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# HEARING AFGHAN WOMEN'S VOICES: FEMINIST THEORY'S RE-CONCEPTUALIZATION OF WOMEN'S HUMAN RIGHTS

Shefali Desai\*

Feminism is the political theory and practice to free all women: women of color, working-class women, poor women, physically challenged women, lesbians, old women, as well as white economically privileged heterosexual women. Anything less than this is not feminism, but merely female self-aggrandizement.

-Barabra Smith, This Bridge Called my Back<sup>1</sup>

I give you the seeds of a new way  
I give you the moon shining on a fire of singing women  
I give you the sound of our feet dancing  
I give you the sound of our thoughts flying

-Chrystos, "Ceremony for Completing a Poetry  
Reading"<sup>2</sup>

## I. INTRODUCTION

When a fundamentalist Islamic organization called the Taliban came to power in Afghanistan in 1996, the Western world (and especially the Western media) immediately denounced the Taliban's policies concerning Afghan women. The Taliban, decrying Western interference, quickly defended themselves by insisting that their treatment of women stems from cultural and religious traditions. This tug-of-war continues today because both the West and the Taliban rely on simplistic definitions of women's human rights and culture in constructing their arguments. Thus, the issue of Afghan women's human rights is entangled in a web between those who insist upon the existence of universal human rights standards and those who declare that human rights are contingent upon the

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1. Barbara Smith, *And When You Leave, Take Your Pictures With You: Racism in the Women's Movement*, in *THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR* 60, 61 (Cherrie Moraga & Gloria Anzaldua eds., 1981).

2. Chrystos, *Ceremony for Completing a Poetry Reading*, in *THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR* 191 (Cherrie Moraga & Gloria Anzaldua eds., 1981).

particular culture of a given society. This Note utilizes feminist theory and practice to create an alternative to the either/or discourse put forth by the proponents of universalism and relativism.<sup>3</sup> It then applies this alternative to an Afghan woman's asylum claim in order to enable an asylum decision informed by both universalism and relativism, and to produce an outcome that is not limited by either.

One alternative to the either/or debate of universalism versus cultural relativism can be found by looking at women's human rights through the theoretical framework provided by feminist theory. Feminist theory is well-suited to the task of thinking about women's human rights because feminism takes gender as its primary category, places women at the center of its inquiry, and strives to create a progressive praxis to end the oppression of and discrimination against women.<sup>4</sup> However, there is another, more important reason for utilizing feminist theory in the search for an alternative women's-human-rights discourse. Over the years, feminist theory has constantly struggled with the category "woman;" a struggle articulated by Simone de Beauvoir when she wrote that "[o]ne is not born, but becomes a woman."<sup>5</sup> In this often quoted phrase, feminist theory demonstrates the constructed nature of the category "woman" and, in the process, questions the assumption that women's similarities outweigh their differences.<sup>6</sup> Because the debate over women's human rights centers around the construction of the category "woman"—universalists insist that women are more similar than different, while relativists emphasize women's differences rather than their similarities<sup>7</sup>—it makes sense to think about women's human rights through a theory which problematizes the category "woman," yet ultimately refuses to choose one way of defining "woman" over another.

Part II provides brief definitions of universal human rights, cultural relativism, and feminist theory. It then illustrates the "tension between feminism, cultural relativism and universal human rights," and explores the dilemma feminist legal theorists face when advocating women's human rights in the context of women's refugee and asylum claims.<sup>8</sup> Part III offers a brief sketch of Afghanistan's social and political history, an account of the events leading up to

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3. In this Note, the terms feminism and feminist theory are used interchangeably. However, it is important to note that these terms are defined differently by different authors.

4. This definition of feminist theory has been provided by Professor Kari McBride, a women's studies graduate faculty member at the University of Arizona.

5. SIMONE DE BEAUVOIR, *THE SECOND SEX* 267 (1952).

6. See Monique Wittig, *One Is Not Born a Woman*, in *FOR LESBIANS ONLY: A SEPARATIST ANTHOLOGY* 439, 440 (Sarah Hoagland & Julia Penelope eds., 1988).

7. See Nancy Kim, *Toward A Feminist Theory of Human Rights: Straddling the Fence Between Western Imperialism and Uncritical Absolutism*, 25 COLUM. HUM. RTS. L. REV. 49, 50 (1993).

8. See *id.* at 50.

the Taliban's presence in Afghanistan, the present situation of the country, and Afghan women's lives both before and after the Taliban seized power in Afghanistan. Part IV places the Taliban within the tension put forth in Part II by first evaluating the situation of Afghan women through both the lenses of universalism and relativism, and then pointing out the limitations of each viewpoint. Lastly, Part V puts forth an alternative women's human rights discourse and Part VI utilizes this alternative to produce a positive outcome for a hypothetical Afghan woman's asylum claim. Although this Note began as a hypothetical question, there is more at stake here than a theoretical exercise. On November 5, 1998, two years after the Taliban came to power in Afghanistan, an Afghan woman in Tucson, Arizona applied for asylum in the United States because she feared persecution on account of her gender if she were to return to her homeland.<sup>9</sup> Therefore, this is a real controversy, with real implications, for a real woman.

## II. THE TENSION BETWEEN HUMAN RIGHTS, CULTURAL RELATIVISM, AND FEMINISM<sup>10</sup>

Before embarking upon any type of human rights discussion, it is useful to examine human rights terminology and feminist theory. At first the categories "universal human rights" and "cultural relativism" may seem fixed and rigidly defined. In actuality, the categories are fluid and constantly changing in reaction to one another. To illustrate the varying levels of human rights and cultural relativism that may exist in any given discussion, Jack Donnelly, a human rights scholar, divides the viewpoints into "radical cultural relativists," "radical universalists," "strong cultural relativists," and "weak cultural relativists."<sup>11</sup> Donnelly's subdivisions illustrate that a viewpoint need not fully embrace either universal human rights standards nor cultural relativism to the exclusion of the other. There is, in short, a wide spectrum of viewpoints to choose from. Additionally, although Donnelly's categories may be helpful, they are only one way to characterize the human rights debate. Perhaps the most important point to remember is that "[n]either feminism, cultural relativism nor human rights theory

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9. Telephone Interview with Ruben Rivera, Attorney, Tucson Ecumenical Council for Legal Assistance (Nov. 5, 1998).

10. See Kim, *supra* note 7, at 50. It should be noted that this tension has been the subject of several law review articles by feminist legal theorists such as Nancy Kim. My purpose in this section is not so much to reinvent this tension, but to re-articulate it so that later, I can place the issue of Afghan women's human rights within this tension.

11. See JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* 109-110 (1989).

is easily summarized. Each theory contains strains of thought that are often contradictory or inconsistent."<sup>12</sup>

#### A. Exploring The Meanings of Universal Human Rights, Cultural Relativism, and Feminist Theory

Broadly defined, universalism espouses the belief that "international human rights like equal protection or physical security or free speech, religion and association are and must be the same everywhere."<sup>13</sup> Furthermore, universal human rights standards are premised upon the idea that all people are entitled to a core set of rights for no reason other than the fact that they are human beings. Modern-day human rights are rooted in the 1945 creation of the United Nations (U.N.) and the U.N. Charter which "first gave the formal and authoritative expression to the human rights movement that began at the end of World War II."<sup>14</sup> Since the U.N. Charter referred to human rights but did not expand on what these rights may be or how they might be recognized, the U.N. drafted and adopted the Universal Declaration of Human Rights (UDHR) in 1948.<sup>15</sup> The UDHR includes "the right to life, liberty and security of person," the right to be free from slavery and torture, and its preamble "[p]roclaims . . . a common standard of achievement for all peoples and all nations."<sup>16</sup> Thus the UDHR, like universalist notions of human rights, assumes that all human beings share a common standard of human rights.

An extension of the UDHR and the idea of the existence of universally applicable human rights is the U.N. Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW). CEDAW was created in 1981 and although it has only been ratified by a few countries, it is the human rights instrument most often referred to when discussing women's human rights. Like the UDHR, the human rights standards contained in CEDAW presuppose the existence of fundamental rights that all women should enjoy irrespective of the cultures or societies in which they live.<sup>17</sup> The following few phrases from CEDAW help illustrate the universal human rights notion that informs this document. State parties must

adopt appropriate legislative and other measures . . . prohibiting  
all discrimination against women . . . [by] modify[ing] or

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12. Kim, *supra* note 7, at 51.

13. INTERNATIONAL HUMAN RIGHTS IN CONTEXT 192 (Henry J. Steiner & Philip Alston eds., Oxford Univ. Press 1996).

14. *Id.* at 118.

15. *See id.* at 119.

16. UNIVERSAL DECLARATION OF HUMAN RIGHTS preamble, para. 2, 7.

17. *See* U.N. CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN.

abolish[ing] existing laws, regulations, customs and practices which constitute discrimination against women . . . [and by] modify[ing] the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and custom[s] and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.<sup>18</sup>

CEDAW goes one step beyond generating a list of universal human rights by also putting forth a universal definition for what constitutes discrimination against women. CEDAW's preamble states that "the term 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex."<sup>19</sup> Like the rest of the document, the above passages reflect CEDAW's universalist standpoint with respect to women's human rights. When taken together, universalist concepts of human rights, the UDHR, and CEDAW are examples of a belief that despite the cultural and societal differences that may exist among human communities, all human beings are inherently entitled to certain enumerated rights. Because there is room for divergence within the universalist viewpoint, the specific rights that fall under the category of universal human rights will vary depending on the brand of universalism that is being put forth.

A reaction to universalism, cultural relativism is the "claim that rights and rules about morality (most, some, a few) are encoded in and thus depend on cultural context."<sup>20</sup> Originating from within anthropological discourse, cultural relativism further suggests "that knowledge and understanding of cultures is limited by the cultural upbringing of the observer; and that all cultures are equally valid."<sup>21</sup> Although the problematic nature of the term "culture" is explored later, the idea of the existence of culture is central to all forms of cultural relativism.

During the Cold War, cultural relativism was employed by the Communist world to critique the human rights norms established by Western democracies.<sup>22</sup> Pointing to the Western framework within which the U.N. Charter and the UDHR were constructed, Communist countries asserted that different ideological structures resulted in different formulations of what is and what is not considered to be a fundamental right. An extension of this critique of universalism is the cultural relativist conclusion that "notions of right (and wrong) and moral rules necessarily differ throughout the world because the culture in which they inhere themselves differ."<sup>23</sup>

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18. *Id.* at art. 2, para. 1, 2, 6. *Id.* at art. 5, para. 1.

19. *Id.* at art. 1, para. 1.

20. INTERNATIONAL HUMAN RIGHTS IN CONTEXT, *supra* note 13, at 192.

21. Kim, *supra* note 7, at 56.

22. See INTERNATIONAL HUMAN RIGHTS IN CONTEXT, *supra* note 13, at 193.

23. *Id.* at 192.

Like universalist points-of-view, cultural relativism also refers to an entire spectrum of opinions from those that embrace U.N. instruments, such as the UDHR, but advocate an awareness of different cultural interpretations of human rights to those that relinquish all hope for a unifying standard of human rights. This latter viewpoint, one that might be referred to as strong cultural relativism, declares that there are

. . . no transcendent or trans-cultural ideas of right . . . and hence  
. . . no culture (whether or not in the guise of enforcing  
international human rights) is justified in attempting to impose  
on others what must be understood as its own ideas. In this  
strong form, cultural relativism necessarily contradicts a basic  
premise of the human rights movement . . .

and rejects the idea that all human beings are similar at some fundamental level.<sup>24</sup> According to legal scholar Tracey E. Higgins, "[c]ultural relativism raises the possibility that the category 'human' is no longer sufficient to enable cross-cultural assessment of human practices or the actions of the state."<sup>25</sup> Thus, instead of recognizing a human condition that pre-exists social conditioning, strong cultural relativism puts forth an idea of the individual as wholly constructed by her society.

Because international instruments and treaties such as the UDHR and CEDAW are tools for the implementation of universal human rights standards, relativists tend to offer poignant critiques of these instruments saying that they, like the history of colonialism, highlight the Western world's tendency to assimilate all that it encounters and thus raise the threat of neo-colonialism in the form of cultural imperialism.<sup>26</sup> Cultural relativists further argue that universal human rights standards not only create the danger of cultural imperialism, but that they have the potential to destroy cultural differences and eradicate the diversity that exists among different people in different parts of the world.<sup>27</sup> In short, cultural relativists, especially strong cultural relativists, assert that international human rights laws as put forth in instruments such as the UDHR and CEDAW are meaningless because they fail to take into account the various and conflicting notions of rights that exist in different parts of the world.<sup>28</sup>

Feminist theory entails much more than looking at the world through a pair of female eyes. Although a key component of feminism and feminist theory requires exposing and moving away from a male-centered and a male-created

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24. See *id.* at 193.

25. Tracey E. Higgins, *Anti-Essentialism, Relativism, and Human Rights*, 19 HARV. WOMEN'S L.J. 89, 96 (1996).

26. See *id.*

27. See *id.*

28. See Kim, *supra* note 7, at 58.

lens, feminist theory is not comfortable with merely replacing a patriarchal worldview with a monolithic female-centered and female-created worldview.<sup>29</sup> This is stressed in postmodern feminist critiques of feminism that point out that no definitions of "feminist" or "theory" exist.<sup>30</sup> Thus, there is no singular definition of feminist theory, and like definitions of universalism and cultural relativism, feminist theory refers to a wide spectrum of "ideologies and theoretical perspectives," some of which may even be in conflict with one another.<sup>31</sup> Although the definition of feminist theory is rather fluid, and defining it is largely contingent upon the context within which one is working, a general understanding of feminist theory is still possible.

Feminist theory was born from female scholars' desire to think about the important issue of difference—something that had not been contemplated by previous scholars who felt that their experience of the world was the only experience possible. Although early feminism focused entirely on how women differ from men, more recent feminist analyses (especially those by women of color and Third World women) are also concerned with differences among women.<sup>32</sup> This preoccupation with difference leads to feminism's two main goals: (1) valuing individual women's different experiences and perceptions, and (2) recognizing that the constructed differences between male and female result in the privileging of male over female and once having made this recognition, finding ways of combating the structure of male privilege.<sup>33</sup>

The first goal of feminist theory as presented above is illustrated in Professor Marilyn Frye's essay, *The Possibility of Feminist Theory*.<sup>34</sup> She writes that "[f]eminism (the worldview, the philosophy) rests on a most empirical base: staking your life on the trustworthiness of your own body as a source of knowledge."<sup>35</sup> In saying this, Frye suggests that feminist theory is built upon the notion that each and every woman's experience is of value and importance in

29. See Norma Alarcon, *The Theoretical Subject(s) of This Bridge Called My Back and Anglo-American Feminism*, in *MAKING FACE, MAKING SOUL* 356, 357 (Gloria Anzaldua ed., 1990).

30. See Marilyn Frye, *The Possibility of Feminist Theory*, in *FEMINIST FRAMEWORKS* 103 (Alison M. Jagger & Paula S. Rothenberg eds., 1993). As Frye notes in her essay, the use of "feminism" and "feminist theory" in this Note is and will remain problematic.

31. Kim, *supra* note 7, at 51; see also Mary E. Hawkesworth, *Knowers, Knowing, Known: Feminist Theory and Claims of Truth*, 14 *SIGNS* 533, 535 (1989). In this essay, Hawkesworth presents "three models for a feminist theory of knowledge [that] surface with great regularity: feminist empiricism, feminist standpoint theories, and feminist postmodernism.

32. See Higgins, *supra* note 25, at 98-99.

33. See *Redstocking Manifesto*, in *FEMINISM IN OUR TIME* (Miriam Schneir ed., 1994).

34. See generally, Frye, *supra* note 30.

35. Frye, *supra* note 30, at 105-106.



informing her as well as our understanding of the world. This belief leads Frye to declare that "[i]t is an unforgettable, irreversible, and definitive fact of feminist experience that respect for women's experience/voice/perception/knowledge, our own and others', is the ground and foundation of our emancipation."<sup>36</sup> Similarly, Nancy Kim, a feminist legal scholar, states that "the value of feminism is that it recognizes the value of women's experiences, or at least women's interpretations of their experiences."<sup>37</sup>

To think that feminist theory's main purpose is to interject the female subject or multiple female subjects where before there was only a so-called objective (read subjective male) viewpoint, however, is faulty.<sup>38</sup> As stated in the latter goal, feminist theory also advocates the examination of the systemic subordination of women in male-dominated societies. In this way, feminist theory's aim is not confined to privileging women's voices and experience, but also includes the simultaneous goal of eradicating the inequalities that exist between men and women.<sup>39</sup> Depending on the school of feminist thought employed to achieve this goal, this may mean passing laws created upon notions of formal equality or calling for an overhaul of the entire patriarchal power structure.<sup>40</sup>

Although the terms feminism and feminist theory will be continuously redefined and reconstituted by the people and societies that employ them, feminism can broadly be defined as a way of thinking that challenges the heretofore male-centered approach to the world.<sup>41</sup> Furthermore, its main goals can be summarized to include a dedication to the acceptance of each woman's individual story (and by extension, her agency and ability to make her own choices) and a philosophy that calls for the end to the oppression of and discrimination against women.

## **B. Feminism's Dilemma**

The twin aims of feminist theory do not appear incongruous, and indeed seem complimentary until evaluated within the context of international women's human rights. The call for and recognition of women's human rights puts feminist theory in a dilemma because articulations of the need to view women's rights as

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36. *Id.* at 106.

37. Kim, *supra* note 7, at 51.

38. *See* Alarcon, *supra* note 29, at 357.

39. *See id.* at 357.

40. *See* Kim, *supra* note 7, at 52-56. Kim's article divides feminism into three types: liberal feminism, radical feminism, and social/psychoanalytic feminism. While Kim concedes that the ultimate goal of all three brands of feminism remains the same, she points out the different viewpoints that inform the different strategies for each group.

41. *See* Alarcon, *supra* note 29, at 357.

human rights stem from the universalist notion that relies on the existence of universal human rights standards. In fact, the very forum for the discussion of women's human rights is the U.N., an organization with undeniably universalist tendencies;<sup>42</sup> this forum includes the U.N. Charter, the UDHR, and various U.N. conventions such as CEDAW. Thus, if feminist theory supports women's human rights as put forth by the U.N. and its human rights' instruments, feminism is in danger of being branded as just another form of cultural imperialism. At the same time, if feminist theory "lead(s) us into the valley of the shadow of humanism—wishy-washy, laissez-faire, I'm O.K.—You're O.K., relativistic humanism (or more recently into the bottomless bog of relativistic apolitical postmodernism)—where there are no Women and there is no Truth,"<sup>43</sup> feminism is in danger of condoning a variety of unequal and oppressive patriarchal structures. This, then is the dilemma feminist theory finds itself in when considering whether to endorse a universal standard for women's human rights.

Advocates of universal human rights disagree with "the relativist claim that there is no such thing as human rights, arguing that international human rights law cannot mean one thing to Western countries and another to non-Western countries."<sup>44</sup> When applied to women's human rights, this argument would be something like this: women's human rights cannot mean one thing to Western countries and another to non-Western countries. This is an appealing position for many feminist theorists because it urges the recognition that women are oppressed in all parts of the world and that oppression, regardless of the various forms it may take in different societies, stems from the unequal balance of power between men and women. Nancy Kim, despite her attempt to locate feminist theory between universalism and cultural relativism, reveals this universalist leaning when she writes that "[n]either feminism nor gender oppression is endemic to the West. Rather, feminism is a multicultural response to the oppression of women."<sup>45</sup> Another universalist strategy that attracts the favor of feminist theory is CEDAW because it not only establishes a standard of human rights women should be afforded by their societies, but it goes on to declare that violations of these rights will not be tolerated irrespective of cultural traditions and practices.<sup>46</sup> Thus feminism, as a philosophy that calls for an end to the oppression of and discrimination against all women, would seem to be in favor of a universal human rights regime requiring all societies to provide women with equality and the same rights afforded to the male members of any given society.

Feminist theory itself, however, has a problem with a strictly universalist interpretation of women's human rights. To begin with, universalist-informed

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42. See INTERNATIONAL HUMAN RIGHTS IN CONTEXT, *supra* note 13, at 132.

43. Frye, *supra* note 30, at 106.

44. Kim, *supra* note 7, at 63.

45. *Id.* at 49.

46. See U.N. CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, *supra* note 17.

feminist theory would have to view any treatment of women that violated CEDAW as a violation of women's human rights without looking to the specific context in which the so-called violation occurred.<sup>47</sup> By adhering to CEDAW, feminist theory indirectly affirms the women's human rights standard created by a small group of women for the entire world's female population.<sup>48</sup> In short, feminist theory would have to disregard its goal of affirming individual women's voices and differences in order to fulfill its goal of eradicating oppression and inequality if it chose to view women's human rights through the universalist model of human rights. This is true because in upholding a universal standard both for what constitutes women's human rights and what constitutes the violation of these rights, feminist theory implicitly denies the existence of women's voices or experiences that may deviate from this standard. Thus, women who disagree that their societies' unequal treatment of women amounts to oppression will be accused of false consciousness and their societies will be condemned as perpetrating women's human rights abuses.<sup>49</sup>

Given feminist theory's concern with privileging women's voices and supporting the diversity of viewpoints that may be held by different women, it might seem that feminist theory has more in common with cultural relativism than universalism. Feminist theory's attempt to include non-Western women's issues as part of its focus has been criticized by relativists as "a form of cultural imperialism" since feminism has been considered a Western ideology imposing its view of women and oppression on the rest of the world.<sup>50</sup> Since this criticism "is one that strikes a particularly tender nerve with feminists because it labels feminism as a form of oppression," feminist theorists have begun to examine the claim and point out ways in which feminist theory is actually aligned with the relativist viewpoint.<sup>51</sup> To this end, feminist theory has reaffirmed its respect for difference and urged that "feminism itself is grounded in the importance of participation, of listening to, and accounting for the particular experiences of women."<sup>52</sup> Cultural relativism appeals to feminist theory because it condemns "very broad assumptions about women's lives and experiences" and forces those who would speak about women's human rights to take a closer look at specific

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47. See *id.*

48. See INTERNATIONAL HUMAN RIGHTS IN CONTEXT, *supra* note 13, at 912. There are 23 elected members on the CEDAW Committee. To date, all its members have been women except for one. *Id.*

49. The term "false consciousness" refers to the Gramscian notion of "cultural hegemony" that states that women, "although they believe they are making choices [are in reality] . . . unwittingly accomplices in the maintenance of existing inequalities." Dennis Patterson, *Postmodernism/Feminism/Law*, 77 CORNELL L. REV. 254, 293-294 (1992).

50. See Kim, *supra* note 7, at 60.

51. *Id.* at 62.

52. Higgins, *supra* note 25, at 91.

women and their specific conditions.<sup>53</sup> This strategy not only eliminates the oppressive force of essentialism, but by valuing individual women's experiences it also allows for the creation of effective solutions to help women—something that feminist theory has been concerned with from the very start. Furthermore, a relativistic formulation of feminist theory will also ensure against what bell hooks, a leading feminist scholar, refers to as the “notion of common oppression.”<sup>54</sup> She criticizes feminism's use of common oppression as a political strategy because the illusion of common oppression ignores the real differences that exist among women and in so doing, what is perceived as all women's common oppression is really just that oppression felt by women in the most privileged positions.<sup>55</sup> In other words, feminist theorists who claim a common oppression for all women are talking about their oppression in their societies, not the forms of oppression that women in other parts of the world may be experiencing.

Despite the similarities between cultural relativist standpoints and one of feminism's two major goals, cultural relativism, like universalism, is inadequate as an exclusive way for feminist theory to approach women's human rights. In taking a wholly relativistic position, feminist theory would have to disavow the need for human rights standards specifically designed to improve the condition of women. Thus, as Higgins puts it, cultural relativism “threatens to undermine the central goal of feminist human rights advocacy: to identify and criticize systems of inequality and injustice.”<sup>56</sup> Additionally, by agreeing that there are no women's human rights, just different women and different rights, feminist theory accepts the legitimacy of the use of power “to dictate the outcome of competing claims of truth.”<sup>57</sup> Since the majority of power in a society is seldom held by women, women are the losers in a world where power determines what will be regarded as a woman's human right and what will not.<sup>58</sup> Lastly, feminist theory should not condone the use of culture and religion to justify treating women in any way that benefits the power structure of a given society.<sup>59</sup> In this way, taking a relativist stand would preclude feminist theory from any critique of any cultural practices that may be harmful to women. In addition, cultural relativism might actually stifle women's voices by privileging the dominant (patriarchal) view of their culture.<sup>60</sup> Together, these concerns illustrate that although cultural relativism has had positive influences on feminist theory's analysis of women's human

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53. *Id.*

54. BELL HOOKS, *FEMINIST THEORY: FROM MARGIN TO CENTER* 6 (1984). bell hooks is a feminist theorist who does not capitalize the first letters of her first and last name.

55. *See id.*

56. Higgins, *supra* note 25, at 103.

57. *Id.* at 104.

58. *See id.*

59. *See id.* at 91.

60. *See* Kim, *supra* note 7, at 50.

rights, it cannot in the end be the definitive way to decide the need for the establishment of women's human rights standards.

Feminist theory at once embraces and rejects the universalist and cultural relativist views on the subject of women's human rights. On one hand, feminism as a theory that deals with the broad category "woman" is always in danger of overlooking "genuine differences between people" whenever its goals include all those who fall into that category; yet on the other hand, feminist theory's desire to respect difference risks ignoring "the sameness of people and fails to respect each person's humanity."<sup>61</sup> Thus, the tension between feminism and universalism and feminism and cultural relativism actually "reflects a tension within feminism itself, between describing women's experiences collectively as a basis for political action and respecting differences among women."<sup>62</sup> Feminist legal scholars and feminist theorists agree that the tension cannot be resolved by choosing one lens over the other. This is true not only because both universalism and cultural relativism alone present oversimplified solutions, but also because the two major goals of feminist theory require an approach to women's human rights that recognizes and incorporates both universalist and relativist viewpoints. The question, then, is not which lens to choose or whether the tension can be reconciled, but how this reconciliation will occur and what the alternative strategy will look like.<sup>63</sup> In forging this alternative, feminist theory must recognize that the alternative "will be imperfect or perhaps even highly problematic. The task is not to settle on a fully elaborated theory that will perfectly describe women's condition, but rather to find partial, contingent theories that will usefully describe the condition of women for some cross-cultural purposes."<sup>64</sup>

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61. Allan C. Hutchinson, *Inessentially Speaking (Is There Politics After Postmodernism?)*, 89 MICH. L. REV. 1549, 1554 (1991).

62. Higgins, *supra* note 25, at 91.

63. See Linda Alcoff, *Cultural Feminism Versus Post-Structuralism: The Identity Crisis in Feminist Theory*, 13 SIGNS 405, 436 (1988). In her essay, Alcoff agrees that "the solution lies . . . in formulating a new theory within the process of reinterpreting our position, and reconstructing our political identity, as women and feminists in relation to the world and to one another." *Id.*

64. Higgins, *supra* note 25, at 124.

### C. Women's "Gender-Based" Refugee and Asylum Claims<sup>65</sup>

Viewing women's human rights within the context of refugee and asylum claims is useful for several reasons. To begin with, removing the inquiry of how feminist theory should react to claims of women's human rights abuses from the theoretical realm and grounding it in a realistic situation forces feminist theory's alternative to be a realistic one that can and will be useful to real life women. Secondly, placing the inquiry within an asylum claim brings the issue of international women's human rights home to Western feminists. In other words, there is no longer a distance between the "us" and the women we are theorizing about; "they" are no longer thousands of miles away. Instead, the women whose human rights we are debating are right here, asking us if we are willing to recognize what they claim is a violation of their human rights. Lastly, since decisions made about women's gender-based refugee and asylum claims influence the way in which we perceive women's human rights, future feminist discussions about the outcome of these cases (and optimistically, future court decisions of these cases) will be made with an understanding of the multi-nuanced nature of this debate.

Although there have been many different types of women's gender-based refugee and asylum claims over the past decade, perhaps the one which has stirred the largest amount of attention and debate is *In Re Fauziya Kasinga*.<sup>66</sup> In this case, a young woman from Togo fled her country out of fear that her family would force her to undergo Female Genital Cutting (FGC).<sup>67</sup> The question her case presented to the world community, including the United States, was whether an asylum claim premised on a woman's belief that a cultural practice constituted persecution should be accepted as a reason to grant asylum.<sup>68</sup>

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65. Since gender is not an official category through which one may apply for asylum in the United States, this Note's use of the term "gender-based" is simply to refer to a woman's asylum claim which is, at least in part, premised on the claim that she has or will be subject to persecution on account of her status as a woman in her home country. Furthermore, the term "gender-based" is what is commonly used in literature describing women who claim refugee and asylum status because they feel they have been or will be persecuted because they are women.

66. *In Re Kasinga*, B.I.A. 3278 (1996) (order granting preliminary injunction).

67. See L. Amede Obiora, *Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign Against Female Circumcision*, 47 CASE W. RES. L. REV. 275, 290 (1997). As Professor Obiora notes in her article, the very terms that are utilized when talking about this issue are highly politicized, and thus, employing any one term to refer to the practice is problematic. I have chosen to use the term "female genital cutting," but some other terms used by different authors are "female genital surgery," "female genital mutilation," and "female circumcision."

68. See Layli Miller Bashir, Note, *Female Genital Mutilization in the United States: An Examination of Criminal and Asylum Law*, 4 AM. U.J. GENDER & L. 415, 419-423 (1996).

The discussion surrounding Kasinga's claim led to the question of how the West should view women's human rights. Inevitably, the discussion bifurcated into two opposing and seemingly irreconcilable standpoints with the universalists condemning any treatment of women that deviated from Western notions of women's equality, and the relativists accusing the universalists of neo-imperialism while defending cultural differences at all costs. Universalist positions, such as the one put forth by Layli Miller Bashir, a law student who worked on Kasinga's case, recognize that "values of cultural identity, morality, and family integrity are honorable," but ultimately decide that "the use of [FGC] as a means to achieve them is unjustifiable" because it is ultimately a violation of women's human rights.<sup>69</sup> Relativist positions, on the other hand, hesitate to characterize FGC as a violation of women's human rights by pointing out the complex nature of the practice, the vastly different forms it takes from one place to another, and the various views held by the women in the cultures being condemned by universalists.<sup>70</sup> In the midst of this heated debate, the question of women's human rights became the choice between universalism and cultural relativism, ruling out the existence of a concept of women's human rights that included both viewpoints.

Like Kasinga's case, the asylum claim of a woman fleeing Afghanistan because she fears gender-based persecution under the gender-specific system of government imposed by the Taliban, lends itself to an analysis based on the universalist versus cultural relativist dichotomy. As demonstrated in Part II, feminist theory is a way to escape this either/or mentality. However, before feminist theory's alternative to universalism and relativism can be put forth and applied to a hypothetical Afghan woman's asylum claim, it is necessary to gain a general understanding of the Taliban and the situation of Afghan women in present-day Afghanistan.

### III. INTRODUCTION TO THE TALIBAN

#### A. Afghanistan: Then and Now

Prior to September 1996, Afghanistan, a landlocked country in Southwestern Asia, received very little attention from the Western world despite the fact that it was embroiled in a devastating thirteen year civil war between a Soviet-backed communist government and U.S.-subsidized "bands of Islamic rebels known as Mujahedeen"—a war in which "more than one million of Afghanistan's sixteen million inhabitants died [and] [m]illions more ha[d] become

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69. See *id.* at 424.

70. See Obiora, *supra* note 67, at 280.

refugees.”<sup>71</sup> The Afghan people, looking forward to peace when the Mujahedeen finally ousted the Soviets, were subjected to yet another series of internal wars when the separate Islamic groups that had originally banded together to form the Mujahedeen began fighting one another.<sup>72</sup> This time, more than 45,000 civilians were killed and the country's capital city of Kabul was transformed into a “bullet-scarred disaster.”<sup>73</sup>

In 1995, a relatively unknown Islamic group calling themselves Taliban, meaning “theology student” in Arabic, appeared almost mysteriously and swiftly conquered two thirds of Afghanistan, including the capture of Kabul on September 28, 1996.<sup>74</sup> According to the Western media, the Taliban's appearance “upon the scene . . . [upset] the fragile truce and [collapsed] hopes for the implementation of a United Nations-supervised peace plan.”<sup>75</sup> More recent newspaper articles suggest, however, that some Afghans might have a different view of the Taliban. A *New York Times* journalist comments that “even some Afghans who are most critical of the Taliban's austere rule say that . . . the world overlooks the good the Taliban have done in bringing peace and social order.”<sup>76</sup> Thus, as William Maley points out in the introduction to his book on Afghanistan and the Taliban, “the tale of the Taliban's activities was more complex than some of the immediate reporting suggested.”<sup>77</sup>

The government that existed in Afghanistan before the Taliban's rule consisted of a president “who head[ed] a Leadership Council and [wa]s supported by a prime minister and a Cabinet,” a 205-seat parliament and a Supreme Court that overs[aw] the judiciary.<sup>78</sup> Under former President Rabbani's government, the only constitution per se was the Qur'an and the judiciary followed Islamic Shari'a law.<sup>79</sup> Since the Taliban has gained control of the country, they have set forth several laws which they claim originate from a strict interpretation of the Qur'an. The goal of the Taliban's new laws is to “create a pure Islamic society free from crime, vice and Western influence;” and in doing so, the Taliban's laws include

71. Michael A. Lev, *Holy War Without End, Chill of Extremism Grips Ruins of Kabul*, CHI. TRIB., Nov. 24, 1996.

72. Compare *id.* with Ben Bradlee Jr., *Afghanistan Dissolves into Tribal Warfare*, ORANGE COUNTY REG., Nov. 10, 1996. Different sources cite different numbers of factions within the Mujahedeen which range from five to nine.

73. Lev, *supra* note 71.

74. See Bradlee, *supra* note 72. This article also includes a detailed account of the battles that led up to the Taliban's capture of Kabul.

75. *Technically Speaking, Taliban*, YOMIURI SHIMBAN, Sept. 24, 1998.

76. Barry Bearak, *Afghans Ruled by Taliban: Poor, Isolated but Secure*, N.Y. TIMES, Oct. 10, 1998, at A1.

77. FUNDAMENTALISM REBORN?: AFGHANISTAN AND THE TALIBAN 2 (William Maley ed., New York Univ. Press 1998).

78. *Id.*

79. The meaning and implementation of law based on the Qur'an and Shari'a is discussed below.



requirements that men grow beards and attend a mosque five times a day; prohibitions on music, movies, and television; and severe sanctions for crimes (a thief's hand was cut off and two adulterers were stoned to death).<sup>80</sup> The final set of laws implemented and carried out by the Taliban concern women and girls and are, consequently, the focus of the women's human rights debate. According to the Taliban's interpretation of Islamic law, a woman must appear in public as little as possible, and if she does leave her home, she must be covered from head to toe in a burqa and be accompanied by a male family member.<sup>81</sup> Furthermore, the Taliban's laws forbid girls from attending school and women from work; an act that has also cut off women's access to health care, and in some cases, food and aid from non-governmental human rights organizations.<sup>82</sup>

The Taliban and its laws have been characterized by the Western media as "dogmatic application[s] of Islamic law and rules."<sup>83</sup> This type of vague statement, however, does little to illuminate and begin an examination of the numerous religious and cultural beliefs that inform the Taliban's policies. The majority of the Taliban's leadership are Pushtun, an Afghan ethnic group that has largely remained in rural areas of the country away from cities and what is regarded by the Taliban as "Western influence."<sup>84</sup> Kandahar, "the birthplace and headquarters of the Taliban movement," is mostly Pushtun and the social values and behavior exhibited there bear a striking resemblance to the society the Taliban envision for all of Afghanistan.<sup>85</sup> Not only did the Taliban's leaders come from villages such as Kandahar, but much of their religious training "was heavily influenced by the Deobandi school, which originated in the Dar ul-Ulum Deoband, an institution established in the Indian town of Deoband in 1867."<sup>86</sup> This school of Islam "preached a form of conservative orthodoxy," which can be traced to the Taliban's view of Islam.<sup>87</sup>

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80. Pamela Constable, *Into the Land of the Taliban: From Kabul to Kandahar*, WASH. POST, Sept. 27, 1998, at A1.

81. See Nancy Hatch Dupree, *Afghan Women under the Taliban*, in FUNDAMENTALISM REBORN?: AFGHANISTAN AND THE TALIBAN 145, 145-146 (William Maley ed., 1998).

82. See *id.*

83. Chandra Muzaffar, *Don't Mistake Taliban's Bigotry for Islam*, ARAB AM. NEWS, Nov. 29, 1996.

84. See FUNDAMENTALISM REBORN?: AFGHANISTAN AND THE TALIBAN, *supra* note 77, at 20.

85. Constable, *supra* note 80.

86. FUNDAMENTALISM REBORN?: AFGHANISTAN AND THE TALIBAN, *supra* note 77, at 14.

87. *Id.*

## B. Islam and the Law

For its followers, Islam is not merely a religion, it is a way of life as well as a set of legal codes; as a result, the laws of many Islamic countries reflect the values and rules set forth by Islam.<sup>88</sup> No clear and straightforward method by which law is extracted from the Islamic faith exists, and although this is a very cursory look at the different forms of Islamic law, it provides a basic framework upon which to structure a discussion of the Taliban's use of Islamic religious law in their rule of Afghanistan.

Muslims believe that "the Qur'an is the literal and final word of God and Muhammad is the final Prophet."<sup>89</sup> During his lifetime, which spanned from 610 A.D. to 632 A.D., Muhammad expounded the teachings of the Qur'an for the Muslim people and his interpretations of the Islamic holy text are collectively known as Sunna.<sup>90</sup> Consequently, the legal system espoused by many Islamic nations is based on both the Qur'an and Sunna, and the law that results is referred to as Shari'a law.<sup>91</sup> It is important to realize that "Shari'a is not formally enacted legal code," but consists of a vast body of jurisprudence created by individual Islamic scholars expressing their views on the Qur'an and Sunna and the legal implications of those views.<sup>92</sup> Historically, the application of Shari'a law to new circumstances was the sole responsibility of a "class of highly trained religious scholars" known as *ulama* and was not for political leaders or rulers to determine.<sup>93</sup> Similarly, judges in most pre-modern Islamic societies did not create Shari'a law, they merely applied it according to the interpretations offered by the *ulama*.<sup>94</sup>

Since Shari'a law is based upon interpretations of the Qur'an and Sunna, it is not unlikely that local customs and traditions played a role in the formation of law since different scholars from different regions might have had differing ways of interpreting religious doctrine.<sup>95</sup> Furthermore, Shari'a developed as a comprehensive legal system over nearly three centuries and thus the sheer amount of time that passed from its original inception to the point at which it was a stable

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88. *See id.*

89. Abdullahi Ahmed An-Na'im, *Human Rights in the Muslim World*, 3 HARV. HUM. RTS. J. 13, 17 (1990).

90. *See id.* at 13.

91. *See id.*

92. *Id.* at 19.

93. Ann Elizabeth Mayer, *Islam and the State*, 12 CARDOZO L. REV. 1015, 1022 (1991).

94. *See* Leila P. Sayeh and Adriaen M. Morse, Jr., *Islam and the Treatment of Women: An Incomplete Understanding of Gradualism*, 30 TEX. INT'L. L.J. 311, 316 (1995).

95. *See* Mayer, *supra* note 93, at 1023-1024.

system of law indicates that several factors must have influenced both the structure and content of what is today known as Shari'a law.<sup>96</sup>

### C. The Taliban's Version of Islamic Law

From the few statements the Taliban has made to the Western media, it is difficult to determine whether the Taliban's application of Islamic law comes directly from the Qur'an or if it embodies elements of Sunna, and to what degree the Taliban's version of Shari'a is influenced by the background and experiences of its leaders. Finding answers to these questions may be an impossible task not only because the lines between religion, culture, and tradition tend to blur, but also because the Taliban, like many Islamic regimes that came before them, disavow the presence of any influences upon their laws that are not solely based upon Islam as it is set forth in the Qur'an.<sup>97</sup> The Taliban's Minister of the Department for Promoting Virtue and Preventing Vice has said that the Taliban's application of Islamic law aims at establishing "the purest Islamic state in the world."<sup>98</sup> Other Taliban leaders have said that the Taliban's interpretation of Islam comes exclusively from the Qur'an.<sup>99</sup> What this means, however, is not clear because "Islamic scholars say that the Taliban's edicts on women have no basis in the Kuran," and they may not have a basis in Sunna either.<sup>100</sup> Unfortunately, a *New York Times* interview with Mullah Mohammed Hassan, a Taliban cleric and leader, did little to illuminate how the Taliban has come to formulate its version of Shari'a law.<sup>101</sup> In the interview, Hassan talks about some of the Taliban's new laws by tracing their origins to Islamic tradition.<sup>102</sup> For instance, Hassan points out that theft and adultery have always been regarded as crimes in Islamic societies, and have always been punished by "amputation of hands and feet for thieves [and] death by stoning for adulterers."<sup>103</sup> Other Taliban edicts such as laws banning homosexuality, television, and women's ability to attend school and work, however, make it difficult to discern whether the Taliban is applying what is commonly understood as Shari'a law or whether they are creating new interpretations of the Qur'an and Sunna. In short, the laws set forth by the Taliban

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96. See *id.*

97. See *id.*

98. Tim Johnston, *Taliban Seek World's Purest Islamic State*, REUTERS N. AM. WIRE, Mar. 29, 1997.

99. See Fred Halliday, *Kabul's Patriarchy With Guns: Fighters Armed by Pakistan Have Turned the Afghan Capital into a No-Woman's Land*, THE NATION, Nov. 11, 1996.

100. Bradlee, *supra* note 72.

101. See *Taliban Cleric Sweetly Unreasonable*, N.Y. TIMES, Nov. 29, 1996.

102. See *id.*

103. *Id.*

do not appear to have a singular origin despite the declarations of its leaders to the contrary.

#### D. Afghan Women: Before and After the Taliban

The rules and laws laid down by the Taliban affect all Afghan people regardless of variables such as age and gender. The Western world, however, has given special attention to the effects of the Taliban's interpretations of Islam on Afghan women.<sup>104</sup> A *New York Times* article containing a passage saying "[w]omen and girls have been barred from work and school, their aspirations secreted away like messages in bottles,"<sup>105</sup> is an example of this focus in the Western media and Western consciousness. An initial feminist reaction to the media's concern with Afghan women's rights under the Taliban might be appreciative since it is not often that women's human rights play a central role in Western television and print media. However, Nancy Hatch Dupree, in her essay, points out the importance of questioning the reason behind this sudden interest in Afghan women's human rights when Afghan women have always faced conditions similar to the ones they are facing now, and how this affects what is meant in reference to women's human rights.<sup>106</sup> To do this, it is necessary to look at Afghan women's lives both before and after the Taliban came to power in Afghanistan.

Several news articles as well as Maley's introduction in *Fundamentalism Reborn?: Afghanistan and the Taliban*, assert that rural Afghan women's lives have not changed much under Taliban rule.<sup>107</sup> For instance, one article reports that "[i]n Afghan villages, most women were never seen unveiled in public, never worked outside the home and, as girls, never went to school, for many years before the Taliban issued decrees enforcing these taboos."<sup>108</sup> Another article reiterates this message when it describes the lives of Afghan women in the less Westernized city of Kandahar. Here, "[w]omen . . . are rarely seen and never heard; on brief shopping excursions they scurry quietly along the sidewalks, anonymous behind billowing sky-blue or pine-green burqas."<sup>109</sup> The article goes on to cite the opinion of one young man from Kandahar who says that his "life hasn't changed at all since the Taliban came . . . our women have traditionally

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104. See Bearak, *supra* note 76, at A1, A4.

105. *Id.* at A4.

106. See Dupree, *supra* note 81, at 147-149.

107. See *Taliban Cleric Sweetly Unreasonable*, *supra* note 101; see FUNDAMENTALISM REBORN?: AFGHANISTAN AND THE TALIBAN, *supra* note 77, at 19.

108. *Taliban Cleric Sweetly Unreasonable*, *supra* note 101.

109. Constable, *supra* note 80.

been at home. So you see there was little that needed to be changed [after the Taliban's rise to power]."<sup>110</sup>

These articles present accurate but inconclusive descriptions of rural Afghan life. Far from being scholarly accounts of Afghan village culture, they are a handful of journalists' observations taken under extremely restricted conditions. Thus, the question of what Afghan women's lives were like in rural Afghanistan before the Taliban is not one that can, as of now, be fully answered. However, if women's lives in rural Afghanistan have always been the same as the conditions imposed upon all Afghan women by the Taliban, then the West's recognition of women's human rights violations in Afghanistan seems to be more of a recognition of the rights of Afghan women living in Westernized cities such as Kabul who now must conform to codes of conduct that parallel those that their rural counterparts have always lived by.<sup>111</sup>

However, the lives of Afghan women who live in Kabul have changed drastically since the Taliban takeover of Afghanistan.<sup>112</sup> One of the first laws the Taliban enforced when it came to power was to prohibit women from participating in the paid work force and prohibit girls from attending school.<sup>113</sup> Zohra Rasekh, an Afghan-born public health researcher with Physicians for Human Rights, observes that life for Afghan women "wasn't always like this. Forty percent of Afghan doctors were once women; more than half the teachers were women."<sup>114</sup> Furthermore, before the Taliban's rise to power, there were 103,256 girls in public schools and "anywhere from 40,000-150,000 women, including teachers plus doctors, nurses, administrators, and other civil servants" who were employed outside the home.<sup>115</sup> After restricting girls' access to education, the Taliban's Minister of Education issued a statement saying that the suspension of girls' education was only a temporary measure that had to be taken until a fully segregated system of education could be constructed.<sup>116</sup> In 1996, shortly after the Taliban closed down schools for girls, the Education Minister, Maulavi Abdul Salam Hanafi, was quoted as saying that "[l]ady teachers and girl students will be given permission to return to school when a specific program has been organised for them by the Taliban."<sup>117</sup> Two years later, women still could not work and girls could not attend school.<sup>118</sup> Hanafi conceded that Islam does not prohibit women

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110. *Id.*

111. *See id.*

112. *See id.*

113. *See id.*

114. Ellen Goodman, *The Hidden Suffering of Women in Afghanistan*, B. GLOBE, Dec. 6, 1998, at D7.

115. Dupree, *supra* note 81, at 154-155.

116. *See* Terence White, *Taliban Will Allow Girls Education When "Specific System" Prepared*, AGENCE FRANCE-PRESSE, Nov. 23, 1996.

117. *Id.*

118. *See id.*

from going to school, but that according to Shari'a law members of the opposite sex cannot legally mix with one another by stressing that "Islam is not against education for anybody, but Islam is against corruption within the education system."<sup>119</sup>

Not allowing women to engage in the country's paid labor force has impacted the Afghan population in several ways. First, families headed by women who were widowed by the thirteen-year war with the Soviets and thus depend on the woman's income for survival no longer have a source of income. Second, these women who cannot work have been forced to become beggars in order to feed their children. Third, it has caused a serious shortage of medical personnel in hospitals that are already inundated with patients from the ongoing fighting.<sup>120</sup> Similar to the edict concerning education, the Taliban's Minister of Information and Culture said that women, like girls, will be able to return to work, but only after there are "Islamic rules" in place to govern their conduct in the workplace.<sup>121</sup> A few women medical professionals have been "allowed to work in the medical field, but only under severe restrictions."<sup>122</sup> Despite this slight reprise, many newspapers as well as the U.N. have reported that women in need of medical care cannot be treated because there is a shortage of women doctors and women cannot be seen by male physicians under the Taliban's interpretation of Islam.<sup>123</sup> In her travels among Afghan women, Rasekh documented that 70% of the 160 women she interviewed experienced a decline in their physical health, 87% experienced a decrease in access to doctors, and 97% exhibited major depression with one-fifth of the women contemplating suicide.<sup>124</sup>

Even if an Afghan woman is not affected by the Taliban's rules concerning education, work, and medical attention, she is affected by the everyday way in which she must conduct and dress herself. To begin with, Afghan women must travel on separate buses from men and curtains must divide the driver from female passengers.<sup>125</sup> More drastic, however, is the dress code imposed upon all Afghan women. Islamic scholars explain that the Qur'an calls for all Muslims to dress modestly; but what this means is open to interpretation.<sup>126</sup> Although the Taliban would be hard-pressed to find instances in either the Qur'an or Sunna

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119. *Id.*

120. See Dupree, *supra* note 81; see Taliban, *Taliban Online* (visited Nov. 24, 1998) <<http://www.ummah.net/taliban/>>.

121. See Lev, *supra* note 71.

122. Tim Johnston, *U.N. Human Rights Mission Visits Afghanistan*, REUTERS N. AM. WIRE, Jan. 9, 1997.

123. See Bradlee, *supra* note 72.

124. See Goodman, *supra* note 114.

125. See *Taliban Army Imposes New Rules*, PERISCOPE-DAILY NEWS CAPSULES, Dec. 3, 1998.

126. See Beth Krodell, *Scarves Make Muslim Women Targets for Bigotry*, AUSTIN AM.-STATESMAN, Nov. 23, 1996.

mandating that women be covered at all times from head-to-toe, the Taliban claims that its interpretation of Islam requires that if women venture out in public, they must be completely covered in a burqa: "a tent-like garment through which the wearer can see only through a mesh veil."<sup>127</sup> Before the Taliban came to Kabul, "less than 20% of the women wore burqas."<sup>128</sup> The Taliban's Deputy Minister for the Propagation of Islamic Orders and the Discouragement of Islamic Prohibitions explained that "[t]he burqa is very, very important to maintain a society that is free of corruption . . . [because it] promotes dignity for women by sheltering them from men in public."<sup>129</sup> As a result, women seen on the streets of Kabul who did not follow this law have been beaten by Taliban soldiers and women who cannot afford burqas are unable to leave their homes.<sup>130</sup> One bleak story caused by the burqa mandate and reported in several Western newspapers is of an Afghan woman whose daughter died because the woman could not pay for a burqa that would allow her to leave her home in search of medical care.<sup>131</sup> Even if women are clothed in burqas there is risk involved in venturing outside the home, thus they must appear in public as little as possible and should be accompanied by a male relative when they do.<sup>132</sup>

Although the West's concern for women's human rights in Afghanistan may include those Afghan women who live in rural villages where little has

127. Kathy Gannon, *Victorious Rebels Set Strict Rules in Kabul Edicts Include Closing Girls' Schools, Imposing Dress Codes*, BUFFALO NEWS, Sept. 29, 1996.

128. Andrew Selsky, *Afghan Women's Garment Hinders Seeing or Being Seen*, AUSTIN AM -STATESMAN, Nov. 9, 1996.

129. Constable, *supra* note 80.

130. *See Afghan Rulers Enforce Strict Laws With Beatings*, ARIZ. REPUBLIC, Apr. 30, 1997.

131. *See Goodman, supra* note 114.

132. *See Revolutionary Association of the Women of Afghanistan, RAWA* (visited Nov. 24, 1998) <<http://www.rawa.org>>. The following is a story reported on RAWA's website:

Turpeki was taking her toddler to the doctor. The child had acute diarrhea and needed to be seen by a doctor soon. Turpeki was dressed in a burqa. She reached the market area when a teen-aged Taliban guard noticed her. The guard called her. Turpeki knew that if she stopped she would be beaten for appearing in public. She was also frightened that her child might die if she did not hurry. She began to run. The Taliban guard aimed his Kalashnikov at her and fired several rounds. Turpeki was hit but did not die. People intervened and took the mother and the child to the doctor. Turpeki's family then complained to the Taliban's leaders. But were simply told that it had been the woman's fault. She should not have been appearing in public in the first place.

changed since the Taliban came to power, the attention given to women's rights in Afghanistan has more to do with those women in Westernized cities such as Kabul.<sup>133</sup> Afghan women living in Kabul have experienced a change in their standard of living and their way of life. This change is being touted as a violation of women's human rights, and it is this change that will have to be evaluated by an immigration judge when deciding whether or not an Afghan woman should be granted asylum in the United States.

#### IV. PLACING THE TALIBAN AND AFGHAN WOMEN WITHIN THE TENSION BETWEEN CULTURAL RELATIVISM, HUMAN RIGHTS, AND FEMINIST THEORY

##### A. The Taliban's Arguments and Cultural Relativism

Proponents of cultural relativism are concerned with protecting cultural practices and norms that may not fit into universal human rights standards, but that are felt to be an important component of a particular society's identity and mode of living.<sup>134</sup> In this way, the Taliban are a classic example of cultural relativists when they defend many of their laws and regulations concerning women as a desire to eliminate what they perceive as Western influence upon their culture.<sup>135</sup> The leader of the Taliban, Mullah Mohammed Omar "asked Afghans to reject foreign cultures," saying that "[t]he struggle against colonialist culture is the duty of every Moslem."<sup>136</sup> This relativist viewpoint is further demonstrated on the Taliban website (which includes everything from interviews with Taliban leaders to updates on how the Taliban is working to redevelop Afghanistan) where an entire section is devoted to rebutting Western claims that the Taliban is violating Afghan women's human rights.<sup>137</sup> The Taliban points out that "[t]he basic question here is what are the rights of women and who will determine them?"<sup>138</sup> In saying this, the Taliban is already assuming a relativist position by asserting that what is considered to be a woman's human right differs from one society to another. The Taliban go on to say that the people of Afghanistan need not "acknowledge the rights given to women by the West," and to force Afghans to acknowledge Western views of women's human rights is a "denial of [Afghans'] freedom and . . . religious rights."<sup>139</sup> The Taliban insists that its view of women's rights has been "determined and fixed by Allah Ta'ala,"

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133. See Constable, *supra* note 80.

134. See INTERNATIONAL HUMAN RIGHTS IN CONTEXT, *supra* note 13, at 192.

135. See Constable, *supra* note 80.

136. Johnston, *supra* note 122.

137. See *Taliban Online*, *supra* note 120.

138. *Id.*

139. *Id.*



and thus its edicts do not violate women's human rights but uphold those rights women are entitled to under Islam.<sup>140</sup> In a statement to a foreign journalist, the Deputy Minister for the Propagation of Islamic Orders and the Discouragement of Islamic Prohibitions reinforces this point when he explains the Taliban's rules for women by saying, "[i]n Western societies . . . women are used by men when young and discarded when old. In Islam . . . we shelter women for life."<sup>141</sup> An Afghan man in the village of Kandahar echoes the deputy minister's sentiments when he tells a reporter that "[e]very people should live in accordance with their own customs, and the Taliban are the system we want . . . . If you have a tradition of so-called freedom in your country, that's fine, but we have our own traditions."<sup>142</sup> Thus, the Taliban as well as other Afghans feel that the Taliban's treatment of women, far from violating women's human rights, is actually a way to protect and preserve their time-honored traditions and their cultural heritage.

Consistent with the above claims is the notion that the Taliban's treatment of women should not be condemned by the Western world because it is "the arrival of 'village' values and attitudes to the city."<sup>143</sup> According to one Kandahar local, the Taliban takeover of Afghanistan has not changed their way of life since "our women have traditionally been at home."<sup>144</sup> However, in "cities like Kabul and Herat, Western and secular ideas had taken hold and the new restraints are stifling."<sup>145</sup> Therefore, condemning the Taliban also means condemning rural Afghan culture because it differs from Westernized notions of living.

Finally, some relativists argue that the Taliban, despite whatever discomfort its new laws might bring to Afghans who live in more Westernized parts of the country, have brought some measure of peace to this war-torn country.<sup>146</sup> For instance, an Afghan U.N. official commented that "[b]efore the Taliban, this country belonged to warlords . . . . My daughters sit in the house and cry to me: we want education. This is a heartbreak, but peace is the first priority for people here. The Taliban must be given credit for accomplishing this."<sup>147</sup> The Taliban's leaders themselves have pointed out that their laws restricting women's lives are actually a benefit rather than a detriment to Afghan women.<sup>148</sup> Prior to its rise to power, the Taliban claims that women were being raped and violated with impunity; now however, "the violence that had come with anarchy [has been]

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140. *Id.*

141. Constable, *supra* note 80.

142. *Id.*

143. FUNDAMENTALISM REBORN?: AFGHANISTAN AND THE TALIBAN, *supra* note 77, at 19.

144. Constable, *supra* note 80.

145. Bearak, *supra* note 76, at A4.

146. *See id.*

147. *Id.*

148. *See id.*

replaced with a less capricious brutishness dictated by religion—a tradeoff many were ready to accept.”<sup>149</sup> To drive this point home, “Taliban leaders argue that the world has been so busy condemning their social beliefs that their restoration of social order has been slighted.”<sup>150</sup> This is again illustrated by a comment made by the Religion Minister, Al-Haj Maulavi Qualmuddin, that he “is tired of hearing about the oppression of women . . . . Where was the world when men here were violating any woman they wanted?”<sup>151</sup> Thus, the Taliban defend their edicts not only by invoking Islam and their cultural tradition evident in present-day village life, but they insist that the rules they have laid down protect women in a way that they were never protected under Afghanistan’s previous regimes.<sup>152</sup>

## **B. The United Nations and Universal Human Rights Standards**

Although the U.N., like many of the world’s governments, has commented very little on the situation in Afghanistan, the U.N. special rapporteur (reporter) on human rights for Afghanistan has visited Afghanistan to “assess the situation, particularly the plight of women under the Taleban administration.”<sup>153</sup> Once in Afghanistan, the rapporteur, Professor Paik Choong-Hyun, “expressed concern about the long-term effects of the fundamentalist Islamic Taleban’s policies towards women.”<sup>154</sup> Meanwhile, the U.N. special rapporteur on violence against women, Radhika Coomaraswamy, criticized the Taliban by saying that “the following human rights of Afghan women are threatened: the right to liberty and security of persons; the right to equal status and to be free from all forms of discrimination; the right to equal access to education, and the right to work.”<sup>155</sup> Finally, the U.N. High Commissioner for Human Rights, Jose Ayala-Lasso, sent messages to the Taliban informing them that “their denial of women’s access to education and work [is] against international conventions signed by Afghanistan.”<sup>156</sup> In short, the U.N. has indicated it believes that the Taliban is violating women’s human rights since the Taliban’s rules concerning women

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149. *Id.*

150. *Id.*

151. *Id.*

152. See Kathy Gannon, *Afghan Women Suffer Depression and Poverty under Taliban Rule*, Hous. Chronicle, Oct. 12, 1998.

153. Johnston, *supra* note 122.

154. *Id.*

155. *Id.*

156. *Id.*

violate, among other conventions, the standard of women's human rights set forth by CEDAW.<sup>157</sup>

In addition to the Taliban's violations of established U.N. human rights standards, universalists want to "debunk the myth that women are content or, at least, safe under the Taliban."<sup>158</sup> They attempt to do this by pointing to the material conditions in which women must live their day-to-day lives. Several newspaper articles have depicted women begging on the streets because they can no longer work and earn money for their families' survival and women suffering mental breakdowns from the sudden and extreme regulation on their daily lives as well as the discomfort and anonymity imposed upon them by having to wear a burqa.<sup>159</sup> These accounts assert, if not explicitly then implicitly, that being forced to live this way is a violation of women's human rights. Thus, universalists criticize what they perceive as "foreign policy-makers [closing] their eyes to Afghanistan, writing it off as an international basket case or declaring that at least there is peace under the Taliban," and vociferously argue that there is a "difference between 'culture' and politics, between peace and the eerie quiet of hoplessness and oppression."<sup>160</sup>

### C. The Limitations of Both Cultural Relativism and Universal Human Rights

Although there is validity in both the relativist and universalist positions in regard to whether Afghan women's human rights are being violated under Taliban rule, each viewpoint has its limitations. Accepting the Taliban's decrees as an assertion of cultural pride and a desire to protect tradition fails to deconstruct the illusion of "cultural authenticity" because this viewpoint does not question what class and gender of people developed those laws that are now being touted as the "traditional" laws of the Afghan culture. At the same time, declaring that the Taliban must follow internationally set standards of women's human rights elicits reactionary anti-Western sentiments among the Afghan people who want to live their lives according to their religion and culture.<sup>161</sup>

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157. See *id.* It is interesting to point out that Afghanistan is a signatory to CEDAW, however, this does not mean that the Taliban recognize the convention. Afghanistan signed, but did not ratify CEDAW in 1979.

158. Goodman, *supra* note 114. See Dupree, *supra* note 81, at 149.

159. See Gannon, *supra* note 127.

160. Goodman, *supra* note 114.

161. See UMA NARAYAN, *DISLOCATING CULTURES: IDENTITIES, TRADITIONS, AND THIRD WORLD FEMINISM*, 14-17 (1997); see Ann Elizabeth Mayer, *Universal Versus Islamic Human Rights: A Clash of Cultures or a Clash With Construct?*, 14 MICH. J. INT'L L. 307, 310-311 (Winter 1994).

In her book *Dislocating Cultures: Identity, Traditions, and Third World Feminism*, Uma Narayan discusses the constructed nature of culture and the illusion that any country has a single "authentic culture."<sup>162</sup> In other words, what is so often referred to as culture is never monolithic. Rather culture is merely a particular view constructed by a certain group within a society. More importantly, culture is not a fixed entity, it has different meanings in different contexts and is always changing in response to both internal and external pressures.<sup>163</sup> Although Narayan uses Indian society as her example, scholars writing about the Islamic world have similarly pointed out that there is no single Islam; instead, there are various different ideas of what Islam is depending on who interprets it.<sup>164</sup> In her article, Mayer points out that

Islam is a decentralized religion without a universally recognized clerical hierarchy or an institution which makes definitive and binding pronouncements on doctrinal matters. The result of this absence of centralized authority is that Muslims of very dissimilar persuasions have been left to advocate their respective positions on the role of Islam in the modern state, positions that are inevitably put forward as definitive expositions of Islamic doctrine.<sup>165</sup>

Thus, Mayer's words caution that we must be very careful in determining whose version of "cultural authenticity" we are willing to legitimize and hold up as the culture of a particular group of people. In fact, sometimes it may not even be feasible to proclaim a singular culture for a given society because that society has several different cultures that overlap and are in opposition to one another at the same time.

When applying this idea to the Taliban, one might say that the Taliban's assertion that they are merely trying to preserve their culture is actually one Afghan group's desire to preserve one type of Afghan culture. Maley further suggests that the culture the Taliban are trying to impose on the rest of the country stems not from "the values of the village, but the values of the village as interpreted by refugee camp dwellers or madrassa students most of whom have never known ordinary village life."<sup>166</sup> Regardless of whether the Taliban's interpretation of the Qur'an originates from rural Afghan villages or the refugee camps that bred the Taliban's leaders, the Taliban's claims of cultural authenticity represent only one view of Islam and Afghan life. Along these lines, Mayer

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162. See NARAYAN, *supra* note 161.

163. See *id.*

164. See Mayer, *supra* note 93, at 1015.

165. *Id.* at 1017.

166. FUNDAMENTALISM REBORN?: AFGHANISTAN AND THE TALIBAN, *supra* note 77, at 20.

cautions that "[o]ne should distinguish . . . between what Muslims universally accept as being Islamic in the sense of being mandated by their religion and what only a segment of Muslim opinion or a governmental elite endorses as Islamic."<sup>167</sup> This message is reinforced by the voices of Afghan people who do not agree with the Taliban's views and legislation. One Afghan doctor who confided to Western journalists that his daughter is being secretly educated explained, "[I]ook, I am Muslim, everyone in this country is Muslim by birth. We go to mosque because we want to . . . . If people think the Taliban have brought Islam to Afghanistan, they are wrong. They have brought something else, and they are implementing it by force."<sup>168</sup>

At the same time, universalist positions, alone, are not a fruitful way to view the Taliban either. Mayer cites the theory that

the promotion of the universality of human rights by the West is counterproductive; it merely provokes clashes and backlash movements in non-Western cultures: Western efforts to propagate such ideas produce instead a reaction against "human rights imperialism" and a reaffirmation of indigenous values, as can be seen in the support for religious fundamentalism.<sup>169</sup>

Another concern with universalism is that it does exactly what it accuses relativism of—it holds up one formation of a particular culture as the true culture for that particular society. In other words, thinking about Afghan women through the narrow lens of universalism creates the danger of validating the Taliban's construction of Afghan culture and tradition as the real Afghan culture.

An additional danger of universalism is exemplified by the Taliban's reaction to U.N. statements that they are violating international human rights and women's human rights conventions. Dupree reports that "[t]his argument made no impression, for the Taliban recognise only the validity of the Sharia; they do not feel bound by U.N. human rights instruments, which they regard in good part as vehicles of Western cultural imperialism."<sup>170</sup> Taliban officials have also remarked at what they perceive to be the "arrogance of outsiders assuming that Western standards must be imposed" upon Afghanistan and Afghan women.<sup>171</sup> In this way, universal human rights standards and women's human rights standards that might be imposed upon the Taliban from the outside will only create temporary change and carries with it the danger of fueling reactionaries and fundamentalists.

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167. Mayer, *supra* note 93, at 321.

168. Constable, *supra* note 80.

169. Mayer, *supra* note 93, at 310-311.

170. Dupree, *supra* note 81, at 147.

171. *Id.* at 149-150.

In evaluating an Afghan woman's refugee and asylum claim, feminist theory can embrace neither cultural relativism and send the claimant back to her country thus implying that the Taliban's laws regulating women's lives are merely an expression of culture, nor universalism that would grant the claimant refugee status but fail to question the universality of internationally established women's human rights standards. The former addresses critiques of feminism as merely another form of imperialism, but leaves feminism without a standard by which to "condemn abuses of women throughout the world," and in Afghanistan in particular.<sup>172</sup> Meanwhile, the latter solution declares that all women suffer from patriarchal oppression and that the way out of this oppression is by applying an established set of human rights to the asylum claim. It offers "the promise of uniting women," but risks the oppressive essentialism that feminist theory seeks to combat.<sup>173</sup> Thus, feminist theory cannot choose one viewpoint over the other; what remains is to begin envisioning alternatives.

## V. TOWARDS A FEMINIST ALTERNATIVE TO THE EITHER/OR DISCOURSE

### A. Redefining the Category "Woman"

The tension that exists between human rights, cultural relativism, and feminist theory when discussing women's human rights forces feminism to confront "divergent paths, neither of which seems to lead out of the woods of patriarchy."<sup>174</sup> This tension also forces feminism to seek an alternative to universalism and relativism, and this need has been articulated by several feminist legal scholars. Professor Obiora observes that "it seems that more effort is devoted to packaging feminist concepts than to developing how to actualize them or to understanding what it means to make that attempt."<sup>175</sup> Nancy Kim declares that "[f]eminism provides an alternative way of looking at the conditions in which women live,"<sup>176</sup> and Tracey Higgins writes that we must "forge an alternative path."<sup>177</sup> The work that is yet to be done, however, is envisioning what these alternatives might look like and putting them into practice.

One alternative path that may be forged requires a redefinition of the category "woman" upon which the concept of women's human rights is based. At the moment, women's human rights are thought of in the same way as the

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172. Higgins, *supra* note 25, at 104.

173. *Id.*

174. Kim, *supra* note 7, at 50. Higgins, *supra* note 25, at 125.

175. L. Amede Obiora, *Feminism, Globalism and Culture: After Beijing*, 4 IND. J. GLOBAL L. STUD. 355, 374-375 (Spring 1997).

176. Kim, *supra* note 7, at 104.

177. Higgins, *supra* note 25, at 126.

category "woman"—an all-encompassing and totalizing category premised upon the notion of woman's consciousness as "synthetic unifactory power."<sup>178</sup> According to Marilyn Frye, this idea of "woman" as containing a monolithic identity must give way to a notion of "woman" as multitudinous. In other words, Frye writes that rethinking "woman" can be done by "working difference into" the very structure of how we construct the category "woman."<sup>179</sup> Thus, reconceptualizing "woman" as a site for the existence of multiple consciousness instead of singular identity is one way to actualize a new concept of women's human rights—one that is neither universalist nor relativist.

Although Frye's suggestion sounds good in theory, it is not entirely clear how the category "woman" can be constructed so as not only to include difference, but to embody difference in its very definition. Fortunately, women of color and Third-World women have always challenged the singular notion of "woman," and writing by women of color and Third-World women provide examples of a category "woman" constructed from multiple consciousness.<sup>180</sup> In fact, the central motivation behind creating *This Bridge Called My Back: Writings By Radical Women of Color* came from the editors' desire to demonstrate that "[a] representation of reality from the standpoint of women must draw on the variety of all women's experience[s]."<sup>181</sup> Hearing the wide range of women's voices represented in this anthology shows that in order to move away from essentializing views of women and oppression, yet keep women's best interest in mind, feminist theory's alternative to universalism and relativism must create a multiple-voiced category "woman," and this can only be done through the listening to and privileging of women's different experiences.<sup>182</sup>

## B. Listening to Women's Voices

In her article, *Arrogant Perception, World-Travelling and Multicultural Feminism: The Case of Female Genital Surgeries*, Isabelle R. Gunning provides some tips on how to be a good listener and, in the process, circumvent the pitfalls of universalism and relativism.<sup>183</sup> To begin with, Gunning points out that "[t]he negative of universalism or ethnocentrism in analyzing culturally challenging practices has been characterized . . . as 'arrogant perception.'"<sup>184</sup> According to

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178. Alarcon, *supra* note 29, at 357.

179. Marilyn Frye, *The Necessity of Difference*, 21 SIGNS 991 (Summer 1996).

180. See Alarcon, *supra* note 29, at 357.

181. *Id.* at 362.

182. See *id.* at 366.

183. See Isabelle R. Gunning, *Arrogant Perception, World-Travelling and Multicultural Feminism: The Case of Female Genital Surgeries*, 23 COLUM. HUM. RTS L. REV. 189 (1991-1992).

184. *Id.* at 198.

Gunning, the arrogant perceiver creates a distance between "me" and "the other," and in doing so, "falsifies and oversimplifies" women's different experiences either by lumping all women into one unified category or by completely isolating dissonant women's voices and declaring that they have "no basis for shared values or perspectives" with our own.<sup>185</sup> Instead, Gunning proposes "world-travelling" as a method by which women from various cultural backgrounds can "identify their interconnectedness" while respecting difference.<sup>186</sup> When "[o]ne moves or travels among different 'worlds' . . . [t]ravelling" is the shift from being one person in one world to a different person in another world, but the difference is part of a coherent whole; one does not act or pose as someone else."<sup>187</sup> In this way, "[o]ne does not travel in order to judge," and world-travelling becomes a strategy for listening to women's voices as well as for including multiple women's experiences in the collective "women's" experience.<sup>188</sup>

One key aspect of listening is to refrain from commenting that women whose voices may disagree with Western notions of women's human rights are "oppressed in part through the internalization of cultural norms [and call] into question the reliance on individual accounts of oppression."<sup>189</sup> Responding in this fashion minimizes the very thing that feminism seeks to privilege: individual women's voices and experiences. Instead, it is necessary to listen to the many varied voices that exist among women and allow them to play with, distort, and ultimately transform the category "woman." This does not mean, however, that there is no danger in privileging a "politics of experience."<sup>190</sup> Individual women's voices and experiences do not reveal a "*pure origin* and [*a*] *true self*."<sup>191</sup> In other words, too often the Western search (and in some cases the feminist search) for women's experience becomes a search for an authentic woman's voice. This not only leads to the temptation to romanticize and essentialize the voice being heard, but it also reinforces the myth that there are "uncontaminated aspects of culture" to be found out by Western seekers.<sup>192</sup> For instance, anthropologist Christine J. Walley "embarked on a search for an 'authentic' perspective" by asking young Kenyan students about their opinions regarding female genital surgeries, but eventually discovered that there is no process through which one can determine what is a "true" woman's experience in any given culture.<sup>193</sup> Walley notes that

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185. *Id.* at 199-202.

186. *Id.* at 202.

187. *Id.* at 202-03.

188. *Id.* at 204.

189. Higgins, *supra* note 25, at 116.

190. Hutchinson, *supra* note 61, at 1561-1562.

191. TRINH T. MINH-HA, WOMAN NATIVE OTHER 90 (1989).

192. *Id.* at 56.

193. Christine J. Walley, *Searching for "Voices": Feminism, Anthropology, and the Global Debate over Female Genital Operations*, CULTURAL ANTHROPOLOGY 404, 411 (1997).



she finally "began to recognize the naivete of [her] search for 'real' voices . . . for clearly the girls' voices shifted according to context."<sup>194</sup> Thus, as Allan Hutchinson points out in his essay on feminism and postmodernism, "experience [like everything else] is itself always and already the product and subject of interpretation;" and to pretend it is anything else would be to elevate one experience at the peril of ignoring others.<sup>195</sup>

In light of the fact that experience is shaky ground upon which to construct a feminist discourse on women's human rights, how is it possible to continue valuing individual women's experiences? Hutchinson suggests that a workable concept of women's human rights can adhere to individual women's experiences by, instead of looking at these experiences as truths, looking at them as voices responding to specific situations.<sup>196</sup> This "relational approach . . . assumes that people live within networks of relationships" and proceeds by valuing the voice that is being heard but remembering that the voice is not produced in a vacuum.<sup>197</sup> Finally, this approach to women's human rights allows one to "raise questions about how anyone knows and how the observers' relationship to the observed influences what they think they know," without invalidating the speaker's voice.<sup>198</sup> Thus, feminist theory can escape the limitations of universalism by incorporating individual women's voices in its conception of women's human rights, and it can avoid the dangers of relativism by remembering that women's voices are less like straight lines and more like flowing curves with "constantly changing . . . [points] of departure and arrival."<sup>199</sup>

Another equally important component of listening is legitimizing the voice of the dissident "other." This means that Third-World women's voices that go against the grain of the hegemonic view of their culture must be heard, accepted, and valued. Kim writes that "feminist approaches to international human rights should shift the focus from the existing male-dominated status quo to one that takes women's experiences into account."<sup>200</sup> This is very crucial because in wanting to respect cultural differences, it is easy to ignore the voices of women from within the culture who disagree with the dominant portrayal of their culture. For instance, women in

many countries and at different periods in history . . . have mobilized to fight traditional practices that harmed them. Often their efforts have been ignored by human rights groups [as well as] . . . stifled by governments and power elites unwilling to

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194. *Id.* at 412.

195. Hutchinson, *supra* note 61, at 1562.

196. *See id.*

197. *Id.* at 1556.

198. *Id.* at 1557.

199. MINH-HA, *supra* note 191, at 63.

200. Kim, *supra* note 7, at 104.

expand or create choices for women at the risk of losing control over them.<sup>201</sup>

Since feminist theory's interest in preserving diversity stems from its desire to value different women's experiences rather than the preservation of cultural diversity for the benefit of those in power, it makes sense that the voices of women who oppose certain aspects of their culture must be included in defining women's human rights.<sup>202</sup>

Uma Narayan's introduction to *Dislocating Cultures: Identities, Traditions, and Third World Feminism* is an example of a woman's voice rejecting certain aspects of her culture's view of women. In a semi-personal narrative style, Narayan describes her girlhood in order to point out that her "eventual feminist contestations of [her] culture have something to do with the cultural dynamics of the family life that surrounded [her] as a child, something to do with [her] early sense of the 'politics of home.'"<sup>203</sup> In this way, Narayan combats the view that Third World women's feminism is merely a "symptom of their 'lack of respect for their culture,' rooted in the 'Westernization' that they seem to have caught like a disease."<sup>204</sup> She goes on to argue that "Third-World feminism is not a mindless mimicking of 'Western agendas' in one clear and simple sense—that, for instance, Indian feminism is clearly a response to issues specifically confronting many Indian women."<sup>205</sup> In doing this, Narayan not only deconstructs any given "culture's own dominant accounts of itself," but she also demonstrates the importance of valuing women's dissonant voices within the seemingly fixed and monolithic view of their culture.<sup>206</sup> Thus, just as feminist theory must refrain from accusations of false consciousness when women in other

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201. *Id.* at 92.

202. See Higgins, *supra* note 25, at 109.

203. NARAYAN, *supra* note 161, at 7.

204. *Id.* at 6.

205. *Id.* at 13. It should be noted that Narayan is not saying that all Third World women who offer critiques of their culture would think of themselves as feminists. Narayan points out that

[m]any Third-World women who do not consider themselves feminists know and acknowledge that women face mistreatment within their social contexts and cultural institutions . . . What may set feminist [Third-World women] apart is the ways in which they insist that [differences in privileges and power between men and women] requires us to rethink notions of what it is to 'be at home' in a 'culture,' and to redefine notions of 'cultural loyalty, betrayal, and respect' in ways that do not privilege the experiences of men.

*Id.* at 9.

206. *Id.*

cultures are comfortable with how their culture's traditions and practices affect women, so too must feminist theory refrain from accusing Third World women who disagree with their culture's treatment of women of having a false "Western feminist" consciousness.<sup>207</sup>

Feminism's alternative to universal human rights standards and cultural relativism requires re-conceptualizing women's human rights through a multi-layered, multiple-voiced category "woman." The practical implications of this reconfiguration of women's human rights are many. To begin with, although women's human rights will remain a vehicle by which to help end the oppression of and discrimination against women, locating this oppression and discrimination will need to be the result of active listening and learning "through genuine curiosity, concern, and interest."<sup>208</sup> Secondly, women, including those who are not Other or Third-World women as well as those who are, will have to participate in the dialogue of difference with the understanding that difference is not a problem to be solved. Instead, the problem is learning how "to live fearlessly with and within difference."<sup>209</sup> Third, those who participate in the women's human rights discourse must make a conscious effort to engage in the tedious and ongoing task of watching themselves while they are in the act of watching. In other words, they must be aware that they are just as vulnerable to the allures of totalizing, categorizing, and essentializing as those whom they criticize, and they must not hesitate to critique themselves every step of the way. Lastly, if feminist theory's alternative conception of women's human rights is to effectuate real change for the real women who exist outside the realm of theory, it is vital that women's human rights be discussed with specific women's situations in mind—such as that of an Afghan woman applying for asylum in the United States because she believes the Taliban are violating women's human rights. This strategy fulfills feminism's universalist concern by establishing the need for women's human rights while reinforcing feminist theory's relativist concern by forcing a situation-specific analysis of what constitutes women's human rights and the subsequent violation of these rights.

## VI. APPLYING FEMINISM'S ALTERNATIVE TO AN AFGHAN WOMAN'S ASYLUM CLAIM

### A. Deciding Women's Gender-Based Refugee and Asylum Claims

In 1951 the U.N. Convention Relating to the Status of Refugees defined a refugee as "a person with a well-founded fear of persecution for reasons of race,

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207. *See id.*

208. MINH-HA, *supra* note 191, at 84.

209. *Id.*

religion, nationality, membership of a particular social or political opinion."<sup>210</sup> The United States employs the same refugee definition and requires an asylum claimant to prove, among other things, that she was persecuted or has a well-founded fear of persecution on account of her membership in one of the five designated categories. Since gender is not one of the designated categories, the court in *In Re Fauziya Kasinga* allowed Kasinga to represent herself as a "member of a particular social group"—a social group that consists of "young women of the Tchamba-Kunsuntu Tribe [in Togo] who have not had FGC, as practiced by that tribe, and who oppose the practice."<sup>211</sup> While the court may not have had this intention when it created this narrow category for Kasinga, the decision of the Board of Immigration Appeals (BIA) resulted in the privileging and validating of the voice, experience and needs of one particular woman. At the same time, since the court's decision is not broad enough to include all women who have undergone or may undergo FGC, it does not reflect the universalist tendency to denounce all cultures' practice of FGC as a violation of women's human rights. In this way, the ultimate outcome of *In Re Fauziya Kasinga* can be viewed as an example of applying feminist theory's alternative to women's gender-based refugee and asylum claims.

The court does make sweeping generalizations about FGC and condemns it using very Western notions of human rights. However, although this seems to have informed Kasinga's asylum decision, it is not at the core of the ultimate holding. The challenge, of course, is to fashion an asylum decision that values the voice of an individual woman refugee claimant and her perception of what violates her human rights without requiring that voice to be representative of all women who live within a certain cultural context. *In Re Fauziya Kasinga* comes close to actualizing this goal—and in the process actualizing the following twin goals of feminist theory: (1) valuing individual women's different experiences and perceptions and (2) addressing and eliminating the oppression of and discrimination against women. However, it falls short due to the court's need to totalize all women's reactions toward FGC rather than recognizing the dissonance which may exist among women's feelings toward the practice.

## **B. Hearing Afghan Women's Voices**

In order to apply feminism's alternative to universalism and relativism to an Afghan woman's asylum claim, it is first necessary to listen to Afghan women's voices. Despite restrictions on their movement and ability to communicate, a few Afghan women have been able to share their reactions to the

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210. Nancy Kelly, *Guidelines for Women's Asylum Claims*, HARV. IMMIGR. & REFUGEE PROGRAM (1995).

211. Kasinga, *supra* note 66.

Taliban with the rest of the world. One newspaper article interviewed a young Afghan woman who attended Kabul University until the Taliban's arrival. She was quoted as saying, "I really felt bad . . . Since the day the Taliban came, I have felt that I am a woman, and that I have no choice in my life."<sup>212</sup> The same woman further commented on the Taliban's insistence that their decrees originate in Islam by saying that "[the Taliban] think it's Islamic if they cover all women . . . In fact, in the Koran, it says nothing about wearing burkas or men beating women (who do not wear them)."<sup>213</sup> Another reporter, Pamela Constable, wrote that although she was forbidden to interview Afghan women, she noticed "the flushed cheeks and undisguised relief on women's faces when, upon reaching an all-female sanctuary, they could finally fling the sweltering garment back over their heads and relax."<sup>214</sup> In the same article, Constable notes that she was able to speak with professional Afghan women refugees in Pakistan as well as a few teachers and nurses in an internationally run clinic in Kabul; and both these groups of women "expressed strong resentment at being forcibly relegated to anonymity."<sup>215</sup> In addition to the individual women's voices and feelings that a handful of reporters have been able to publicize, Afghan women have also collectively raised their voices in opposition to the Taliban. On October 23, 1996, "women rallied for five hours in Mazir-e Sharif raising slogans such as 'Taliban law is not Islamic law.'"<sup>216</sup> This protest as well as several others was attributed to a group of Afghan women who have created an organization called the Revolutionary Association of the Women of Afghanistan (RAWA).<sup>217</sup> On their website, RAWA explains that it is "an independent political organization of Afghan women . . . struggling for peace, freedom, democracy and women's rights in fundamentalism-blighted Afghanistan."<sup>218</sup> The website also includes Afghan women's stories describing their lives under Taliban rule and gives a brief synopsis of RAWA's work in establishing schools and hospitals for Afghan refugees.<sup>219</sup> One of RAWA's main goals is to restore Afghan women's human rights, and to that end it has "conducted nursing courses, literacy courses and vocational training courses for women."<sup>220</sup> Although RAWA has been in existence since 1977, the website declares that "since the overthrow of the Soviet-installed puppet regime in 1992, the focus of RAWA's political struggle has been

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212. John-Thor Dahlburg, *Strict Taliban Dress Code Hems in Afghan Women Culture: Confining Garment Required by Extremist Militia Reveals Wearers' Subservient Role*, L.A. TIMES, Nov. 23, 1996, at A8.

213. *Id.*

214. Constable, *supra* note 80.

215. *Id.*

216. Dupree, *supra* note 81, at 161.

217. *See id.* at 162.

218. RAWA, *supra* note 132.

219. *See id.*

220. *Id.*

against the fundamentalists and the ultra-fundamentalist Taliban's criminal policies and atrocities against the people of Afghanistan in general and their incredibly ultra-male-chauvinistic and anti-woman orientation in particular."<sup>221</sup>

While feminist theory must be wary of making statements that indicate that the above voices speak for all Afghan women, it should be important not to delegitimize the voices that have been heard. When hearing Afghan women denounce the Taliban or Muslim feminists arguing "that it is actually patriarchal attitudes and misreadings of Islamic sources, not Islamic tenants, that inspire the patterns of discrimination against women," it may be tempting to dismiss these claims as tainted by Third-World women's exposure to Western ideas or Western feminism.<sup>222</sup> Indeed, the Taliban's website does just this when it declares that "the [Afghan women] who are demanding freedom from Purdah [and the] right to employment . . . do not in fact belong to Afghanistan at all but have come from somewhere else."<sup>223</sup> Dismissing Afghan women's voices in this way, however, is an extreme form of relativism that, ironically, threatens to universalize one particular understanding of a given culture to the exclusion of all the other voices within that culture.<sup>224</sup> Instead of ignoring the Afghan women's voices that have been heard, feminist theory urges us to listen to these voices while concurrently contextualizing the experiences being heard. Thus, in valuing these voices one must realize that all of the women whose voices have been heard occupy relatively privileged positions because they were in a situation where they *could* be heard—they are all women who live in the city rather than rural villages and most of the women interviewed were students and professionals.

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221. *Id.*

222. Mayer, *supra* note 93.

223. *Taliban Online*, *supra* note 120.

224. See INTERNATIONAL HUMAN RIGHTS IN CONTEXT, *supra* note 13, at 195. Cultural relativism was born from a desire to temper the neo-imperialistic view of the world presented in international human rights instruments created largely by Western powers. Cultural relativism was not, at least originally, an attempt to promulgate romantic stereotypes about "other not-so-developed" cultures. It is ironic, then, that an idea which was largely a reaction to the over-generalization that non-Western countries were barbaric and needed human rights systems imposed upon them, has itself become an over-generalization stating that non-Western peoples do not need or are not capable of sustaining an ideology which calls for human rights. Today we can see that cultural relativism has, in its attempt to validate non-Western modes of living and understanding, created its own absolutist stance; it is one which "contains a more or less implicit value judgement in its call for tolerance: it asserts that we *ought* to respect other ways of life" regardless of whether those "other ways of life" are representative of a military government or a small group of elite men who continue to interpret holy texts in ways that will be to their social, economic, and political benefit. *Id.*

### C. Listening to an Afghan Woman's Voice through Her Asylum Claim

The case of an Afghan woman applying for asylum in the United States seems to present the either/or dilemma of universalism versus relativism. Those who would grant asylum are accused of wanting to impose Western standards of women's human rights on another culture and those who would deny asylum are accused of valuing cultural practices that are oppressive to women. Feminism's alternative, however, rejects this dichotomous framework by focusing on the individual woman's voice that is presented by the asylum claim. Using *In Re Fauziya Kasinga* as a model, an Afghan woman would claim that she has a well-founded fear of persecution on account of her membership in a particular social group. Paralleling Kasinga's case, the social group would be defined as Afghan women who oppose the effects of the Taliban's practice of Islamic law upon their bodies and minds. A court decision employing feminist theory's understanding of women's human rights would grant the asylum claim in its desire to recognize what one woman experienced as a violation of her human rights. However, unlike *In Re Fauziya Kasinga*, the court's analysis in reaching its decision would allow the Afghan woman to assert persecution as a result of being a member of the narrow social group constructed above, without asserting that all Afghan women's experiences under Taliban rule mirror the experiences of the asylum claimant. Viewing women's human rights through the lens of feminist theory would enable a court to recognize the validity of a social group consisting of women who oppose the Taliban's laws affecting women. Granting refugee status to an Afghan woman because she is a member of a social group consisting of women in Afghanistan who fear persecution if they do not adhere to the Taliban's decrees is a way of assessing women's human rights in Afghanistan without making universalist or relativist statements about the Taliban, Islamic law, and traditional Afghan culture. Most importantly, resolving an Afghan woman's asylum claim by adhering to feminist theory's re-conceptualization of women's human rights means that we are finally willing to not only hear women's different voices, but that we are utilizing these voices to effectuate positive change in women's lives.

Feminist theory allows one to think of women's human rights in much the same way one perceives a rainbow—a single band of light that is, by definition, a panoply of bright and various colors. This view does not eliminate the overarching category “woman,” yet makes it impossible to think of “woman” without also being aware of the nuances and fluidity that exists within the category. Difference is worked into the very structure of women's human rights so that one cannot utilize feminist theory's construction of women's human rights without simultaneously referring to its multiplicity. While envisioning this alternative women's human rights discourse not bound by the limits of universalism and relativism is a beginning, it is sobering to contemplate that the newly-heard voices that are becoming a part of our re-construction of women's

human rights are “already privileged enough to reach the moment of cognition of a situation for [themselves].”<sup>225</sup> In other words, although more and more voices are becoming a part of the women’s human rights discourse, there are voices that have not yet been heard and some that may never be heard. This suggests that even a multitudinous women’s human rights discourse will not, in the end, be enough.

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225. Alarcon, *supra* note 29, at 366.



