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A POLICY OF MEDIOCRITY: A REVIEW OF UNITED STATES POLICY CONCERNING THE WOMEN OF AFGHANISTAN

*How would it feel
To walk down the streets of your
country and not be known*

*How would it feel
To be enslaved by your own husband
To be beaten
To be raped
To be tortured to death
With meaningless cries for help.*

*How would it feel
To be imprisoned from the outside
Forbidden to work
To have an education
Feeling life is not worth living for.*

*How would it feel
To feel unworthy of your own name.¹*

For years, the women of Afghanistan suffered under the darkest oppression of the Taliban; now, they struggle to eliminate despair and devastation and repair their lives, their families and their nation. The United States, together with its world allies, aided Afghani women during its occupation and reconstruction of Afghanistan in 2001. Unfortunately, the United States only recognized and addressed half of the problems that these women face. The United States provided tremendous aid for education and healthcare in the reconstruction era but failed to place any serious emphasis on women's issues in terms of participatory democracy and legal issues. The women of Afghanistan need more than words and token gestures from their world allies to fully recover from the damage done to their rights under the Taliban.

The United States had a tremendous opportunity to help the women of Afghanistan in the recent reconstruction period. Fortunately, the actions and implementation of policy by the United

1. Lydia Brackett, *How Would It Feel*, at <http://www.rawa.org/lydia.htm> (last visited Mar. 17, 2005).

States in the immediate post-invasion period² pushed the women's rights agenda forward. However, the United States and the Afghani governments must continue to work to ensure that this issue is more than symbolic. Women's rights must be part of the synthesis of government and society, and not merely an ancillary topic of discussion to be dealt with later.³ The United States must not be complacent in accepting only the formality of words or ceremonies. Instead, the United States should, and must, push for real and lasting change for the women of Afghanistan. If the United States catches itself in the dangerous position of exempting women's rights from discussion due to a 'cultural' loophole, it will lose its position as a moral champion of human rights and democracy.

President George W. Bush stated in his 2005 Inaugural Address, "[a]ll who live in tyranny and hopelessness can know: the United States will not ignore your oppression, or excuse your oppressors. When you stand for your liberty, we will stand with you."⁴ The President has framed the debate as a struggle for freedom, and there can be no cultural exception for women — particularly not when the women of Afghanistan, through organizations like the Revolutionary Association of the Women of Afghanistan (RAWA), have valiantly fought for their freedom with little international support.

The women of Afghanistan constitute just one example of gendered oppression in today's world. Their plight reflects upon the policies of the United States in regard to universal women's rights and democracy. The United States provides strong rhetoric for women's rights⁵ but is soft in its insistence upon their implementation. As the United States assists in Afghanistan's nation-building process, it has a clear opportunity to equalize women in the eyes of the law.

Despite stated goals of gender equality and an effusive promotion of successes in education and health care, the United States is harming the women of Afghanistan by failing to prevent

2. "Post-invasion" refers to the period following the U.S. invasion of Afghanistan in 2001. The purpose of the invasion was to oust the Taliban government, capture the terrorists, and liberate the Afghani people.

3. See Anne McClintock, *"No Longer in a Future Haven": Nationalism, Gender, and Race*, in BECOMING NATIONAL 260, 281 (Geoff Eley & Ronald Grigor Suny eds., 1996).

4. President George W. Bush, Inaugural Address (Jan. 20, 2005), available at <http://www.whitehouse.gov/inaugural> (last visited Mar. 17, 2005).

5. U.S. Support for Afghan Women, Children, and Refugees, July 12, 2002, at <http://usawc.state.gov/documents/organization/13530.pdf>.

the rights of Afghani women from being subjected to gender-biased Islamic law.⁶ The new Afghani constitution embraces Islamic law⁷ as its foundation.⁸ The basic human and civil rights of women in Afghanistan were eroded by extremist Islamic law,⁹ interpreted negatively toward women by the Taliban and the warlords who currently attempt to control rural Afghani territory.¹⁰ The United States has a responsibility to ensure that Afghani women are not subjected to future discrimination under the guise of a nation-building exercise led by the United States; it should not defer to customary law as an escape from its duty to uphold basic human rights.¹¹

Arguments for what should occur in Afghanistan include: the incorporation of The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) into the new Afghani constitution, detailed family law that would not allow for Islamic law to dictate the rights of women as wives and mothers, highly appointed or elected female officials who have actual policy-making power in the new government, education and health care reform, and efforts to engage women in participatory democracy.¹²

This note will explore the United States' involvement in the reconstruction of Afghanistan and the United States policy's impact on women's rights. Section I provides an overview of the United States' stance on women's rights and a comparison of United States' actions to international efforts in Afghanistan. Section II provides criticism of the United States' policy toward women in Afghanistan as well as an examination of the United States' stance

6. See Michele Landsber, *Afghan Women Remain Victims of Hope Unfulfilled*, SUNDAY STAR, Sept. 8, 2002, available at <http://www.rawa.org/womenremain.htm>.

7. Islamic law is often referred to as "Shari'a," or "sharia." *Shari'a* has generally been the basis of family law in the Islamic world. See GERALDINE BROOKS, *NINE PARTS OF DESIRE: THE HIDDEN WORLD OF ISLAMIC WOMEN* 11 (1995).

8. AFG. CONST., unofficial translation, available at [http://www.cic.nyu.edu/pdf/Constitution_of_Afghanistan_\(unofficial_translation\).doc](http://www.cic.nyu.edu/pdf/Constitution_of_Afghanistan_(unofficial_translation).doc). Chapter One, Article Three embraces Islamic law as the supreme law of Afghanistan. *Id.*

9. Mayank Shekhar, *RAWA at the World Social Forum: "No Photographs, Please!!"*, Mayank Shekar, at <http://www.afghanwomensmission.org/awmnews/index.php?articleID=24> (Jan. 19, 2004) (detailing RAWA's viewpoint on the new Afghani Constitution as still entrenched in customary law and the secondary nature of Afghan women's citizenship).

10. Cynthia Peters, *New Afghan Constitution Only One Step on Long Road to Women's Rights*, THE NEW STANDARD, at <http://newstandardnews.net/content/index.cfm/items/65> (last visited Mar. 18, 2005).

11. *Id.* (discussing the role of customary law in the oppression of rural Afghani women).

12. *Afghanistan: Women and Reconstruction*, International Crisis Group, at <http://www.reliefweb.int/rw/Rwb.nsf/AllDocsByUNID/cba795f1da7d2a5285256cec007c88b6?OpenDocument> (Mar. 14, 2003).

on CEDAW. Section III provides a closer look at Afghanistan, its history with women, its cultural barriers to change, and its proposed new Constitution. The note concludes with a look at the status of current United States' legislation regarding Afghani women.

UNITED STATES AND INTERNATIONAL POLICY ON AFGHANI WOMEN

The United States: A Generic Policy on Universal Women's Rights

The promotion of democracy is the foundation of United States foreign policy.¹³ Included in this policy are the right of universal suffrage and the right of all citizens to participate equally in government.¹⁴ The plight of Afghani women, who were long subjected to the oppressive rule of the Taliban, presents the United States with an excellent opportunity to apply its principles and practices of democracy and development. In the wake of the 2001 Afghani invasion, the United States passed the Afghan Women and Children Relief Act of 2001,¹⁵ a law concerning the health and education of Afghani women. However, the United States tabled the Access for Afghan Women Act of 2001¹⁶ in the House Committee on International Relations. This latter piece of legislation is very important, because it partially links aid to Afghanistan to the active promotion of women's rights through voting initiatives, participation in government, and property rights.¹⁷ These representation issues were in addition to provisions for the more basic human rights issues of health care, safety, and education.¹⁸

An International Comparison of Aid to Afghani Women

The Afghan Women's Summit for Democracy met in 2001 and produced the Brussels Proclamation, which Proclamation called on all foreign aid donors for Afghanistan's reconstruction to

13. See *supra* note 4; see also President George W. Bush, Remarks on Freedom in Iraq and Middle East (Nov. 6, 2003), at <http://www.whitehouse.gov/news/releases/2003/11/20031106-2.html> [hereinafter President Bush Remarks on Freedom in Iraq and Middle East].

14. See President George W. Bush, Remarks upon Signing the Afghan Women and Children Relief Act of 2001 (Dec. 12, 2001), 2002 U.S.C.C.A.N. 888.

15. Afghan Women and Children Relief Act of 2001, Pub. L. No. 107-81 (2001).

16. H.R. 3342, 107th Cong. (2001).

17. See generally *id.*

18. See *id.*

conditionally link their aid to women's rights, women's participation in government, the writing of a new constitution that would recognize women's rights, support of women's organizations, as well as health and education concerns of women.¹⁹ Following the issuance of the Proclamation, the European Union Parliament passed a resolution²⁰ that followed many of the Afghan Women's Summit recommendations.

The European Union resolution included the linking of foreign aid to the participation of women in the constitution writing process, representation of women in the Loya Jirga,²¹ as well as financial aid for women's issues of education, property and asset ownership reform and health care.²² The resolution went so far as to allocate twenty-five to thirty percent of all economic aid to Afghanistan to the direct benefit of Afghani women and the issues outlined in the resolution.²³

On November 19, 2001, the United States House of Representatives introduced a bill entitled Access for Afghan Women Act of 2001 (the House Bill).²⁴ The House Bill's stated objective was "[t]o require activities carried out by the United States in Afghanistan and other countries of Central Asia relating to peace negotiations, post-conflict reconstruction and development, refugee relief, resettlement, and repatriation, and peacekeeping operations comply with the basic human rights of women."²⁵ The House Bill outlined its purpose and initiatives in much the same way as the European Union Parliament's resolution.²⁶

The emphasis of the House Bill was on women's participation in a democratic Afghani government and the formation of the new Afghani government.²⁷ In addition to addressing voting and democratic participation issues, the House Bill established measures for health and education needs.²⁸ The House Bill was

19. THE AFGHAN WOMEN'S SUMMIT FOR DEMOCRACY, BRUSSELS PROCLAMATION, *available at* http://www.un.org/womenwatch/afghanistan/documents/Brussels_Proclamation.pdf (Dec. 2001) (providing a summary of the summit, declaration, and provisions).

20. European Parliament Resolution on Women in Afghanistan, *see* EUR. PARL. DOC. (B5-073)(2001).

21. The Loya Jirga is the Grand Assembly in the formal government of Afghanistan. *See supra* note 8, ch. 6.

22. *See* European Parliament Resolution on Women in Afghanistan, *supra* note 20.

23. *Id.*

24. H.R. 3342, 107th Cong. (2001).

25. *Id.*

26. *Id.*

27. *See generally id.*

28. *See id.*

referred to the House Committee on International Relations, and is now effectively dead in committee.²⁹

The Afghan Women and Children Relief Act (the Act) was passed later by the 107th United States Congress, after being introduced by a slate of all female Senators.³⁰ Unlike the House Bill, the Act deals solely with humanitarian needs like health care and education of women and children. The Act focuses very little on democracy; the word "democracy" is never even mentioned in the Act.³¹ At the signing of the Act, President George W. Bush referenced the Bonn Convention on Afghani Reconstruction³² and spoke of the general goals of improving health and education.³³ The Bonn Accords of 2001³⁴ produced the following statement regarding women in the interim Afghani government: "The Interim Authority and the Special Independent Commission for the Convening of the Emergency Loya Jirga will ensure the participation of women as well as the equitable representation of all ethnic and religious communities in the Interim Administration and the Emergency Loya Jirga."³⁵

President Bush stated that "[t]he Afghan Women and Children Relief Act commits the United States to providing education and medical assistance to Afghan women and children and to Afghan refugees in surrounding countries."³⁶ His message revolved around humanitarian aid and the suffering of Afghani women under the Taliban. There is an apparent disconnect between the goals set forth in the Bonn Accords and President Bush's statement regarding the Act. President Bush acknowledges that women in Afghanistan were central players in the nation's educational system, government, and medical hospitals prior to Talibani rule.³⁷ He makes no direct mention, however, of the new Afghani

29. *See id.*

30. Afghan Women and Children Relief Act of 2001, *supra* note 15.

31. *Id.*

32. The United Nations-sponsored Bonn Convention was held nearly simultaneously with the Afghan Women's Summit in Brussels, and several of the female delegates were present at both meetings. *See Afghanistan: Women and Reconstruction*, *supra* note 12.

33. *See* President Bush, *supra* note 14.

34. The Bonn Accords took place in Bonn, Germany, in 2001, as organized by the United Nations. The Accords established an Interim Authority for Afghanistan and set out goals for reconstruction. *See infra* notes 35 and 47.

35. Statement of the Bonn Accords (2001), at <http://www.state.gov/p/sa/rls/6675.htm> (last visited Mar. 22, 2005).

36. *See* President Bush, *supra* note 14.

37. *Id.*

constitution, voting, or women's participation in the reconstruction process for Afghanistan.³⁸

There is a marked and vast difference between the House Bill, which focused on access to political power and decision making processes for Afghani women, and the Act, which provided only for humanitarian aid and relief. The difference highlights the gap between symbolic rhetoric and mediocre action for true reform. The House Bill concentrates largely on issues of democracy and democratic participation in government, while also addressing issues of humanitarian needs. The Act, however, concentrates wholly on humanitarian issues and marginalizes issues of democracy into vague references concerning the United States' aid in reconstructing the Afghani nation-state.

The gap between the House Bill and the Act represents the United States' unwillingness to go beyond mere words and humanitarian aid and take a strong and firm stance on women's rights. The enacted legislation, while noble in its humanitarian efforts, abandons traditional United States policy of universal suffrage and participatory democracy. The Act effectively portrays Afghani women as victims who need aid, but does not seek to restore them to full citizenship in the new Afghanistan.

The United Nations in Post-Conflict Afghanistan

The United States is not the only foreign presence in Afghanistan; there are also significant United Nations peacekeeping troops in Kabul and aid workers throughout the Afghani territory.³⁹ The United Nations has maintained its usual high rhetoric in dealing with women's rights in Afghanistan. The United Nations first passed Security Council Resolution 1378 in 2001, which expressed that a new government "should respect the human rights of all Afghan people, regardless of gender, ethnicity or religion."⁴⁰ This sentiment was upheld in 2002 with the passage of Security Council Resolution 1401, which outlined the ideal of self-determination in governing for the Afghani people.⁴¹ Resolution 1401 also relied heavily on the Bonn Agreement from 2001, which

38. *Id.*

39. See Peacekeeping and the UN: Council on Foreign Relations, at http://cfrterrorism.org/afghanistan/peacekeeping_print.html (last visited Mar. 23, 2005) (outlining the troop commitment and responsibilities of UN peacekeepers in Afghanistan).

40. S.C. Res. 1378, U.N. SCOR, 56th Sess., U.N. Doc. S/Res/1378 (2001).

41. S.C. Res. 1401, U.N. SCOR, 57th Sess., U.N. Doc. S/Res/1401 (2002).

was responsible for establishing the Ministry of Women's Affairs in Afghanistan.⁴²

The Inter-agency Network on Women and Gender Equality, a working group in the United Nations, published a communiqué on women in Afghanistan in July 2003.⁴³ The communiqué outlined the needs of the Afghan reconstruction to actively monitor women's rights issues, promote women's ownership and political participation, work to empower women through education, and create incentives for men in power to work with women.⁴⁴ Most notable in the document, though, was the advocacy for the position of the United Nations senior gender advisor position to be immediately filled in Afghanistan.⁴⁵ As of Spring 2003, there was still no gender advisor in place for a country with one of the worst recent records on women's and human rights issues.⁴⁶

In 2002, the United Nations Secretary General prepared a report on the status of women and children in Afghanistan.⁴⁷ The report stated that "[w]omen are reported to restrict their participation in public life to avoid being targets of violence by armed factions and elements seeking to enforce the repressive edicts of the previous regime."⁴⁸ The report pointed to the fact that the lack of security made it nearly impossible to ensure women's rights, that violations of women's rights were increasing at an alarming rate in some areas, and that without increased security presence the gains women had made could soon be lost.⁴⁹ While the report recognized the many organizational meetings, workshops, and programs that have been instituted for the benefit of women, it also noted the establishment of the Department of Islamic Teaching within the Ministry of Religious Affairs, which had begun sending people out to find and punish women in violation of Islamic law.⁵⁰ This Department is reminiscent

42. *See id.*; see also Statement of the Bonn Accords, *supra* note 35.

43. Joint Workshop of the United Nations Inter-Agency Network on Women and Gender Equality and the OECD-DAC Network on Gender Equality (Final Communiqué, Paris, Jul. 10-11, 2003), at <http://www.un.org/womenwatch/ianwge/taskforces/communique03.htm>.

44. *Id.*

45. *Id.*

46. *Id.*

47. *The Situation of Women and Girls in Afghanistan*, REPORT OF THE SECRETARY-GENERAL, U.N. ESCOR, U.N. Doc. E/Cn.6/2003/4 (2003), at <http://un.org/womenwatch/afghanistan/reports.html> (last visited Mar. 22, 2005).

48. *See id.* at § II.

49. *See id.* at § III, IV(F).

50. *See id.* at § IV(F).

of the Taliban's Vice and Virtue Squad,⁵¹ which actively terrorized the women of Afghanistan. Subsequently, the United Nations asked for the repeal of all legislation that impinged on the civil liberties of women or discriminated against them.⁵²

The United Nations pointed out in the report that while violence continues unabated against women, there are almost no services, facilities, or law agencies to which women can turn for aid or remedy.⁵³ There is no way for the women of Afghanistan to protect themselves from rape and torture except through total submission to those with power. Furthermore, the report suggested that naming a permanent gender advisor is essential to promoting gender rights.⁵⁴ The United States could make a strong showing on its gender rights advocacy by insisting on the appointment of a gender advisor to Afghanistan.

International Reconstruction and USAID in Afghanistan

The United States Agency for International Development (USAID) is largely responsible for overseeing the transition of power in Afghanistan, in conjunction with efforts provided by the United States military.⁵⁵ USAID created several initiatives regarding the empowerment of women in Afghanistan, including educational and vocational training centers, funding of renovations for the Afghan Ministry of Women's Affairs, and women's rights non-governmental organizations (NGOs).⁵⁶ "USAID's approach to gender is to design programs that take both women's and men's participation into account. When this is done development programs are more effective."⁵⁷ This inclusionary principle of development is a laudable goal. A survey of the information contained on the USAID website clearly indicates the pursuit of valuable programs

51. The Vice and Virtue Squad was a Taliban governmental department responsible for the patrol of cities and towns. Zana Coursen-Neff & John Sifton, *Taliban Rerun*, at http://www.nowtoronto.com/issues/2003-01-23/news_story5.php (last visited Mar. 25, 2005). Its purpose was to ferret out and punish anyone it unilaterally decreed to be in violation of Islamic law. *Id.*

52. See *The Situation of Women and Girls in Afghanistan*, *supra* note 47.

53. See *id.* § IV(D).

54. See *id.* § VI(A).

55. USAID, *Empowering Women*, at http://www.usaid.gov/locations/asia_near_east/afghanistan/empoweringwomen.html (last visited Mar. 22, 2005).

56. *Id.*

57. See generally *Women in Development: Achieving Results*, USAID, at http://www.usaid.gov/our_work/cross-cutting_programs/wid/ (last visited Apr. 26, 2005).

in education, vocational training and access to health care.⁵⁸ These humanitarian programs are all positive developments that certainly will have a tremendous effect on the quality of life for Afghan women. It is important to note, though, that USAID makes very little mention of women's participation in the reconstruction of the country, in its transition of governance, or in the development of a universal property ownership law.

The United States, through USAID, is supporting several women's organizations and NGOs in Afghanistan. One of the most notable is the Afghan Ministry of Women's Affairs.⁵⁹ The U.S. State Department report makes much of its financial contribution to the ministry, but in reality the contribution amounted to \$64,000 for the renovation of the building.⁶⁰ Surely, staplers, desks, and chairs are important in running any administration, but monetary support for political programs is equally important to the success of women's equality in the new Afghanistan.⁶¹

CRITICISMS OF U.S. FOREIGN POLICY TOWARD WOMEN

Why is the United States So Passive on Women's Rights?

The United States is a strong advocate for universal suffrage and democracy.⁶² Leading up to the conflict in Afghanistan, after the events of September 11, 2001, the United States government made several statements regarding the treatment of women in Afghanistan under the rule of the Taliban. The United States used the plight of Afghan women as part of the public relations campaign to gain popular approval for a military attack on Afghanistan and the Taliban.⁶³

On November 17, 2001, First Lady Laura Bush made a radio broadcast that articulated the serious problems and challenges that Afghan women faced under Talibani rule. She stated that "[t]he fight against terrorism is also a fight for the rights and

58. See USAID, *Afghanistan*, at http://www.usaid.gov/locations/asia_near_east/afghanistan/ (last visited Mar. 22, 2005).

59. *Id.*

60. See USAID Funds Rebuilding of Afghan Women's Affairs, at http://www.usembassyjakarta.org/press_rel/usaid_fund.html (last visited Apr. 26, 2005).

61. *Id.*

62. See generally Valerie Epps, *Peace and Democracy: The Link and Policy Implications*, 4 ILSA J. INT'L & COMP. L. 347 (1998).

63. See April Witt, *Activists Now Have Audience for Plight of Afghan Women*, WASH. POST, Oct. 18, 2001, at T03.

dignity of women.”⁶⁴ Her British counterpart, Cherie Blair, stated in a speech a few days later that “[i]n Afghanistan if you wear nail polish, you could have your nails torn out.”⁶⁵ This statement, of course, refers to the Islamic practice of having religiously clean hands, and nail polish being a pollutant.⁶⁶ Blair went on to state that the women of Afghanistan had “the right for their voices to be heard.”⁶⁷ Linda Heard, of the Gulf News, recognized the fact that Mrs. Blair and Mrs. Bush were diligent advocates for women’s rights before and during the military operations in Afghanistan, but Ms. Heard wonders, “where are the voices of Mesdames Bush and Blair on this subject now, strangely silent over the past 22 months?”⁶⁸

How much has really changed for women in Afghanistan since the United States occupation? Many people point to sharp increases in food, health, and education aid as positives. Certainly, the countries of the West have sent much in the way of humanitarian aid.⁶⁹ And in Kabul,⁷⁰ where the U.S. occupation is strongest, women certainly benefit from increased police presence.⁷¹ However, much of the country is rural and shielded from discipline. It is in the rural areas that women continue to suffer.⁷² Although there are no accurate statistics from the field, there are anecdotal reports of a sharp increase in the selling of young girls into marriage.⁷³ Kofi Annan, United Nations Secretary General, stated in the spring of 2003:

Despite positive developments regarding women’s rights, intimidation and violence by regional and local commanders against women continue unabated In many rural areas,

64. Linda S. Heard, *Apathy of Afghan Women After Taliban*, GULF NEWS, Sept. 23, 2003, available at <http://www.rawa.org/apathy.htm>.

65. *Id.*

66. BROOKS, *supra* note 7, at 97.

67. See Heard, *supra* note 64.

68. *Id.*

69. See Michael Buchanan, *Afghanistan Omitted from U.S. Aid Budget*, BBC NEWS, Feb. 13, 2003, at http://news.bbc.co.uk/2/hi/south_asia/2759789.stm.

70. Kabul is the recognized capital city of Afghanistan.

71. See Edith M. Lederer, *UN Hopes for U.S. Backing of International Force in Kabul*, GLOBAL POL’Y FORUM, Nov. 3, 2002, at <http://www.globalpolicy.org/security/issues/afghan/2002/1104us.htm>.

72. See Shekhar, *supra* note 9 (“We recently heard the Grand Assembly state that the women must not consider themselves equal to men. There is absolutely no difference between the fundamentalism of the Taliban and that of the Northern Alliance.”).

73. Marc Kaufman, *Afghan Poor Sell Daughters as Brides*, MSNBC, Feb. 23, 2003, at <http://www.rawa.org/brides.htm>.

especially in the more conservative tribal belt, the situation of women has not changed to any great extent since the removal of the Taliban. The prevalence of conservative attitudes limits the full, equal and effective participation of women in civil, cultural, economic, political and social life throughout the country at all levels of society.⁷⁴

There is both law and disorder in rural Afghanistan.⁷⁵ The legal system functions minimally, especially in rural areas where local warlords still control much of the territory.⁷⁶ It could be argued that these types of political and cultural changes take time and cannot materialize overnight. This certainly is true. The question on the table, though, is why the United States is not taking a more active and forward approach to women's rights in Afghanistan. The United States concentrates only on education and healthcare for women, refugees, and children. These forms of aid are extremely important but are not specific to Afghani women. There needs to be more active support for full participation of women in government, women's voting rights, guarantees of women's basic civil liberties, and the right of women to live their daily lives in an atmosphere free of fear and terror.

As stated by President Bush, "fostering respect for women is an imperative of U.S. foreign policy, among the goals that are 'grounded in the non-negotiable demands of human dignity and reflect human values.'"⁷⁷ This policy appears to lend strong support for universal rights of women in Afghanistan. However, the same State Department report containing President Bush's comments about the Afghan Women and Children's Relief Act averred, "[n]otwithstanding these absolutes, in Afghanistan, as elsewhere around the world, the United States will not seek to impose its culture on other societies."⁷⁸ This statement could easily be interpreted to mean that although the United States has no problem promoting an abstract belief in women's rights, it would circumvent the issue if local culture is different in terms of gender treatment.

This cultural deference policy subjugates women's rights to an ancillary problem in the grander scheme of nation-building, one

74. *Despite Progress Afghan Women Still Subject to Intimidation, Violence-UN*, UN NEWS SERV., Mar. 6, 2003, at <http://www.un.org/apps/news/printnewsAr.asp?nid=6363>.

75. See *Afghanistan: Warlords Implicated in New Abuses* (July 29, 2003), at <http://www.hrw.org/press/2003/07/afghan072903.htm>.

76. *Id.*

77. *U.S. Support for Afghan Women, Children, and Refugees*, *supra* note 5.

78. *Id.*

of so little import as to warrant only mention in a speech, and no actual pressure for the United States to change its policy. The United States is in the unique position of being able to help rebuild a nation devastated by war. American scholars and lawyers have assisted in writing the new constitution and structuring of government. Unfortunately, they did not go far enough in their assistance. Despite a constitution that assures equality for all, with a reference to gender included, there is still the inclusion of the troublesome clause referring back to customary Islamic law.⁷⁹ The International Crisis Group, Feminist Majority, and RAWA all are imploring the United States to act wisely and with strength of conviction.⁸⁰ These groups hope to see CEDAW implemented into the civil and criminal codes of Afghanistan. These groups also ask for greater policy persuasion positions of political prominence for women in Afghanistan. These groups face an enormous obstacle in helping Afghani women now that the Afghani interim authority enshrined Islamic law as the basis for all law in the new Afghani Constitution.⁸¹ The United States must press for a clear constitutional statement for the equal rights of women in Afghanistan.

The report indicating the United States' policy toward Afghanistan states that "[t]he reconstruction of Afghanistan should be an Afghan-led effort because international assistance efforts can only work if they are acceptable to the Afghan people."⁸² This logic is very circular, particularly because it comes from the United States, a country that espouses democracy as the cure for all ills.⁸³ Outside of Kabul, women have very little freedom⁸⁴ and consequently cannot participate in forums reviewing the new constitution. How can the United States adequately determine that it is assisting in the creation of Afghanistan's vision of a state in totality, when it is only hearing half of the country's voices?

79. See AFG. CONST., *supra* note 8, ch. I, art. III.

80. See generally Feminist Majority Foundation, *The Campaign to Help Afghan Women and Girls*, at <http://www.feminist.org/afghan/facts.html> (last visited Mar. 20, 2004); International Crisis Group, *Afghanistan: Women and Reconstruction*, at <http://www.icg.org/home/index.cfm?id=1637&l=1> (last visited Mar. 20, 2005); The Revolutionary Association of the Women of Afghanistan (RAWA), at <http://www.rawa.org>, (last visited Mar. 20, 2004).

81. See AFG. CONST., *supra* note 8, ch. I, art. III.

82. U.S. *Support for Afghan Women, Children, and Refugees*, *supra* note 5.

83. President Bush, Inaugural Address, *supra* note 4.

84. See generally U.S. *Support for Afghan Women, Children, and Refugees*, *supra* note 5.

Some may argue that certain women, because of their religion or culture, do not want to be equal to their male counterparts. However, it is unclear whether the situation of women in Afghanistan is truly the result of a religious culture or whether it is merely a recent custom. It is therefore possible that the custom to which the United States is deferring is the most recent extremism displayed under Talibani rule and not the true customs of Afghanistan that are evident in a broader overview of Afghani history. More importantly, it is difficult for President Bush to argue that culture outweighs fundamental rights that should be present in any form of democracy, in light of his stated goals of freedom across the world.⁸⁵

CEDAW: U.S. Reluctance to Ratify the Treaty and its Relation to Afghanistan

The Convention on All Forms of Discrimination Against Women (CEDAW) is an important convention on women's rights. The United States signed CEDAW⁸⁶ in 1980, and today it is one of the only countries in the world not to have ratified the treaty. In fact, Afghanistan ratified CEDAW in 2003.⁸⁷ The Convention discourages

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.⁸⁸

85. President Bush, Inaugural Address, *supra* note 4.

86. Convention on the Elimination of All Forms of Discrimination Against Women, at <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm> (last updated Feb. 10, 2005); see also Division for the Advancement of Women: Convention on the Elimination of All Forms of Discrimination Against Women, at <http://www.un.org/womenwatch/daw/cedaw/> (last visited Mar. 20, 2005).

87. CEDAW State Parties, at <http://www.un.org/womenwatch/daw/cedaw/states.htm> (last updated Feb. 10, 2005).

88. CEDAW, *supra* note 85, Part I, Article I.

Sheryl Swed, the president of UNIFEM/USA, recently gave testimony imploring the United States to ratify CEDAW, especially in light of the struggles in Afghanistan.⁸⁹ She stated:

The plight of women in Afghanistan is the most recent and visible example of why the world's women need the protection of CEDAW. The leadership that the Congress and the United States demonstrated on Afghanistan now needs to be extended to CEDAW. Without the United States, the Convention lacks the necessary strength to effectively and positively defend women's status and security in nations around the world.⁹⁰

There is great debate surrounding the United States' failure to ratify CEDAW. The resolution continues to languish in the United States Senate Foreign Relations Committee. The United States House of Representatives passed a bill in the 108th Congress strongly recommending that the Senate ratify CEDAW.⁹¹ In the 106th Congress, a Senate resolution noted that the U.S. was in a small group of countries who had failed to ratify the Convention — including, at the time, Afghanistan, North Korea, Sudan, and Iran.⁹² These are not the countries with which the U.S. should want to be associated, with respect to women's or human rights.

In March 2000, Senator Kennedy of Massachusetts and Senator Boxer of California brought the resolution to ratify CEDAW up for a congressional hearing.⁹³ In both 1999 and 2000, the Republicans, via Senators Collins and Gorton respectively, blocked the unanimous consent request for the consideration of CEDAW.⁹⁴

In one extremely egregious example of political resistance, Senator Jesse Helms, the Republican Chair of the United States Senate Foreign Relations Committee, forced nine female members of the United States House of Representatives to leave his Senate Committee session.⁹⁵ The female Representatives were attempting to present arguments for the ratification of CEDAW.⁹⁶ Senator

89. Sheryl J. Swed, *Testimony of the United States Committee for the United Nations Development Fund for Women (UNIFEM/USA)*, at <http://www.womenstreaty.org/UNIFEMstatement.pdf> (last visited Mar. 20, 2005).

90. *Id.*

91. H.Res. 21, 108th Cong. (2003).

92. S. Res. 237, 106th Cong. (1999).

93. *Id.*

94. *Id.*

95. James E. Coleman, *A Report from the Chair*, 27 WTR HUM. RTS. 1 (2000).

96. *Id.*

Helms infamously told Senator Boxer to "please be a lady."⁹⁷ This patriarchal attitude is just one obstacle the United States faces in ratifying CEDAW.

The history of CEDAW internationally is interesting to examine. Many countries maintain reservations to the treaty, which are commonly known as Reservations, Understandings, and Declarations (RUDs). The United States created a series of RUDs for the treaty. For instance, the United States does not recognize abortion as an element of family planning or birth control.⁹⁸ Additionally, the United States contends that the question of equal pay for men and women is not applicable in the United States based on any notions of comparative worth.⁹⁹ While the United States would hardly be subject to any major treaty ramifications, its RUDs are meant to indicate that the United States will maintain its position of deciding equality measures and standards only in terms of United States society and politics.

Interestingly, many other countries maintain RUDs. For instance, it is common for RUDs to specifically exempt from the treaty anything that is contradictory to religious or cultural relativism. This cultural relativism is a huge exception considering that many of the major violations of women's human rights that subsequently lead to gender apartheid are directly related to the legal enforcement of religious or cultural norms.

Dr. Sima Samar, who has held positions as vice chair and Minister of Women's Affairs and chair of the Human Rights Commission in post-Taliban Afghanistan, has stated that it is imperative for the United States to support CEDAW.¹⁰⁰ However, mere support of CEDAW is not sufficient; the United States needs to support CEDAW without making any exceptions for religious or cultural norms. These exceptions counter democracy. Religious norms which are imposed upon, and not the free choice of, many people in a nation-state seem a poor omen for participatory democracy.

97. *See id.*

98. S. TREATY DOC. NO. 96-53 (1980) at § 3(4).

99. *Id.* § 2(4).

100. Nora O'Connell & Rita Sharma, *Treaty for the Rights of Women Deserves Full U.S. Support*, 10 WTR HUM. RTS. 22 (2003). "This treaty will then truly be the international measure of rights that any country should guarantee to its women. We will be able to refer to its terms and guidelines in public debates over what laws should say." *Id.* at 24.

AFGHANI HISTORY AND CULTURE

The Women of Afghanistan: A Historical Perspective

The women of Afghanistan have experienced a rich, yet disturbed and often violent, history. The recent control of Afghanistan by the oppressive Taliban regime set the rights of the women of Afghanistan back by half a century. History indicates that women have held positions of respect in Afghanistan.¹⁰¹ A queen ruled the territory in the 1400s and in the 1800s, and during the regime of Abdur Khan, numerous reforms advancing the rights of women occurred.¹⁰² In the 1920s, Afghanistan ruled that women no longer needed to wear veils to walk in parks.¹⁰³ Another strong Queen, Soraya, established a women's magazine in 1921.¹⁰⁴ The 1931 Afghani Constitution granted equality to all people, though women were not expressly mentioned and many women did in fact still hold an inferior position in society.¹⁰⁵ Over the course of the next few decades there were discussion and reversals on the Afghani veil-wearing policy, but women were allowed higher education and entry into professions deemed suitable for women, such as teaching and medicine.¹⁰⁶ Ultimately, women were given the right to vote in 1964.¹⁰⁷ In the 1960s and 1970s, Afghani women were known to serve in the government and adopted western style clothing.¹⁰⁸ "Women and men were declared equal 'in all social, economic, political, cultural and civil aspects.'"¹⁰⁹

During the Soviet invasion in the 1980s, women actively helped the resistance and fought to free their country.¹¹⁰ The group leading this resistance for women was RAWA.¹¹¹ Many of the women who resisted the Soviets were tortured and killed, but still RAWA

101. ROSEMARIE SKAINE, *THE WOMEN OF AFGHANISTAN UNDER THE TALIBAN* 13 (2002).

102. *See id.* at 13-14 (indicating that such reforms included the right of women to be free from forced remarriage and mandatory registration, the right of a pre-pubescent girl given in marriage to refuse the union when she came of age, the right of women to sue for alimony, and in some cases, the right of women to divorce their husbands).

103. *Id.* at 14.

104. *Id.*

105. *Id.*

106. *See id.* at 15.

107. *See id.* at 16 (noting that women usually only voted in urban centers).

108. *Id.*

109. *Id.* at 17.

110. *See id.* at 19.

111. *Id.*

fought.¹¹² During this violent period in Afghani history, women fled the country as refugees to avoid work camps and death.¹¹³ The Soviets, however, also instituted broad reform for women, such as allowing women into the police forces, hospital management and universities.¹¹⁴ In testimony before the United States Senate, Mavis Leno stated:

Before the Taliban gained dominance in Afghanistan, women were a crucial part of the workforce. In Kabul, for example: 70 percent of teachers were women; 40 percent of doctors were women; over half the university students were women; schools at all levels were co-educational; Afghan women held jobs as lawyers, judges, engineers, and nurses; and Afghan women were not required to cover themselves with the burqa.¹¹⁵

The women of Afghanistan were among the most free of all women in the Islamic world before the Taliban gained control of the country. Today, it is argued that the new reforms in post-Taliban Afghanistan should reflect culture and religion.¹¹⁶ This argument suggests that the new government may place women in an inferior position that is allowable under a cultural exception. The history of this nation indicates, however, that women were progressive members of society actively furthering their roles before Taliban control. It is doubtful that the women of Afghanistan expected the U.S., or anyone else, to free them from the Taliban only to keep their rights in a secondary, or culturally-excepted, position. In an interview about the new Afghani Constitution and its major detractors, Saher Saba stated that "even if we assume upon ourselves the world's best constitution, who will implement it, its prime violators? We need the world to know this."¹¹⁷ Saba's point is a strong one. With warlords controlling the rural Afghan territory and Islamic law serving as the basis for a Supreme Court, it is difficult to see how Afghani women will be assured of their rights.

112. *Id.* This is the same fighting spirit that RAWA demonstrated in the 1990s fighting the Taliban.

113. *Id.* at 19-20 (quoting Mavis Leno, *Prepared Testimony of Mavis Leno, National Board Member, Feminist Majority, Before the Senate Appropriations Committee Foreign Operations Subcommittee, Subject — Gender Apartheid in Afghanistan*, FEDERAL NEWS SERV., Mar. 9, 1999).

114. *See id.* at 20-21.

115. *Id.* at 21.

116. *See, e.g., U.S. Support for Afghan Women, Children, and Refugees*, *supra* note 5.

117. Shekhar, *supra* note 9.

Cultural Barriers to Change

One of the most important factors the United States faces in dealing with the issues in Afghanistan is the urban-rural divide. Tradition is difficult to break, and "in the countryside, ancient customs still prevail and can be stretched to cover the sale of young girls, which Afghans and foreigners alike say is something new and alarming."¹¹⁸ For instance, in the town of Herat, there are reports of brutal acts concerning young girls; disturbingly, nine young women immolated, or burned themselves alive, in order to escape forced marriage.¹¹⁹

Michele Landsber puts forth her own theory as to why immolations are occurring more frequently now than they did under the rule of the Taliban.¹²⁰ She argues that President Bush gave women hope that their lives would change and that in the absence of this change they have reached new levels of desperation.¹²¹ As part of the ongoing troubles that Afghani women face, she cites that as recently as the summer of 2003, the Chief Judge of the Afghani court ruled that women's voices could not be played on the radio.¹²² This incident happened a full two years after United States intervention and demonstrated that the basic democratic right to freedom of speech was not being even moderately promoted.¹²³ The silence from the United States in these situations echoes loudly in the political amphitheater of women's rights.

The United States points to significant improvement in girls attending school. It is true that in Kabul close to half the girls are now receiving some form of formal education; however, that number drops to nine percent in the countryside.¹²⁴ "In a town west of Kabul, the local Taliban has blown up a girls' school and vowed to kill any woman who goes to school or work."¹²⁵ For the purpose of a complete United States policy, there must be recognition that problems do not cease at the Kabul city limits.

Many industrialized, western nations point to the continued wearing of the traditional burkha as a sign that women have

118. Kaufman, *supra* note 73.

119. Landsber, *supra* note 6.

120. *See id.*

121. *See id.*

122. *See id.*

123. *See id.*

124. *Id.*

125. *Id.*

the choice not to wear it, but continue to affirmatively choose a cumbersome ensemble representative of being second class citizens. Deflating this argument is the statistic that in 2002, ninety-five percent of women wore the burkha, whereas now that figure has dropped to approximately sixty-five to seventy percent.¹²⁶

Under the Soviet occupation there was a fundamentalist backlash which led to the rise of the Taliban.¹²⁷ The Taliban obliterated women's rights under their regime.¹²⁸ After the 2001 United States military strikes in Afghanistan, the United States claimed that the Afghani people were free and able to function without terror.¹²⁹ Many reports, however, state that women now are more fearful than ever to go outside their homes due to the lack of law and order.¹³⁰ "The retreat of the Taliban has led to the return of the warlords and of ethnic rivalries."¹³¹ For many people living in the rural countryside and mountain areas of the country, there is no law except that which is forged by the most brutal warlords.¹³²

The United States made certain allegiances to the Northern Alliance in Afghanistan during the 2001 invasion. "The Northern Alliance claims that they have changed their stance on the issue of women's rights, despite their documented crimes against women from 1992-1996 Under Northern Alliance rule, just prior to the fall of the Taliban, Afghan women were barely better off than under the Taliban."¹³³ The President of the United States may have declared that the women of Afghanistan are free,¹³⁴ but this article demonstrates that there is an increasing refugee problem as well as continued acts of violence against women.¹³⁵

126. Stephanie Hiller, *Awakened Women*, at <http://www.rawa.org/anne5.htm> (July 25, 2003).

127. See Sonali Kolhatkar, *The Impact of U.S. Intervention on Afghan Women's Rights*, 17 BERKELEY WOMEN'S L.J. 12, 17-18 (2002).

128. See *id.* at 18.

129. See President Bush, Remarks on Freedom in Iraq and Middle East, *supra* note 13.

130. *Id.* at 20.

131. See *id.* at 21 (quoting Zubeida Malik, *Better the Devil You Know?*, THE ECOLOGIST, Feb. 2002, available at <http://www.theecologist.co.uk/article.html?article=227>).

132. *Id.* at 20-21.

133. *Id.* at 21.

134. See President George W. Bush, State of the Union Address (Jan. 29, 2002), at <http://www.cnn.com/2002/ALLPOLITICS/01/29/bush.speech.txt/index.html>.

135. See *id.*

A New Era for Women's Rights: A New Afghani Constitution?

The new Afghan Constitution,¹³⁶ which was adopted in January 2004, espouses equality for men and women. This document appears to be a return to the gender equality enshrined in the 1964 Afghani constitution. There exists, however, a major caveat to this triumph for gender equality: the incorporation of Islamic law. Chapter I, Article III of the new Constitution states, "In Afghanistan, no law can be contrary to the sacred religion of Islam and the values of this Constitution."¹³⁷ Throughout the new constitutional documents there are references to rights being "according to the rule of law"¹³⁸ based in Islam.¹³⁹ This rule of law — the rule of Islam — provides the paradox of equality that women in Afghanistan now face. At no place in the document is there an express statement of protection of women's rights, either with respect to individual citizens, or more importantly, in reference to such historically problematic legal areas as forced marriage, divorce, and freedom of movement.¹⁴⁰

The Afghan Constitution only directly addresses women in areas of education, widowhood, and elections. Article 44 puts forth, "The state shall devise and implement effective programs for balancing and promoting education for women"¹⁴¹ Articles 83 and 84 provide for electoral positions for women. The former states that "at least one female delegate shall be elected for each province" for the House of the People in the Loya Jirga,¹⁴² while the latter addresses the Council of the Elders, allowing the President of Afghanistan to appoint one-third of the Elders, of whom fifty percent must be women.¹⁴³

On the surface, these representational positions appear to be excellent provisions for women's rights in Afghanistan, but the presence of the commentary "according to the rule of law" throughout the document continuously addresses the problematic rooting of the constitution in Islamic law. Some scholars consider

136. AFG. CONST., *supra* note 8.

137. *Id.* art. III.

138. *Id.*

139. *Taliban Lite* (Jan. 9, 2004), at <http://www.coxandforkum.com/archives/000254.html>.

140. See *Afghanistan: Constitution Fails Women*, at <http://web.amnesty.org/library/Index/ENGASA110272003?open&of=ENG-AFG> (Nov. 27, 2003).

141. AFG. CONST. (2003), *supra* note 8, § 44.

142. *Id.* § 83. There are a total of 222-250 delegates to the House depending on variations in population per province. *Id.*

143. *Id.* § 84.

Islamic law to be anti-women's rights,¹⁴⁴ and already there have been problems in Afghanistan under the new constitution. For instance, under the rule of the Taliban, women were not allowed to be seen or heard in public. The new constitution should provide women with the right to be both seen and heard in public, the same as men. Recently, a woman was censured for singing a rural traditional song over broadcast media.¹⁴⁵ She broke *Shari'a*, or Islamic law, by being heard in public. The Afghan Supreme Court complained to the legislature that the female singer was in violation of Islamic law.¹⁴⁶ One of the judges stated that "[w]e are opposed to women singing and dancing as a whole This is totally against the decisions of the Supreme Court and it has to be stopped."¹⁴⁷ The Afghan Supreme Court is mired in Islamic law, and the entire Constitution is pinned on non-violation of Islamic law. Consequently, it appears that without the express detailing of the key rights of women, these rights are left open to broad, fluctuating, and differing viewpoints of Islam and the role of women in society.

Amnesty International provides a harsh criticism of the new Constitution in regard to women's and children's rights.¹⁴⁸ This international human rights advocacy group has stated, "Amnesty International believes that while the constitution alone cannot prevent human rights violations, if key women's rights are not explicitly enumerated, then the overall framework of guarantees for the protection of fundamental human rights and freedoms will be weakened."¹⁴⁹ The criticism details the need of women to be protected explicitly in the areas of marriage, divorce, and education. These issues are largely up for interpretation under Islamic law, such that women are at the mercy of local clerics and provincial council members.

While the United States has been supportive of the Afghani efforts and lauds the new constitution for its enshrinement of equal rights, Amnesty International ended its criticism with, "[t]he United States' commitment to the rights of Afghanistan's women must include lobbying for much-needed protections to be

144. See generally Lisa Hajjar, *Religion, State Power, and Domestic Violence in Muslim Societies: A Framework for Comparative Analysis*, 29 LAW & SOC. INQUIRY 1 (2004).

145. *Woman Singer Angers Afghan Judges*, at http://news.bbc.co.uk/2/hi/south_asia/3396283.stm (Jan. 14, 2004).

146. *Id.*

147. *Id.*

148. See *Afghanistan: Constitution Fails Women*, *supra* note 140.

149. *Id.*

added to the Afghan Constitution.”¹⁵⁰ The United States must go beyond its pat-on-the-back policy of complimenting a document which on its surface appears to guarantee equal rights for women, but provides ample room for future legal (mis)interpretation and creates significant legal obstacles for the women of Afghanistan.

CONCLUSION

A country that invades the territory of another has an inherent duty to protect the citizens of the occupied territory. The United States owes a duty to the women of Afghanistan to pay more than lip service to them and the protection of their rights. The goal must be more than painting one small, happy picture of participatory democracy in the city of Kabul. The goal must be to accord women the same rights as men and ensure that these rights are not subject to interpretative Islamic law. One can only imagine what the outcry of American women would be if they were informed that their equal rights were contingent on the subjective understanding of the Catholic Church or any other religion. Qualified rights are not equal rights, and the United States must ensure that the women of Afghanistan have unqualified, fully supported, equal legal rights.

It was with great hope that one looked to United States Senator Barbara Boxer's resolution, the Afghan Women Security and Freedom Act of 2004.¹⁵¹ This legislation provides for tying economic assistance from the United States to the development and support of the Afghan Women's Ministry and to women's participation in government and elections.¹⁵² The new Act has many similarities to the tabled Access for Afghan Women Act in the U.S. House.

Unfortunately, Senator Boxer's bill remains in committee even into the 109th Congress.¹⁵³ There seems to be no true commitment on behalf of the United States to go beyond the humanitarian aid to the true gifting of equality to the women of Afghanistan. A recent Washington Post editorial stated:

This is not to say that either Iraq or Afghanistan should look like the West or that they should accept an American notion

150. *Id.*

151. Afghan Women Security and Freedom Act, S. 2032 108th Cong. (2004).

152. *See id.*

153. *Id.*

of separation of church and state. But outsiders should pay attention to at least two fundamental issues. One is a guarantee for women to have a role in the political process: the rights to vote and stand for office. The second is that elected politicians, not clerics, should have ultimate jurisdiction over the legal system.¹⁵⁴

This sentiment raises the important question of whether we can impose a western sense of women's rights in Islamic countries. If the United States is truly seeking to promote democracy and human rights, it cannot merely accept the edict of fundamentalist men in countries like Afghanistan, without first trying to incorporate women into the political process and consider their input on issues of self-determination. Democracy is *not* a system of government only guaranteed to men, and it would be a mistake for the United States to allow women to be a cultural loophole in democratic reform. It is imperative that the United States act quickly on issues of women's rights in Afghanistan; otherwise, gender equality for these women may never be addressed.

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154. *Women and Islam*, WASH. POST, Mar. 14, 2005, at A18.

* J.D. Candidate 2005, William and Mary School of Law; M.B.A. 2001, Case Western Reserve University; B.S. 1998, Hamilton College. I would like to thank my mother for all her love, support, and insight, as well as my family and friends for their encouragement and support. I thank the journal members for their hard work editing this note. I dedicate this note to my late Nana, who taught me what it means to be a strong woman.