

# INTERNATIONAL HUMAN RIGHTS DIMENSIONS OF INTIMATE VIOLENCE: ANOTHER STRAND IN THE DIALECTIC OF FEMINIST LAWMAKING

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It is a deep pleasure to gather to discuss Liz's great book *Battered Women and Feminist Lawmaking*<sup>1</sup> and a privilege to be part of this great gathering. Liz and I have shared each others paths as feminist lawyers, teachers, scholars and friends for over thirty years. This book is for me a journey into both past and future as well as more deeply into her persistently reflective, illuminating and generative analysis. It is a powerful illustration of the indispensability of activist feminist scholarship and critical feminist activism. Thank you Liz, for the pains you took and the other pleasures you forewent.

The documentation of the history of our movement and Liz' thoughtful reflections on the continuing dialectic and challenges are, indeed, a gift to all of us and to women in many parts of the world who have been struggling to have recognized and to eliminate violence against women. In that process, and unlike most United States activists, many of our sisters abroad have turned to the framework and mechanisms of international human rights to both legitimate and advance their struggles and, in so doing, have contributed to the vision and tools we can be using here. Characteristically, Liz transcends the traditional frames within which we work and recognizes the significance of these developments and the similar impetus they can provide to our own domestic struggle here.

My comments today will briefly trace the history and theoretical

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1. ELIZABETH M. SCHNEIDER, *BATTERED WOMEN & FEMINIST LAWMAKING* (2000).

obstacles in this process and elaborate on how the human rights framework and human rights activism can assist us here in the United States, as well as how the dialectic of state dependency, depoliticization and the disaggregation of violence from equality, signaled by Liz, compromise international human rights and present continuing challenges for women's human rights activists and scholars as well.

In 1990, womens' human rights issues were barely on the margin of the international human rights agenda. The Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW")<sup>2</sup> was consigned to little more than window-dressing. Violence against women was almost never addressed in either official or non-governmental human rights documentation and reporting. Even when the state was responsible for rape, for example, it was usually treated as a personal matter, rendered invisible and immunized from accountability. Rape in war was also on shaky ground as it had evolved in international humanitarian law only as implicit in the crime of "humiliating and degrading treatment" or in the "offense against honor and dignity" rather than as an explicit, named crime of violence.

In response, a burgeoning and irrepressible international feminist women's human rights movement coalesced and identified violence against women, by intimates and officials alike, as a priority issue of human rights in its preparations for the 1993 World Conference on Human Rights in Vienna ("Vienna Conference"). In the early stages, the allies were visionaries or renegades from mainstream thinking or women, in various positions in and out of governments, who themselves were survivors of rape or battering.

Leading mainstream human rights non-governmental advocates, however, adhered to a state-centric approach to human rights and were just beginning to recognize the severity of gender-based violence. With narrow exceptions like slavery, the traditional view was that human rights address only the actions of the state, not private individuals. In this view, state action which inflicts violence of sufficient gravity upon women would constitute a human rights violation. But privately inflicted violence, while appropriate for condemnation by municipal criminal laws, did not, they argued, present a human rights concern apart from some form of active state involvement. Thus, when state officials inflicted violence on women—for example, rape in prison—that would be a violation, for

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2. G.A. Res. 180, U.N. GAOR, 34th Sess., U.N. Doc. A/RES/34/180 (1980).

example, of the right of personal security. And, if the state treated violence against men and women unequally—e.g., in not enforcing assault laws against domestic violence or in nullifying the killing of women by the defense of honor—that would be discrimination, an appropriate human rights concern.

But the notion of treating the phenomenon of private violence against as discrimination *per se*, or as torture or enslavement, or even as a violation of the international protection of life, liberty or personal security when tolerated by the state, was taking matters too far. Including private gendered violence, it was said, would “dilute” the human rights framework. Thus feminists had to challenge this incarnation of the public/private distinction, and discovered, in the process, that the international human rights process was not impenetrable to global organizing and that basic human rights principles include certain positive state responsibilities that should apply to private gender violence.

The Vienna Conference was a watershed. Testimonies as to the gravity and pervasiveness of gender violence, the force of women’s broad organizing, and the very concrete fact, brought home by the participation of women from Bosnia and the former Yugoslavia, that women were being raped systematically in Bosnia—just hours from the site of the Conference—prevailed over objections to incorporating gender violence as a human rights problem. They also prevailed over the vigorous chorus of “nos” from defenders of archly patriarchal religions and cultures, who may condemn violence against women but who also contend that it is not an international problem and that sexual subordination in the home should be excluded from the human rights framework. The new consensus is reflected in the official document, the Vienna Declaration and Programme of action.<sup>3</sup>

The historic achievement of Vienna Conference was two-fold: the recognition of violence against women as a human rights issue and the setting into motion of a process of integrating or “mainstreaming” issues of women’s rights and gender equality into the international system at all levels. The process, when carefully monitored by women and when in the hands of women or men committed to gender-inclusiveness, has produced a tremendous literature and significant advances. This is true not only internationally but also at the national and local level, as NGOs bring the international framework home and countries are called upon by

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3. U/N Doc. A/Conf. 157/24, *reprinted in* 32 I.L.M. 1661 (1993).

international bodies to report their progress in implementing remedies against domestic violence.

Significant international documents address domestic violence as a human rights problem. These include Recommendation No. 19, "Violence Against Women,"<sup>4</sup> of the Committee to End Discrimination Against Women (which monitors implementation of CEDAW); the Inter-American Convention on the Prevention, Punishment and Elimination of Violence Against Women (called the Convention of Belém do Pará),<sup>5</sup> the unanimously approved UN General Assembly Declaration on the Elimination of Violence Against Women,<sup>6</sup> the Beijing Platform for Action,<sup>7</sup> and the reports of Radhika Coomaraswamy as the UN Special Rapporteur on Violence Against Women: Its Causes and Consequences,<sup>8</sup> which reports have been accepted by annual resolutions of the UN Human Rights Commission on the Rights of Women.

While the UN human rights system operates primarily through various shaming techniques, the recent Rome Treaty creating the International Criminal Court ("ICC") is different. Despite vigorous objections from the Vatican and some Islamist countries, the ICC's jurisdiction encompasses rape, sexual slavery, forced pregnancy, enforced sterilization and other sexual violence in time of peace as well as war as crimes against humanity when such violence is widespread or systematic and is the consequence of state or organizational policy. The ICC exists not only as an institution of justice but as an incentive to states to adopt and prosecute these crimes domestically. Thus, for example, acceptance or encouragement of marital rape or battering by law or by organizational leaders is one example of the ICC's potential reach.

At the same time, intimate gender-based violence seems intractable and the obstacles endure. In United Nations arenas, a small band of countries, representing various fundamentalisms, and now joined by

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4. CEDAW General Recommendation No. 19, U.N. HCHR, 11th Sess., U.N. Doc. A/47/38 (1992)

5. See Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, "Convention of Belém do Pará," June 9, 1994, 33 I.L.M. 1534.

6. G.A. Res. 48/104, U.N. GAOR, U.N. Doc. A/RES/48/104 (1993).

7. 35 I.L.M. 401 (1996).

8. *Preliminary Report Submitted by the Special Rapporteur on Violence against Women, Its Causes and Consequences, Ms. Radhika Coomaraswamy, in accordance with Commission on Human Rights Resolution 1994/45*, U.N. ESCOR, 50th Sess., U.N. Doc. E/CN.4/1995/42 (1994). To view the various reports issued by Ms. Coomaraswamy and the Human Rights Commission's resolutions, visit the UN High Commissioner of Human Rights website at <http://www.unhchr.ch>.

representatives of the Bush Administration, continues to challenge the Vienna framework. In addition to outright obstruction, the full implementation of the obligation to eliminate gender-based violence in international or domestic policy has yet to be achieved in practice as the implementers commonly lack commitment or know-how. Beyond that, having just passed through the first stage of recognition, the problems, which Liz highlights in her book, of de-politicization and fragmentation, the tension between victimization and agency, the need for collaboration with and dangers of cooptation by the state, and the cultural embeddedness of violence against women, are also among the dilemmas faced by international activists.

Nonetheless, there are a number of important ways in which the international human rights recognition of gender-based violence, and particularly intimate violence, should strengthen and inspire the struggle here as well as abroad. The fact that intimate violence is now clearly a human rights issue is itself significant and heightens the demand for vigorous and multifaceted preventive and remedial action by the state. In this time of unprecedented and frightening attack by the Bush Administration on both political and civil rights at home and in foreign relations, it is especially important that United States activists utilize and defend human rights norms. In that defense, we not only enhance the significance of the problem of intimate violence and bring home some of the more capacious and positive aspects of international human rights obligations; we also reinforce the over-arching importance of universal principles and multilateral frameworks for human security and human rights generally.

Liz points out the significance of the international acceptance of the concept that gender violence as *per se* gender discrimination. International recognition of gender violence as a human rights violation does not depend upon showing that the state inflicted it or that the state treated violence against women differently from violence against men. Rather, gender violence is viewed as inherently discriminatory in that it both reflects inequality and perpetuates it. This approach is rooted in an acknowledgment of the impact of this systemic practice and the necessity to prioritize its elimination. It entrains the positive obligation of the state under the International Covenant on Political and Civil Rights (“ICCPR”)<sup>9</sup> to ensure people against attack on their rights by others and the obligation, set forth in CEDAW and the Convention on the Elimination of All Forms of

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9. G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966).

Racial Discrimination (“CERD”),<sup>10</sup> to both eliminate discrimination and take positive steps to achieve full equality.

Recognition by the international human rights system is an important step in transforming private gender violence from a personal to a political issue. Paralleling right-wing anti-federalist opposition to the federal Violence Against Women Act here, opponents of recognizing privately inflicted gender violence as a human rights violation argued that this is a municipal or “domestic” law matter inappropriate for international scrutiny, sanction or redress. Internationally, the argument that addressing domestic battering transcends the proper scope of the state-centric human rights system had superficial plausibility. The focus of human rights on the wrongs committed by states was already a significant inroad into state sovereignty. State wrongdoing, it was argued, is the appropriate target because the state has a greater capacity to harm and where the state is the wrongdoer, the victim has no recourse. However, feminist advocates around the globe insisted upon and demonstrated—through women’s tribunals, testimonies, documentation, statistical compilations, scholarship, and manifestations—that the harm done by the batterer is no less grave than that perpetrated by the state. Further, as Celina Romany elucidated in her classic article on the public/private distinction in international human rights, women in battering relationships, when denied meaningful recourse to the state, are relegated by the state to rule by a private, and equally absolute “parallel state”—the rule of the batterer. In other words, neither human rights law, nor the state, can claim to be neutral when it does nothing to prevent private abuse, because the impact in fact is to empower the abuser.<sup>11</sup>

Further, as Liz points out, to elucidate the gravity and political nature of private gender violence, feminist human rights advocates and scholars analogized battering to enslavement and torture. The issue of torture, for example, was first brought to the table by Latin American women who, while fighting dictatorial repression in their countries, recognized that what they or their sisters were suffering at home had far too much in common with the violence inflicted on political prisoners in the jails. The analogy to torture and slavery challenges the traditional trivialization of private violence as well as

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10. 660 U.N.T.S. 195 (1969).

11. See Celina Romany, *Women as Aliens*, 6 HARV. HUM. RTS. J. 87 (1993); see also Elizabeth Schneider & Nadine Taub, *Women’s Subordination and the Role of Law*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 328 (3d ed. 1998) (1982) (argued that the state’s traditional hands-off approach to violence in family life is not neutral but rather supports women’s subordination).

shifts the responsibility from the blameful woman to the batterer. These arguments provide an additional lens, illuminating women's dependency, not as a product of their own weakness or pathology, but as a function of the exercise of political power and control. By probing the relevance of torture and enslavement and utilizing these terms to characterize severe battering and marital rape, feminists challenged the tendency to see this violence as somehow permissible or inevitable. As the author of an early article analogizing domestic violence to torture,<sup>12</sup> I still hear frequently from battered women survivors and advocates that the process of understanding battering as torture put their suffering in a new and empowering perspective. These ends, and not the justification of higher penalties, should be the point of illuminating the discrepancy between the gravity of intimate violence and the impunity traditionally accorded it.

Again, traditional human rights advocates originally argued that the concept of torture had no bearing on violence against women at least unless the violence was state-inflicted or explicitly state-sanctioned. Nonetheless, women persisted and the notion that rape and battering can constitute torture or enslavement gained ground in official documents as well as in the jurisprudence of the *ad hoc* International Criminal Tribunals.<sup>13</sup> It also is very significant that, as this symposium goes to press, Amnesty International has begun a domestic violence campaign that relies heavily on the analogy to torture. Understanding domestic violence as torture thus situates intimate violence as a form of political violence and helps to illuminate the impossibility of eliminating one without the other. It also opens the door, for example, to relief for battered women refugees who cannot legally be returned to countries where they are in danger of torture.

The international human rights system also helps us to understand the nature of battering as a "cultural practice." Western media tend to focus on "cultural practices"—honor killings, female genital mutilation, and dowry deaths, for example—as human rights violations. But these are simply ritualized and openly legitimated versions of the implicitly accepted violence in the everyday—the intimidation, humiliation, beating, rape and killing of women in intimate relationships for some form of resistance to their gender-

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12. Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence As Torture*, 25 COL. HUM. RTS. L.REV. 291 (1994).

13. See, e.g., Prosecutor v. Kunarac, 2002 I.C.T.Y. No. IC-96-23, IC-96-23/1-A (affirming a twenty-eight year conviction for the repeated raping of a detained Muslim women during the Bosnian Serb and Muslim conflict).

determined role or for no reason at all. In other words, throughout the world, as well as in the United States, intimate battering of women is a pervasive “cultural practice,” rooted in patriarchal norms of male superiority and control and female inferiority and obedience, encased in familial and social and economic structures of inequality, terrorizing women and perpetuating gender conformity and oppression. A culturally embedded practice requires also a cultural response. CEDAW, for example, requires states to “take appropriate measures to . . . modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on stereotyped roles for men and women.”<sup>14</sup>

Contrary to our constitutional system, the international human rights system—including political and civil rights—imposes positive as well as negative state responsibilities. Under our federal constitutional system, claims that the state is responsible for failing to protect, prevent or punish have no force. In *DeShaney v. Winnebago County*,<sup>15</sup> the Supreme Court crystallized the extreme and cruel form of negative constitutional protection that dominates our system in denying redress for the state’s knowing failure to protect a helpless child from his father’s violence. In *Harris v. McRae*,<sup>16</sup> the Court told poor women needing Medicaid to exercise the right to abortion that their inability to obtain abortion was their fault. The state has no obligation either to provide a person the means to exercise a fundamental right or even to avoid discriminating against that exercise by favoring one option over another (thereby funding pregnancy, but not abortion). Excepting essentially custodial situations, the state has only the duty to refrain from actively harming a person. As a federal constitutional matter, we are often reminded that the state has no obligation to enact murder laws or to stop a murder or a battering apart from the rare case where selectivity renders the omission discriminatory.

The international human rights framework, however, does require murder laws and much more. The ICCPR identifies two concepts of state responsibility: the duty to respect (negative) or do no harm and the duty to ensure (positive) the protection of these rights as against private interference as well as the means to exercise basic rights. Acquiescence in privately inflicted torture renders the state directly

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14. CEDAW, *supra* note 2, at art. 5(a).

15. 489 U.S. 189 (1989).

16. 448 U.S. 297 (1980).

responsible. Thus, the state has, at least, the obligation to exercise due diligence to protect women from the harm of intimate violence just as it is obligated to protect the life, liberty and personal security of all its citizenry. Under CEDAW, a state has a broader obligation to take positive measures to eliminate gender-based violence as part and parcel of the obligation to eliminate both intentional and disparate impact discrimination. Thus the positive responsibilities of the state under human rights law to protect even what our Supreme Court has labeled negative rights are, in theory, far reaching. They include not only the duty to investigate and punish, but also to prevent, protect, rehabilitate and develop and implement a plan to eliminate such violence in every sphere. These obligations are reinforced by the obligation in CERD to take positive measures to eliminate racial discrimination. Although originally resistant to incorporating a gender perspective, the CERD Committee has recently issued Recommendation No. 25, which partially adopts an intersectional analysis of race and gender discrimination with respect to private violence.<sup>17</sup>

To the extent that our constitutional system embraces international law, the positive obligations of the international framework should eventually bear concrete fruit here despite persistent objections from successive administrations.<sup>18</sup> Consider a familiar and narrow example—the provision of a federal judicial remedy for gender-based discrimination such as legislated by Congress under the Violence Against Women Act (“VAWA”).<sup>19</sup> Under the ICCPR, which the United States has ratified, the state has the duty to provide appropriate remedies for gender violence, including judicial remedies. With our students at CUNY’s International Women’s Human Rights Clinic, Cathy Albisa and I sought to defend the VAWA cause of action on international law grounds through submitting the Brief *Amicus Curiae* on Behalf Of International Law Scholars and Human Rights Experts to the

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17. General Recommendation 25, U.N. GAOR, Comm. on Elimination of Racial Discrimination, 55th Sess., Supp. No. 18, U.N. Doc. A/55/18 (2000).

18. The United States has ratified the ICCPR, CERD, and the UN Convention Against Torture and Cruel, Inhuman and Degrading Treatment or Punishment, albeit with broad reservations, understandings and declarations designed to limit their scope and enforceability, including to prevent treaty-based claims without explicit Congressional approval. The United States has signed CEDAW and the Convention on the Rights of the Child which entails the responsibility not to act inconsistently with their purpose or spirit. In the Inter-American system, the United States is bound by the American Declaration of the Rights and Duties of [ ]Man” and has signed the American Convention on Human Rights.

19. Violence Against Women Act of 2000 (“VAWA”), Pub. L. No. 106-386, 114 Stat. 1464 (codified in relevant part at 42 U.S.C. § 13981 (2000)).

Supreme Court in *United States v. Morrison*.<sup>20</sup> The *amicus* argued that Congress' power to implement treaty obligations and to confer Article III jurisdiction on the federal courts over treaty-based and customary international law claims, enables Congress to enact remedies against gender-based violence irrespective of whether it has authority to do so under the Commerce Clause or Fourteenth Amendment. The Clinton Administration had already touted VAWA as implementing legislation pursuant to the ICCPR and we emphasized that VAWA also implemented the United States' obligation under federal common law created by customary norms to provide appropriate remedies for gender-based violence.

The Court, and, most disappointingly, the dissenters in *Morrison*, did not even note this argument as one for the future, which would have been appropriate since the issue had neither been addressed by Congress nor argued below. Nonetheless, unless this increasingly rightist Supreme Court completely reframes the relationship of international and domestic law—which is a very real and immediate risk—these arguments should operate as a counterweight to devolution and enable Congress to legislate enhanced protection of the human right to be free of gender violence as well as other human rights having comparable status in treaty or customary law.

The Vienna Convention's mandate to "mainstream" gender in the human rights system also applies to nations and has been an important tool for local activists. Gender mainstreaming is pro-active. In theory, all governmental and inter-governmental entities are required to take initiative to examine the impact of their policies on women, search out the invisibilized harms and inequalities that result, and develop alternative approaches and remedies. To do this, agencies and institutions are to have a gender focal point—someone who has expertise in the subtleties of gender—with authority to investigate, critique, jump start and implement reforms in a continuing process of consultation with women affected and their representatives. While this approach is not unknown in United States domestic processes, it tends to become quickly marginalized when separated from a positive human rights mandate. Taking the positive obligations seriously calls for a far more systematic approach to eliminating gender violence than is demanded by our negative Constitution or by remedies that depend upon individual cases. Gender-mainstreaming, gender analysis, and gender budgeting would make a difference if adopted as domestic policy. Along with

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20. 529 U.S. 598 (2000).

heightening awareness of the human rights system and the seriousness of intimate gender violence, these mainstreaming strategies are among the goals of current efforts in the U.S. to enact CEDAW and CERD on a state or local basis. As local initiatives, they emphasize the importance of the human rights framework generally and of national ratification CEDAW, in terms both of the definition of discrimination and the reach of state responsibility.

While the international system can inspire and legitimate change, international initiatives and impact will wane or rise with the strength of the continued mobilization and monitoring by the women's movement. The long overdue but rapid progress in women's human rights in the 1990s also spawned the proverbial backlash, to slow down or block advances by women both domestically and internationally. Progress is endangered by the rise of various fundamentalisms and their impact on governmental policies. This applies to the efforts of the Vatican to pressure its constituent states and of certain Islamic governments which oppose women's human rights, but also to the startling fact that anti-choice and anti-equality advocates now sit on the United States delegation in the place of the feminists who were included to a limited extent by the Clinton Administration. Although the Clinton Administration ultimately supported human rights initiatives with respect to gender violence, it too brought to the table a neo-liberal fundamentalism and opposed economic and social rights and development commitments. Because of the tremendous power of the United States in the United Nations system, it is critical that the women's anti-violence movement, and the women's and progressive movements generally, keep the pressure on the U.S. Administration at home and utilize human rights principles and the human rights system to bring attention to its failures. The impact will be felt both domestically and internationally.

All of this is not to deny that the international human rights system still operates more in rhetoric than in reality. The range of problems and contradictions that Liz discusses in her book also plague the official international human rights approaches. While it is undeniably progress that the international system has finally recognized gender violence as a human rights matter, the remedies are primarily state-centric. This raises, in turn, the limitations and dangers of transferring reliance for protection to, and, thereby, enhancing, the policing power of the state. What happens to women's alternative remedies—the protective whistles used in Nicaragua and the shaming tactics, picketing, etc., with which movement in many places, including here, began? Casting women as victims draws attention and support, but victimization approaches can undermine rather

than advance the goal of women's empowerment. And dealing only with violence rather than with the broader underlying social, economic, cultural and racial discrimination, as well as poverty, all of which perpetuate the conditions for gender violence, is to focus on the tip of the iceberg.

Liz ends her book with a compelling plea to reinvigorate the struggle against the separation of the problem of gender violence from gender equality. The same problem exists, not as a theoretical but as a practical matter, in the United Nations system when it comes to the fashioning of concrete remedies. For example, the mandate of the Special Rapporteur on Violence against Women, *Its Causes and Consequences* was the product of women's demand for a rapporteur on violence *and discrimination*. Closely linked to the separation of gender violence from discrimination is the even greater chasm between the commitment progressively to implement economic and social rights, which is also crucial to addressing the cycle of gender violence and dependency as well as women's inequality.

Unlike our constitutional system, the international framework stands on the foundation of indivisibility and interdependence of all human rights and for the application of human rights norms to all aspects of human activity, including the intimate sphere as well as the still exempt global economic structures and multinational corporations. Expanding the reach and power of human rights is thus a priority here and around the globe. The human rights system should not be viewed as cabined by the limitations of its official decrees or official mechanisms of enforcement. Human rights is fundamentally a movement and its progress is maintained by the same irrepressible spirit and organized mobilizations that so recently forced recognition of private gender violence as a human rights issue and by those who continue to insist that gender violence, gender inequality and poverty are inextricable.

Liz reminds us of the beginnings of the women's and anti-violence movements in the U.S. Having taken several steps forward, we must recapture these beginnings to propel the dialectic toward the elimination of violence, inequality and poverty here. Integrating human rights and the experience of our sisters abroad will hopefully fuel these efforts and reshape the debate and the remedies in the decades to come.