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Gender Indicators as Global Governance: Not Your Father's World Bank

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GENDER INDICATORS AS GLOBAL GOVERNANCE: NOT YOUR FATHER'S WORLD BANK

CATHERINE POWELL*

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INTRODUCTION

As feminism has come of age, it has powerfully instantiated itself in global governance.¹ What are the tools feminism has borrowed—even co-opted—to embed itself within governance? Do these tools enhance or diminish the liberatory potential of feminism? To investigate these questions, this article critically examines one tool—the use of gender indicators in global governance, with a focus on the World Bank’s relatively new Women, Business and the Law program (WBL).² In focusing on the World Bank—an enormous producer and consumer of data—this article explores a microcosm of the recent explosion and popularity of gender indicators.

This article borrows a working definition of “indicator” used by Professors Kevin Davis, Benedict Kingsbury, and Sally Engle Merry, who “subsume[] indexes, rankings, and composites which aggregate different indicators” to refer to:

[A] named collection of rank-ordered data that purports to represent the past or projected performance of different units. The data are generated through a process that simplifies raw data about a complex social phenomenon. The data, in this simplified and processed form, are capable of being used to compare particular units of analysis (such as countries or institutions or corporations), synchronically or over time, and to evaluate their performance by reference to one or more standards.³

Because development of indicators often requires mathematical skills and quantitative expertise, technical experts—who are not necessarily elected nor subject to close scrutiny by the public—typically lead the establishment and elaboration of indicators, as well as the norms they embody. This raises accountability questions and can make such indicators hard to contest. At the same time, because indicators themselves are seen as scientific, objective, and

1. Cf. Catherine Powell, *How Women Could Save the World, If Only We Would Let Them: From Gender Essentialism to Inclusive Security*, 28 YALE J. OF L. & FEMINISM_ (forthcoming 2017) [hereinafter Powell, *How Women Could Save the World*].

2. See *Women, Business and the Law 2016: Getting to Equal*, WORLD BANK, <http://wbl.worldbank.org> (last visited April 22, 2016).

3. Kevin E. Davis, Benedict Kingsbury & Sally Engle Mary, *Introduction: Global Governance by Indicators, in GOVERNANCE BY INDICATORS: GLOBAL POWER THROUGH QUANTIFICATION CLASSIFICATION AND RANKINGS*, 3, 6 (Kevin E. Davis, Angelina Fisher, Benedict Kingsbury, and Sally Engle Mary, eds., 2012) [hereinafter Davis et al. *Global Governance by Indicators*].

neutral, they seem to possess authority, impartiality, consistency, and efficiency, which policymakers find attractive for measuring and marking change.⁴

Gender indicators are quantitative metrics that measure progress in securing gender equality.⁵ While this article views gender indicators as potentially powerful tools for reframing the discourse of law and development, it argues that in the context of the World Bank WBL program, indicators fall somewhat short, at least on feminist terms. Rather than *transforming* the development paradigm, the WBL gender indicators insert feminism into the prevailing (male-oriented) framework. As the WBL program itself admirably acknowledges (discussed further in Part IV), due to methodological limitations, its gender indicators focus on formal (not substantive) equality, the formal economy (without addressing the informal sector), and positive law (with limited coverage of customary law). By emphasizing the formal legal and economic spheres in this way, the WBL gender indicators largely ignore the private realm—(re)entrenching the public/private divide that feminist scholars have long criticized.⁶

Why is this important? In measuring and coaxing inclusion of women into existing, traditional “male-oriented” structures of law and markets, these gender indicators measure law on the books (more than law in practice), fail to account for the substantial challenges women face in the unregulated informal economy, and miss the ways women’s roles are socially constructed—often based on customary practices and “tradition”—which can, *inter alia*, relegate women to unpaid or underpaid work, such as caregiving. The WBL program recognizes these shortcomings in their reports and notes that measuring progress in the formal legal and economic spheres is, at least, a good start.⁷ The problem, however, is that because of the World Bank’s influence, their gender indicators become proxies for women’s progress, and, as discussed further below, member states use the Bank’s indicators to make substantial decisions (including funding and establishment of reform agendas).⁸

4. *Id.* at 13–15.

5. For examples of the rise of gender indicators, see *e.g.*, Hillary Rodham Clinton, Secretary of State, U.S. Department of State, Remarks at the Evidence and Impact: Closing the Gender Data Gap Conference, <http://www.state.gov/secretary/20092013clinton/rm/2012/07/195244.htm> (July 19, 2012); U.N. Secretary-General, *Women and Peace and Security: Rep. of the Secretary-General*, U.N. Doc. S/2010/173 (Apr. 6, 2010) (promoting gender indicators to evaluate and facilitate the integration of gender in peace and security); Jim Yong Kim, President, World Bank, Remarks at the Evidence and Impact: Closing the Gender Data Gap Conference, <http://www.worldbank.org/en/news/speech/2012/07/19/remarks-world-bank-group-president-jim-yong-kim-evidence-impact-closing-gender-gap> (July 19, 2012) (personally launching a gender data portal in one of his first public appearances as Bank President). The Evidence and Impact conference was co-hosted by the World Bank, the U.S. State Department, and the polling firm, Gallup.

6. See, *e.g.*, Hilary Charlesworth, Christine Chinkin & Shelley Wright, *Feminist Approaches to International Law*, 85 AM. J. INT’L L. 613 (1991) [hereinafter Charlesworth et al., *Feminist Approaches*].

7. See *infra* Part IV.

8. See *infra* in Part I.

Therefore, the WBL program is a good example of “Governance Feminism,” a construct Professor Janet Halley and her co-authors promote to analyze and critique the ways “feminists and feminist ideas get incorporated (or not) into state, state-like, and state-affiliated power.”⁹ On the one hand, Governance Feminism signals the fact that (at least some) feminists now “walk the halls of power.”¹⁰ But on the other hand, while Governance Feminism has helped feminism move to the mainstream, it has had its costs: “Women benefit differentially; some are harmed; and conflicts among feminists about what worlds to imagine are prematurely settled.”¹¹ Thus, as Dianne Otto notes, efforts to theorize about Governance Feminism must reckon with “familiar accounts of feminist attempts to engage with international law and its institutions, [which] tell a saga of [ongoing] ‘marginalisation,’ ‘silencing,’ and ‘talking to ourselves.’”¹² Exploring the complexity—indeed the paradox—of Governance Feminism, Halley and her coauthors explore its limitations and risks, even as they celebrate its achievements.¹³

This article draws on the notion of Governance Feminism to examine how feminism has become embedded in the World Bank through the use of gender indicators that measure the legal rights of women on a country-by-country basis. I conclude that while feminism has shaped the way the Bank pursues law and development, the transformative potential of feminism within the Bank has been limited by the strictures of the formal equality doctrine and the formal economy. Even as feminism has influenced the Bank’s policies and funding, it has done so on the Bank’s terms. In effect, the Bank has co-opted feminism to advance the Bank’s economic *growth* agenda, rather than the other way around to advance feminism’s more *redistributive* agenda.

I ground these conclusions about feminism and its limits through exploration of two clusters of questions about gender indicators at the World Bank. First, what do gender indicators tell us about whether feminism is changing global

9. Janet Halley, *Describing and Assessing Governance Feminism*, in Janet Halley, Prabha Kotiswaran, Rachel Rebouché, and Hila Shamir, *Governance Feminism: An Introduction* (forthcoming) (manuscript at 1) [hereinafter Halley, *Describing and Assessing Governance Feminism*]. Others view this phenomenon through the lens of “gender mainstreaming,” but this article focuses on the intertwining of feminism and governance.

10. JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* 21 (2006) [hereinafter HALLEY, *SPLIT DECISIONS*].

11. Halley, *Describing and Assessing Governance Feminism*, *supra* note 9, at 4. (“Merging into the mainstream can . . . consolidate a particularistic, identity-based project, sometimes at the expense of alternative affiliations that ignore the siren call of victimization and identity . . . [and] [s]ome of the best things within and about feminism get left out.”)

12. Dianne Otto, *Power and Danger: Feminist Engagement with International Law Through the UN Security Council*, 32 *AUSTL. FEMINIST L.J.* 97, 97 (2010) (internal citations omitted).

13. HALLEY, *SPLIT DECISIONS*, *supra* note 10, at 29–32; Janet Halley, Prabha Kotiswaran, Hila Shamir & Chantal Thomas, *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 *HARV. J.L. & GENDER* 335, 341–42 (2006) [hereinafter Halley et al., *Four Studies in Contemporary Governance Feminism*].

governance or whether governance is changing feminism? Does governance by indicators have a de-radicalizing effect on feminism? Put another way, can feminism use the master's tools (*i.e.*, indicators) to, if not, dismantle the master's house (*i.e.*, the prevailing legal doctrine that draws a sharp dichotomy between public/private law, formal/informal economy, and constitutional/customary law), at least substantially renovate it (*i.e.*, by at least moving beyond the current limitations of formal equality, the formal economy, and the formal constitution)?¹⁴

Second, when using indicators to measure legal rights in the context of gender equality, what do these quantitative measurements make visible, and what do they obscure? What are the normative and practical implications of quantifying equality for feminism? And what are the implications of economizing gender equality for breaking down gender hierarchy?¹⁵

Early scholarship on Governance Feminism (and critiques of it) centered on criminal punishment, specifically in the context of sexual violence in war and trafficking.¹⁶ This scholarship identifies “the fierce turn in American feminism toward the state,” particularly the tendency toward criminalizing “bad things that men did to women[.]”¹⁷ In shifting from international criminal law to law and development, my objective here is to build on this earlier scholarship, but make a unique contribution by analyzing the turn to the state to monetize feminist values through indicators.¹⁸

Numeric indicators are a classic governance device for identification, allocation, and evaluation. Tracing the “genealogy of indicators,” anthropologist

14. See AUDRE LORDE, *The Master's Tools Will Never Dismantle the Master's House*, in *SISTER OUTSIDER* 110, 112 (1984) (“For the master's tools will never dismantle the master's house. They may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine change.”); see also Otto, *supra* note 12, at 98 (invoking Lorde as a critique of Governance Feminism).

15. As Galit A. Sarfaty notes:

[T]hings really happen in the Bank when an economic case could be made for them. You put [them] in economic language It [] became acceptable internally to talk about corruption when people could show with cross-country regressions that it's related to lower growth People needed [economic-based evidence] to say that “OK, it's all right for us to work on this.” So one obstacle would be to try and articulate rights issues in the way that economists could understand.

GALIT A. SARFATY, *VALUES IN TRANSLATION: HUMAN RIGHTS AND THE CULTURE OF THE WORLD BANK* 107, 127 (2012) [hereinafter SARFATY, *VALUES IN TRANSLATION*] (discussing the trend toward economizing human rights within the World Bank) (quoting a March 14, 2006, interview with an official with the World Bank Development Research Group); see also *id.* at 131 (discussing quantifying the social capital concept and translating it econometrically).

16. See, e.g., Halley et al., *Four Studies in Contemporary Governance Feminism*, *supra* note 13; Kelly Askin, *A Decade of the Development of Gender Crimes in International Courts and Tribunals: 1993 to 2003*, 11 *HUM. RTS. BRIEF 10TH ANNIVERSARY ISSUE* 16, 16 (2004). Otto, *supra* note 12.

17. John Sutherland, *The Ideas Interview: Janet Halley*, *THE GUARDIAN* (Aug. 87, 2006) <http://www.theguardian.com/world/2006/aug/08/gender.academicexperts> (interview quoting Halley).

18. While working on this project, I have learned that Halley et al are working on an edited book, which will collect analysis of Governance Feminism in a variety of areas of law. See, e.g., Janet Halley, Prabha Kotiswaran, Rachel Rebouche, and Hila Shamir, *Governance Feminism: An Introduction* at 4 (Minn. U.P. forthcoming).

Sally Engle Merry describes the rise of indicators as a “project of modernity,” noting:

Numbers as an instrument of knowledge production were developed first for business transactions . . . and subsequently as instruments of state governance . . . for administration and tax . . . , but it is only with the development of the modern state that statistics have been used to describe the characteristics of populations themselves.¹⁹

Within legal scholarship, the continued growth of empirical studies, such as within law and economics, has proliferated. In the development field, indicators drive decision-making in policy and program design, implementation, and monitoring and evaluation.²⁰ This article synthesizes feminist criticism, empirical studies, and law and development literature²¹ to analyze the emergence of gender indicators as a tool of global governance in vital decisions concerning the allocation of international assistance.²²

The World Bank promotes a dual narrative about why gender equality as a legal norm matters for development. First, “gender equality matters in its own right, because the ability to live the life of one’s own choosing and be spared from absolute deprivation is a basic human right, to be enjoyed by everyone, whether one is male or female.”²³ Second, gender equality “matters instrumentally, because greater gender equality contributes to economic efficiency and the achievement of other key development outcomes.”²⁴

19. Sally Engle Merry, *Measuring the World: Indicators, Human Rights, and Global Governance*, 52 CURRENT ANTHROPOLOGY S83, S89 (2011) [hereinafter Merry, *Measuring the World*].

20. See, e.g., WORLD BANK, WORLD DEVELOPMENT REPORT: GENDER EQUALITY AND DEVELOPMENT 37 (2012) [hereinafter 2012 WDR ON GENDER]; USAID, GENDER EQUALITY AND FEMALE EMPOWERMENT POLICY 1 (2012), http://pdf.usaid.gov/pdf_docs/PDACT200.pdf [hereinafter USAID, GENDER POLICY]; Memorandum from the Development Economics Vice Presidency and Poverty Reduction and Economic Management Network for World Bank’s staff, *Engendering Justice: A Gender Assessment’s Impact on Project Design* (May 2005), <http://www1.worldbank.org/prem/PREMNotes/premnote98.pdf>; Andrew D. Mason & Elizabeth M. King, *Preface to* WORLD BANK, *ENGENDERING DEVELOPMENT — THROUGH GENDER EQUALITY IN RIGHTS, RESOURCES, AND VOICE*, at xii (2001), <http://documents.worldbank.org/curated/en/2001/01/891686/engendering-development-through-gender-equality-rights-resources-voice>.

21. Note that the law and development field itself sits at the intersection of economic, legal, and institutional theory. See David M. Trubek & Alvaro Santos, *Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice*, in *THE NEW LAW AND DEVELOPMENT: A CRITICAL APPRAISAL 1* (David M. Trubek & Alvaro Santos eds., 2006) [hereinafter Trubek & Santos, *New Critical Practice*].

22. This article, thus, builds on my broader interest in new governance approaches (beyond gender) to diagnosing, managing, and solving transnational problems. See, e.g., Catherine Powell, *Libya: A Multilateral Constitutional Moment?*, 106 AM. J. INT’L L. 298 (2012).

23. 2012 WDR ON GENDER, *supra* note 20, at 47.

24. *Id.*; see also SARFATY, *VALUES IN TRANSLATION*, *supra* note 15, at 115–20 (discussing the Bank’s use of intrinsic and instrumentalist claims in the context of human rights). As discussed below in Part I, the Obama Administration has echoed this dual frame, for example, in the President’s first National Security Strategy. WHITE HOUSE, NATIONAL SECURITY STRATEGY 38 (2010), http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf [hereinafter NATIONAL SECURITY STRATEGY].

While focused on the World Bank's WBL program, this article considers the broader ecology within which gender indicators have flourished to identify lessons about law reform, global governance, and transnational feminism. In so doing, it examines the implications of utilizing a technology of corporate governance—numerical measurement and analysis—as an instrument of the modern state and now, by extension, multi-governmental institutions.²⁵ The WBL program's indicators provide a useful case study because they inform the Bank's own work and influence its partners (including aid recipients and donors) and other stakeholders.

Increasingly, governments and international organizations have relied on quantitative indicators to make the case that investing in women and girls yields not only beneficial development outcomes for the sake of women and girls themselves, but also positive outcomes for whole *communities*, for whole *nations*, and even for the pursuit of *international* peace and prosperity.²⁶ Further, the claim that economic development experts at the World Bank and elsewhere make is that investing in women and girls leads to more *sustainable* outcomes and is thus a more *efficient* use of resources than prior development strategies that failed to use gender as a pathway for scarce, targeted resources.²⁷

The goal of this article is to interrogate what is gained and what is lost through the use of gender indicators in the service of these ambitious claims. Do such quantitative metrics make gender inequality more visible and therefore more susceptible to remediation? Does the use of data create (at least the illusion of) greater objectivity and accountability (to taxpayers at the national level and shareholders at the international financial institution level)?

Conversely, in what ways do numbers obscure certain forms of gender dominance and subordination that are not easily reducible to quantification (such as gender-based violence and women's empowerment and autonomy)? Empiricism often relies on proxies to measure these phenomena. But is the solution to come up with more and better data? As discussed further below, the problem is

Then-Secretary of State Hillary Clinton and U.S. Agency for International Development (USAID) Administrator Raj Shah each issued gender policy guidances, further raising the profile of this dual narrative within the Administration. See U.S. DEPARTMENT OF STATE POLICY GUIDANCE: PROMOTING GENDER EQUALITY TO ACHIEVE OUR NATIONAL SECURITY AND FOREIGN POLICY OBJECTIVES (2012), <http://www.state.gov/documents/organization/189379.pdf> [hereinafter STATE DEPT, GENDER POLICY GUIDANCE] (fact sheet) (summarizing internal policy guidance cable); Rajiv Shah, *Message from the Administrator* in USAID, GENDER POLICY, *supra* note 20, at iv.

25. For a broader consideration of the use of indicators in transnational law and regulation, see, for example, Davis et al., *Global Governance by Indicators*, *supra* note 3 (collecting case studies across various fields of transnational law).

26. See, e.g., Melanne Vermeer, *Why Women Are a Foreign Policy Issue*, FOREIGN POL'Y (Apr. 12, 2012), http://www.foreignpolicy.com/articles/2012/04/23/why_women_are_a_foreign_policy_issue (reflecting based on the author's purview as then-Secretary of State Hillary Clinton's Ambassador-at-Large for Global Women's Issues from 2009 to early 2013); 2012 WDR ON GENDER, *supra* note 20, at 6; Powell, *How Women Could Save the World*, *supra* note 1.

27. See, e.g., 2012 WDR ON GENDER, *supra* note 20, at xiii; USAID, GENDER POLICY, *supra* note 20, at 3.

that data's claim of objectivity, combined with its inherently biased nature, suppresses feminist goals.²⁸

Because international law has been traditionally based on relations between states, feminist theorists have criticized its structure for masking gender inequality in the private sphere (for example, in the market) and by private actors (for example, by obscuring accountability for gender- and sexual-based violence by an abusive spouse or a private militia leader).²⁹ This article investigates how using gender indicators fits into prevailing accounts and critiques of international law and global regulation.

The article is organized in five parts. Part I analyzes the World Bank's dual narrative on why gender equality matters for development. That the instrumental value of gender equality (as told through gender indicators) has been emphasized over its intrinsic value represents a strategic choice to get institutional buy-in. But, it also represents a normative choice that has practical implications. Part II discusses the rise of indicators as a mode of governance, including in the development assistance field and, by extension, the law and development field. Part III provides an overview of the burgeoning construction and use of *gender* indicators as a mode of Governance Feminism within the United Nations (U.N.) family (including within the World Bank's WBL program) in response to earlier indicators that were insufficiently attentive to gender. Part IV summarizes criticism of gender indicators for falling short in the way they have been conceived, interpreted, and deployed. Much of the criticism of gender indicators involves methodological arguments, rather than arguments questioning the normative implications of relying on indicators as a way to evaluate gender justice. Building on these critiques, Part V returns to the normative—and by extension practical—implications of the turn to gender indicators (and the motives underlying them), concluding with thoughts about how gender indicators might fit more meaningfully into the feminist project.

I. THE WORLD BANK'S DUAL NARRATIVE: THE INTRINSIC AND INSTRUMENTAL VALUE OF GENDER EQUALITY

A. THE WORLD BANK'S DUAL NARRATIVE

While highlighting both the intrinsic value and the instrumental value of gender equality, the World Bank's work inherently privileges the latter. Because of its role as a development institution that focuses on economic growth and efficiency, the Bank views gender primarily from a cost-benefit perspective. The Bank's core mission is to “[e]nd extreme poverty within a generation and boost shared prosperity”³⁰—and its agenda has expanded to include a comprehensive

28. See *infra* text accompanying notes 73–74 and accompanying text.

29. See Charlesworth et al., *supra* note 6, at 614–15 for an example of feminist critique.

30. *About the World Bank*, WORLD BANK, <http://www.worldbank.org/en/about> (last visited Apr. 3, 2016).

set of programs to advance this mission. To pursue this mission, the Bank leans on its comparative advantage—utilizing economic analysis and promoting market-friendly policies.³¹

The Bank's 2012 World Development Report—which took gender equality and development as the primary theme—is an example of this dual narrative.³² The Report initially states that gender equality is a core objective with its own intrinsic value. It describes gender equality as “a process of expanding freedoms equally for all people.”³³

However, the Report then largely focuses on the instrumental justification for gender equality as being “smart economics.”³⁴ From the Bank's perspective, gender equality is “an instrument for development” because “it can enhance economic efficiency and improve other development outcomes in three ways.”³⁵ First, eliminating gender barriers in education, economic opportunities, and productive inputs “can generate broad productivity gains[.]”³⁶ Second, “improving women's absolute and relative status feeds many other development outcomes, including those for their children.”³⁷ Third, gender equality is an instrument for development through “leveling the playing field” and facilitating “more representative, . . . more inclusive institutions.”³⁸

This emphasis on the instrumental value of gender equality over its intrinsic value is an institutionally strategic decision. The World Bank, the U.N. system generally, and national governments have sought to mainstream gender throughout their organizational structures.³⁹ Pitching gender equality as facilitating broader goals of these institutions is more likely to secure buy-in by the

31. Jessica Einhorn, *Interview with the Author*, FOREIGN AFF. (Sept. 1, 2001), <http://www.foreignaffairs.com/articles/64199/jessica-einhorn/interview-with-the-author> (responding to letters in reaction to the author's earlier piece, *The World Bank's Mission Creep*, FOREIGN AFF. (Sept/Oct. 2001), <http://www.foreignaffairs.com/articles/57235/jessica-einhorn/the-world-banks-mission-creep>).

32. 2012 WDR ON GENDER, *supra* note 20.

33. *Id.* at 3 (citing and paraphrasing AMARTYA K. SEN, DEVELOPMENT AS FREEDOM (1999) [hereinafter SEN, DEVELOPMENT AS FREEDOM]). The Bank's Report also cites to the U.N. Millennium Development Goal 3 on gender equality and the main international treaty on women's equality, Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). *Id.*; see generally GENDER & DEV. GRP. IN THE POVERTY REDUCTION & ECON. NETWORK, WORLD BANK, GENDER EQUALITY AS SMART ECONOMICS: A WORK IN PROGRESS (2011), <http://bit.ly/1ospFzE> [hereinafter GENDER EQUALITY AS SMART ECONOMICS].

34. 2012 WDR ON GENDER, *supra* note 20. To be fair, a section of the Report focuses on “promoting women's agency[.]” which, along with other references sprinkled throughout the Report, includes references to the ways in which women's agency “has intrinsic relevance for women's individual well-being and quality of life.” *Id.* at 151. Nevertheless, the bulk of the Report—even the section on women's agency—is focused on the “instrumental relevance” of women's equality and empowerment.

35. *Id.* at 3.

36. *Id.*

37. *Id.*

38. *Id.*

39. See, e.g., 2012 WDR ON GENDER, *supra* note 20; STATE DEPT., GENDER POLICY GUIDANCE, *supra* note 24.

leadership of these organizations, who are frequently men⁴⁰ or, regardless of their gender, may not necessarily view gender equality for its own sake as an institutional priority.

Thus, increasingly, international organizations, national foreign ministries, and development agencies are touting the key links between gender equality on the one hand and economic prosperity and even world peace on the other.⁴¹ As the World Bank's 2012 World Development Report says in its opening paragraph, "[g]reater gender equality can enhance productivity, improve development outcomes for the next generation, and make institutions more representative."⁴² The U.S. National Security Strategy echoes this, stating, "[e]xperience shows that countries are more peaceful and prosperous when women are accorded full and equal rights and opportunity."⁴³ The World Bank views the monetary benefits

40. Micah Zenko & Amelia Mae Wolf, *Leaning from Behind*, FOREIGN POL'Y (Sept. 24, 2015), <http://foreignpolicy.com/2015/09/24/leaning-from-behind-women-foreign-policy-media/>.

41. See Catherine Powell, *How Women Could Save the World*, *supra* note 1, at 3 n.5 and accompanying text (discussing how instrumentalist strategies to promote gender equality secure broader institutional buy-in than equality or moral claims).

42. 2012 WDR ON GENDER, *supra* note 20, at xx.

43. NATIONAL SECURITY STRATEGY, *supra* note 24, at 38; see Lucy Madison, *In Farewell Speech, Clinton Calls for "Smart Power" on Global Stage*, CBS NEWS (Feb. 1, 2013), http://www.cbsnews.com/8301-250_162-57566994/in-farewell-speech-clinton-calls-for-smart-power-on-global-stage/ [hereinafter Madison, *Farewell Speech*] (quoting former Secretary of State Hillary Clinton as saying: "The jury is in. The evidence is absolutely indisputable: If women and girls everywhere were treated as equal to men in rights, dignity, and opportunity, we would see political and economic progress everywhere."); see also Mary-Katherine Ream, *USAID Launches New Gender Policy*, IIP DIGITAL (Mar. 1, 2012), <http://iipdigital.usembassy.gov/st/english/article/2012/03/201203011512.html#axzz2b6DzOGzH> ("This is the first time in 30 years the U.S. government has updated and issued a formal approach to gender and development, officials said. It reveals a fundamental shift in the aid community's conversation on women."); Rajiv Shah notes:

This is the first time in 30 years that the U.S. government is updating and issuing a formal approach to gender in development. It's an extraordinary thing to believe when you are aware of all of the data and insight and learning that has come out over the last three decades about how investing in women as the solution to development and human rights challenges around the world is a core evidence-based strategy to achieve success. But now we are hopefully correcting for a few lost decades in terms of making that central insight a definitive part of our approach to our work.

Rajiv Shah, *USAID Gender Policy Rollout*, The White House, (Mar. 1, 2012), <https://www.youtube.com/watch?v=FMaf3D7JdRM>. (Relevant time 12:17-12:55).

The first Gender Policy Guidance issued by the State Department notes:

Evidence shows that investments in women's employment, health, and education are correlated with greater economic growth and more successful development outcomes. Engaging women as political and social actors can change policy choices and makes institutions more representative and better performing. And a growing body of evidence shows that women bring a range of unique experiences and contributions in decision-making on matters of peace and security that lead to improved outcomes in conflict prevention and resolution.

STATE DEPT., GENDER POLICY GUIDANCE, *supra* note 24; see also USAID, GENDER POLICY, *supra* note 20.

of investing in women and girls as “smart economics.”⁴⁴ Similarly, former Secretary of State Hillary Clinton refers to promoting the status of women as an exercise of “smart power.”⁴⁵

At the same time, economizing gender involves a process of translation that can be viewed as a form of adaptation to an organizational culture—or, as Professor Sally Engle Merry puts it, a form of “vernacularization”—adopting the local vernacular or language.⁴⁶ Economics and quantitative analysis are the vernacular (or local language) of the World Bank. However, vernacularization has its limits, both as a normative matter and as a practical one. Normatively, vernacularization tends to involve adopting or co-opting the local culture.⁴⁷ Therefore, liberatory projects such as feminism may be sapped of their emancipatory potential when confronting an organization’s dominant ideology.⁴⁸ As Professor Galit Sarfaty notes, “a paradox of vernacularization” is that a project that otherwise seeks to challenge practices, policies, and structures of an institution may end up losing its own normative valence in the face of a potentially more powerful one.⁴⁹ Applying this insight to the World Bank, while feminist economists have been quite adept at adopting the Bank’s local vernacular of economics and quantitative analysis, by their own admission,⁵⁰ their effort to translate gender equality into the language of the Bank has diminished the normative valence of feminism’s critique of the formal equality, formal law, and the formal economy.

B. THE BANK’S GENDER INDICATORS ENTRENCH THE DUAL NARRATIVE

The World Bank’s gender indicators use the local vernacular of the Bank—economics—which shifts the normativity of the gender equality project from a focus on equality for its own sake to equality as a beneficial factor in facilitating development. As a practical matter, the emphasis on indicators “neglects what

44. See, e.g., GENDER EQUALITY AS SMART ECONOMICS, *supra* note 33; 2012 WDR ON GENDER, *supra* note 20, at xx (“Gender equality is . . . smart economics.”); *id.* at 3 (“Gender equality matters for development—It is smart economics.”).

45. Madison, *Farewell Speech*, *supra* note 43 (quoting Clinton as pointing to gender equality as an example of smart power—a compromise between hard, military power and the soft power of moral suasion—because gender “is not only a moral issue. Which of course it is. It’s an economic issue and a security issue It therefore must be central to U.S. foreign policy.”); see also Verveer, *supra* note 26 (Verveer, then-Secretary of State Hillary Clinton’s Ambassador-at-Large for Global Women’s Issues, states that “promoting the status of women is not just a moral imperative but a strategic one; it’s essential to economic prosperity and to global peace and security. It is, in other words, a strategy for a smarter foreign policy.”).

46. Sally Engle Merry, *McGill Convocation Address: Legal Pluralism in Practice*, 59 MCGILL L.J. 1, 7 (2013).

47. *Id.*

48. SARFATY, VALUES IN TRANSITION, *supra* note 15, at 151.

49. *Id.* at 141.

50. See discussion, *infra*, Part IV.

cannot be counted”⁵¹ and obscures women’s empowerment, voice, and agency.⁵² The emphasis on the instrumental value of gender equality fits into a broader trend toward “evidence-based investments”⁵³ and “results-based management.”⁵⁴

This trend toward quantification often means that indicators are deployed as proxies to measure activities that are otherwise hard to quantify. For example, measures of “women’s empowerment” must rely on proxies of autonomy, such as whether a woman needs her husband’s permission to travel, sign a contract, buy land, etc., as a formal matter. Furthermore, activities (such as training programs, enrollment, or graduation rates) are presumed to correspond to particular outcomes (*i.e.*, educational attainment).⁵⁵ However, in practice, women and girls may have difficulty obtaining a quality education for any number of reasons, including violence, harassment, lack of childcare, lack of safe and affordable transportation, etc.

At the same time, gender indicators have helped advance a feminist agenda within the development landscape by threading the needle of instrumentalist economic growth and efficiency goals within narratives concerning the intrinsic value of gender equality. This is apparent in the assessments gender indicators have helped shape—on a range of gendered phenomena—from “missing women” and “missing girls,”⁵⁶ to the “Girl Effect,”⁵⁷ to evaluating persistent

51. Sally Engle Merry, *Firming up Soft Law: The Impact of Indicators on Transnational Human Rights Legal Orders*, in *TRANSNATIONAL LEGAL ORDERS* 374, 395 (Terence C. Halliday & Gregory Shaffer eds., 2015) [hereinafter Merry, *Firming up Soft Law*].

52. See *supra* note 34 for discussion of women’s agency within the Bank’s instrumentalist framework.

53. USAID, *GENDER POLICY*, *supra* note 20, at 1; see also Danny Leipziger & Eckhard Deutscher, *Foreword*, in *EQUALITY FOR WOMEN: WHERE DO WE STAND ON MILLENNIUM DEVELOPMENT GOAL 3?*, at xv (Mayra Buvinić et al. eds., 2008), <http://siteresources.worldbank.org/INTGENDER/Resources/EqualityforWomenfinal.pdf> (the coauthors worked for World Bank and OECD, respectively) (“There is compelling *evidence* of the importance of gender equality for poverty reduction and sustainable growth. So it should come as no surprise that most development actors—international agencies, bilateral donors, and most developing countries—have an official policy for promoting gender equality.”) (emphasis added).

54. See generally United Nations Dev. Programme [UNDP], *Results Based Management: Concepts and Methodology* (July 2000), <http://web.undp.org/evaluation/documents/RBMConceptsMethodgjuly2002.pdf>.

55. Merry, *Firming up Soft Law*, *supra* note 51, at 382.

56. Amartya Sen, *More Than 100 Million Women Are Missing*, 37 *N.Y. REV. BOOKS* (1990), <http://ucatlasc.ucsc.edu/gender/Sen100M.html> (while the numbers have since been updated, Sen introduced the phenomenon and estimated that 100 million women were “missing”—their potential existence extinguished through infanticide or inadequate nutrition during infancy); see also 2012 WDR ON GENDER, *supra* note 20, at 15 (discussing how the phenomenon of “missing girls” and “missing women” is based not only on preference for sons, discrimination, and social norms, but also on poor institutions that “force households to choose among many bad options” and “multiple service delivery failures”).

57. Prominently branded by the Nike Foundation, the “Girl Effect” relies on the empirical claim that “investing in a girl stops poverty before it starts.” Maria Eitel, *The Girl Effect*, CNN, (Sep. 19, 2011, 4:00 AM), <http://globalpublicsquare.blogs.cnn.com/2011/09/19/the-girl-effect/>; see also Stuart Elliot, *Nike Harnesses Girl Effect Again*, *N.Y. TIMES* (Nov. 10, 2010), <http://www.nytimes.com/2010/11/11/giving/11VIDEO.html> (tracing the roots of the “Girl Effect” campaign back to Nike’s “if you let me play” campaign regarding the participation of women and girls in sports and noting that while the “Girl Effect” campaign rebrands poverty, it is purposefully not branded as Nike). Data on the “Girl Effect” website

gaps and discrimination in numerous areas. These narratives are powerful and penetrating, in large part because of the story the numbers tell. Girls and women are more likely to die; girls' school enrollment continues to be low; women everywhere tend to earn less; women are more likely to do unpaid family work or to work in informal sectors; women are underrepresented in the upper echelons of formal politics and have less say in decisions and control over household resources.⁵⁸

The World Bank itself attributes the persistence of such gender inequalities to a variety of factors that numbers alone may not be able to fully diagnose, such as the fact that there may not be a single institution or policy "fix" that is blocked, multiple constraints that are mutually reinforcing (in ways that are not easily measurable), and entrenched social norms and gender roles, including notions surrounding caregiving and housework.⁵⁹

C. GOVERNANCE BY INDICATORS: TOP-DOWN OR BOTTOM-UP?

Steps to address persistent gender inequality are more sustainable when assessed and addressed through *both* bottom-up and top-down forms of governance.⁶⁰ Top-down methods involve experts and other policymakers taking leadership in developing and/or imposing decisions, while bottom-up solutions involve affected individuals and communities taking the lead in crafting and/or implementing decisions to improve their own destiny. As discussed further below, governance by indicators tends to be top-down (from international development agencies or donors to national governments to affected individuals or communities).

reflects that "when we all invest in girls, everyone wins[.]" since such investments lead to improvements in income (as each additional year of secondary school increases a girl's eventual wages by 15 to 25 percent) and in health (as mothers get more schooling, their infants and children will be healthier). *Id.* An independent website on the "Girl Effect" campaign is available at <http://youthinkyouknowme.girleffect.org/> (last visited Aug. 18, 2014); accord Rajiv Shah, *Message from the Administrator*, in USAID, GENDER POLICY, *supra* note 20 at iv ("[I]n other cases—boys are falling behind. With [the new USAID gender equality] policy, we can ensure our values and commitments are reflected in durable, meaningful results for all."); see also Judith Warner, *Is There Really a 'Boy Crisis'?*, TIME IDEA (Mar. 21, 2013), <http://ideas.time.com/2013/03/21/the-boy-crisis-is-it-fictional/> (concluding, based on current research, that American boys face challenges due to gendered social experience and expectations as well as because of "class" (income and education level). The study recommends against "pit[ting] boys' needs against those of girls or view[ing] one gender's success as a zero-sum game that requires the relative failure of the other The solution is rather to realize that a rising tide of educational expectation will raise all boats.").

58. 2012 WDR ON GENDER, *supra* note 20, at xxi. Even in a rich country, such as the United States, women are at a disadvantage. "Women may control 65% of global spending, but in the United States, where that number is higher, we represent only 3% of Fortune 500 directors."

59. 2012 WDR ON GENDER, *supra* note 20, at 13–14 (pointing, in particular, to the "sticky domains" of health and mortality, the economy, and agency in society and in household decision-making).

60. Cf. Janet Koven Levit, *A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments*, 30 YALE J. INT'L L. 125 (2005).

However, bottom-up decision-making can, in some circumstances, be more agile, better informed, more targeted, and more effective, as affected individuals and communities will likely feel greater ownership over the solutions and therefore have more of an interest in sustaining them.⁶¹ As a social justice method, bottom-up decision-making—which has deep roots in feminists’ consciousness-raising methodologies—is also more likely to reflect the intrinsic value of “the ability to live the life of one’s own choosing.”⁶²

Top-down indicators appear objective, neutral, and scientific. However, their selection and reproduction often require discretion, judgment, and preference. But they actually mask political struggle over questions of power, gender, development, corporate responsibility, rule of law, and human rights as “technical questions of measurement, criteria, and data accessibility.”⁶³ Since such debates often rely on technical expertise, the creation and interpretation of an indicator frequently involves a “slippage . . . in the way . . . problems are defined, in the identity and role of experts, [and] in the relative power of the people engaged in producing and using [the] indicator[]”⁶⁴

By exercising the “power of naming” in labeling the category to be measured, determining what is included in or excluded from the category, and setting forth parameters for measurement, the use of an indicator is an exercise of hegemony.⁶⁵ Indeed, indicators are typically created in the global North, while the data collection (particularly in the context of development assistance) occurs in the global South, seemingly enlisting the subject being measured in self-regulation.⁶⁶

This form of control and regulation has been called “government at a distance.”⁶⁷ These standards promote “self-governance among the governed”⁶⁸ in ways that have become so naturalized and ingrained that we rarely question these forms of social control and self-control. Common examples of self-governance through which individuals and institutions submit to evaluation

61. See, e.g., ISOBEL COLEMAN, *PARADISE BENEATH HER FEET: HOW WOMEN ARE TRANSFORMING THE MIDDLE EAST* 188 (2013) (discussing how World Bank-supported *community*-led development initiatives in Indonesia and Afghanistan were considered success stories, particularly where, for example in Afghanistan, villagers “had little reason to trust their long-dysfunctional government and believed that community-led development was the only way forward.”).

62. 2012 WDR ON GENDER, *supra* note 20, at 3.

63. Merry, *Measuring the World*, *supra* note 19, at S88. Merry points out:

Political debates about compliance shift to arguments about how to form an indicator, what should be measured, and what each measurement should represent The outcomes appear as forms of knowledge rather than as particular representations of a methodology and particularly political decisions about what to measure and what to call it. *Id.*

64. *Id.*

65. John M. Conley, *Comment*, 52 *CURRENT ANTHROPOLOGY* S93 (2011) (response to Merry, *Measuring the World*, *supra* note 19).

66. Merry, *Measuring the World*, *supra* note 19, at S89–90, S93.

67. NIKOLAS ROSE, *GOVERNING THE SOUL: THE SHAPING OF THE PRIVATE SELF* xxii (1989).

68. Merry, *Measuring the World*, *supra* note 19, at S89.

measured by numbers include: grades and GPAs; SAT and LSAT scores; *U.S. News and World Report* higher education rankings; reports to donors evaluating project outcomes; and even indicators for faculty productivity pegged to allocation of academic research grants.⁶⁹

The World Bank's turn to gender indicators⁷⁰ has tended to be both top-down and bottom-up because its WBL program relies on both input from in-country practitioners to document national laws and World Bank databases to collect information on women's rights issues selected by the WBL program.⁷¹ Perhaps because the Bank functions as both a bank that can resource gender equality through its financial assistance *and* a social justice agency, it provides both top-down and bottom-up support when working with national and subnational governments. An example of the Bank's experience with supporting bottom-up development is its support for the establishment of the National Solidarity Program in Afghanistan, which relied on input from community-based councils comprised of democratically-elected leadership structures to determine how to use development funds from the Bank.⁷²

D. GENDER INDICATORS FALL SHORT IN THE PROJECT OF TRANSFORMATION

The role of gender indicators in the WBL program can be understood as advancing (yet falling short in realizing) three transformative projects: (1) feminist transformation, (2) legal transformation, and (3) economic transformation.

Feminist transformation: First, on the feminist theory front, the history of the WBL program reflects a classic example of Governance Feminism, with feminists within the World Bank developing and gaining acceptance for gender indicators within the context of an institution whose approach to development is deeply informed by quantitative indicators. Feminist economists and lawyers infiltrated the Bank, using the language of banking, to develop gender indicators (discussed *infra*, Part III) that help advance a legal and economic justice reform agenda for women and girls.⁷³ The WBL is a cross-disciplinary enterprise of lawyers, economists, and other experts who bring a variety of understandings about feminism to the table, often in consultation with outside stakeholders in

69. *Id.* at S89–90. *But see* Susan Sturm & Lani Guinier, *The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity*, 60 VAND. L. REV. 515 (2007) (criticizing the LSAT).

70. *See, e.g.*, 2012 WDR ON GENDER, *supra* note 20 (noting the World Bank's turn to gender indicators); *see also* Kim, *supra* note 5 (noting that the Bank also launched the Gender Data Portal in 2012).

71. WORLD BANK GRP., WOMEN, BUSINESS, AND LAW 2016: GETTING TO EQUAL 31 (2015), [hereinafter 2016 WBL REPORT] (this was the most recent report available at the time of this writing, with the first biennial report having been issued in 2010).

72. *See* ISOBEL COLEMAN, PARADISE BENEATH HER FEET: HOW WOMEN ARE TRANSFORMING THE MIDDLE EAST 188–89 (2010) (discussing how the visionary behind the National Solidarity Program was a former World Bank official, Ashraf Ghani, who went on to become Afghanistan's finance minister (after the fall of the Taliban) and was elected to the Afghan presidency in 2014).

73. Telephone Interview with WBL Staffer (Mar. 28, 2013).

poor countries, in which the Bank works, as well as with elite development professionals and advocates who can access the Bank's elaborate organizational structure.⁷⁴ As discussed *infra*, Part III, in developing and advancing gender indicators, feminists within the World Bank have used the "master's tools" (quantitative metrics) to reform, not transform, the "master's house" (the World Bank).

Legal transformation: Second, on the legal reform front, the WBL program uses gender indicators to measure progress in women's rights, for example, in access to credit, jobs, and property⁷⁵ (again, discussed *infra*, Part III). However, the use of gender indicators reveals several limitations about law, development, and the use of quantitative empiricism to draw conclusions about law and development. An initial limitation is that, despite their appearance of scientific objectivity, indicators are far from neutral and rest on normative assumptions about which legal rights are counted, how they are counted, and what the goals of legal reform should be.⁷⁶ Another limitation is that legal variables are challenging to measure "in the face of legal complexity and uncertainty."⁷⁷ A final limitation is that, since the notion of development is in itself contested, measuring how legal rights and law reform advance "development" turns on a contested idea that may be problematic, if the path to development is one that replicates existing structures of dominance and subordination in "developed" countries.⁷⁸

Economic transformation: Third, on the economic front, while the WBL program does not provide funding itself, its gender indicators are used by other agencies, such as the U.S. Millennium Challenge Corporation (discussed below)

74. *Id.*

75. Press Release, World Bank and IFC, Many Societies Gradually Moving to Dismantle Gender Discrimination, Yet More Can Be Done, Says World Bank Group President Jim Yong Kim (Sept. 26, 2013), <http://www.worldbank.org/en/news/press-release/2013/09/24/societies-dismantle-gender-discrimination-world-bank-group-president-jim-yong-kim> [hereinafter Press Release, World Bank and IFC].

76. For example, there is substantial debate about how to measure the right to be free of gender-based violence. As Sally Engle Merry notes, there has been disagreement about whether and how to measure the severity and extent of violence; whether to include mental or psychological violence; how to account for the potential underreporting of violence against women to law enforcement; and whether to take into account subjective factors such as fear of violence. Merry, *Firming up Soft Law*, *supra* note 51, at 384, 386, 384. "[T]he content of indicators is fundamentally shaped by a focus on what is countable and what forms of data already exist or can be acquired in a way that seems 'objective.'" *Id.* at 394.

77. See, e.g., Kevin E. Davis & Michael B. Kruse, *Taking the Measure of Law: The Case of the Doing Business Project*, 32 LAW & SOC. INQUIRY 1095 (2007) [hereinafter Davis & Kruse, *Taking the Measure of Law*].

78. See *id.* at 1108–10; see also Trubek & Santos, *New Critical Practice*, *supra* note 21, at 7–8 (describing efforts to broaden the definition of development to include "human flourishing as its benchmark" rather than merely "a purely economic conception"). Despite the complexities of quantifying legal rights (or perhaps because of these complexities), my interest in selecting the World Bank's WBL program as a focus of this article was to focus on an initiative in which law is doing some work.

that make funding decisions.⁷⁹ As an international financial institution, the World Bank generally sits at a pivot point between public and private international governance to move money and resources. Substantially more money and resources began to flow to so-called “gender-informed” projects from fiscal year 2010 to fiscal year 2012,⁸⁰ with the total share of “gender-informed” lending rising from fifty-four to eighty-three percent during this time period.⁸¹ According to the Bank, “[t]his translates into a dollar figure in FY12 of almost US\$29 billion in gender-informed loans, out of a total lending envelope of US\$34 billion.”⁸² The work of the WBL program has arisen within this context. However, it is not clear how much of the reported increase in “gender-informed” lending represents new investment, as opposed to merely recasting investments that would have been made in any event. The value of increasing investment in “gender-informed” projects will depend on the extent to which these investments actually make a difference in improving the lives of the women who are the beneficiaries of these projects.⁸³

One large donor partner, the U.S. Millennium Challenge Corporation (MCC), is a development agency that relies heavily on the set of gender indicators compiled by the World Bank’s WBL program (discussed *infra*, Part III). Congress established the MCC in 2004 as an independent bilateral U.S. foreign aid agency based on President George W. Bush’s call for a “new compact for

79. See *Guide to the Indicators and the Selection Process for Fiscal Year 2015*, MILLENNIUM CHALLENGE CORP. (October 9, 2016), <https://www.mcc.gov/pages/docs/doc/report-guide-to-the-indicators-and-the-selection-process-fy-2015> [hereinafter MCC, *Guide*] (discussing the MCC’s methodology for its Gender in the Economy Indicator, a composite indicator that combines a number of WBL gender indicators).

80. “‘Gender-informed’ means that gender has been taken into account in at least one of three dimensions—analysis, actions, and monitoring and evaluation.” WORLD BANK, UPDATE ON THE IMPLEMENTATION OF THE GENDER EQUALITY AGENDA AT THE WORLD BANK GROUP 16 (2012), [http://siteresources.worldbank.org/DEVCOMMIT/Documentation/23283845/DC2012-0012\(E\)Gender.pdf](http://siteresources.worldbank.org/DEVCOMMIT/Documentation/23283845/DC2012-0012(E)Gender.pdf). According to the Bank, the benefit of approaching “gender-informed” projects with regard to these three dimensions “is its simplicity and that it is amendable to self-assessment, thereby increasing accountability [and ease of application, since] the ratings on each dimension are binary, not subjective judgments about quality.” *Id.* “Gender-informed” projects include initiatives such as a “[c]ollaboration between the Bank, the Water and Sanitation Program and the Ministry of Water and Irrigation in Kenya, which [] integrated gender into the water sector through a series of capacity-building initiatives[,] includ[ing] collection of gender-disaggregated data, policy dialogue around how to include gender in water laws, and South-South learning in Colombia, India and Peru.” *Id.* at 7–8.

81. *Id.* at 15 (and 16, for chart). The Bank reports that “[f]our out of five projects approved by the Board in FY12 were gender informed.” *Id.*

82. *Id.* However, the Bank makes the caveat that “[i]t is important to recognize that the corporate commitments to assess gender mainstreaming are applied at the ex ante stage—relating to the design and objectives of the operations. As such, these are important instruments for enhancing accountability, but do not function to capture results on the ground.” *Id.* at 16.

83. Cf. SPECIAL INSPECTOR GENERAL FOR AFGHANISTAN RECONSTRUCTION, SIGAR 15-24-AR, AFGHAN WOMEN: COMPREHENSIVE ASSESSMENTS NEEDED TO DETERMINE AND MEASURE DOD, STATE, AND USAID PROGRESS 12 (2014), <http://www.sigar.mil/pdf/audits/SIGAR-15-24-AR.pdf> (noting that U.S. agencies have failed to provide a comprehensive assessment confirming that the gains Afghan women have made—which these agencies tout and take credit for—are actually traceable to development assistance).

development, defined by new accountability for both rich and poor countries alike.”⁸⁴

While the WBL program provides a broad array of data about gender inequality, the MCC has translated these data into a composite “Gender in the Economy Indicator,” which was added in 2012 to the MCC’s list of “selection criteria” for making determinations over allocation of development aid to eligible countries.⁸⁵ As a single composite score, the “Gender in the Economy Indicator” benefits from simplicity and marketability (internally and externally), but it has the downside of potentially diluting explanatory power by synthesizing the complexity of gender equality into one number.⁸⁶

Thus, the WBL’s gender indicators have traveled from an international institution (the World Bank) to a U.S. agency (the MCC), and then overseas, through the MCC’s international assistance program to recipient countries. Prospective grantees are encouraged to improve gender equality laws and policies that affect their MCC Gender in the Economy Indicator score, demonstrating the influence that gender indicators have when they are tied to economic assistance in this way.

II. THE RISE OF INDICATORS AS GOVERNANCE

The rise of gender indicators is part of a wider trend regarding indicators as governance. Indicators are “technologies of knowledge developed in the economic domain [that have] move[d] uneasily into . . . newer fields.”⁸⁷ Indicators reframe “broad normative statements about justice and rights into . . . the economistic language of targets and goals that can be measured[,]” shifting “a justice-focused set of norms to a more technical rational one that crosses more readily into non-legal fields, such as development[.]”⁸⁸ Established initially in the context of business transactions and financial management, indicators involve “[p]ractices of measuring phenomena that are relatively easily counted, such as money or inventories of goods, [but that have been] transplanted into domains far less amenable to quantification, such as frequency of torture or prevalence of ill health.”⁸⁹ While “[i]ndicators are a basic technology of corporate management and control . . . [t]he spread of its techniques of auditing and counting to the state

84. *The Millennium Challenge Account*, THE WHITE HOUSE (last visited Mar. 27, 2016), <http://georgewbush-whitehouse.archives.gov/infocus/developingnations/millennium.html>.

85. MCC, GUIDE, *supra* note 79, at 4.

86. See discussion *infra* Part III.

87. Merry, *Measuring the World*, *supra* note 19, at S88.

88. Merry, *Firming up Soft Law*, *supra* note 51, at 375–76.

89. Merry, *Measuring the World*, *supra* note 19, at S88; see also *id.* at S89 (noting also that “[q]uantification . . . become[s] increasingly important to a variety of government and business functions . . . from developing cost-benefit measures for locating railroad lines to the need to measure life spans by life insurance companies . . .”).

and civil society is an instance of [] seepage of the corporate form.”⁹⁰ Because economists dominate the development assistance field, this field has quite readily adopted indicators as a technology for producing and disseminating knowledge.⁹¹

From measures of the ease of doing business to the enjoyment of basic human rights, the practice of auditing and quantifying has exploded within global governance institutions, ranging from the World Bank’s Doing Business project to treaty bodies spearheaded by the Office of the High Commissioner for Human Rights.⁹² “[W]ith their apparently simple and straightforward meanings,” the reliance on numbers “produces an unambiguous and easily replicated field for judgment.”⁹³ Indicators, such as law school rankings and grade point averages, are alluring because they appear objective, neutral, and “evidence-based.”⁹⁴ “Numbers have become the epitome of the modern fact,” which is “basic to the ways Westerners have come to know the world.”⁹⁵ However, the use of indicators often masks a large degree of subjectivity and ideology.⁹⁶

While experts with experience in statistics and other technical fields typically spearhead the development of indicators, “successful” indicators can gain acceptance by broader publics, sometimes to such a great extent that they can come to stand in for the underlying phenomenon they were intended to measure.⁹⁷ “[S]uch categorization gradually becomes an accepted ‘black box’

90. *Id.* at S90–92 (pointing to various ways the boundaries between corporate and other domains of society have become blurred and intertwined, including indicator-based funding, outsourcing of data collection and evaluation to private-sector consultants, and the use of indicators in corporate responsibility programs, such as the U.N. Global Compact). Indeed, “[t]he expansion of indicator technology into new domains and spaces of governance is another way the corporate form is reshaping contemporary social life.” *Id.* at S93.

91. *Cf.* SARFATY, VALUES IN TRANSLATION: HUMAN RIGHTS AND THE CULTURE OF THE WORLD BANK, *supra* note 15, at 127 (quoting interview with official, Human Development Network, World Bank, Washington, DC (Feb. 14, 1996) (“[T]hings really happen in the Bank when an economic case could be made for them”).

92. *See, e.g.,* Davis & Kruse, *Taking the Measure of Law*, *supra* note 77, at 1095; AnnJanette Rosga & Margaret L. Satterthwaite, *The Trust in Indicators: Measuring Human Rights*, 27 BERKELEY J. INT’L L. 253 (2009); *see also* Davis et al., *Global Governance by Indicators*, *supra* note 3, for a broader collection of examples.

93. Merry, *Measuring the World*, *supra* note 19, at S88.

94. Rajiv Shah, *Message from the Administrator*, in USAID, GENDER POLICY, *supra* note 20, at iv (explaining that the gender policy “provides guidance on pursuing more effective, evidence-based investments in gender equality” and supports “requirements to ensure that every strategy and project is shaped by a gender analysis and establishes common indicators for judging our success”).

95. Merry, *Measuring the World*, *supra* note 19, at S89 (citing MARY POOVEY, A HISTORY OF THE MODERN FACT: PROBLEMS OF KNOWLEDGE IN THE SCIENCES OF WEALTH AND SOCIETY (1998)).

96. *See generally* LANI GUINIER, THE TYRANNY OF THE MERITOCRACY: DEMOCRATIZING HIGHER EDUCATION IN AMERICA (2015) (noting that, in relying on rankings, such as test scores and GPAs, American universities rely on a merit system that prioritizes admission for privileged, elite individuals, rather than creating learning communities oriented toward advancing democratic societies); Sturm & Guinier, *supra* note 69 (criticizing the fact that LSAT scores reinforce a culture of competition and conformity rather than predict how well law school applicants will perform in law school, much less the legal profession).

97. Merry, *Firming up Soft Law*, *supra* note 51, at 391–92.

which no longer needs to be explained and justified,”⁹⁸ thereby producing a kind of “truth” or “illusion of knowledge”—“a way to know a world that is unknowable and to govern a world that is ungovernable.”⁹⁹

In the development assistance field, the Human Development Index (HDI) is an example of a prominent indicator that enjoys broad acceptance.¹⁰⁰ Instead of focusing primarily on economic growth through Gross National Product (GNP), the HDI follows Nobel laureate and Harvard economist Amartya Sen’s capacities approach to development by measuring other indicators of well-being, such as access to health and education.¹⁰¹ The HDI reports assert that “non[-]income measures [of well-being] should be an integral component of any assessment of well-being as they measure important aspects of well-being *directly*, while income is only one among several inputs generating such well-being.”¹⁰² When the United Nations Development Program (UNDP) first introduced the HDI as part of its first annual Human Development Report, it was notable that the HDI initially expressed development through an index that ranked countries based on their *human* development and on combined economic and social factors. But as the new indicator became accepted and established, it became “settled” as the new normal and is now virtually presented as a fact about a country’s

98. Sally Engle Merry, *Measuring Violence against Women*, in *THE SEDUCTIONS OF QUANTIFICATION: MEASURING SEX TRAFFICKING, GENDER VIOLENCE, and Human Rights* (Sally Engle Merry, ed.), at 53 (forthcoming 2016), <http://www.law.uvic.ca/demcon/2012%20readings/violence%20ag%20women.pdf>.

99. *Id.* at 395. For a thoughtful discussion of this, consider Sally Engle Merry’s cautionary note:

One of the puzzles of indicators is the extent to which they are used and even considered reliable despite widespread recognition of their superficiality, simplification, and neglect of context and history This is a seductive form of knowledge. It promises certainty and clarity and provides readily comparable information that facilitates decision-making. [T]his apparent clarity accounts for their growing popularity. Indicators and other numerical forms of knowledge subdue the thorny difficulties of making decisions about incommensurable social practices, issues, and problems.

Id. at 395; *see also* the work of scholars in science and technology studies, who have provided insight regarding the consequences of classification on knowledge production; *see generally* GEOFFREY C. BOWKER & SUSAN LEIGH STAR, *SORTING THINGS OUT: CLASSIFICATION AND ITS CONSEQUENCES* (1999); BRUNO LATOUR, *SCIENCE IN ACTION: HOW TO FOLLOW SCIENTISTS AND ENGINEERS THROUGH SOCIETY* (1987); *THE MUTUAL CONSTRUCTION OF STATISTICS AND SOCIETY* (Ann Rudinow et al. eds., 2011).

100. Davis et al., *Global Governance by Indicators*, *supra* note 3, at 20 (citing as other prominent examples Transparency International’s Corruption Perception Index, Freedom House’s Freedom in the World indicator, and the World Bank’s Doing Business indicators); *see also* Wendy Nelson Espeland & Michael Sauder, *The Dynamism of Indicators*, in *GOVERNANCE BY INDICATORS: GLOBAL POWER THROUGH CLASSIFICATION AND RANKINGS* 87 (Kevin E. Davis et al. eds., 2012) (focusing on U.S. NEWS & WORLD REPORT law school and other educational rankings as another example of a prominent indicator).

101. Amartya K. Sen, *Foreword*, in *READINGS IN HUMAN DEVELOPMENT: CONCEPTS, MEASURES AND POLICIES FOR A DEVELOPMENT PARADIGM* vii–xiii (Sakiko Fukuda-Parr & A.K. Shiva Kumar eds., 2005); *see generally* SEN, *DEVELOPMENT AS FREEDOM*, *supra* note 33.

102. Kalpana Bardhan & Stephan Klasen, *UNDP’s Gender-Related Indices: A Critical Review*, 27 *WORLD DEV.* 985, 985 (1999).

level of development.¹⁰³

III. THE EMERGENCE OF GENDER INDICATORS

The WBL indicators can be usefully considered within the broader ecology of gender indicators to demonstrate that other leading gender indicators share the WBL's limitations. Before turning to analyze the World Bank's WBL program, this section summarizes three prominent sets of gender indicators in the law and development field in the context of: (A) the UNDP Human Development Index and Report, (B) U.N. Millennium Development Goals, and (C) the World Economic Forum.¹⁰⁴ While these three sets of indicators are composites of data, as discussed further below, the WBL program's biennial reports provide responses to questions (mainly structured to elicit "yes/no" answers) that reveal simple statistics on legal differentiations (*i.e.*, "Can women work the same night hours as men?").¹⁰⁵

A. UNDP GENDER INDICATORS

The construction of gender indicators in the development field emerged in response to earlier indicators that were viewed as insufficiently attentive to gender, such as the HDI.¹⁰⁶ In its 1995 Human Development Report—which focused on gender—UNDP introduced two new gender-related indexes: the Gender-related Development Index (GDI) and the Gender Empowerment Measure (GEM).¹⁰⁷ The GEM gauged women's empowerment by measuring women's agency in political and economic life.¹⁰⁸ By contrast, the GDI factored gender inequality into the overall HDI assessment, modifying the HDI by imposing a welfare penalty for gender inequality in the HDI's components—life expectancy, educational attainment, and per capita gross domestic product (GDP).¹⁰⁹ To obtain the GDI, the HDI was adjusted downward to the extent there were gender gaps in these three areas, in effect "penalizing" the HDI if gender inequality existed.¹¹⁰

103. Sally Engle Merry, *Global Legal Pluralism and the Temporality of Soft Law*, Special Issue on Temporalities of Law, 46 J. OF LEGAL PLURALISM AND UNOFFICIAL L. 108, 116 (2014); *Firming up Soft Law*, *supra* note 51, at 377–78.

104. While this article focuses on gender indicators in the context of law and development, the U.N. Secretary-General has also recommended gender indicators as part of its implementation of U.N. Security resolutions on women, peace, and security.

105. 2016 WBL REPORT, *supra* note 71, at 44–247 (listing the questions and answers).

106. Caren Grown, *Indicators and Indexes of Gender Inequality: What Do They Measure and What Do They Miss?*, in *EQUALITY FOR WOMEN: WHERE DO WE STAND ON MILLENNIUM DEVELOPMENT GOAL 3?* 93, 98–137 (Mayra Buvinic et al. eds., 2008) [hereinafter Grown, *Gender Inequality*].

107. United Nations Dev. Programme [UNDP], *Human Development Report*, at 72 (May 22, 1995), http://hdr.undp.org/sites/default/files/reports/256/hdr_1995_en_complete_nostats.pdf.

108. Grown, *Gender Inequality*, *supra* note 106, at 93.

109. *Id.* at 93, 114.

110. *Id.* at 104 (explaining that the greater the gap between men and women in the HDI components, the more the GDI varied from the HDI); *see also* Bardhan & Klasen, *supra* note 85, at 985–86 (noting that

In response to criticism—both conceptual and methodological—of the GEM and GDI, UNDP launched the Gender Inequality Index (GII) in the 2010 Human Development Report.¹¹¹ The GII seeks to deliver a comprehensive picture of gender inequality by measuring women’s status in three dimensions: empowerment, economic activity, and reproductive health.¹¹² This index is unique from other indices in that it focuses on critical issues of educational attainment, economic and political participation, and female-specific health issues.¹¹³ Marking an improvement over the GEM and GDI, the GII permits analysis of women’s issues not only in relation to men, but also in light of issues that do not affect men in a comparable way (like reproductive health).¹¹⁴ A further improvement is that the GII uses a more holistic approach by capturing components that were previously gauged with separate empowerment and development indices.¹¹⁵

B. U.N. MILLENNIUM DEVELOPMENT GOALS GENDER INDICATORS

A separate set of gender indicators emerged in the context of the U.N. Millennium Development Goals (MDGs).¹¹⁶ The U.N. Millennium Declaration identifies eight development goals with time-bound targets and quantifiable indicators.¹¹⁷ The goal for gender is embodied in the third goal, MDG3, whose objective is to “promote gender equality and empower women.”¹¹⁸ The target for MDG3 is to “eliminate gender disparity in primary and secondary education, preferably by 2005, and at all levels of education no later than 2015.”¹¹⁹ Measuring progress toward this target was operationalized as the ratio of girls’ to boys’ enrollment in primary, secondary, and tertiary education. Three additional official indicators were added for MDG3: ratio of literate females to literate males among 15- to 24-year-olds; the percentage of nonagricultural wage earners who are women; and the proportion of parliamentary seats held by women.¹²⁰

more so than the GEM, “the GDI suggest[ed] that gender inequality is not only a problem for those it disfavors, but that it detracts from overall development in a country”).

111. Amie Gaye et al., United Nations Dev. Programme, *Measuring Key Disparities in Human Development: The Gender Inequality Index*, Research Paper 2010/46 (2010).

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Goal 3: Promote Gender Equality and Empower Women*, UN.ORG, <http://www.un.org/millenniumgoals/gender.shtml> (last visited Aug. 16, 2013) [hereinafter *Goal 3*].

117. U.N. General Assembly, *United Nations Millennium Declaration*, U.N. Doc. A/RES/55/2 (Sept. 8, 2000), <http://www.un.org/millennium/declaration/ares552e.htm>.

118. *Goal 3*, *supra* note 116.

119. *Id.*

120. Mayra Buvinić & Andrew R. Morrison, *Introduction, Overview, and Future Policy Agenda, in EQUALITY FOR WOMEN: WHERE DO WE STAND ON MILLENNIUM DEVELOPMENT GOAL 3?*, at 1 (Mayra Buvinić et al. eds., 2008) [hereinafter Buvinić, *Introduction*].

While seen as useful by international development professionals, the official MDG3 indicators came under strong criticism.¹²¹ The Millennium Project Task Force on Gender Equity suggested twelve indicators to replace the official MDG3; however, many of the recommended indicators required data that were not widely available.¹²² The World Bank's 2007 Global Monitoring Report (GMR) suggested a more modest, feasible list of supplemental indicators to complement, rather than replace, the official MDG3 indicators,¹²³ which feminist economists within the World Bank, who helped pioneer these additional indicators, referred to as the "MDG3 plus" approach.¹²⁴

C. THE WORLD ECONOMIC FORUM'S GLOBAL GENDER GAP INDEX

In 2006, the World Economic Forum introduced another prominent gender indicator, the Global Gender Gap Index.¹²⁵ The Index "convert[s] data into male/female ratios, which are then truncated according to an 'equality benchmark' and a somewhat elaborate weighting procedure."¹²⁶ This index includes five components of gender inequality: economic participation, economic opportunity, political empowerment, educational attainment, and health and well-being.¹²⁷ While it originally included female-specific measures (similar to the GII) as well as gender gaps, it now includes only achievement disparities between men and women.¹²⁸

D. THE WORLD BANK'S WOMEN, BUSINESS, AND LAW GENDER INDICATORS

In contrast to the three composite indicators discussed above, the World Bank's WBL biennial reports focus on a narrower set of concerns based on simple data collection involving gender equality in work and business. The WBL program measures how laws, regulations, and institutions "differentiate between women and men in ways that may affect women's incentives or capacity to work or to set up and run a business."¹²⁹ In 2016, the WBL program issued its fourth biennial

121. Andrew R. Morrison et al., *The State of World Progress, 1990–2007*, in EQUALITY FOR WOMEN: WHERE DO WE STAND ON MILLENNIUM DEVELOPMENT GOAL 3?, 33, 33–34 (Mayra Buvinić et al. eds., 2008).

122. *Id.* at 35.

123. *Id.*

124. Buvinić, *Introduction*, *supra* note 120, at 10 ("The additional indicators recommended in our MDG3 plus approach are: i) primary completion rates disaggregated by gender; ii) under-five mortality rates disaggregated by gender; iii) percentage of reproductive-age women and their partners using modern contraception; iv) percentage of 15- to 19-year-old girls who are mothers or pregnant with their first child; v) labor force participation rates for 20- to 24- and 25- to 49-year-olds, disaggregated by gender; and vi) average hourly wages, also disaggregated by gender.").

125. WORLD ECONOMIC FORUM, THE GLOBAL GENDER GAP INDEX 2014 (2014), http://www3.weforum.org/docs/GGGR14/GGGRMainChapterAppendices_2014.pdf.

126. Gaye et al., *supra* note 111, at 6–7.

127. *Id.*

128. *Id.* at 7.

129. Press Release, World Bank and IFC, *supra* note 75; see also *About Women, Business and the Law*, WORLD BANK, <http://wbl.worldbank.org/aboutus> (last visited July 6, 2015).

report on legal differences based on gender.¹³⁰ The 2016 report included 173 economies, covering seven subject areas (accessing institutions, using property, getting a job, providing incentives to work, building credit, going to court, and protecting women from violence).¹³¹ Methodologically, the data collected in the WBL report is based on a wide array of information, including survey questions answered in-country as well as verification against the text of laws in each country.¹³²

However, as mentioned earlier, once the MCC obtains the WBL data, it collapses it into a composite “Gender in the Economy Indicator.” In fact, the MCC bases its composite indicator on a more limited set of activities than are covered in the WBL report.¹³³

President George W. Bush paved the way for the MCC, which was established to “deliver smart U.S. assistance by focusing on good policies, country ownership, and results [The MCC was designed to] benefit[] both developing countries and U.S. taxpayers through: competitive selection[,], country-led selection[, and] country-led implementation” of projects.¹³⁴ It has provided over \$8.4 billion in development assistance to governments, based on “Scorecards” it calculates to “evaluate policy performance [based on] objective and quantifiable policy indicators in three broad policy categories: Ruling Justly, Investing in People, and Encouraging Economic Freedom.”¹³⁵

130. 2016 WBL REPORT, *supra* note 71.

131. Press Release, World Bank and IFC, *supra* note 75. Significantly, the 2014 report also piloted the “protecting women from violence” indicator, covering 100 countries. WORLD BANK & IFC, WOMEN, BUSINESS AND THE LAW 2014: REMOVING RESTRICTIONS TO ENHANCE GENDER EQUALITY 4 (2013), <http://wbl.worldbank.org/reports/media/FPDKM/WBL/Documents/Reports/2014/Women-Business-and-the-Law-2014-FullReport.pdf> [hereinafter 2014 WBL REPORT].

132. The 2016 WBL report includes indicators constructed through answers by practitioners in each country with expertise in family and labor law, representatives of civil society organizations who work on gender issues. These responses were verified by cross-checking: “codified sources of national law, including constitutions, codes, labor codes, law, statutes, rules, regulations and procedures in areas such as labor, social security, civil procedure, tax, violence against women, marriage and family inheritance, nationality and land.” 2016 WBL REPORT, *supra* note 71, at 31.

133. While the WBL’s reports pose scores of questions across the six main topics covered, the MCC bases its Gender in the Economy Indicator solely on ten activities: (1) getting a job, (2) registering a business, (3) signing a contract, (4) opening a bank account, (5) choosing where to live, (6) getting passports, (7) traveling domestically, (8) traveling abroad, (9) passing on citizenship to their children, and (10) becoming heads of households. *Compare id.* at 45 with *Gender in the Economy Indicator*, MILLENNIUM CHALLENGE CORP., <https://www.mcc.gov/pages/selection/indicator/gender-in-the-economy-indicator> (under “Methodology”) (last visited Apr. 10, 2016).

134. *About MCC*, MILLENNIUM CHALLENGE CORP., <http://www.mcc.gov/pages/about> (last visited Mar. 25, 2013). The MCC was established largely in reaction to the view that the U.S. Agency for International Development (USAID) had many different, conflicting goals, frequently growing out of political pressure and not resulting in long-term economic progress. Patrick Cronin, *The Rebirth of USAID*, DAILY CALLER (May 4, 2010), <http://dailycaller.com/2010/05/04/the-rebirth-of-usaid/> (“The problem is not so much USAID as the proliferation of goals and authorities and earmarks that have often satisfied Washington’s powerbrokers at the expense of promoting development around the world.”).

135. MCC, GUIDE, *supra* note 79.

The “Gender in the Economy Indicator” was added in 2012—to much fanfare—as a “selection indicator” (for selecting aid recipients) under the “Encouraging Economic Freedom” rubric (though it relates to the other two policy categories—“Ruling Justly” and “Investing in People”—as well). Girls’ education—both primary school *completion* and secondary school *enrollment*—were already included as independent MCC indicators,¹³⁶ but there had been no indicator pertaining to adult women. The “Gender in the Economy Indicator” utilizes the WBL data, although simplified to one number, through which MCC “measures the [aid-recipient] government’s commitment to promoting gender equality by providing women and men with the same legal ability to interact with the private and public sector.”¹³⁷

In its guidelines explaining its indicators and aid selection process, the MCC states two rationales linking greater economic equality for women to growth and poverty reduction.¹³⁸ The first rationale is that studies show that gender inequality significantly harms the economic growth of a country aid recipient, as inequality “prevents a large portion [of] the population from fully participating in the economy[.]”¹³⁹ Women are underrepresented in the formal labor market and as entrepreneurs and are overrepresented in the “female” informal sector, which depresses wages in the “female” sectors.¹⁴⁰ The second rationale is that “[r]esearch shows that when women have access to employment, investment in children’s health, nutrition, and education often increases, promoting higher levels of human capital.”¹⁴¹ Both of these rationales are instrumentalist, viewing women’s equality as important not necessarily for the sake of women, but rather to grow national economies or improve the well-being of children.

IV. CRITICISM OF GENDER INDICATORS

While the criticisms of most gender indicators are methodological, this article is mainly concerned with more conceptual matters, which the World Bank’s WBL program itself has, to its credit, raised openly.

A. THE WORLD BANK’S WOMEN, BUSINESS, AND LAW GENDER INDICATORS

Due to the newness of both the World Bank’s WBL program and the MCC’s “Gender in the Economy Indicator,” there is little independent analysis of these initiatives. However, the WBL has undertaken a self-assessment and has

136. *Id.*

137. *Id.* (under “Gender in the Economy Indicator”).

138. The MCC favors indicators that, *inter alia*, have a clear theoretical or empirical link to economic growth and poverty reduction. *Id.* (under “Guide to the MCC Indicators”).

139. *Id.* (under “Gender in the Economy Indicator”) (“Studies show that legally sanctioned gender inequality has a significant negative impact on a country’s economic growth because it prevents a large portion [of] the population from fully participating in the economy, thus lowering the average ability of the workforce.”).

140. *Id.*

141. *Id.*

acknowledged shortcomings of its reports, indicating that these omissions are grounded in methodological limitations:¹⁴²

De jure, not de facto inequality: In focusing exclusively on *de jure* inequality, the WBL 2016 report “acknowledges there are frequently large gaps between law on the books and law in practice, and that women do not always have access to the equality to which they are entitled under formal law.”¹⁴³ This focus on *de jure* inequality is based on the fact that it is easier to identify *de jure* law than it is to measure *de facto* inequality. While conceding the lack of coverage of *de facto* inequality as a limitation, the WBL 2016 report notes that identifying *de jure* inequality “is one step towards better understanding where and how women’s economic rights may be restricted in practice.”¹⁴⁴

Formal, not informal, economy and other factors: While the 2016 report recognizes that “most women in developing economies start businesses or work in the informal economy,” the report focuses on the formal economy, as a main goal is to identify barriers women face in transitioning from the informal to the formal economy.¹⁴⁵ The report also acknowledges, but does not measure, factors referred to as “infrastructure,” such as safe transportation and good street lighting, which “might also affect women’s ability and desire to work in certain locations or at night.”¹⁴⁶

Limited coverage of customary law: The 2016 report does not cover the actual application of customary law in any detail, even while recognizing that “customary law can determine a woman’s rights to marriage or in property an inheritance,” as it can “exist in parallel with formal legal regimes,”¹⁴⁷ providing different rights to women than the formal legal system does. However, the report does cover the constitutional treatment of customary law, including “whether customary law is exempt from constitutional provisions on nondiscrimination and equality.”¹⁴⁸

Parental leave and child care responsibilities: The 2014 report recognizes that “[e]qualizing rights to work may not necessarily result in more women entering the workforce, if they are still expected to be the primary caregivers for their children, and if access to child care is limited.”¹⁴⁹ The 2012 report had downplayed data on childcare—because such issues are not always related to facially explicit gender differentials—which was a limitation in the earlier report.¹⁵⁰ Where there were gender differentials in the law, the 2012 report still

142. 2016 WBL REPORT, *supra* note 71, at 30.

143. *Id.*

144. *Id.*

145. *Id.* at 29.

146. *Id.*

147. *Id.* The report goes on to say that customary law is only partially included “because it is often uncodified, which makes it difficult to define its rules.” *Id.*

148. *Id.*

149. *Id.*

150. Compare 2016 WBL REPORT, *supra* note 71, with 2014 WBL REPORT, *supra* note 131.

than questioning the normative implications of relying on indicators as a way to evaluate gender justice.

Feminist economist Caren Grown does an impressive job of summarizing the criticisms of the GDI and GEM,¹⁵⁸ which led to the replacement by the GII. The GDI had “conceptual and empirical problems associated with both the life-expectancy and earned-income components.”¹⁵⁹ Furthermore, the GDI was “difficult to interpret in a situation in which gender gaps in the three components [life expectancy, educational attainment, and income] favor one sex in one component and another in the other components[. . .] a problem [that] applies as well to the GEM[.]”¹⁶⁰ There were also challenges associated with the *use* of the GDI, without reference to the HDI.¹⁶¹ The GDI results were meaningful only when read in combination with the results of the HDI.

The GEM also suffered from conceptual and empirical issues. Because it used unadjusted income per capita, “women in rich countries appear relatively more empowered than women in poor countries with otherwise equal relative shares of economic and political power.”¹⁶² Moreover, by “combining absolute levels of human development with relative female well-being, [it was] difficult to sort out which is changing over time—women’s relative status or levels of development[.]”¹⁶³ Further, GEM’s heavy emphasis on representation at the national political level and in the formal economy obscured the important role women play in local institutions and grassroots organizations.¹⁶⁴

UNDP established the GII to address these concerns. However, some who have been involved in administering it have noted substantial challenges, including the lack of: (1) gender disaggregated data, (2) time series data,¹⁶⁵ and (3) more consistent measurement (for example, to make international comparisons more meaningful).¹⁶⁶

Critics have also discussed a number of data problems with the MDG3 indicators, including availability and quality of data; the difficulty of quantifying women’s empowerment; and the fact that a narrowing of any particular gender gap, such as a wage gap, might indicate declines for men rather than

158. Grown, *Gender Inequality*, *supra* note 106, at 114.

159. *Id.* at 115.

160. *Id.*

161. *Id.* at 114 (“The GDI is not interpretable in itself Yet countries, and even the UN Human Development Reports, have interpreted the GDI a measure of gender inequality[.]” reflecting the “great demand and a need for a direct gender inequality measure.”).

162. *Id.* at 115.

163. *Id.*

164. Bardhan & Klasen, *supra* note 102, at 1000–01.

165. Time series data evaluates a set of variables over time, for example, whether girls’ school enrollment has increased from 1980 to 1990.

166. Gaye et al., *supra* note 111, at 28.

improvements for women.¹⁶⁷ There are also reporting problems and other challenges associated with collecting data on violence against women.¹⁶⁸

V. NORMATIVE AND PRACTICAL IMPLICATIONS OF GENDER INDICATORS FOR THE FEMINIST PROJECT

This article concludes with the following thoughts on the normative implications of relying on indicators as a way to evaluate gender justice. Building on the critiques summarized above, this part analyzes these normative—and, by extension, related practical—implications of prevailing gender indicators and the motives underlying them.

Many of the existing gender indicators reflect a thin, formal approach to gender equality. Considered within the framework of feminist accounts of international law, many of these indicators fit largely within first-wave, formal feminist approaches. First-wave liberal assimilationist feminism argues that women should seek to be more like men by becoming better educated, obtaining higher paying jobs, and spending less time in the private sphere of the family and more time in the public sphere of politics and the market.¹⁶⁹ Gender indicators largely reflect a concern with this type of formal equality.

In response to this formal equality approach, second-wave cultural feminism asserts that the first-wave liberal assimilationism neglects challenging the fundamentally problematic value system that associates femininity with inferiority.¹⁷⁰ On this view—represented, for example, in feminist psychologist Carol Gilligan’s “different voice” theory¹⁷¹—feminism should validate qualities historically associated with femininity and activities historically assigned to women, such as mothering and caregiving more generally.¹⁷² While most gender indicators address formal equality, as discussed above, the most recent WBL

167. Grown, *Gender Inequality*, *supra* note 106, at 114; *see id.* at 95, 96, and 98 (discussing each data problem, respectively). On empowerment, Grown notes proxies for measuring women’s empowerment, including:

(i) decision[-]making over expenditures and resource allocation, social and domestic matters (for example, cooking), and child-related issues (for example, well-being, schooling, health); (ii) control over resources (income, assets, unearned income, welfare receipts, household budget, participation in paid employment); and (iii) mobility or freedom of movement. Measures of the process of female empowerment are more difficult; most available indicators tend to measure the enabling factors or conditions for empowerment, such as labor force participation, female literacy or school enrollment, and political representation by women. [However,] [o]nly one of these—the share of seats in national parliaments held by females—is included among the official indicators for monitoring progress toward MDG3.” *Id.* at 96.

168. *Id.* at 113.

169. For discussion, *see generally*, CATHARINE MACKINNON, *FEMINISM UNMODIFIED* (1987).

170. *See, e.g.*, CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982).

171. *Id.*

172. For discussion, *see* Amy Allen, ‘*Mommy Wars*’ Redux: A False Conflict, *N.Y. TIMES* (May 27, 2012, 5:00PM), http://opinionator.blogs.nytimes.com/2012/05/27/the-mommy-wars-redux-a-false-conflict/?_r=0 [hereinafter Allen, ‘*Mommy Wars*’].

reports are beginning to go beyond formal equality, for example by addressing issues that disproportionately affect women, such as parental leave and child care policies.

However, both liberal and cultural feminist approaches share a common flaw by leaving the essentialist conceptual dichotomy between men and women intact.¹⁷³ Hence, liberal feminism fails to value femininity, while cultural feminism, “even as it challenges the prevailing devaluation of femininity, runs the risk of tacitly legitimating women’s marginalization by underscoring how different [women] are from men.”¹⁷⁴ Thus, feminist professor Catharine MacKinnon insists on deconstructing the structures of dominance and subordination that trap women.¹⁷⁵ On this view, meaningful equality requires moving beyond formal equality and embracing substantive equality.

The gender indicators discussed in this article have limited capacity either to deconstruct structures of dominance and subordination or to pave the way to new structures that move societies toward substantive equality. Instead, these gender indicators are geared toward measuring and coaxing inclusion of women in existing structures, which are largely defined by traditional “male-oriented” models of success (*i.e.*, that fail to value traditionally female-dominated forms of unpaid or underpaid work, such as caregiving). Moreover, given the interest that development agencies, such as the World Bank, have in promoting consistency that enables comparison across countries and across time, the gender indicators surveyed here tend to simplify complex social relations and strip them of context and history.¹⁷⁶ Perhaps better-designed indicators could address these shortcomings, or perhaps indicators need to be supplemented by other forms of knowledge, including surveys, case studies, and more broadly qualitative information.

To address the various concerns raised throughout this article, gender indicators would need to advance approaches that move beyond formal equality in their operation—as well as in their aspiration. For example, gender indicators could utilize the feminist methodology of participatory decision-making (including in the creation of the indicators themselves). Participatory decision-making could more effectively disrupt existing structures of dominance and subordination. Such bottom-up strategies could also pave the way to solutions that are more responsive to affected individuals and communities. These individuals will have a greater stake and deeper investment in sustaining solutions that they are

173. For discussion, see generally MACKINNON, *supra* note 169.

174. Allen, ‘*Mommy Wars*,’ *supra* note 172.

175. See generally MACKINNON, *supra* note 169.

176. Cf. Sakiko Fukuda-Parr et al., *The Power of Numbers: A Critical Review of MDG Targets for Human Development and Human Rights 2* (Harv. Sch. Pub. Health Working Paper Series, May 2013), http://www.worldbank.org/content/dam/Worldbank/document/Gender/Synthesis%20paper%20PoN_Final.pdf (noting the reductionism in the way the MDGs’ targets were set and “the potential for distorting priorities and marginalizing, or even displacing, important human development and human rights concerns inherent in such global goal-setting exercises”).

involved in developing. Thus, these approaches can be more effective as a practical matter as well as more respectful of the integrity of individuals whose lives are being measured by indicators.

In sum, rather than co-opt global governance, global institutions have co-opted gender indicators. Because of their current methodological, conceptual, and normative limitations, gender indicators are not capable of securing a more fundamental transformation of global governance. Indicators are a classic governance device. As with other indicators, gender indicators replicate and promote the characteristics of governance that have emerged in the eras of enlightenment, science, and modern government, including individualism, rationalism, objectivity, and accountability. Yet, quantitative measurements only create the *perception* of objectivity, neutrality, and transparency. Indicators, in fact, embed normative assumptions.

Given the technical nature of indicators, technocrats end up wielding power in debates over data, shifting the conversation from norms to numbers. The fact that many leading technocrats are educated in the global North reifies existing inequalities in global governance by empowering those who govern from afar over those immediately affected.¹⁷⁷ In this sense, the World Bank WBL case study reflects feminist Audre Lorde's famous point that the master's tools cannot dismantle the master's house.¹⁷⁸

Governance almost certainly has a deradicalizing effect on feminism, even as feminists have come to power in international institutions, in foreign ministries, in parliaments, and as heads of state. As a mechanism of governance, gender indicators seek to institutionalize gender equality and thereby reshape policies, priorities, and laws in both international and national law and development efforts. But the reach of gender indicators will continue to be limited so long as they are used primarily to mainstream women into existing structures of power, rather than to transform those structures.

177. NIKOLAS ROSE, *GOVERNING THE SOUL: THE SHAPING OF THE PRIVATE SELF*, *supra* note 67; *see also* DAVID KENNEDY, *A WORLD OF STRUGGLE: HOW POWER, LAW, AND EXPERTISE SHAPE GLOBAL POLITICAL ECONOMY* (2016).

178. LORDE, *supra* note 14.

