rights.

In describing a transformative, dynamic human rights discourse, I am explicitly anticipating a great deal of misunderstanding, miscommunication between women, as well as recognizing that there will be very real substantive differences in how women approach various rights issues. I expect that these differences between women will be especially intense in areas of reproduction that are so deeply and personally experienced.

I also don't mean to sound overly optimistic about the Irish trilogy. Whether the Irish experiences have any importance for any other culture is problematical. Africa, Asia, and Latin America each present vastly different cultures and issues. I suspect, however, that Ireland takes its Roman Catholic religion as seriously as any other theocracy. Ireland is certainly very poor by European standards, and is still engaged in an internal struggle against what many Irish view as colonialism.

Whether the changes within Ireland have a broader impact on the status of women within also remains to be seen. Yet I do think it is worth spending some effort to tell this Irish story, and to see if clues about shifting power relations can be gleaned.

The idea of transformative notions of human rights is ultimately an effort to breathe some life into what are too often cold and bloodless legal concepts. It is an attempt to recognize that liberty is won

76. See Bunch, supra note 1, at 976.
77. See Engle, supra note 67, at 1513.
78. Bunch, supra note 1, at 971.
through struggle, not generally handed down in court opinions. The transformations come through engaging at the local level, I believe, with an eye toward the international doctrines and institutions, but with a clear understanding that it is ultimately through cultural transformation that the status of women must improve.