Some Unsolicited Advice to My Women Friends in Eastern Europe

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I. INTRODUCTION

During the past two years, I have travelled to Eastern Europe half a dozen times with delegations of lawyers and jurists trying to help those fledgling post-Revolution democracies draft new constitutions, restructure judiciaries, and expand human rights. Frankly, I am worried that the women of these countries will miss this splendid opportunity to make things significantly better for themselves and their daughters. I am also worried that early disillusionment with the turmoil and hardships of forging democratic governments in the midst of daily power outages, food shortages, and intolerable unemployment rates will result in a withdrawal of their essential support for democratic reforms.

A survey¹ conducted in late 1991 of 13,000 Europeans, including Eastern and Western Europeans of both sexes, revealed "a profound gender gap in attitudes toward democracy and the change to a market economy."² More specifically, "in [every] eastern nation surveyed . . . women showed less support for democracy" than men.³ The women consistently rated economic and social welfare needs above political freedoms.⁴ Their hopes of the future focused on personal happiness and fulfillment for basic needs rather than enhanced political freedoms.⁵ They idealized a marriage in which the husband would provide for the family and the wife would stay home.⁶ Most disturbingly, women lacked enthusiasm about the prospects for change, as evidenced by their rapid loss of interest in post-Revolution politics.⁷ In several countries, fewer women ran for office in the new democratic elections than had run in the old one-party Socialist elections. Also, predictably, both men and women thought that, in all Eastern European countries, men had a better life than women.⁸ Worse still, neither men nor women believed that women's legal or social rights would significantly improve under the new

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² Id. at 13.
³ Id.
⁴ Id.
⁵ Id. at 156, 193.
⁶ Id. at 33.
⁷ Id. at 30-31.
⁸ Id. at 33.
This information should not surprise us, but it should concern us. The Eastern European countries must stick with democracy-building, and the women, no less than the men, must contribute to this arduous effort. No democracy is worth its salt if its women do not honestly believe they can attain lives equally as good as its men. In this spirit, I offer these countries—and the U.S. as well—some unsolicited advice on how to strike now for equality and improvement before the ink is dry on the basic charters and fundamental laws of these new nations. Presumptuous though it may be, this advice grows out of the history, some parts good, some not so good, of American women's two-century struggle for the same goal.

II. THE CONTENT OF THEIR CONSTITUTIONS

Let us first consider the proposed constitutions of these countries. Many, though not all, of the new drafts contain a provision guaranteeing that no individual will be discriminated against on the basis of sex, race, nationality, religion, etc. In this respect, the Eastern Europeans have already improved on our original effort at drafting a constitution. Women were not even acknowledged in our own Constitution. Abigail Adams' plea to her husband John to "[r]emember the ladies" fell on deaf ears. Throughout the 19th century, American women had no right to vote, to hold office, or to serve on juries. Married women could not even make contracts or own property. Even after the Civil War, and the 14th Amendment's assurances to all citizens of due process and equal protection, only male citizens were guaranteed voting rights. Women, who had worked alongside abolitionists to ratify the 13th, 14th and 15th Amendments, were told to wait. Their time had not yet come. It took 50 more years for women to secure their right to vote through the 19th Amendment, which was finally ratified in 1920.

Presently, more than 70 years after ratification of the 19th Amendment, Americans are just beginning to tease from the Equal Protection and Due Process Clauses exactly which kinds of discrimination are prohibited on the basis of gender. Indeed, right now, that same Equal Protection Clause is invoked by men to challenge what they regard as preferential treatment for women, in hiring, promotions, maternity leaves, or extended insurance protection for pregnancy-related medical needs.

A. UNENFORCEABLE RIGHTS

My sense from the public-opinion survey and from personal conversations I have had with Eastern European women is that they wish to preserve some of the affirmative benefits and protections that they enjoyed, at least in the-

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9. Id.
ory, under the prior legal regime. Thus, we see recurrent references to so-called positive or "aspirational" rights in the new constitutions. For example, the Lithuanian Constitution proclaims that "the State shall take care of families bringing up children, and shall render them support . . . in the manner established by law."12 This includes requiring the state to provide "old age and disability pension, social assistance in the event of unemployment, sickness, widowhood, loss of breadwinner, and other cases provided by law."13 Another provision requires that "[f]amily, motherhood, fatherhood, and childhood shall be in the special care of society and the State."14 Finally, the Constitution provides that "every person shall have the right . . . to adequate, safe and healthy working conditions, adequate compensation for work, and social security in the event of unemployment"15 and shall have "the right to rest, leisure and annual paid vacations."16 Albania's draft Constitution similarly provides that "mother and child are entitled to special care and protection in accordance with law"17 and, specifically, "a mother enjoys the right to paid leave from work before and after childbirth."18

Americans are uncomfortable with this kind of language in constitutions. Eminent scholars objected to such language, believing that these positive or aspirational rights could not possibly be judicially enforceable. These scholars further argue that aspirational rights represent a holdover of the Soviet practice of using constitutions as places to declare meaningless aspirations rather than to delineate enforceable rights. Because these provisions can have no practical effect, they will breed cynicism and disrespect for new constitutions, just as they did under Soviet rule. Additionally, these scholars argue, civil rights that can be judicially enforced tend to be weakened when included alongside judicially unenforceable rights.19

Although this may be the majority view in the West, it is not necessarily right for Eastern Europeans, men or women. As Professor Herman Schwartz points out, such aspirational rights are common in post-World War II constitutions, including those of France, Japan and Switzerland, as well as in the constitutions of many states of the United States.20 Moreover,

12. Lithuanian Const., art. 39.
13. Id. art. 52.
14. Id. art. 38.
15. Id. art. 48.
16. Id. art. 49.
18. Id. The Polish and Ukraine draft constitutions as well as the Bulgarian Constitution adopted in 1991 have similar provisions. See Bulgarian Const., arts. 43-47. The right to a "sound environment" is found in the new Hungarian and Romanian Constitutions.
the International Covenant on Economic, Social and Cultural Rights,\(^{21}\) recognizes the legitimacy of aspirational constitutional standards as long as the Constitution acknowledges that the rights are to be realized "progressively"\(^{22}\) and consistent with "available resources."\(^{23}\) Enshrining positive aims for government in a nation's charter need not denigrate the charter's worth. Indeed, under the evolving jurisprudence of the European Economic Community, of which most countries of Eastern Europe hope one day to be members, fundamental rights of the Community may be derived in part from principles common to the constitutions of the Member States.\(^{24}\)

I hope that Eastern European women will not be afraid to ask for the positive guarantees about which they feel so strongly, even if these rights are not immediately or fully enforceable in their courts. I would, however, caution them to choose carefully, highlighting only the affirmative rights of highest priority which they believe essential to the well being of themselves and their families. Specifically, they should ask for inclusion of a statement that the inclusion of these aspirational rights will not invoke negative inferences about the enforceability of other basic guarantees to nondiscriminatory treatment under the law, which must be immediately enforceable. They must be concerned, too, about gender equity as well as gender equality\(^{25}\)— which guarantees should adhere to both men and women, and which can be justified for women alone. That kind of differentiation demands involvement, parsing, and priority-setting on their part, but the effort will be a worthwhile one. It may well be a positive benefit to include in a country's basic laws, for all to see, the economical and social minima that its Founders, both men and women, deem necessary for a decent family life. Our own history in America illustrates too well the uphill battle women must wage to attain real as well as formal equality.

### B. Formal v. Real Equality

Most of you are familiar with the tension in the women's rights movement in the United States between those who believe that equal treatment is all that women require and those who believe that biological or socially imposed differences require special legal treatment to allow women to live lives as fulfilling as those of men.\(^{26}\) The first "pure equality" group points to a discouraging history of special legislation that was enacted to protect women from long hours or dangerous working conditions with the disastrous result of excluding them from the best paying jobs. Only recently, our Supreme

\(^{22}\) Id. art. 2, ¶1.  
\(^{23}\) Id.  
\(^{25}\) See supra notes 19-21 and accompanying text.  
Court decided in *United Autoworkers v. Johnson Controls*\(^{27}\) that under Title VII of the Civil Rights Act of 1964, which legislates equality in working conditions except when the employee's gender is a bona fide occupational qualification, women cannot be barred from jobs on the ground that working conditions may endanger their ability to reproduce healthy offspring. Women's groups that applaud the *Johnson Controls* decision often oppose other job protection policies for women as well, including child care leave or pregnancy-"disability" insurance, if they are not equally available to men.

Another group of women, however, believes that the way to secure gender equality in the long run is to be sensitive to the special needs of women, especially working women, in the short run. Their immediate focus is on lightening the load on working mothers in low-paying jobs who inordinately bear the burden of child care and who need maternity and child care leaves even if such benefits are not equally available to men.\(^{28}\)

One American feminist writer concludes the test should be "whether legal recognition of sex-based differences is more likely to reduce or reinforce sex-based disparities in political power, social status and economic diversity."\(^{29}\) That is a complex and subtle criterion for choosing among rights, although probably the correct one. American women have found over the last 25 years that being treated just like men has not in any real sense made them equal members of society. As another writer points out, "[w]hile the equal rights approach has helped women gain access to existing institutions, it has not helped change the institutions themselves."\(^{30}\)

Workplaces and career patterns in our country, as well as in Eastern Europe, have traditionally been structured for men with wives at home. Therefore, they make little or no allowance for pregnancy or child care, and they typically demand the most from workers of both genders during their prime child-rearing years. Equal treatment is neither the issue nor the answer here; the creation of a workplace that can accommodate parenting is what women and men need.

But, as numerous studies have shown,\(^{31}\) it is the women in our country who work two shifts—one at the office or factory, the other at home—and

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\(^{28}\) *See* Jana Singer, "*Women's Work,*" *Phil. & Pub. Pol'y* 1-2 (Winter 1991) (over past two decades, number of families maintained by single women has increased tenfold; 25% of all births, and 50% of births to women of color are to unmarried women; in 90% of single-parent households (one-fourth of all American households) the parent is a woman; one-half of all female-maintained families fall below the poverty line); Dana Priest, *Major Changes Seen in Female Labor Force,* *Wash. Post,* Mar. 25, 1992, at A21 (GAO study shows 60% of women with young children work); Douglas J. Besharov, *Beyond Murphy Brown,* *Wash. Post,* Sept. 27, 1992, at C3 (children of never-married mothers three times more likely to be on welfare than children of divorced mothers).


\(^{30}\) *Okin* note 29, at 557.

\(^{31}\) *See* Singer, *supra* note 28, at 3 (research confirms economic effects or any hiatus in employment are substantial and longstanding); Arlie Hochschild, *The Second Shift* (Avon 1991); *No Stay, No Pay,* *Working Woman,* Apr. 1992, at 21 (study shows women who take time off from work, even six months, make less than their peers 20 years later).
this is even truer in Eastern Europe. When conflicts arise with parenting duties, the mothers are the ones who take time off, because their jobs typically pay less. Due to the fact that their work is so frequently interrupted, their upward mobility is stymied. The pattern works in a vicious circle over the long haul to disadvantage women in the labor market. Although such institutional discrimination may not be illegal, it is nonetheless real and devastating.

Eastern European women should urge that their new constitutions and laws provide for guarantees of parental (even just maternal) leaves and child support, where needed. Even if Eastern European women prefer a marriage in which a wife stays home, they are no strangers to divorce. In our country, the divorced homemaker has traditionally fared poorly. The husband normally has no responsibility to continue to share earnings even though the wife's maintenance of the household during the marriage has made his earnings possible and hers impossible. Her post-marriage disadvantage in the labor market can even prejudice her custody rights.

Over fifty percent of women in the United States with children under one year of age work outside the home and sixty percent work during pregnancy. Still, after thirty years of a politically active women's movement, we have not yet made the careers of mothers and fathers anywhere near comparable. Only a bare majority of states require private employers of any size to provide unpaid parental or maternal leave, with reinstatement guarantees (a few other states require some unpaid maternity leave), and President Bush vetoed a national family leave bill near the end of his term of office. Our Supreme Court has decided that women of childbearing age

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32. See, e.g., Donna Harsonyi, Women in Romania (1992) (unpublished manuscript, on file with author) (under Communist regime, women had to be wage earners for the State to merit approval; great majority held jobs outside home in lower paid "women's" jobs while continuing primary responsibility for home and child care; compulsory gynecological examinations and strict anti-abortion and anti-contraception laws were added under Ceausescu's regime; divorced women were discriminated against in workplace; low involvement of women in post-Revolution politics is response to previous forced and manipulated involvement).

33. Singer, supra note 28, at 4; see also Mary Rowland, Strategies for Stay-at-Home Moms, N.Y. TIMES, Aug. 23, 1992, at C16 (average American marriage lasts nine years; of marriages ending in death, woman is left alone in 70% of cases).


36. Paul Taylor, The Family-Friendly Private Sector, WASH. POST, Apr. 27, 1992, at A19 (federal government lags behind private sector in flexible personnel policies). See also Frank Swoboda, Family Issues Make Slow Progress in Labor Contracts, WASH. POST, Apr. 5, 1992, at H2 (formal inclusion of family-related provisions in labor contracts is low; only 207 in sample of 452 had any provision for maternity leave, family illness leave, or child care); If Women Ran America, LIFE, May 1992, at 36, 44 (only three percent of nation's businesses offer day care help); Kenneth J. Cooper and Helen Dewar, Bush Vetoed Family Leave Bill, WASH. POST,
cannot be barred from higher paying jobs that may endanger the fetus, but no one has decreed that the workplace must be free of such dangers for all workers.

Finally, I would like to say a brief word on the subject of affirmative action for women. I hope the Eastern Europeans do not prohibit it outright in their constitutions, although I know they are receiving advice from some American quarters to do just that. In our country, sex segregation by occupation is extensive, pervasive, and seemingly intractable. Inroads must be made and maintained in occupations that are segregated de facto at least long enough to allow significant numbers of women to try their hands at such jobs. Industries and enterprises with entrenched histories of hiring only men will not change these practices in response to laws limited to protecting individuals from intentional discrimination. Individual merit is, in the end, a social conclusion, influenced substantially by conventional stereotypes and past traditions and patterns. In many cases, only affirmative preferences can bring the situation back into equilibrium so that individual merit based on nongender criteria can prevail over the long run.

It is possible that the Eastern European constitutions and basic laws can advance women's rights ahead of our own. It is possible that they can capitalize on our checkered experience with “pure equality” and move beyond it by acknowledging the dual role of women in a way that successfully integrates the workplace and the home. That is what women are still struggling for in America. At a time when national values are being articulated in new constitutions, charters, and Bills of Rights, Eastern European women have an unparalleled opportunity to define and defend those things they want most and can reasonably expect from their leaders. They have a once-in-a-lifetime chance to contribute meaningfully to the creation of that better future about which they now appear to be so pessimistic.

III. HORIZONTAL DIVISIONS OF AUTHORITY: LEGISLATURES AND COURTS

When I visited Eastern Europe, I did so as a judge, usually as part of an international team stressing the indispensability of an independent judiciary in a democratic government. Eastern Europe's recent experience with the
judiciary has been unfortunate. While judges may have acted fairly with regard to nonideological cases, in cases where the ruling party had an interest, they were frequently subjected to what people called "telephone justice;" the judge received a call from a party official on the eve of trial indicating which way she should decide the case. In country after country, I have been struck by how many judges are women—a much higher percentage than in the United States. I learned early, however, that because judges were poorly paid and held in low esteem, women lawyers fresh from law school were channeled into the judiciary while their male peers were steered into more profitable and prestigious jobs in state enterprises and even burgeoning new private enterprises.

Currently, however, most of these countries are trying to improve the prestige of their judiciaries through new constitutions and judicial restructuring laws. Judges are to be appointed for longer terms or even for life; they are to be removable only for cause and only by the assent of the parliament or both the executive and parliament; and they are to be barred from active politics, including party membership. The courts under the new constitutions have also been given expanded powers, although in most of the countries, the power to invalidate executive and legislative acts rests only in one constitutional court rather than as in our country in all courts. In the United States, courts are credited with playing an important role in defining the constitutional rights implicit in our Due Process and Equal Protection Clauses against gender-based discrimination. In Eastern Europe, the prospect of assigning greater power to a judiciary in which women are already well-represented is an encouraging sign for the development and expansion of women's rights.

However, candor compels the concession that the judicial route to equality for women in the United States has been neither fast nor straight. The small victories women gained during the 19th century and the first half of the 20th century came from legislatures, not courts. In fact, until recent years, the judiciary relentlessly struck down women's efforts to squeeze equal treatment from the Constitution, even after the 14th Amendment was passed to afford its protection to blacks as well as whites. When the Supreme Court declared that the Privileges and Immunities Clause did not cover a woman's rights to practice a profession, it was the state legislatures that began, slowly, to enact such rights. It was Congress that ultimately had to compel by law the admission of women to the Supreme Court bar.

41. LITHUANIAN CONST., art. 102 (constitutional questions must be certified to constitutional court); art. 113 (ban on political activity by judge); art. 115 (dismissal of judge whose "behavior discredits their position of judge"). But see LITHUANIAN COURT LAW (Draft May 1992), art. 26 (judge's term is five years; women judges must retire at the age of 60, men judges at 65).
42. See Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873).
ter the Court decided that the 14th Amendment did not guarantee women the right to vote, it took backbreaking campaigns, parades, starvation vigils, pamphleteering, and demonstrations finally to pass the 19th Amendment.

Protective laws assuring minimum wages or maximum hours were initially seen by social reformers as helpful to poor women trying to earn a living while they took care of children. These laws were later assailed, however, by some women’s groups for singling out women for special treatment and thereby relegating them to a perpetually lower employment track. Courts initially struck them down under a freedom of contract theory but later upheld them on the mischievous ground that they were justified by a woman’s “physical structure and a proper discharge of her maternal functions.” Neither rationale was particularly helpful to the quest for equality in the workplace. As late as 1923, the Supreme Court overturned a minimum wage law for women in the District of Columbia, with Justice Oliver Wendell Holmes dissenting on the grounds that it would take “more than the Nineteenth Amendment to convince me that there are no differences between men and women, or that legislation cannot take those differences into account.”

In the 1960s and 1970s, a newly energized women’s movement, spearheaded by organizations like the National Organization for Women and the Women’s Political Action Caucus, returned to the courts for another try at securing a constitutional foundation for equal treatment. This time the focus was on the Due Process and the Equal Protection Clauses. The Equal Rights Amendment, which had reemerged in 1972 after languishing in Congress since 1923, failed finally at the end of the decade to obtain approval by the necessary three-fourths of the state legislatures. Women advocates in court concentrated on exposing the stereotypes and assumptions, however benevolent, that underlay gender-based laws. Originally, they argued that women should be recognized as a suspect class, like blacks and other minorities, which would mean that the law could treat them differently only if the government had a compelling justification to do so. The Court never adopted the “strict scrutiny” standard for women but chose, instead,

46. For example, concern about “protectionist” laws prompted the American Civil Liberties Union, the League of Women Voters, and the National Organization of Women to File amicus curiae briefs in California Fed. Sav. & Loan v. Guerra, 479 U.S. 272 (1987), urging reversal of a California statute that provided leaves for pregnancy, but not for other temporary disabilities. Advocates of women’s equality were divided on this issue, as Planned Parenthood Federation of America, the Coalition for Reproductive Equality in the Workplace, and Equal Rights Advocates filed briefs urging affirmance of the law. For a useful discussion of these differing approaches, which reflect the debate about equality of treatment or equality of opportunity, see Christine A. Littleton, Reconstructing Sexual Equality, 75 CAL. L. REV. 1279, 1295-99 (1987).
47. The best-known freedom of contract case is, of course, Lochner v. New York, 198 U.S. 45 (1905), which dealt with maximum workday protection for men and women.
an intermediate level of scrutiny for gender-based classifications.\(^50\) Under this level of scrutiny, classifications by gender "must serve important governmental objectives and must be substantially related to achievement of these objectives."\(^51\) Using this standard, the Court struck down laws that allowed eighteen-year-old women, but not men, to buy beer,\(^52\) laws that compelled a preference for men over equally qualified women in selecting the administrator of a deceased's estate,\(^53\) and laws that required married women in the armed forces to prove that they provided over one-half the family income before they could obtain increased health benefits, while married men automatically received the additional benefits without having to prove anything.\(^54\) This same level of scrutiny, however, led the Court to uphold laws that provided a widows-only tax exemption,\(^55\) laws that authorized funds to register only men in the selective service,\(^56\) and laws that imposed a criminal sanction on men for engaging in sexual intercourse with underage women but not on women with underage men, reasoning that women already had an incentive to avoid getting pregnant and so, therefore, did not require the additional deterrent of a criminal sanction.\(^57\)

During this same period, women in America were exercising newly-discovered political power and demanding inclusion in the civil rights coalition so that they could pass legislation affirmatively protecting them from discrimination in employment, trade, housing, and education. Ironically, what began as a cruel hoax on women in 1964 turned out to be their salvation. While Congress was considering Title VII of the Civil Rights Act of 1964, proposing to guarantee to all races and religions equal rights to employment by both public and private employers, Congressman Howard Smith of Virginia proposed to amend the bill to include women, thereby hoping to create so much controversy that the entire bill would be defeated.\(^58\) Instead, a frantic, last-minute effort by women and by some, though not all, civil rights leaders succeeded in passing the law with the amendment tacked onto it. Quantitatively, I think it is fair to say that women have benefitted more from that legislation and from its implementation than they have from all of the sporadic applications by the courts of the constitutional equal protection doctrine.

Actually, there has been a continual dialogue over the past several decades between Congress and the federal courts concerning women's rights in the United States. Even after Title VII was passed barring gender discrimination in the workplace, courts have had to define its scope in cases such as

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51. Id. at 197.
52. Id.
Meritor Savings Bank v. Vinson\textsuperscript{59} where the Court held that a hostile work environment, created by sexual harassment, violated Title VII.\textsuperscript{60} And when the Supreme Court rejected a woman's right under either the Constitution\textsuperscript{61} or under Title VII\textsuperscript{62} to medical insurance benefits for pregnancy-related disabilities even when benefits were provided for other disabilities, Congress responded to pressure from women and passed the Pregnancy Discrimination Act of 1978,\textsuperscript{63} forbidding employers that provide medical disability benefits from denying pregnancy and childbirth-related disability benefits to women.

After Congress passed the Equal Pay Act of 1963,\textsuperscript{64} on the other hand, courts narrowly construed it to include only differential pay rates for exactly the same jobs. They have refused to extend the Act to jobs of "comparable worth."\textsuperscript{65} The result is that here, as in Eastern Europe, the vast majority of women work in sex-segregated occupations and in general earn lower pay than men. In the United States, women earn about seventy cents to a man's dollar, only a dime more than when the Equal Pay Act was passed thirty years ago.\textsuperscript{66} The phenomenon is the same worldwide—jobs in which women predominate are automatically downgraded, whether at teaching, nursing, child care, or, in Eastern Europe, judging.

And so the dance continues, even to the present day. In a "separation of powers" government, women must press their causes in different fora. While the 1960s and 1970s signalled advances in the courts for women and minorities, the 1980s saw retrenchment. The 1988-89 Supreme Court Term ushered in a virtual counterrevolution in civil rights law. The Court held that the plaintiffs had the burden of demonstrating specifically how certain hiring practices led to a significantly disparate impact on minority employment.\textsuperscript{67} It held that aggrieved white men can challenge racial consent decrees long after they have been implemented despite their failure to intervene in a timely fashion.\textsuperscript{68} It held that when challenging a seniority system, the statute of limitations begins to run when the system is first adopted rather than when the disparate impact on women is actually felt.\textsuperscript{69} Also, despite a virtually unanimous parade of lower courts having interpreted § 1981 of the Civil Rights Act of 1866 as outlawing racial discrimination at any time during a contractual relationship, the Supreme Court held that § 1981 applies

\begin{thebibliography}{99}
\bibitem{59}477 U.S. 57 (1986).
\bibitem{60}Id.
\bibitem{64}Pub. L. No. 88-38, 77 Stat. 56 (codified at 29 U.S.C. § 206(d) (1963)).
\bibitem{65}See, e.g., American Nurses Ass'n v. Illinois, 783 F.2d 716 (7th Cir. 1986); American Fed'n of State, County & Mun. Employees (AFSCME) v. Washington, 770 F.2d 1401 (9th Cir. 1985).
\bibitem{67}Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).
\end{thebibliography}
only to discrimination at the time of the formation of the contract, and not to harassment or discrimination which occurs during the execution or termination of the contract. Just last year, after a bitter fight with the executive branch, Congress finally enacted the Civil Rights Act of 1991, a compromise bill which modified or overruled many of these recent Supreme Court decisions.

Based on this experience, my message to women in Eastern Europe is to avoid putting all of your eggs (and your hopes) in one basket or in one branch of government. There are periods when courts are receptive to enforcing declarations of fundamental values or rights in constitutions and charters. This was so in the 1960s and 1970s for American women. But even then, our courts were willing to interpret the Constitution as guaranteeing equal rights for women only in the "easy cases" where laws treated men and women differently based on archaic notions of women's roles. Where real physical or biological differences actually did exist, such as in the pregnancy-benefit cases, courts have been unwilling to move beyond the simple concept of treating similar cases alike to a notion of equality that is sensitive to issues of dominance and powerlessness. In thirteen out of twenty-five gender discrimination cases decided by the Supreme Court since 1971, the Court struck down laws as gender discriminatory. Out of those thirteen cases, eight were brought by men challenging benefits which only women received. In twelve cases, the Court upheld the laws against the equal protection challenge.

75. These were Hogan, Wengler, Caban, Orr, Goldfarb, Kahn and Stanley, supra note 74.
In America women have learned that courts, like legislatures, go through political and ideological phases. Women in the past have gone to court to have gender-based discriminatory laws overruled. Now they look to Congress to overrule court decisions that have interpreted past legislative attempts to advance their rights too restrictively. The courts, in turn, are now used by those seeking to attack legislation benefitting women, such as maternity leave, job guarantees and affirmative-hiring programs.

Long after the new constitutions and laws have been passed, Eastern European women will have to stay active in politics and in their parliaments to monitor their rights. An independent judiciary, even one with constitutional power to invalidate discriminatory laws and executive acts, will never be enough. The process of advancing women's place in society is a continuing one, and it must be vigilantly monitored in both the courts and legislatures. For this monitoring to be effective, women must be prominently placed in both branches. In America women have learned that hard lesson only belatedly.

IV. VERTICAL DIVISIONS OF AUTHORITY: FEDERALISM

The United States is a federal government. This is true of some, but by no means all, Eastern European countries. In the history of our women's rights movement, federalism has been profoundly important. Women won the right to vote in seventeen states before a constitutional amendment made this a national right. Protection for women workers in the early part of the century was a product of state legislation, as were the laws which the Supreme Court struck down in the sixties and seventies that excluded women from various activities. Our federalist scheme generally allows state laws to go beyond the federal minimum in protecting women's rights as long limited to men); Parham v. Hughes, 441 U.S. 347 (1979) (unmarried father unable to sue for wrongful death of his illegitimate child); Quillio v. Walcott, 434 U.S. 246 (1978) (unmarried father unable to veto adoption of illegitimate child); Fiallo v. Bell, 430 U.S. 787 (1977) (immigration preference for mothers of illegitimate children); Vorchheimer v. School District of Philadelphia, 430 U.S. 703 (1977) (public high school restricted to male students) (affirmed without opinion); Califano v. Webster, 430 U.S. 313 (1977) (advantage to women in calculating pensions); Schlesinger v. Ballard, 419 U.S. 498 (1975) (women naval officers allowed longer time in rank); Geduldig v. Aiello, 417 U.S. 484 (1974) (exclusion of pregnancy from disability plan); Kahn v. Shevin, 416 U.S. 371 (1974) (automatic tax exemption restricted to widows).

77. Until recently, Eastern European parliaments had the largest number of women members (29% compared to 10% worldwide). Marianne Howe, Sex Discrimination Persists, U.N. Says, N.Y. TIMES (int'l ed.), June 16, 1991, at A7. According to one feminist spokesperson, "once you hit twenty to thirty percent women in a state legislature—or in a European parliament—they have a much greater likelihood of reaching across party lines on issues that affect women differently. There is a certain consciousness as a subgroup, a higher feeling of support and clout." Patricia Ireland, NOW President, quoted in If Women Ran America, supra note 36, at 46. See also Marlise Somers, Amsterdam Journal, Women Jump Into Politics, Making Quite a Splash, N.Y. TIMES, Sept. 18, 1992, at A4 (one-third of Dutch Parliament is women; women's parties exist in Holland, Sweden, Belgium, Ireland, and Spain; Dutch women seek flexible working hours; child care, and protection from spousal abuse). James F. Clarity, Irishwomen on the March, to Seats in Parliament, WASH. POST, Nov. 30, 1992, at A4 (women hold twenty seats in Irish Parliament, half again as many as ever before).

as they do not violate constitutional norms and are not preempted by federal laws.\textsuperscript{79} In fact, the only real progress in mandating equal pay for jobs of “comparable worth” has come at the state level.\textsuperscript{80} Our history demonstrates that both horizontally, between Congress and federal courts, and vertically, between the federal and state systems, women have benefitted from having more than one place to go to address their grievances.

Currently, many of our state supreme courts are more hospitable towards women’s concerns than are our federal courts, and some have struck down as contrary to state constitutions laws that would probably have passed muster under federal standards. Actually, many of our state constitutions tend to be more like the European versions—long, detailed and aspirational.\textsuperscript{81} In general, states still serve as useful laboratories in which to experiment with new levels of protection and new means to address women’s needs. And when the states act in violation of national constitutional rights or federal laws, women can seek redress in the federal courts or through new federal legislation.

Professor Judith Resnik, argues, however, that the vertical allocation of power and jurisdiction between the national government and the states in our federal system too closely reflects the dichotomy between public and private spheres that women have fought so hard to remove from our legal system.\textsuperscript{82} The public areas of commerce and work have traditionally been reserved for men, while the private areas of home and personal relationships are the domain of women. The laws governing the public sphere of commerce are similarly considered to be more significant than the laws governing the private sphere of family. This hierarchy, Resnik says, has been carried over into the structure of our federal system. Thus, laws governing marriage, custody, divorce, child support, and even rape and sexual assault—so-called domestic or family laws—lie within the province of the states. Except for employment discrimination and abortion, the federal courts and Congress are expected to stay out of these areas. For instance, presently in Congress, a debate rages over the proposed Violence Against Women Act\textsuperscript{83} which would, among other things, provide a federal civil rights remedy for a victim of a “crime of violence motivated by gender” in the same way that existing law “federalizes” similar crimes based upon race.\textsuperscript{84} The Judicial Conference, the governing body of our federal judges,


\textsuperscript{80} See, e.g., MINN. STAT. §§ 181.66 -.71 (1984).


has recommended against enactment because it would “embroil the federal
courts in domestic relations disputes” and “flood [the federal courts] with
cases that have been traditionally within the province of the state courts.”
The Chief Justice of the United States Supreme Court urged Congress to
insure that the federal courts are “reserved for issues where important na-
tional interests predominate.”

Federal courts also declared a “domestic relations” exception to the diver-
sity jurisdiction that would otherwise require them to hear divorce, alimony,
or child custody cases involving citizens from different states. Our
Supreme Court has refused to find a state agency liable, for example, under
§ 1983 of the federal civil rights laws when the agency negligently stood by
while an abusive father beat his four year old into hopeless disability.
Likewise, the Court held that a state agency was not liable when the agency
failed to live up to its legislative obligation to make “reasonable efforts” to
return children to their own homes prior to placing them into foster care.

Few women judges sit on either the federal bench or the state benches in the
United States. Only about seven and a half percent of federal judges, sixteen
percent of federal magistrates, and five percent of administrative law judges
are women; the number of women on state court benches is about the
same. This “acute occupational segregation” has caused one surveyor to
observe that “many members of the Article III judiciary could sit on panels with
other judges, sit with other judges at lunch, ride judges’ elevators and
never or rarely see a woman judge.”

Yet there can be little doubt that despite this self-imposed abstention from
the private sphere of domestic relations, federal legislation and court deci-
sions have significantly affected American women’s well-being over the
years. There are, for instance, criminal sanctions for transporting women in
interstate commerce for immoral purposes, and for rape on military ba-
ses or on Indian reservations. The Supreme Court has constitutionalized
areas of family law by establishing standards of proof for terminating parental rights, setting limits on statutes of limitation for bringing paternity suits, prohibiting bans on interracial marriages, and prohibiting ordinances seeking to limit housing occupancy only to traditionally-constituted families. These decisions have carved out a general constitutional right to privacy in the family relationship. Federal regulations also require one state to give full faith and credit to another state’s divorce and custody decrees. Tax and social security laws regulate eligibility for survivor, spousal, or household benefits, welfare or food stamp privileges, and pensions. Sixty percent of social security beneficiaries are women. Women’s benefits are typically lower than men’s because, during most of their lives, women were either dependent on their husbands or had low-paying or less than full-time jobs. Women are also the prime beneficiaries under the Aid to Families with Dependent Children program, and these benefits are similarly lower than unemployment benefits that go to both sexes. Even federal bankruptcy laws affect women and children through their administration and control of jointly-owned assets. Immigration law requires federal courts to decide whether a woman has been abused so as not to require her signature on a joint application for citizenship. Federal judges, in the final analysis, do decide many issues that affect the family, even though they have been reluctant to acknowledge the depth of their involvement in family-related issues.

There is, of course, no a priori reason that family law must be reserved for the local government in a federal system. In some federated states, family law is the province of the national government. The lesson our history teaches is that women and their families are still presumed not to be significant enough “national interests” of the United States to merit federal consideration except through the side entrance and on an ad hoc basis.

According to critics of the status quo, our women must work harder to have their issues considered significant enough to be part of the legitimate concern of federal courts. Professor Judith Resnik says:

Because the federal courts claim to be and are understood as the place in which the national agenda is debated and enforced, women must insist that our presence be recorded and that we not be summarily sent elsewhere. The “law of the federal courts” needs to be rewritten to take our presence into account and to examine, critically, what kinds of family law decisions federal courts do and should make, how authority over family life is and should be shared among court systems, and whether both court systems should respond to violence against

101. Resnik, supra note 82, at 1723-25.
103. Resnik, supra note 82, at 1727-29.
I agree also with Professor Resnik that we need a dialogue in which state and federal judges working on the same problems from differing perspectives enhance the development and coherence of the legal norms, federal and local, that undergird family law. Having said that, abortion law in the United States is perhaps the best, or the worst, example of shared state and federal jurisdiction over an area of paramount concern to women. Until the 1973 Roe v. Wade decision, abortion was considered to be a purely local matter. In thirty-two states, it was a criminal offense to perform an abortion. In Roe, the Supreme Court said that a woman, in consultation with her doctor, had a constitutional right to make her own choice about abortion during the first trimester of pregnancy, and after that, the state could regulate the availability of abortion on grounds reasonably related to the mother’s health. According to the Court, the state could pass regulations to protect the baby’s well-being during the final trimester—the point of the fetus’s viability. Before Roe, about one million illegal abortions a year were performed. Abortion reform was proceeding, albeit slowly, state by state. In the two years following Roe, thirty-two states passed laws regulating abortion during the second trimester. These laws were aimed at such matters as where the abortions could be performed, who had to be notified, whether waiting periods could be imposed, whether women could be required to receive lectures or information before having an abortion, and what records had to be kept by the facility. Between 1973 and 1991, the Supreme Court ruled sixteen times on the constitutionality of these requirements, upholding many and striking down others as unreasonable burdens on the exercise of the fundamental right recognized in Roe v. Wade. Over the years, an increasingly conservative Court upheld both state and federal prohibitions on public funding for abortion and approved the requirement of parental or judicial consent for an abortion performed on a minor. By 1988, twenty-five states had parental notice and consent laws. In 1991, the Court upheld federal regulations that prohibited doctors or health personnel in federally-funded hospitals from even telling women of the availability of abortion elsewhere. This past Term the Court upheld still more

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105. Resnik, supra note 82, at 1699.
106. Id. at 1757-78.
108. Id. at 118 n.2.
109. Id. at 164-65.
110. See MEZEY, supra note 39, at 213 (citing HYMAN RODMAN ET AL., THE ABORTION QUESTION 23 (1987)).
111. MEZEY, supra note 39, at 220.
114. Abortion Laws State by State, USA TODAY, June 30, 1992, at 8A.
restrictions, including requirements that the Court formerly found unduly burdensome, such as the requirement of parental notification and consent for minors, and waiting periods and compulsory counseling.'

Until the election, many women feared that the basic constitutional right to have an abortion would be taken away altogether.117

The debate has again returned primarily to the states, although there is also a bill in Congress that would prevent states from interfering with the right to an abortion in the first trimester, and thereafter allow an abortion only to protect the life of the woman or child.118 This time, however, the fate of abortion laws may be decided not just in the state legislatures but in the state courts. Some state courts interpreting state constitutions have actually invalidated abortion restrictions that the United States Supreme Court has allowed. The state courts are not bound by interpretations of parallel federal provisions on privacy or equal protection since federal standards represent a floor, not a ceiling. Using their own mode of interpretation of their own constitutions, supreme courts in Florida, California, Massachusetts, Michigan, and New Jersey have struck down state laws restricting abortion or abortion funding;119 in other states, they have invalidated consent and notice requirements for minors seeking abortions.120

Thus, abortion policy continues to develop out of decisions made by the President, federal courts, Congress, state legislatures, and state courts.121 Although the image of a federal system entirely unresponsive to women's
concerns is not accurate, the notion lingers on that divorce, custody, and sexual violence are less significant than the usual issues of "national interest" considered by Congress and the federal courts. In those new democracies that adopt a federal structure, it is critically important that so-called "domestic law" be taken seriously. If women want their concerns to be considered a prime responsibility of the national government, they should urge that these issues be placed on the federal legislative and judicial agendas. The precise allocation of jurisdiction over family matters between state and federal governments may differ from country to country, depending on the federalist structure itself, cultural values, and history, but it should, at a minimum, be an issue confronted directly and not automatically relegated to purely local jurisdiction. Whatever the resolution of this jurisdictional issue, family concerns will be affected by national laws. Women must therefore ensure that they have a voice in both levels of the federal structure and especially in their national parliament and in their federal courts.

V. SOME INTERNATIONAL LESSONS

Like it or not, we are fast becoming one world. It would be excessively parochial to focus attention exclusively on American history. Although there are valuable lessons to be learned from the experience of American women, the women of Eastern Europe should also examine the roles women have played (or have not played) in shaping the agendas of international institutions and the laws of transnational legal systems.

A. WOMEN AND INTERNATIONAL LAW

A few months ago, the New York Times reported in a brief article buried in the middle of the second section that a coalition of women's groups around the world had presented a petition, bearing 75,000 signatures and a few thumbprints from seventy eight countries, asking that women's rights and violence against women be included as central concerns of the 1993 World Conference on Human Rights.122 "We demand," they said, "that gender violence, a universal phenomenon which takes many forms across culture, race and class be recognized as a violation of human rights requiring immediate action."123

123. Id. See also Jane Perlez, In Rwanda, Births Increase and the Problems Do Too, N.Y. TIMES, May 31, 1992, at A1 (World Bank says better education for women would be decisive in reducing poverty; lower status of women contributes to increased population which results in overuse of land and therefore poorer crops); Lena H. Sun, Abduction, Sale of Chinese Women Reemerges from China's Past, WASH. POST, June 21, 1992, at A1, A28 (trade in women more profitable than farming; 65,000 arrested for trafficking in women and children in 1989-90); Nathaniel Nash, Bolivia is Helping Its Battered Wives to Stand Up, N.Y. TIMES, Mar. 30, 1992, at A4 (Indian women "trying to organize and trying to assert" legal rights against battering by husbands); Katajun Ghazi, Helping Women Raise Sights in Islamic Society, N.Y. TIMES, Mar. 14, 1992, at A2 (increasing numbers of women in Iran seeking work but running into discrimination; factories are male-segregated; women cannot file for divorce; mothers never qualify as guardians for children; minimum age for marriage is 9 years); Judy Mann, Is This What We Went to War For?, WASH. POST, Mar. 18, 1992, at C22 (Kuwaiti society shuns
Some progress on women's issues certainly has been made in the international arena. U.N. organizations, as well as the international conventions, protocols, and commissions they sponsor, have generally run ahead of national governments, including those of Eastern Europe, in recognizing the rights of women to equal treatment. The Convention on the Elimination of All Forms of Discrimination Against Women now has 110 signatories, although the United States is not one of them, and the Committee on the Elimination of Discrimination against Women was established in 1982 to monitor compliance with the Convention. Similar guarantees are included in the European Convention on Human Rights, to which all members of the European Economic Community belong.

The problem with these various international institutions, however, is that none of them has the power to grant direct relief to individuals. Except for the ultimate sanction of expulsion, these institutions have no way to bind member states to their norms of equality. They may influence national norms and lend credence to domestic reform organizations, but the political branches of each member state must agree to implement their protocols to render them effective.

Lately, international organizations that are not dedicated specifically to women's concerns have come under strong attack for their lack of sensitivity to those concerns. A recent article in the American Journal of International Law contains a compelling critique of bias against women's concerns in international law, bias the authors, all women, found implicit in the structure, processes, and norms of international law in general. Briefly summarized, the writers contend that international law generally reflects Western legal concepts, emphasizing rationality, neutrality, and objectivity of principles,

Kuwaiti women raped by Iraqi invaders; such women cannot obtain abortions; Kuwaiti women cannot vote; one-third of Kuwaiti women surveyed had been assaulted; Abuse of Women Charged in Pakistan, WASH. POST, June 21, 1992, at A30 (epidemic of police violence against women charged; 70% of women in custody subjected to physical and sexual abuse by police); World's Women Work More, Get Little Pay, Much Stress, WASH. POST, Jun. 3, 1992, at A24 (ILO reports more women work outside home than before, but their jobs are part-time and precarious and they face low pay and sexual harassment); Howe, supra note 77 (majority of world's women lag far behind men in power, wealth and opportunity; workplaces are almost always gender-segregated with women in less prestigious and lower-paid jobs; women poorly represented in ranks of power, policy, and decisionmaking); Helsinki Watch & Women's Rights Project, Hidden Victims in Post-Communist Poland (1992) (women prohibited from employment in 90 occupations deemed "detrimental to their health"; retirement age lower for women than men; family leave available only to mothers; low level of child support payments; few feminist organizations being established; 50% of Polish women work but earn 70-80% of salaries of men holding same jobs; women concentrated in lowest paying jobs; recent restrictions on abortions including proposals to criminalize abortion; high level of domestic violence against women).


and devaluing the importance of the political, economic, social, and cultural context in which its principles operate. They argue that current doctrine is not interested in how so-called "neutral principles of international law" actually affect women inside nation-states. Rarely do the norm-givers seek out the experiences of women in those states to guide their norm-making. The authors point out that, not surprisingly, women in developing nations are poorer, more powerless, and more subjugated than in developed countries. Nationalism, with its emphasis on traditional cultural roles for women, often impedes their emancipation, and anti-colonialism is too often accompanied by a visible reassertion of male dominance.

The primary subject and object of international law remains the nation-state, and women are largely excluded from the vast majority of state power elites. Women comprise only four out of 159 heads of state in United Nations Member States, they hold only three and a half percent of cabinet-level Ministries, and there are only four women representatives to the United Nations. Although the United Nations Charter places no "restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs," at the present rate, women will not reach a fifty percent level of the United Nations professional staff for three more decades. In the subject matter areas where women's interests are strongest, their paucity in numbers is especially discouraging. In the United Nations Children's Fund, for example, only four out of twenty-nine senior officials are women. There are no women among the fifty-one senior positions in the Food and Agriculture Organization, although nearly half of the food grown in the world is produced by women. In the World Health Organization, four out of forty-two senior officials are women. Similarly, while a majority of the world's refugees are women and children, in 1989, only one of the twenty-eight senior posts in the Office of the United Nations High Commissioner for Refugees was held by a woman (in 1990, the first woman High Commissioner was finally appointed). Only one woman has sat on the International Court of Justice, and that was only as a judge ad hoc in a single case. Women are under-represented even on human rights bodies and, they make up a substantial majority only on, predictably, the Committee on the Elimination of Discrimination Against Women.

The message of the numbers is that as long as men dominate bodies wielding international, as well as national, political power, priorities will be de-

127. Id. at 625-34.
128. Id. at 614.
129. Id. at 619.
130. Id. at 619-21.
131. Id. at 622 n.56 (citing U.N. DEP'T OF PUBLIC INFO., UNITED NATIONS FOCUS: WOMEN IN POLITICS: STILL THE EXCEPTION? (1989)).
132. U.N. CHARTER art. 8.
133. See Charlesworth, supra note 126, at 623.
134. See id. at 623 n.60.
135. See id. at 623 n.64.
136. See id. at 624.
Women's issues will be relegated to a subordinate position in the hierarchy. Even in areas affecting both men and women that dominate the U.N. priority list, such as poverty, economic development, and education, the special problems of women risk being ignored or even exacerbated by the "gender-neutral" application of international legal principles.

For example, the prohibition against torture is generally limited to torture used for a "political purpose," and male subjugation of women is not considered to be "political." Similarly, the neutral application of the principle that all U.N. Member States have the right "to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized" has meant that the U.N. has been loath to interfere in shaping the development policies of post-colonial regimes. We have virtually no information on how "development" has affected the condition of women in these countries. While the right of "peoples" to self-development is properly recognized, the peculiar situation of women is largely ignored. Women's work in reproduction, child care, and subsistence are part of a private sphere that is considered beyond the "production boundary" and excluded from the traditional measurements of economic development.

In sum, international law also tends to reflect the public/private dichotomy that already characterizes the distinction between men's and women's activities at the national level. International lawmakers, like their domestic counterparts, generally assume their norms and programs are gender-neutral. The reality, however, is that the impact of these norms and programs is not. The aim of many women's groups now is to "redefine the traditional scope of international law so as to acknowledge the interests of women . . . [and to] permit [its] promise of peaceful coexistence and respect for the dignity of all persons to become a reality." That goal does not sound very radical, and if the cited statistics are accurate, it is long overdue. To the extent that Eastern European women look to international organizations like the United Nations for guidance and assistance, these issues of subliminal gender bias and insensitivity must be addressed directly. Otherwise, Eastern European women are not likely to benefit significantly from their countries' participation in international organizations.

137. E.g., United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res. 39/46, 39 U.N. GAOR (No. 51), U.N. Doc. A/Res./39/46 (1985) (adopted Dec. 10, 1984) (defining torture as an act "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."). But see Charlotte Bunch, Women's Rights as Human Rights: Toward Re-Vision of Human Rights, 12 HUM. RTS. Q. 399, 490-91 (1990) (violence against women is central to maintaining "political relations . . . of power, domination and privilege between men and women . . . at home, at work, and in all public spheres").

138. United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, supra note 137.


140. See Charlesworth, supra note 126, at 640-41.

141. Id. at 645.
B. THE EUROPEAN ECONOMIC COMMUNITY

Finally, I would like to say a few words about the European Community. The EEC is less than four decades old, yet to many Europeans, both Eastern and Western, despite some recent setbacks, it represents the hope of the future. It now has twelve member countries with a total of 340 million citizens. At least eight others have requested admission, and Eastern countries such as Czechoslovakia, Poland and Hungary expect to seek full membership by the end of the decade as a means to stabilize the evolution of their political democracies and free-market economies. The European Community, however, faces staggering problems of maintaining its unity and efficiency as it grows larger and more diverse.142 The decision of the Danes to reject the recently negotiated Maastricht Treaty on European Union is evidence that the road toward greater integration will be more bumpy than many had hoped or anticipated.

Where do Eastern European women’s rights fit into all this? EEC Member States, as well as their Western allies, look to the Community to take the lead in the reconstruction of Eastern Europe. If the EEC takes the responsibility to guide the countries of Eastern Europe into a true European union, it is important to understand the kind of help that the women of Eastern Europe should reasonably expect.

Since the EEC was established in 1957 by the Treaty of Rome,143 its primary focus has been economic—to ensure the free movement of goods, services, capital, and labor throughout the Community. Member States have agreed to be bound by Community law. The principal legislative organ is the Council of Ministers, composed of representatives from each of the twelve Member States. The Council issues directives that are binding on Member States but which leave the form and method of compliance to the discretion of the national authorities. The Commission is the principal executive organ of the Community, composed of seventeen commissioners appointed by common agreement of the Member States. The commissioners are bound to neither follow nor seek instructions from their home governments.144 Although it has recently begun to assume a more important role, the European Parliament is still primarily an advisory and consultative body. Finally, the European Court of Justice has the task of interpreting the treaties of the Community and of ensuring that the laws of the Member States conform to Community law. The EEC Treaty contains no Bill of

142. See William Drozdiak, Finland Applies for EC Membership, WASH. POST, Mar. 19, 1992, at A20 (interest of former Soviet and Eastern republics raises prospect of a Community encompassing 30 states and 600 million people from the Atlantic to the Ural Mountains); William Drozdiak, New Doubts Surface Over EC Unity Plan, WASH. POST, Apr. 11, 1992, at A19; Peter Maass, EC Chided for Limiting Imports From Eastern Europe, WASH. POST, Apr. 14, 1992, at D6 (EC criticized by European Bank for limiting imports from Eastern Europe). William E. Schmidt, European Community Weighs a 10th Amendment, N.Y. TIMES, Oct. 18, 1992, at A12 (European leaders, to assure their voters, focus on interests and diversity of member states, as well as closer political and monetary cooperation).
144. Id. art. 157(2).
Rights as such, but over the past twenty five years, the Court of Justice has teased a significant body of law from various sources, including the Treaty itself, Council Directives, national constitutions, and international protocols. This body of law is binding on Member States and, in a few instances, acts directly to effect the rights of individual citizens in those states.

There are two important points to keep in mind when considering the role of the European Court of Justice in protecting and defining the rights of women. First, its rulings are necessarily tied directly or indirectly to economics, so women are principally affected in their capacity as laborers or entrepreneurs. Second, the relationship between the rulings of the Court of Justice and the rights and obligations of citizens in the Member States is extremely complex and not always predictable.

When the Court of Justice, for example, determines that a community legal norm exists, it may, but does not usually, declare that the norm has "direct effect" on Member States and their citizens. "Direct effect" means that without further implementation by the Member States' legislatures or courts, the norm becomes part of their national law and trumps any domestic law to the contrary. Community directives may have "direct effect," but only if they impose clear, unconditional and non-discretionary requirements. Only if a norm has direct effect may citizens invoke it to challenge their own government's actions in their domestic courts.

Article 119 of the EEC Treaty states that "[e]ach Member State shall . . . maintain the application of the principle that men and women should receive equal pay for equal work." The Court of Justice, interpreting Article 119, declared that "the elimination of discrimination based on sex forms part of [the] fundamental rights" enshrined in Community law. However, the Court found that it was not a violation of Article 119 for a state-owned airline to require only its female crew members to terminate their employment when they reached forty years of age. According to the Court, Article 119 proscribes only unequal pay, not unequal working conditions. In response to the Court's narrow interpretation of the EEC Treaty, the Council has passed several directives to implement the principle of gender-equality. The Equal Pay Directive provides that women must receive equal pay "for the same work or for work to which equal value is attributed." The Equal Treatment Directive explicitly extends the principle of equality from "equal pay" to equal working conditions and equal access to employment and promotions, as well as to equal provision of workers' benefits such as social

145. For a discussion of the European Court of Justice's development of fundamental rights, and how it parallels that of the United States Supreme Court, see Steven A. Bibas, The European Court of Justice and the Early Supreme Court: Parallels in Fundamental Rights Jurisprudence, 15 HASTINGS INT'L & COMP. L. REV. 253 (1992).
147. Id.
148. EEC TREATY, supra note 143, at art. 119.
150. Id. at 1377.
security and pensions.\textsuperscript{152} It also prohibits discrimination on the basis of marital or family status while permitting protective provisions such as pregnancy and maternity leaves.

More recently, the Court of Justice concluded that a staff regulation, which applies only to employees of the Community institutions themselves, could not deny survivor's benefits to widowers while providing them to widows.\textsuperscript{153} The staff regulation, according to the Court, was "contrary to fundamental right" and had to be annulled.\textsuperscript{154} The Court has also held that a state agency could not force women to retire at age sixty while permitting men to retire at sixty five.\textsuperscript{155} Significantly, however, the Court concluded that the state agency had violated only the specific provision of the Equal Treatment Directive mandating equal working conditions. The Court said that fundamental norms had not been violated, and the Directive "may be relied upon [only] against a state authority acting in its capacity as employer,"\textsuperscript{156} and not against a private employer.

Member States enjoy quite a bit of discretion in deciding how to implement Community directives and how to interpret Court of Justice decisions. As long as most gender equality rights are not considered to have a "direct effect" in national courts,\textsuperscript{157} which would make them automatically enforceable against both private and public entities, their application will be uneven and will depend on how the national institutions choose to give them effect.

In the final analysis, even the Community's guaranty of equal pay under Article 119 is based only upon the economic goal of insuring the efficient movement of workers throughout the Community. It was originally put into the EEC Treaty because the one country whose national law mandated equal pay for men and women was concerned that it would be competitively disadvantaged in relation to those Member States that exploited women by paying them lower wages.\textsuperscript{158} It seems unlikely, given all the other problems facing the European Community currently, that the scope of equal treatment for women workers in the European Community will expand exponentially in the immediate future.

It is, perhaps, significant that fifty seven percent of Danish women voted against the Maastricht Treaty in early June of 1992. One commentator has suggested that the explanation for this repudiation of European union by a majority of Danish women was the women's fear that Denmark would be required to reduce tax rates, which, in turn, would lead to a reduction in social benefits.\textsuperscript{159} At a minimum, many European women retain serious res-

\begin{footnotes}
\footnote{153. See Joined Cases 75 & 117/82, Razzouk v. Commission, 1984 E.C.R. 1509.}
\footnote{154. \textit{Id.} at 1530.}
\footnote{156. \textit{Id.} at 750 (emphasis added).}
\footnote{157. See supra notes 146-47 and accompanying text.}
\footnote{159. See Michael Elliott, \textit{Little Denmark’s Big “No”}, \textit{WASH. POST}, June 7, 1992, at C1, C2. See also Kara Swisher, \textit{With Unity, There Also Is Worry}, \textit{WASH. POST}, Sept. 9, 1992, at F1.}
\end{footnotes}
ervations about the effects of increased Community integration on their welfare. Thus, while international organizations and the EEC surely do offer some hope and guidance, the women of Eastern Europe must confront their current limitations of structure and focus. In the end they must conclude that their greatest potential for progress lies primarily in their own backyards.160

VI. CONCLUSION

The history of American women's struggle for equality can provide some insights for Eastern European women who are now in the throes of building both constitutions and institutions. It is essential that women become involved in legislatures as well as independent judiciaries. In federalist countries, the interplay between the national and local governments may be a critical factor in the women's movement. Women must insist on a greater voice in structuring the priorities of international organizations if these are to play an important role in enhancing their welfare. The history of the law of gender equality in the European Economic Community suggests that greater integration may not be the answer to the most pressing problems facing the women of Eastern Europe today.

Most importantly, Eastern European women must not retreat into the private sphere of home and family life to the exclusion of political life, for if they do, they will find, as American women have, that public policies have a significant impact on what happens to them as wives, mothers, and daughters.161 This is a message that has not gotten through to them yet, as the

(80% of 4300 East German women polled believed their situation had deteriorated since unification, women make up two-thirds of the jobless, support systems are disappearing, and abortion laws are being stiffened).

160. But see Harsonyi, supra note 32, at 18, commenting on women in Romania:

The low involvement of women in politics is nothing but a natural response to the previous forced and manipulated involvement. Significantly, during the first free electoral campaign in more than fifty years, women's issues were missing from the agenda of most major parties. The only party to declare women's promotion as a specific goal was the National Salvation Front, but the strong neo-communist flavor of its discourse actually stirred more resentment than appreciation. Anyhow, the N.S.F. itself dropped the issue altogether after achieving electoral victory. Very few women went under the spotlight; now there are 21 women in the Chamber of Deputies (out of 397 members), one woman in the Senate (out of 119 members) and no women in the government. Moreover, the wives of the politicians make no public appearances or statements, in order to avoid any comparison with the Ceausescu couple.

Id.

161. There are strong indications that women do have different views on public policy issues than men. In a survey of over 1,000 Americans, by Life Magazine, 84% of (younger) women favored paid maternity leave versus 42% of (older) men, 78% of all women compared to 64% of men believed businesses should have to provide paid maternity leave, and 86% of women compared to 58% of men wanted government-developed child care facilities. Women also favored stricter law enforcement against drug dealing, drunk driving and firearms. Two-thirds of women thought unequal pay for men and women was a "very serious problem" compared to only half of the men, and half the women felt the same way about job discrimination compared to one-third of the men. If Women Ran America, supra note 36, at 44. See also Women in Poll Voice Economic Concerns, WASH. POST, Sept. 5, 1992, at A13 (poll of 1400 American women found that women "support government solutions to help them keep fami-
survey of Eastern Europeans suggests. I hope that we, their American friends, will succeed in persuading them of its merit soon. They have an unparalleled opportunity at this point in their history to lay a groundwork for gender equity as well as gender equality that has taken us almost 200 years to establish. All of us, American and Eastern and Western European women, have a long way still to go in that quest, but it will be truly tragic if the promise of new beginnings for Eastern European women is allowed to wither.

I wish them (and us) the best of luck.