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It is a great pleasure for me to be here today to deliver the Ruth Bader Ginsburg lecture. My thanks to the Dean and to Professor Julie Cromer-Young for inviting me; and to Donna Gehlken, who persevered, despite my annoying travel schedule, in getting all the necessary information to make this lecture run smoothly. Thank you all for this brief respite from February in the mid-West.

I am particularly honored to be delivering a lecture named for, and in the presence of, Justice Ginsburg. It is difficult to put into words the respect and affection that I feel for the Justice. She has been a mentor and a role model for me since I clerked for her over twenty-five years ago. She combines tremendous kindness with amazing brilliance and complete integrity. For me, as for so many other women, she has been an inspiration. And for our nation as a whole, she is a beacon of hope—hope for a world in which all women and men are free to be valued for their talents and abilities, and in which gender is a quality and not a limitation. My hope today is that she will accept this lecture as a small gesture of appreciation for all that she has done to bring us closer to that world and all that she has meant to those of us who continue to believe in that dream.

The subject of this conference is women in the judiciary and I am going to offer some thoughts about this subject in a context that may be unfamiliar to many of you: the context of customary law systems. These reflections grow out of my experience over the past ten years, advising constitutional reformers in countries around the

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world. At the Center for Constitutional Democracy at Indiana University, my husband David and I work with reformers in Burma, Liberia, South Sudan, Libya, and Vietnam to help them develop constitutional mechanisms for building democratic institutions, democratic practices, and democratic cultures.

In many of these countries, one of the primary barriers to women's advancement is the resistance of customary systems of law to gender equality norms. I work with women's groups in these countries to develop more effective constitutional mechanisms for dealing with this situation and this lecture grows out of that experience. Indeed, I will draw most of my examples from Liberia, a country I know well. The lesson I think I have learned from this experience, and which I will outline for you today, is that real and lasting change in customary law is only possible when the women within traditional communities exercise power in their own customary systems. Or, to simplify: customary law will be consistent with gender equality only when women are judges in customary courts.

My argument for this proposition will involve weaving together strands from cultural anthropology, legal doctrine, and feminist theory. I will begin by describing for you the status and operation of customary law systems in many countries and the ways in which many such systems discriminate against women. I will then briefly outline the approaches currently taken by various legal systems to try to bring customary law into compliance with the gender equality norms that are enshrined in most modern constitutions. Unfortunately, most of these approaches have had very limited success.

Then I will take a step back and introduce some ideas about the nature of culture, judgment, and justice in feminist theory. Finally, I will tie these strands together and suggest an approach to this problem that focuses on constitutional mechanisms for helping the women within traditional communities to shape customary law to fit their own needs and ideals. I see this approach as part of a larger paradigm shift that organizes legal reform around the model of women as law-makers rather than women as rights-holders.

In many countries in Africa and Asia, there are systems of customary law that predate the formal, state-based legal system and

that continue to exist alongside it. Customary systems are sometimes blended with religious legal systems, but they can also have their roots in tribal or ethnic cultures that are not understood in predominantly religious terms. Such systems tend to have different rules from the formal legal system: they are enforcing tradition and custom rather than enforcing the statutes passed by the legislature. Most customary systems focus on family-related issues—such as marriage, divorce, and custody—and property related issues, but they often include some rules regarding criminal behavior as well. Their rules on these issues are not the same as the rules in the formal laws; for example, statutory law in Liberia requires monogamy, but customary law for many of the tribes includes polygamy.

Customary systems also tend to have different procedures from the formal legal system. There are no lawyers, there are no rules of evidence, and the process often involves consultation with multiple constituencies in the community: families, neighbors, and elders. Judges are not specialized officials. They are usually the chiefs or elders who guide the community in all other ways as well. In some places, like Liberia, trial by ordeal is a traditional part of customary procedure.

In countries like Liberia and South Sudan, systems of customary law are a crucial fact of life for several reasons. First, the governments in these countries do not have the capacity to provide a
formal legal system that is accessible to people in remote areas. In both countries, once you leave the major cities, there are few courthouses, lawyers, or judges. In rural areas, people would need to travel substantial distances over poor or non-existent roads to reach a state-based court. And, once they got there, the costs of litigating a claim—both the official costs, such as court and attorney’s fees, and the unofficial costs, such as bribes—would make it impossible for many people to pursue a case.7

In short, the formal legal system is simply not available to many people as a mechanism for dealing with disputes or even for handling most crimes. As a result, in Liberia, for example, a recent study found that only 3% of civil cases were taken to a formal court, while 38% went to a customary mechanism: people were twelve times more likely to choose a customary court.8 The numbers are similar in South Sudan.9 In short, whether outsiders like it or not, customary systems of justice are a fact of life in these countries for the foreseeable future because the formal justice system does not have the capacity to provide services to the majority of the population.

In addition, many people in these communities prefer their customary systems to the formal system and will choose it even when the formal system is available. They prefer the customary system for two reasons. First, they believe that the formal court system is controlled by people with money and influence and they do not trust it to provide justice. In places like Liberia, where corruption is endemic, this is probably an accurate perception.10 And second, they prefer the customary system because it has a more restorative and less retributive orientation. The goal of most customary proceedings is to repair the social relations damaged by the crime or dispute, rather than to punish the wrongdoer. As a result, these proceedings try to address the underlying issues that might have generated the problem and they involve families and community members in the resolution.

7. See Looking for Justice, supra note 5, at 39–42.
8. Id. at 4. Fifty-nine percent (59%) were taken to no forum at all. Id. The numbers for criminal cases are even more dramatic: 2% to the formal justice system; 45% to the customary system; and 53% to no forum. Id.
9. See Study, supra note 5, at 6 (“Over 90% of day-to-day criminal and civil cases are executed under customary law.”).
Because of this orientation, many people believe that the customary system addresses their problems more effectively than the formal system.11

So, customary legal systems are both necessary and desired by the people in many places. In light of this fact, it should not be surprising that customary legal systems are explicitly or implicitly recognized by the constitutions in many countries. The constitutions often specify that such systems may operate with respect to certain subjects or include provisions recognizing the traditional authorities in these systems, such as chiefs. Thus, customary law systems are both a reality of life and a recognized part of law in many countries.

But such systems are also deeply problematic because they often violate human rights and other constitutional norms. In particular, most customary systems include gender discriminatory rules or procedures. For example, in Liberia, in many of the cultures, wives have no right to inherit their dead husband’s property—it goes to his parents or brothers instead. Indeed, widows are seen as part of that property and are expected to marry one of their dead husband’s brothers. Daughters have no right to inherit their father’s property. After divorce, women have no right to custody of their children.12

Early marriage for girls is expected in many groups, leading to serious health issues and a loss of educational opportunity.13 In some groups, spousal abuse is tolerated. In some groups, female genital mutilation, or “FGM”, is practiced.14 Traditionally, women cannot be chiefs in most groups, which means that they cannot serve as judges for customary disputes. And, in some groups, it is considered unseemly for women to speak in mixed gatherings, so they will be discouraged from participating in the hearing in a customary case in

11. See Study, supra note 5 (discussing South Sudan); Looking for Justice, supra note 5, at 3–4 (discussing Liberia). I base this claim not only on the scholarship referenced here, but also on my own conversations with people in Liberia, including a conversation with Ma Musu, a remarkable woman who works for the Tribal Council in Monrovia, in January of 2013.


14. See Coleman, supra note 4, at 197.
any form. In short, both in terms of the substantive rules and in terms of the process of decision, customary systems often discriminate against women.

Now, the gender discriminatory nature of many customary law systems raises a serious constitutional problem. Almost all modern constitutions include an equality guarantee that specifies that discrimination on the basis of sex or gender is prohibited. If the constitution also includes clauses either explicitly or implicitly recognizing customary law systems, then there is a tension between the equality guarantee and the customary law provisions that must somehow be resolved. There are three possible approaches to this conflict.

First, it would be possible to say that the constitution should not recognize customary law and should simply insist on a single legal system, which is subject to the equality guarantee. Some feminist theorists, such as Susan Moller Okin, have advocated this approach. As I have suggested already, regardless of whether or not one thinks this is a theoretically attractive solution, it is simply not practical in many of these countries.

Second, one might recognize customary law and insulate it from the application of other constitutional norms, such as equality. In other words, the constitution might recognize two separate legal systems: the state-based system, which is subject to the equality guarantee, and the customary system, which is not. Some political

15. E.g., CONSTITUTION OF THE REPUBLIC OF LIBERIA, 1986, art. 11(b) ("All persons, irrespective of ethnic background, race, sex, creed, place of origin or political opinion, are entitled to the fundamental rights and freedoms of the individual, subject to such qualifications as provided for in this Constitution."); id. art. 11(c) ("All persons are equal before the law and are therefore entitled to the equal protection of the law.").

16. The Liberian Constitution recognizes customary law or traditional authorities in several places. See e.g., id. art. 5(b) (mandating that The Republic shall "preserve, protect and promote positive Liberian culture, ensuring that traditional values which are compatible with public policy and national progress are adopted and developed"); id. art. 23(b) ("The Legislature shall enact laws to govern the devolution of estates and establish rights of inheritance and descent for spouses of both statutory and customary marriages so as to give adequate protection to surviving spouses and children of such marriages."); id. art. 56(b) ("There shall be elections of Paramount, Clan and Town Chiefs by the registered voters in their respective localities, to serve for a term of six years."); id. art. 65 ("The courts shall apply both statutory and customary laws in accordance with the standards enacted by the Legislature.").

theorists of multiculturalism, such as Chandran Kukathas, have suggested this approach and a number of African countries have adopted constitutional provisions immunizing customary law from the gender equality requirement. From a feminist perspective however, such an approach is unacceptable because it represents an abandonment of gender equality norms in precisely the areas of life most crucial to women, such as family relations.

Both of these strategies suffer from an additional problem: by casting the decision as a simple “either/or” choice between culture and equality, these approaches fail to recognize women’s interests in being active members in and shapers of their culture. Women are not merely the victims of culture; they act with agency, engaging with and reforming cultural policy. Constructing the problem as culture versus equality, where the legal system simply has to choose a side, casts women as the passive victims of culture rather than as its active creators. In so doing, it both falsifies the situation in which many women find themselves—a situation in which they feel committed to both their culture and their equality—and obscures possibilities for resolving these tensions in more productive ways.

The third possibility then, is for the constitution to recognize customary law, but try to move it toward consistency with the provisions of the bill of rights, including the equality guarantee. Restated, the constitution might try to protect both customary legal systems and gender equality, rather than abandoning one or the other as in the options discussed earlier. There are several constitutional mechanisms that different countries have tried to use to bring customary law into consistency with equality.

Some constitutions explicitly limit the protection for custom to those practices that are consistent with equality. In South Africa, for example, Article 31 of the Constitution protects the right of all persons to enjoy their culture, but specifies that this right “may not be exercised in a manner inconsistent with any provision of the Bill of Rights.” In theory, this is an excellent solution and I think it is a good idea for constitutions that recognize customary law to include

such clauses. But, in practice, this approach has often proven to be less than effective.

Clauses like this one are relatively rarely enforced. There is little enforcement partly because women find it difficult to get to court to raise a challenge based on the constitution, and partly because courts in countries where customary law is a meaningful fact of life are often unwilling to enforce such limits and interfere with custom. So the provisions, where they exist, often go unenforced.

But even where women have made it to court and the courts have been willing to enforce limits on customary law, such litigation has often led to an even worse situation for women. When the government tries to intervene and force a traditional community to change its rules regarding women, the community often responds by becoming defensive, hardening its stance, and putting pressure on the women involved to renounce their rights. Ayelet Shachar has called this response "reactive culturalism." The result is that women in these communities are seen as traitors if they invoke the protection of the state against traditional practices. This social pressure then makes life much harder for the women in these communities and essentially forecloses them from enforcing their rights in most cases. In short, where the state tries to force change on traditional communities in order to promote women's rights, the women inside those communities often suffer. Thus, a constitutional provision designed to generate such external pressure for change—while it express an important public value and may be useful as a last resort in extreme cases—is not an effective way to make life better for the women in traditional communities.

Another strategy tried in some places is to explicitly prohibit those specific cultural practices that are seen as most damaging to women. For example, the constitution or statutes could prohibit FGM or polygamy or could set a minimum age for marriage. There has been a global campaign to get governments to pass laws prohibiting FGM, so this issue provides a good test case for the effectiveness of this "specific prohibition" strategy. I believe that such laws are

22. See Bond, supra note 19, at 335–36.
23. SHACHAR, supra note 20, at 35–37.
25. See Elizabeth Heger Boyle et al., International Discourse and Local Politics: Anti-Female-Genital-Cutting Laws in Egypt, Tanzania, and the United States, 48
important as a symbolic gesture and may be a useful first step in changing attitudes and cultural expectations, but they do not seem to be sufficient to end practices like FGM.\footnote{26} In some cases, the laws have been passed merely to satisfy an international audience, with no real commitment on the part of the government.\footnote{27} Even where the law reflects the sincere belief of the governing elite, there is rarely the enforcement capacity or the political will to apply the law to the millions of girls and women subjected to the practice each year.\footnote{28} The result is that, in some of the countries where the practice is illegal, FGM continues to be the norm rather than the exception in many local communities.\footnote{29} It is necessary to have laws prohibiting the most egregious forms of human rights violations against women, but we should not expect those laws to actually prevent such practices in most cases. We must be looking for other solutions.

A more recent strategy that has been suggested is to create an enforceable right for women to participate in the formation of custom and culture.\footnote{30} Article 17 of the Protocol on the Rights of Women to the African Charter on Human and People’s Rights, for example, says, “Women shall have the right to participate at all levels in the determination of cultural policies.”\footnote{31}

This provision is an important step in a new direction. It seeks to give women not merely rights, but roles within the cultural institutions that are oppressing them. As the attempts to impose equality rights or rights against FGM demonstrate, without the power

\footnote{26. See Sarah R. Hayford, Conformity and Change: Community Effects on Female Genital Cutting in Kenya, 46 J. HEALTH SOC. BEHAV. 121 (2005).}

\footnote{27. E.g., International Discourse, supra note 25, at 531 (explaining that early partial bans in Egypt under Nasser were never enforced and had little effect).}

\footnote{28. Female Genital Mutilation, WORLD HEALTH ORGANIZATION, http://www.who.int/mediacentre/factsheets/fs241/en/ (last updated Feb. 2013) (“About 140 million girls and women worldwide are currently living with the consequences of FGM.”).}

\footnote{29. E.g., Ban Al-Dhayi, Towards Abandoning Female Genital Mutilation/Cutting in Somalia Once and For All, UNICEF (Feb. 27, 2013), http://www.unicef.org/somal ia/reallives_12335.html (explaining that the prevalence rate of FGM in Somalia is estimated at 98%, despite the fact that the new 2012 Constitution outlaws it).}

\footnote{30. E.g., Johanna Bond, Gender, Discourse, and Customary Law in Africa, 83 S. CAL. L. REV. 509, 547 (2010).}

to influence these institutions, rights will never be effective. It is because women lack such power and influence that they have been largely unable to use the rights their constitutions already give them. Thus, what women need in order to make their rights effective is the power to make and shape the norms that affect their lives.

This orientation represents a fundamental shift in paradigm, comparable to the shift that took place when women moved from being seen as property to being seen as rights-holders themselves. The new shift is, to borrow a phrase from Ruth Rubio Marin, to move from understanding women primarily as rights-holders to understanding them as norm-creators, exercising power within social institutions. Women cannot be merely the beneficiaries of the legal system; they must also be the makers and masters of that system.

The difficulty with the particular mechanism in the Protocol, however, is that it represents an incomplete paradigm shift. It recognizes the need for women to exercise power within cultural systems, but it structures the remedy for their current powerlessness as another right. And that structure guarantees that it will continue to be ineffective in the same way as all the other rights already discussed. In fact, when I was in Liberia a few weeks ago, discussing this issue with a large group of women activists, they were very skeptical about the ability of women to effectively demand such participation rights or of the legal system to enforce them. So, this more recent strategy points toward the transformation that is necessary, but does not sufficiently escape the old rights-based paradigm.

Now let me take that step back that I promised and bring in some feminist theory. The problem we face is how to explain and justify the need to expand our focus in thinking about women’s equality. Why are rights not enough? Why is a paradigm shift necessary and how should we think about the new model of women’s role so as to facilitate greater equality? My suggestion is that feminist theory can help us to answer these questions. I will draw here on feminist

34. For a more detailed version of this argument, see generally Susan H. Williams, Democratic Theory, Feminist Theory, and Constitutionalism: The Challenge of Multiculturalism in Feminist Constitutionalism 393, 394 (Beverly Baines et al. eds., 2010).
understandings of culture and of judgment and of justice, and that will bring us back to women as judges in customary law systems.

Some of the arguments for cultural rights seem to rely on what has been called a “billiard ball” model of culture. The billiard ball model sees cultures as mutually exclusive, having clear boundaries and determinate contents. In opposition to this model, feminist theorists such as Seyla Benhabib and Anne Phillips offer a social constructivist account of culture in which cultural communities have long interacted and shaped one another, and they have been internally heterogenous and contested from the start. Sarah Song describes four elements of this constructivist model: (1) “cultures are the products of specific and complex historical processes, not fixed primordial entities”; (2) “cultures are internally contested, negotiated, and reimagined by members, who are sometimes motivated by their interactions with outsiders”; (3) “cultures are not isolated but rather overlapping and interactive”; and (4) “cultures are loose-jointed... the loss or change of one strand does not necessarily bring down the entire culture.”

For our purposes, the most important aspect of this model is the internally contested nature of cultures. We must pay attention to the power dynamics within a group and the ways in which the cultural community’s interaction with the legal system affects the status, power, and resources of subgroups within the cultural community. Certain forms of legal recognition for culture have a systematic effect of supporting traditional authority figures in the community and their views of the culture, at the expense of the power and perspectives of more marginalized groups, including women. For example, reserving seats in the legislature for particular cultural groups or incorporating traditional cultural norms into the state legal system both tend to strengthen traditional leaders—who are overwhelmingly male—as

36. STRANGE MULTIPLICITY, supra note 35, at 10.
against more marginal or progressive elements in the community.\textsuperscript{39} There is no neutral position for the state here: action and inaction both have consequences for the distribution of power and status inside the cultural community.

Thinking about culture as fluid and contested focuses our attention on the crucial role of judges. In customary systems, rules are not made through a legislative process: the rules are understood as already given through tradition. But that does not mean that the rules are static. They grow and change over time and their interpretation and application is often contested within the community. The process through which this change and contestation takes place is the judicial process: the hearing of cases. That is, the customary law is a common law system. And judges are the people with the power to create and recreate the norms in that system.

What exactly is it that judges are doing when they engage in this sort of common law method? Feminist writing on the concept of judgment suggests that we need to reform our understanding of this concept as well. As Jennifer Nedelsky has pointed out, judgment is not about factual accuracy or certainty. Indeed, it is precisely in those areas of life where such factual accuracy or certainty is not possible that we tend to speak about the exercise of judgment. Judgment is best understood in a relational way, as asking us to reflect on our own perceptions and experiences, to consider the perspectives of others, and to reach an understanding that responds to moral and sometimes social concerns, as well as to empirical ones.\textsuperscript{40} In other words, the exercise of judgment is a creative process, in which the judge is not merely declaring a fact that pre-exists her decision, but creating a social reality through the process of decision. It is this creative power that women need to exercise in order to make their rights a reality.

Another way to see this is to think about Nancy Fraser's model of justice as parity of participation.\textsuperscript{41} She suggests that real equality of participation includes three related but independent aspects: first, people must be recognized and respected; second, people must control sufficient material resources to participate fully; and third,

\textsuperscript{39} See PHILLIPS, supra note 37, at 168–69.

\textsuperscript{40} See JENNIFER NEDELSKY, LAW'S RELATIONS: A RELATIONAL THEORY OF SELF, AUTONOMY, AND LAW 58 (2011).

\textsuperscript{41} NANCY FRASER, SCALES OF JUSTICE 145 (2009) [hereinafter SCALES]; Nancy Fraser, Identity, Exclusion, and Critique: A Response to Four Critics, 6 EUR. J. OF POL. TH. 305, 313 (2007) [hereinafter Identity].
people must have voice and representation in the institutions that affect them.\textsuperscript{42} As I have written elsewhere, customary law systems generally fail to provide all three of these requirements.\textsuperscript{43} But even if the first two could be corrected, and the systems could be forced to give women respect and to redistribute material resources to them, such systems still would not be just if they did not also give women voice and power to participate in the creation of the rules.

So, feminist understandings of culture, judgment, and justice help us to see why we need a paradigm shift. Giving women rights, while important and necessary, will never be sufficient because the rights operate within a cultural context in which women are disempowered. Only by giving women the power to change that culture from the inside—to be the norm-creators in that cultural enterprise—can we assure that they are able to enjoy their rights. I believe that the global movement toward electoral gender quotas for women in legislatures is one manifestation of this shift in paradigm.\textsuperscript{44}

In relation to customary law, this paradigm shift suggests that the focus of our legal reforms should not be on mapping out in advance the particular forms that customary practices or institutions should take, but rather on designing incentives, opportunities, and resources that will allow women in these communities to play a more active and central role in creating their future culture. The new model seeks to give women not only rights, but resources and opportunities that they can use to shape their own traditions. And it seeks to create incentives for traditional leaders to include women in the process of norm-creation within their communities.

The particular form such opportunities or incentives should take will vary with the legal context. There is no constitutional solution that fits all sizes here. But I can provide a few examples from the Liberian context that will illustrate certain principles that can be adapted to different circumstances in other countries. There are at least four mechanisms that might be useful in light of this new paradigm. The first two mechanisms have to do with opening the

\textsuperscript{42} \textit{SCALES}, \textit{supra} note 41, at 6.

\textsuperscript{43} Susan H. Williams, \textit{Customary Law, Constitutional Law, and Women's Equality}, in \textit{ENGENDERING GOVERNANCE: FROM THE LOCAL TO THE GLOBAL} (Kim Rubenstein & Katie Young eds.) (forthcoming 2014) (discussing an extended application of Fraser's framework to the issue of gender quality in customary law).

\textsuperscript{44} \textit{E.g.}, Susan H. Williams, \textit{Equality, Representation, and Challenge to Hierarchy: Justifying Electoral Quotas for Women}, in \textit{CONSTITUTING EQUALITY, supra} note 2, at 53 (providing an argument for such gender quotas).
customary system to the possibility of change. The second two mechanisms have to do with increasing women’s ability to be the agents of that change.

First, in order for women to be able to reshape customary law, that law must be seen as the expression of a fluid, living culture that has the capacity to grow and change over time. The constitution can help to generate this understanding of customary law by specifically describing custom and tradition in these terms. Particularly, in the provision that protects custom or tradition, the constitution can specify that what is being protected are not the rules as they exist at any particular moment, but the practice of custom and tradition by a community as it changes and grows over time.

The long-term and general consequence of such a provision would be to help courts and policymakers to approach customary law in a different way. Rather than attempting to insulate and preserve particular customs, they would be guided to strengthen the community’s ability to develop, articulate, and adapt their own traditions. This shift in understanding will not happen overnight, of course, but a provision like this can be one mechanism for encouraging the gradual development of this attitude.

The more immediate and specific consequence of such a provision would be to end the practice of codifying customary law. In Liberia, as in many other African countries, the national legislature has codified some customary law in statutes intended to be applied by the legal system. This practice should stop and the existing statutes should generally be repealed. The practice of codification has the unfortunate effect of freezing customary law as of the moment it was memorialized, and generally in a form approved by traditional leaders without any consideration of dissenting voices within the community. Customary systems should be encouraged to see themselves as living parts of the culture, adapting and growing in response to the changing needs and views of the community. Codification restricts this process.

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45. E.g., Shilubana v. Nwamitwa 2008 (2) SA 66 (CC) at 44 (S. Afr.). The Constitutional Court of South Africa upheld the decision of a traditional authority to change its rules and allow a woman to inherit the chieftaincy. Id. This is a wonderful example of the ability of a community to gradually bring its traditions into line with the constitutional commitment to gender equality.

The impetus behind codification efforts is, however, understandable. The goals of codification are to restrain the discretion of individual decision-makers and to achieve more consistent application of the rules across cases. These are perfectly reasonable goals, but codification is a bad way to achieve them because of its effect of freezing custom. These goals could be better achieved through the methods of the common law: i.e., the use of precedent, which could be facilitated by recording the judgments of customary courts and making such records widely available. This sort of information gathering and dissemination, which can be supported by the government, will benefit the customary system not only by providing some constraint on discretion and some consistency of results, but also by creating a knowledge base about how other communities handle similar issues.

For example, if I can look at case records and determine that the next village over, which belongs to the same tribe as mine, interprets its customs so as to allow girls to inherit their father's property, then I might argue to the chiefs in my village that we can also make this shift. Providing this kind of knowledge, without tying down the system through codification, strikes an appropriate balance between consistency and flexibility. The constitution can contribute to this process by explicitly protecting custom as a living and changing system.

Second, the capacity of customary courts needs to be increased and developed. The government can offer a range of opportunities and resources to customary legal systems that will help to open them to the possibility of change without coercing them to do specific things. For example, the government can provide the personnel to record and maintain the reports of cases, as discussed above. It can also offer training to customary leaders on the constitution and on international human rights, so that they have a better understanding of the legal order as a whole and the values that underlie it. And the government can provide information and education to customary judges on issues relating to gender equality, for example, by giving

47. In a recent conversation with an UNMIL (UN Mission in Liberia) official in Monrovia, I was told that, while large sums of money have been devoted by the international community to building the capacity of the state-based legal system in Liberia, no money has been provided to increase the capacity of the customary system. Conversation at the Constitutional Conference, Constitution Review Committee and Law Reform Commission of the Government of Liberia (Jan. 2013) (Monrovia, Liberia).
them the data that shows that increasing the status of women is one of the most effective mechanisms for increasing the wealth and welfare of the society as a whole. The goal here is not to turn customary courts into just another kind of state agency, but to broaden the horizons of those who are exercising judgment in such courts.

Once the courts have been opened up to the possibility of change and evolution in custom, then women inside traditional communities need to be given the resources and opportunities to become effective participants in shaping their cultures. There is no simple way to achieve this goal, but there are at least two interrelated strategies.

First, the women in these communities need to be offered resources to increase their capacities, in the form of education, economic empowerment, leadership training, and so on. One avenue, which has been promoted with great energy and determination by the Association of Female Lawyers of Liberia, is education for women about the legal rights and remedies available to them. In addition, the reconstruction of the educational system—with particular attention to the encouragement of school attendance by girls—is a crucial, long-term support for the ability of girls and women to shape their communities. This connects to a whole series of issues related to breaking down barriers to girls’ education, including: elimination of school fees, ensuring girls’ safety in and on the way to school, and public education concerning the value of educated girls to the community.

The second strategy is to create incentives for the traditional authorities in such communities to support women in accessing such resources, and to increase the levels of women’s participation in positions of influence over the customary systems. This strategy is necessary because women will not be able to take advantage of resources such as education and economic empowerment unless their communities support them in that effort. And, once they have those resources, they will be unable to translate their increased capacities into increased influence over customary systems unless they are given

49. See Coleman, supra note 4, at 207–09.
entry to positions of power in those systems. So, the central question posed by this paradigm shift is: how can the law provide incentives for traditional authorities to cooperate with and support these projects?

This is a question that can only be answered in a particular legal context and that will probably require some creativity and some trial and error to develop effective responses. But I can give you some examples of programs designed to create such incentives. Imagine a scholarship program for young people from disadvantaged rural areas to attend the university. And imagine that, as the percentage of girls from a certain locality increases, the total amount of scholarship aid given to each student from that locality also increases. If the community wants its sons to get the most benefit from such a system, it will need to include its daughters as well.

Or, perhaps the government might offer greater recognition to the customary system as the role of women in that system increases. So, if a community makes women judges within its system and increases the participation of women in hearings, then the range of cases it can handle and the respect for its judgments in the state-based courts might be increased. This linkage should help recruit traditional leaders, who want more scope for customary law, to support the inclusion of women in positions of power in the system. My point is not to endorse these particular programs, but to point us toward asking the right question—we need to think creatively about ways of getting traditional leaders to facilitate women’s empowerment rather than acting as a barrier to it.

Let me use the Liberian example to make one final point in conclusion. I understand that there is a great risk in turning to internal community evolution to deal with the problem of gender discrimination in customary law systems. The cultural evolution that this model hopes to encourage is often a very slow process and, in the meantime, the women in these communities will be harmed by the persistent gender inequalities enforced by customary law. Even if there is some minimum protection that is afforded by the state legal system so that extreme forms of coercion will not be tolerated, there remains a wide scope for harm and discrimination by their communities. I do not in any way wish to minimize the costs that women will bear during the time it takes for them to gradually change their cultures. But, based on my experience working in countries facing this challenge, I nonetheless believe that accepting these costs is often the best path to a future of greater equality.
In the long run, the welfare of the women in traditional communities depends on their ability to participate effectively in the shaping of their culture. The only way to avoid reactive culturalism and to make stable progress toward equality is for the cultural community to move towards this future through mechanisms it understands to be voluntary. "Voluntary" doesn't mean that the community is unaffected by interaction with and even pressure from other cultures—that kind of isolation has almost never been the case for cultural change. But it does mean that the responses to these pressures must be experienced as generated through a process internal to the community, rather than one imposed from outside. Otherwise, even if a particular case can be resolved so as to help an individual woman, the cultural reaction generated by the imposed solution will mean that other women in the community will pay a cost: their efforts at cultural challenge and growth will be set back.

In other words, in the long run, opening up the channels for internal change in customary communities is a necessary part of reaching greater equality. It is not sufficient, to be sure, but greater equality cannot be achieved without it. And that is why attention to the ways in which the state and larger society can use their resources, including the law, to encourage a more open attitude toward change and to expand the role of women in creating the norms of their cultures must be central. In the end, women will have equality under the law only when women participate fully in the making of the law, whether as legislators in the state-based system or as judges in customary law systems.