



1-1-1989

# Feminism and the Limits of Equality

Patricia A. Cain

*Santa Clara University School of Law*, [pcain@scu.edu](mailto:pcain@scu.edu)

Follow this and additional works at: <http://digitalcommons.law.scu.edu/facpubs>

---

## Recommended Citation

24 Ga. L. Rev. 803

This Article is brought to you for free and open access by the Faculty Scholarship at Santa Clara Law Digital Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact [sculawlibrarian@gmail.com](mailto:sculawlibrarian@gmail.com).

# FEMINISM AND THE LIMITS OF EQUALITY

Patricia A. Cain\*

## I. INTRODUCTION

Feminist legal theorists, at least in this country, seem to be obsessed with the concept of equality. Given the pre-eminence of the equal protection clause in twentieth century constitutional litigation, this obsession is not surprising. One Australian feminist, after observing that "equality" is similarly central to Anglo-Australian jurisprudence, concluded that "the preoccupation with equality has constituted an impediment to the development of feminist theory."<sup>1</sup>

"Liberty" is another central concept in American jurisprudence. The dominant political discourse, however, interprets liberty to mean negative liberty. Thus, constitutional guarantees of liberty mean only that the state shall leave individuals free *from* governmental interference. Part of the feminist attraction to equality stems from the possibility of interpreting equality to grant women more substantive rights than those that can be derived from negative liberty.<sup>2</sup>

Despite its possibilities, the meaning of equality as a constitutional norm has remained limited to the concept of formal equality.<sup>3</sup> This limitation persists despite extensive feminist attempts to

---

\* H.O. Head Centennial Professor in Real Property Law, University of Texas; A.B., 1968, Vassar College; J.D., 1973, University of Georgia. This Essay is an expanded version of the Edith House Lecture I delivered at the University of Georgia School of Law in March 1990. I would like to thank the Georgia students and faculty who engaged me in lively discussions following the House Lecture and whose generous hospitality proved that sometimes you can go home again. I am also indebted to the following colleagues for their extremely helpful written comments on an earlier draft: Martha Chamallas, Karen Engle, Herbert Hovenkamp, Jean Love, and Judith Resnik.

<sup>1</sup> Margaret Thornton, *Feminist Jurisprudence: Illusion or Reality?*, 3 *AUSTL. J.L. & Soc'y* 5, 11 (1986).

<sup>2</sup> Cf. CATHARINE MACKINNON, *FEMINISM UNMODIFIED* 93-102 (1987) (discussing privacy and equality).

<sup>3</sup> See Mary Becker, *Politics, Differences and Economic Rights*, 1989 *U. CHI. LEGAL F.* 169. "Formal equality" requires courts to treat like cases alike. See *infra* notes 58-60 and accom-

reconceptualize the meaning of equality.<sup>4</sup> Feminists have not been able to agree among themselves on a uniform core definition for equality. The most notable debate has been between those feminists who support the "equal treatment" concept (also known as formal equality)<sup>5</sup> and those who support the "special treatment" concept (also known as substantive equality).<sup>6</sup> This debate has centered on the question of pregnancy in the workplace and has been primarily strategic—whether to stress the similarities between men and women (in order to gain support for pregnant women) or whether (and when) to stress their differences (in order to gain support for pregnant women). Because both equal treatment and special treatment feminists agree that the workplace should support pregnant women, their debate has been viewed as a debate about means rather than ends.

Debates about the meaning of equality, however, can be debates about "ends" or goals.<sup>7</sup> As a goal, sex equality can mean a number of different things. For example, some feminists might contemplate an ideal, sex-equal world in which a person's sex is totally irrelevant to everyone.<sup>8</sup> Other feminists might contemplate a world in

---

panying text (discussing the principle of formal equality).

<sup>4</sup> The feminist debate over the meaning of equality is reflected in the following articles: Lucinda Finley, *Transcending Equality Theory: A Way Out of Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118 (1986); Herma Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERK. WOMEN'S L.J. 1 (1985) [hereinafter *Equality and Difference*]; Herma Kay, *Models of Equality*, 1985 U. ILL. L. REV. 39; Linda J. Krieger & Patricia N. Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 GOLDEN GATE U.L. REV. 513 (1983); Kathleen Lahey, *Feminist Theories of (In)Equality*, 3 WIS. WOMEN'S L.J. 5 (1987); Sylvia Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984); Christine Littleton, *Reconstructing Sexual Equality*, 75 CALIF. L. REV. 1279 (1987); Wendy Williams, *Notes from a First Generation*, 1989 U. CHI. LEGAL F. 99 [hereinafter *First Generation*]; Wendy Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1985).

<sup>5</sup> See, e.g., Wendy Williams, *First Generation*, *supra* note 4.

<sup>6</sup> See, e.g., Linda J. Krieger & Patricia N. Cooney, *supra* note 4.

<sup>7</sup> Some male scholars argue that equality is a goal in itself, a "fundamental human good," both instrumentally and intrinsically. E.g., KAI NIELSEN, *EQUALITY AND LIBERTY* 3 (1985); see also David A.J. Richards, *Justice and Equality*, in *AND JUSTICE FOR ALL* 241 (1982). But see Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982). For further discussion of the debate over equality that followed Westen's article, see Kenneth Simons, *Equality as a Comparative Right*, 65 B.U.L. REV. 387, 388-89 (1985).

<sup>8</sup> If you have trouble imagining such a world, see JUNE ARNOLD, *THE COOK AND THE CARPENTER* (1973), a work of fiction in which the author creates sexless pronouns so that the reader is not apprised of the sex of the characters, thereby making sexual identity irrelevant

which a person's sex is irrelevant in public (meaning the law should take no notice), but not in private (meaning individuals may prefer persons of one sex over another for certain personal relationships). Still other feminists might contemplate a world in which sex differences may sometimes be noticed by the law, but only to assure other feminists' goals (for example, that child-bearing be cost-free).

I believe our ability to conceptualize the ideal world is influenced by the world in which we actually live. Thus, I am skeptical of most utopian visions of sex-equal societies. I am particularly skeptical if those visions are too fixed. If equality is to be viewed as a goal, it must constantly be subject to revision. Nonetheless, we need some vision of a better world, some idea of the ideal for women. Equality may be part of the ideal. It may be an interim step, or it may be a means to attaining other ideals.

How we move from this non-ideal world to the ideal one raises a question of appropriate means.<sup>9</sup> Which legal arguments we, as feminists, choose to pursue ought to reflect our vision of the ideal. This is true because the rhetoric we adopt helps to shape future reality. Thus, to argue that pregnant women need special treatment is to emphasize sex differences and to contribute thereby to a reality in which sex is relevant, a reality which those who embrace sex neutrality seek to change. I do not mean to suggest that feminists who believe in sex neutrality as the ideal ought never to adopt a sex-specific strategy. I mean only to suggest that such feminists ought to consider the impact a sex-specific argument will have on their long term goal.

This Essay is about the limits of equality for feminist legal theory. Equality, like all concepts, is a social construct. Whether we view equality as an ultimate goal of feminism, or merely as a useful rhetorical device to help obtain other substantive goals, our current use of the language of equality reflects the meanings that have been constructed by a patriarchal society. In short, the rhetoric of equality compares women to men. Women are either the same as men or different, and in either case, men have set the standard.<sup>10</sup>

---

in the stories of their lives.

<sup>9</sup> Other scholars call this the problem of transition. See, e.g., Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1875 (1987).

<sup>10</sup> See generally CATARINE MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 215-

They have also defined what it means to be a woman.<sup>11</sup>

An important goal of feminist legal theory is to challenge and change the male standard, to recreate reality from a woman-centered perspective. Debates about equality have unmasked the fact of the male standard, but seem to me unlikely to change the standard. It is time to move beyond equality, which inevitably compares women to men, and to focus on women themselves. To do this is to embrace feminist goals that others have claimed are central to the ultimate feminist project: self-definition<sup>12</sup> and self-determination.<sup>13</sup>

In this Essay, I will consider four schools of feminist thought: liberal, radical, cultural and postmodern. My initial purpose is to highlight and explain the disagreements over the meanings of equality that have occurred among feminist legal scholars influenced by these four schools of thought. I believe these disagreements reflect real differences of opinion about how "woman"<sup>14</sup> is currently defined by male power and how she should be defined by feminists. In this event, feminist theory will be better served if we refocus our energy from the debate about equality to a more direct debate about the meaning of self-definition.

What does it mean to say that self-definition is a central goal for

---

34 (1989) [hereinafter TOWARD A FEMINIST THEORY].

<sup>11</sup> "Man has said that woman can be defined, delineated, captured—understood, explained, and diagnosed—to a level of determination never accorded to man himself, who is conceived as a rational animal with free will." Linda Alcoff, *Cultural Feminism Versus Post-Structuralism: The Identity Crisis in Feminist Theory*, 13 *SIGNS* 405 (1988), reprinted in *FEMINIST THEORY IN PRACTICE AND PROCESS* 295, 296 (Micheline Malson, Jean O'Barr, Sarah Westphal-Wihl & Mary Wyer eds. 1989).

"[Male power] makes women (as it were) and so verifies (makes true) who women 'are' in its view . . . ." CATHARINE MACKINNON, TOWARD A FEMINIST THEORY, *supra* note 10, at 122.

<sup>12</sup> "We need a new premise for society: that the most basic right of an individual is to create the terms of its own definition." ANNE KOEDT, *The Feminists: A Political Organization to Annihilate Sex Roles*, in *RADICAL FEMINISM* 368, 370 (1973), quoted in ALISON JAGGAR, *FEMINIST POLITICS AND HUMAN NATURE* 86 (1983).

<sup>13</sup> "Radical feminism is working for the eradication of domination and elitism in all human relationships. This would make self-determination the ultimate good and require the downfall of society as we know it today." CELLESTINE WARE, *WOMAN POWER: THE MOVEMENT FOR WOMEN'S LIBERATION* (1970), quoted in bell hooks, *FEMINIST THEORY: FROM MARGIN TO CENTER* 19 (1984).

<sup>14</sup> When I use "woman" in the singular, I mean to indicate a conceptual category that has been idealized by the dominant discourse in western civilization. And although the attributes attached to this concept have been quite similar over long periods of time, I do not mean to suggest that the category itself reflects reality nor that there is really only one category.

feminism? At the least, for all feminists, it means rejecting male-created definitions of "woman," definitions which have effectively limited the possibilities of many individual women. Beyond this initial shared premise, the questions become more difficult. If the ideal is sex neutrality, perhaps the category "woman" ought to be abandoned completely, allowing individual women to concentrate on individual self-definitions. Yet, for many feminists, the category "woman" is central to their analysis and critique of what is real for women in the present. As such, it is a category that cannot yet be abandoned. And for some feminists, the vision of the ideal includes a vision of the ideal woman, a rejection of the male-defined category replaced by a woman-defined category. But in this case, who is to do the defining? Each individual woman for herself? Female theorists on behalf of all women? Or, all women on behalf of all women? These are not easy questions. In the succeeding sections of this Essay, I hope to shed some light on these questions by suggesting how different schools of feminist thought view the project of self-definition. I will conclude with my own thoughts about the importance of self-definition for feminism and offer some suggestions for the role feminist legal theory should play in the project.

Part II of this Essay will discuss briefly the relationship between self-definition and social construction that is central to my theme. Part III will describe the social construction of "woman" and "equality" from an historical perspective. Part IV will outline the various schools of feminist thought and describe their connections to the concepts of equality and self-definition. Part V will conclude with some thoughts about the future. Specifically, I will propose that feminists in law concentrate on alternative legal arguments—that is, arguments based not on equality, but on other concepts that are better-tailored to accomplishment of the feminist goal of self-definition.

## II. SELF-DEFINITION AND SOCIAL CONSTRUCTION

Simone de Beauvoir said, "One is not born, rather one becomes, a woman."<sup>15</sup> One is, of course, born with particular biological sex characteristics—(usually) either female or male.<sup>16</sup> Simone de

---

<sup>15</sup> SIMONE DE BEAUVOIR, *THE SECOND SEX* 249 (H.M. Parshley trans. 1953).

<sup>16</sup> Sexual ambiguity can occur because female and male sexes are not discrete

Beauvoir is not referring to biological sex characteristics when she refers to the category "woman"; rather, she is referring to a socially constructed category. What Simone de Beauvoir means is that one constructs a female identity as one progresses through life, taking on those characteristics that society deems appropriate for females.

At a general level, we might make a similar claim for all human beings. One is born with the body of a human being. Yet, one *becomes* a person, a particular "self," as one lives one's life. The process of becoming a male "self," however, is much different from the process of becoming a "woman."

Feminists often rephrase Simone de Beauvoir's famous quote as follows: "Women are not born, but made."<sup>17</sup> The difference in phrasing is crucial to a feminist understanding of the problem of self-identity and social construction. The rephrasing also conveys an important critical point: while men *become* persons, women are *made*. The difference is in the identification of the subject. Men make themselves. They are subjects. But who makes women? Simone de Beauvoir says that "woman" is the "other."<sup>18</sup> She is "other" to man and that makes her the object to man's subjectivity.

Some modern social theorists claim that all categories of thought are socially constructed.<sup>19</sup> Thus, "woman" is a category just like any other social category. Its content is provided by the creators of social categories in the same way that those creators give content to all categories. Feminists argue that it is men who have created all the categories. Thus, it is men who have defined women. Or, to put it another way, all social constructs, including "woman," are products of a patriarchal society.<sup>20</sup>

---

phenomena, but rather a mosaic of factors. The various factors which can determine the sex of an individual include gonadal sex, hormonal pattern, internal genitalia, external genitalia, primary and secondary sex characteristics . . . , sex assignment, psychological gender identity, and sex chromosome constitution.

Karen Tokarz, *Separate But Unequal Educational Sports Programs: The Need for a New Theory of Equality*, 1 BERK. WOMEN'S L.J. 201, 205 n.14 (1985).

<sup>17</sup> Elisabeth Young-Bruehl, *The Education of Women as Philosophers*, 12 SIGNS 207 (1987), reprinted in *FEMINIST THEORY IN PRACTICE AND PROCESS* 35, 41 (Micheline Malson, Jean O'Barr, Sarah Westphal-Wihl & Mary Wyer eds. 1989).

<sup>18</sup> SIMONE DE BEAUVOIR, *supra* note 15, at 267-68.

<sup>19</sup> See, e.g., SONDRÁ FARGANIS, *THE SOCIAL RECONSTRUCTION OF THE FEMININE CHARACTER* 40-41 (1986) (discussing Karl Mannheim); MICHEL FOUCAULT, *THE FOUCAULT READER* (1984).

<sup>20</sup> Racial categories are also social constructs, constructed in this country by the dominant

Women feel the weight of this patriarchal definition. Let me describe a simple exercise that may help demonstrate this fact. Let me ask you, the reader, to engage in this exercise right now.

Think about the way you define yourself to others. What words would you choose to describe yourself? Pick three things about yourself that you think are important. Ask your friends to do the same. Notice how many of your female friends include "woman" in their list of three. Compare this to how many of your male friends include "man" in their list. Similarly, notice how many of your friends list their racial or ethnic background. I would be surprised if any of your white friends include race.

I realize this is not a precise social science experiment, but if your results are at all similar to mine, then you will find that women frequently define themselves as women (female, wife, mother), whereas men rarely define themselves as men (male, husband, father).<sup>21</sup> Rather, men list their professional associations, their athletic interests or accomplishments, their educational achievements and myriad other things before "male." Why is that?

Think back to your own three choices. Did you choose these three things about yourself because you independently thought them to be most important? Or was your response to my question affected by how society views you? Some brave, individualistic souls may transcend the limits of society at times, but most people define themselves in relation to others. As a general rule, what others think about you cannot help but affect what you think about yourself.

Women think of themselves as women because society has made female status noticeable. In my own life, female status has prevented me from being president of my high school class (only males could be president), from having a paper route, from playing organized sports, from wearing trousers to school or downtown (only skirts were allowed by rule or by custom), from applying to Harvard or Yale as an undergraduate, from joining certain clubs and from being hired by certain law firms. My personal experience tells me that being a woman is important. Female status has been

---

race, whites. White men are the subject to black men, as well as to black and white women, all of whom are objects.

<sup>21</sup> Men with young children sometimes list "father" as an important category in their lives. They certainly list "father" more often than they list "male" or "husband."



determinative in too many cases for me not to have noticed.<sup>22</sup>

The curious point is that male status is also determinative. Being male is positive. It gets you things that being female does not. If being male is so important, then why don't males feel the need to describe themselves primarily as males? Why is it that maleness goes unstated until someone gets it wrong? I suggest that the answers to these questions may have something to do with male subjectivity.

The point of my exercise is not only to suggest that men and women view the import of their own gender differently. The exercise also serves to demonstrate something about the process of self-definition. Self-definition is affected by the society in which we live as well as by our individual responses to that society. I can resist being defined by others if I don't like those definitions, and my resistance may enable me to build my own definitions. But my very resistance results from, and is in reaction to, my dislike of *their* definitions. Thus, I am likely to define myself in opposition to that definition. If this is the case, then self-definition is never something I can do independently.<sup>23</sup>

Feminists who wish to redefine the category "woman" are faced with similar problems. As Linda Alcoff has said:

[E]very source of knowledge about women has been contaminated with misogyny and sexism. No matter where we turn—to historical documents, philosophical constructions, social scientific statistics, introspection, or daily practices—the mediation of female bodies into constructions of woman is dominated by misogynist discourse. For feminists, who must transcend this discourse, it ap-

---

<sup>22</sup> I do not mean to suggest that female status is only determinative in a negative way. I might, for example, point out that, being female enabled me to join the Girl Scouts and to attend Vassar College in the 1960s. Although I may view these choices as positive, they reflect their negative counterparts.

<sup>23</sup> Because I believe we create our sense of self in relation to others, a totally independent definition of self would never be possible. Ideally, however, the process of self-definition would include *active* as well as *reactive* participation by women. When women resist the limits of patriarchal definitions, their initial step may be reactive, but what follows can be an autonomous act of creation. In an earlier article, I suggested that we have glimpses of our own authenticity when we are able to free ourselves from the socially constructed category "woman." Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERK. WOMEN'S L.J. 191, 194 n.10 (1990).

pears we have nowhere to turn.<sup>24</sup>

In the following section, I will explore some of these sources of knowledge about "woman."

### III. THE CONSTRUCTION OF "WOMAN" AND "EQUALITY": GLIMPSES FROM HISTORY

#### A. Introduction

"Throughout the history of women's struggles for emancipation, analysts of the female condition have understood that prejudice predetermines and perpetuates institutions of inequality as much as institutions of inequality reflect and confirm prejudice."<sup>25</sup>

Man's definition of "woman" is the result of prejudice. Whether that prejudice is more accurately described as misogyny or misunderstanding, its effects are the same: the establishment of institutions of inequality. Dismantling these institutions has been the immediate project of much feminist litigation. So long as the prejudice remains, however, the project will never be finished. And whether the prejudice stems from misogyny or misunderstanding (or something in-between) may well determine the possibilities for ultimate success in eradicating inequality.

In this section, I will first sketch the concept of "woman" as it is reflected in various historical sources. I have focused on sources that are representative of our western tradition. They include Christian doctrines and the teachings of influential Greek and European philosophers. Legal decisionmakers of the late nineteenth century who were asked to respond to feminist demands for equality were certainly familiar with many of these teachings. My review of these sources is not intended as a complete history of western thought, nor as a complete explanation of why male judges and legislators viewed women as they did. My intent in this brief sketch is to suggest a connection between the patriarchal definition of women and the building of legal institutions of inequality.

I will then provide a similar sketch of the concept of "equality" as it has been constructed by legal and political theorists in this country. Although more recent theorists have suggested construc-

---

<sup>24</sup> Linda Alcoff, *supra* note 11, at 295-96.

<sup>25</sup> Elisabeth Young-Bruehl, *supra* note 17, at 37.

tions that may be at odds with classical liberalism, my discussion focuses on "equality" as it has been constructed by liberal theorists. I will proceed, in the following section, to examine various feminist responses to the problems of inequality and male definitions. These sketches of the construction of "woman" and "equality" will enrich that discussion.

### B. *The Construction of "Woman"*

One early description of "woman" comes from the Bible. Eve, the first woman, was created second, after Adam.<sup>26</sup> She was created out of his side, for the purpose of helping him. Many theorists have built on this early story of creation to describe "woman" as inferior to man.

Paul, for example, said that man should not cover his head when he prays or prophesies for "he is the image and glory of God."<sup>27</sup> By contrast, "woman" should cover her head because "the woman is the glory of the man. For the man is not of the woman; but the woman of the man. Neither was the man created for the woman, but the woman for the man."<sup>28</sup>

Augustine was troubled by the reference in Genesis to God's creation of both male and female in his image,<sup>29</sup> and sought to explain Paul's conclusion as follows: Man is in the image of God, and then when "woman" joins him, she too is in the image of God. But when she is alone, she is not in the image of God.<sup>30</sup>

<sup>26</sup> There are actually two creation stories in *Genesis*. In the first chapter of *Genesis*, God creates man, male and female, together. See *infra* note 29. Chapter 2 of *Genesis*, however, tells a separate and different story about the creation of woman:

And the Lord God said, It is not good that the man should be alone; I will make him a help meet for him.

...

And the Lord God caused a deep sleep to fall upon Adam, and he slept: and he took one of his ribs, and closed up the flesh instead thereof;

And the rib, which the Lord God had taken from man, made he a woman, and brought her unto the man.

*Genesis* 2:18, 21-22 (King James).

<sup>27</sup> I *Corinthians* 11:7 (King James).

<sup>28</sup> I *Corinthians* 11:7-9 (King James).

The Jewish Bible does not require that either men or women cover their heads. Jewish tradition, however, requires "men to cover the head as a sign of modesty before God, and women, as evidence, of modesty before men . . ." 8 *ENCYCLOPAEDIA JUDAICA* 1 (1971).

<sup>29</sup> "So God created man in his own image, in the image of God created he him; male and female created he them." *Genesis* 1:27 (King James).

<sup>30</sup> See Augustine, *The Trinity*, in *PHILOSOPHY OF WOMAN* 257 (Mary Briody Mahowald ed.

Thomas Aquinas agreed that "woman" was made as man's helper. But he clarified this point as follows: She is a helper only in reproduction. Otherwise, man is better helped by another man.<sup>31</sup>

Aristotle said that women are less rational than men;<sup>32</sup> that whereas men are generators and creators, women are passive. Indeed, Aristotle described "woman" as an "infertile male."<sup>33</sup>

Immanuel Kant, the father of modern rights theory, claimed that men are the noble sex and women the beautiful sex. He argued that women have no sense of obligation. Thus, they are incapable of acting in accord with moral duty. Women might do what is right, but only because it appears beautiful to them. Man, by contrast, will avoid evil because he has a duty to do what is right. Men are capable of moral agency; women are not.

The virtue of a woman is a beautiful virtue. That of the male sex should be a noble virtue. Women will avoid the wicked not because it is unright, but because it is ugly; and virtuous actions mean to them such as are morally beautiful. Nothing of duty, nothing of compulsion, nothing of obligation! Woman is intolerant of all commands and all morose constraint. They do something only because it pleases them . . . . I hardly believe that the fair sex is capable of principles . . . .<sup>34</sup>

Arthur Schopenhauer, a philosopher much influenced by Kant,

---

1983).

[T]he woman together with her husband is the image of God, so that whole substance is one image. But when she is assigned as a help-mate, a function that pertains to her alone, then she is not the image of God; but as far as the man is concerned, his is by himself alone the image of God.

*Id.* at 258.

<sup>31</sup>

It was necessary for woman to be made, as the Scripture says, as a helper to man; not, indeed, as a helpmate in other works, as some say, since man can be more efficiently helped by another man in other works; but as a helper in the work of generation.

Thomas Aquinas, *On the First Man*, in PHILOSOPHY OF WOMAN, *supra* note 30, at 276-77.

<sup>32</sup> The claim that women are less rational than men has been echoed throughout the history of philosophy. See Genevieve Lloyd, *The Man of Reason*, in WOMEN, KNOWLEDGE, AND REALITY 111 (Ann Garry and Marilyn Pearsall eds. 1989).

<sup>33</sup> Aristotle, *On the Generation of Animals*, in PHILOSOPHY OF WOMAN, *supra* note 30, at 266-67.

<sup>34</sup> Immanuel Kant, *Of the Distinction of the Beautiful and Sublime in the Interrelations of the Two Sexes*, in PHILOSOPHY OF WOMAN, *supra* note 30, at 196.

said that "[w]omen are directly fitted for acting as the nurses and teachers of our early childhood by the fact that they are themselves childish, frivolous and short-sighted."<sup>35</sup> In his view, women were essentially immoral and irrational.<sup>36</sup> They were also incapable of truthfulness.<sup>37</sup> Frederick Nietzsche shared Schopenhauer's view of women as liars.<sup>38</sup> Indeed, whatever the particular description of woman's essence, most western philosophers make a point of defining her as lesser than "man" in her capabilities.<sup>39</sup>

And according to Darwin, sex roles are biologically determined. Males inherit male traits from their male ancestors and females inherit female traits from their female ancestors. Since men have had to fight other men for their female mates, "sexual selection ha[s] resulted in men acquiring greater courage, perseverance, intelligence, and imagination than women."<sup>40</sup>

With the rise of commercial development in the 1800s, men in this country left the home to work in the market economy, and middle-class white women stayed home. Women were viewed as the keepers of emotional and sentimental values, and writers began to talk of "women's sphere." Feminist historians call this the era of the making of a middle-class lady.<sup>41</sup> Harriet Beecher Stowe observed, "in no other country in the world can a woman without much money, forced to do her own housework, be considered a lady."<sup>42</sup>

Thus, by the late 1800s, the category "woman"—as understood in this country to apply to white, heterosexual, middle-class women—meant someone who was passive, emotional and loving, not particularly intelligent, and whose most important role in life

<sup>35</sup> Arthur Schopenhauer, *On Women*, in *PHILOSOPHY OF WOMAN*, *supra* note 30, at 229.

<sup>36</sup> "Hence it will be found that the fundamental fault of the female character is that it has no sense of justice. This is mainly due to the fact . . . that women are defective in the powers of reasoning and deliberation." *Id.* at 231.

<sup>37</sup> "[D]issimulation is innate in woman. . . . Therefore a woman who is perfectly truthful . . . is perhaps an impossibility." *Id.* at 231.

<sup>38</sup> "From the beginning, nothing has been more alien, repugnant, and hostile to woman than truth—her great art is the lie . . . ." Frederick Nietzsche, *Our Virtues*, in *PHILOSOPHY OF WOMAN*, *supra* note 30, at 74-75.

<sup>39</sup> For a collection of these philosophers' views on "woman," see generally *PHILOSOPHY OF WOMAN*, *supra* note 30, and *VISIONS OF WOMEN* (Linda Bell ed. 1983).

<sup>40</sup> *MEN'S IDEAS/WOMEN'S REALITIES 4* (Louise Michele Newman ed. 1985).

<sup>41</sup> CAROL HYMOWITZ & MICHAEL WEISSMAN, *A HISTORY OF WOMEN IN AMERICA* 64-75 (1978).

<sup>42</sup> *Id.* at 68.

was her reproductive one. This understanding of the category "woman" led to laws justified by the need to protect her<sup>43</sup> and keep her in her appropriate role as wife and mother. Until 1971, the United States Supreme Court interpreted the Constitution to support this "separate spheres" ideology.<sup>44</sup>

Of the laws that confined women to the private sphere, perhaps the most well-known among legal scholars are those that banned women from the practice of law.<sup>45</sup> In the first constitutional challenge to such a law, Justice Bradley wrote in justifying the ban:

[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood . . . .

The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.<sup>46</sup>

---

<sup>43</sup> At the Akron, Ohio Women's Rights Convention in 1851, Sojourner Truth, a former slave, challenged the unstated racism in arguments that relied on the definition of woman as weak, beautiful and in need of protection:

That man over there says that women need to be helped into carriages and lifted over ditches, and to have the best places everywhere. Nobody ever helps me into carriages or over mud puddles, or gives me any best place. And ain't I a woman? Look at me! I have ploughed and planted and gathered into barns and no man could head me. And ain't I a woman? I could work as much and eat as much as a man—when I could get it—and bear the lash as well. And ain't I a woman?

*Id.* at 101.

<sup>44</sup> *Reed v. Reed*, 404 U.S. 71 (1971) (holding unconstitutional an Idaho probate law which gave preference to men over women when appointing administrators to decedents' estates as violative of the equal protection clause of the fourteenth amendment).

<sup>45</sup> See *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872); *In re Goodell*, 39 Wis. 232 (1875); Barbara Babcock, *Clara Shortridge Foltz: "First Woman,"* 30 ARIZ. L. REV. 673 (1988) (describing in detail Foltz's challenge to California's exclusion of women from bar). See generally KAREN BERGER MORELLO, *THE INVISIBLE BAR* 3-38 (1986).

<sup>46</sup> *Bradwell*, 83 U.S. (16 Wall.) at 141 (Bradley, J., concurring). Myra Bradwell brought

The constitutional challenge had been brought against the state of Illinois by Myra Bradwell, publisher of the Chicago Legal News, the most widely read legal newspaper in the Midwest. Bradwell passed the bar exam in 1869, and when the State of Illinois denied her application for admission to the bar, she appealed.<sup>47</sup> She argued before the United States Supreme Court that Illinois had denied her privileges and immunities as a citizen under the fourteenth amendment. She did not rely on the equal protection clause because, at the time, it was viewed as a provision available for race discrimination claims only.<sup>48</sup>

Equality arguments on behalf of women came later.<sup>49</sup> Prior to the Supreme Court's 1971 decision in *Reed v. Reed*,<sup>50</sup> most feminist claims to equality were rejected in the courts.<sup>51</sup> These negative decisions have been said to echo two dominant themes: (1) Women's subordinate place in a world controlled by men is divinely ordained; and (2) Differential treatment of the sexes is for the benefit of women.<sup>52</sup> Both of these themes endorsed male defini-

---

her claim under the privileges and immunities clause of the fourteenth amendment. The Court decided *Butchers' Benevolent Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 83 U.S. (16 Wall.) 36 (1872) [hereinafter the *Slaughter-House Cases*], just before the Bradwell decision was handed down. In the *Slaughter-House Cases*, the Court ruled that the privileges and immunities clause did not guarantee citizens a right to earn a living as they chose. Justice Bradley, however, dissented. Having just concluded that the privileges and immunities clause did cover a citizen's right to earn a living, Justice Bradley had to rely on the law of the Creator to justify his holding against Myra Bradwell on the same legal issue.

<sup>47</sup> Myra Bradwell's story is told by Karen Berger Morello. See KAREN BERGER MORELLO, *supra* note 45, at 14-21.

<sup>48</sup>

We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this [equal protection] provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other.

*Slaughter-House Cases*, 83 U.S. (16 Wall.) at 81.

<sup>49</sup> *E.g.*, *Hoyt v. Florida*, 368 U.S. 57 (1961); *Goesaert v. Cleary*, 335 U.S. 464 (1948); see *infra* notes 62-64 and accompanying text (discussing *Hoyt* and *Goesaert*).

<sup>50</sup> 404 U.S. 71 (1971) (striking down on equal protection grounds an Idaho probate law that mandated a preference for men over women in the court's selection of estate administrators).

<sup>51</sup> *But see* *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971). In *Kirby*, decided before *Reed*, the California Supreme Court struck down a statute prohibiting women (other than owners or wives of owners) from tending bar.

<sup>52</sup> See Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1, 2-8 (1975).

tions of "woman" as less rational (not fit for public life), as beautiful and weak (in need of male protection) and as fit only for roles in the private sphere of home and family.

### C. *The Construction of "Equality"*

The Bill of Rights was added to the United States Constitution in order to ensure certain liberties to individuals against the federal government. None of these first ten amendments contained an explicit guarantee of equality.<sup>53</sup> Not until the adoption of the fourteenth amendment did the principle of "equality" become an explicit constitutional principle.<sup>54</sup> Nonetheless, as an ideal, "equality" has been part of America's political heritage since Thomas Jefferson included the concept as a basic tenet in the Declaration of Independence: "All men are created equal."<sup>55</sup>

Despite this early rhetorical commitment to "equality," America's history includes governmental recognition and support for institutions of inequality. The institution of slavery is a prime example. If Jefferson's declaration of equality was an accurate reflection of American political beliefs, how could that same American polity endorse the institution of slavery? How could that same American polity restrict the right to vote to white male property owners?

These questions can be answered once we understand how the meaning of equality has been constructed by liberal legal theorists. Although equality can have many different meanings,<sup>56</sup> its meaning in American jurisprudence has been restricted by liberal traditions. In this section, I will discuss three different meanings of equality that can be reconciled with dominant liberal ideology. Feminist at-

---

<sup>53</sup> "Equality before the law" as a political concept can be traced to the French Revolution and the resulting Revolutionary Constitution. Equal rights arguments in the United States did occur before the passage of the fourteenth amendment. See John Frank & Robert Munro, *The Original Understanding of "Equal Protection of the Laws,"* 1972 WASH. U.L.Q. 421, 434-37.

<sup>54</sup> "No state shall . . . deny . . . equal protection of the laws." U.S. CONST. amend. XIV. The fourteenth amendment was adopted in 1868. Most state constitutions also have an equal protection clause (or some similar guarantee to equality). Although many of the state provisions were adopted at the same time as the fourteenth amendment, some were adopted much earlier. See John Frank & Robert Munro, *supra* note 53, at 438.

<sup>55</sup> The Declaration of Independence para. 2 (U.S. 1776).

<sup>56</sup> See RICHARD HENRY TAWNEY, *EQUALITY* 35 (1952) ("Equality possesses more than one meaning.").



tempts to reconstruct the meaning of equality have had to contend with the fact that the law's predominant notions of equality are linked to these liberal definitions. The three meanings of equality that I will discuss are: (1) Equality as a principle of justice; (2) Equality as a justification for representative government; and (3) Equality as a distributive goal.

1. *Equality as a Principle of Justice.* As a principle of justice, equality means that like cases ought to be treated alike. The corollary is that unlike cases should be treated differently.<sup>57</sup> We can trace this principle back to Aristotle. Institutions of inequality that distinguish males from females, masters from slaves and the rulers from the ruled are compatible with the Aristotelian notion of equality: Males and females are not alike (nor are masters and slaves, according to Aristotle). A major premise in Aristotle's *Politics* is that differences in ability to reason make some fit to rule and others fit only to obey.<sup>58</sup>

To the extent American justice requires that like cases be treated alike, the principle of equality serves as a check on biased governmental action. If A has been treated in a certain way by the government, then B must be treated similarly by the government if B is indeed similar to A. If B is to be treated differently, perhaps less favorably, government must explain why. We call this principle "formal equality" because it tells us nothing about the substance of how A and B ought to be treated.<sup>59</sup> Indeed, the principle of "formal equality" would be satisfied if A's more favorable treatment were changed to correspond with B's less favorable treatment.<sup>60</sup>

This principle of "formal equality" requires that comparisons be

---

<sup>57</sup> See generally RICHARD HENRY TAWNEY, *supra* note 56; Peter Westen, *supra* note 7.

<sup>58</sup> Aristotle's primary discussion of gender roles can be found in the *Politics*. For an excellent discussion of Aristotle on this point, especially his division of the polis into free males, women and slaves (what about slave women?), see ELIZABETH V. SPELMAN, *INESSENTIAL WOMAN* 37-56 (1988).

<sup>59</sup> See Peter Westen, *supra* note 7; Kenneth Simons, *supra* note 7.

<sup>60</sup> A prime illustration of the emptiness of "formal equality" is contained in the facts of *Palmer v. Thompson*, 403 U.S. 217 (1971). The City of Jackson had operated certain public swimming pools for the benefit of whites only. Rather than open these pools on an integrated basis to African-Americans as well as whites, the city council elected to close the pools. As a result, neither class of persons was entitled to the treatment afforded only white persons prior to the decision. Nonetheless, the decision comports with "formal equality." Both classes were being equally denied the use of the pools.

made between classes of persons for whom we wish to obtain equal treatment. Sex equality arguments based on this notion of equality necessitate an emphasis on the similarities between men and women. Because the Supreme Court's understanding of the equal protection clause of the fourteenth amendment seems to be influenced primarily by this Aristotelian notion of "formal equality,"<sup>61</sup> feminist litigators relying on the fourteenth amendment have been forced to argue that men and women are similarly situated.

Equal protection arguments were made in *Goesaert v. Cleary*,<sup>62</sup> a 1948 case in which plaintiffs challenged a law allowing women to tend bar only in taverns owned by their husbands or fathers, and in *Hoyt v. Florida*,<sup>63</sup> a 1961 action in which a female criminal defendant challenged Florida's exclusion of females from juries. In each of these cases, the claim of sex equality was rejected. Differential treatment of women was justified in the Court's view because women are different from men.<sup>64</sup> The Supreme Court did not apply the equal protection clause of the fourteenth amendment to remedy a sex discrimination claim until 1971.<sup>65</sup> Furthermore, the Supreme Court continues to rule against feminist claims to equality on the basis of women's difference from men.<sup>66</sup>

Thus, this first meaning of equality—that likes be treated alike—has helped determine the contours of feminist legal argument. Successful equality arguments require feminists to emphasize the similarities between men and women and to minimize the differences.<sup>67</sup> Under the equal protection clause, this form of equal-

---

<sup>61</sup> See Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 344 (1949).

<sup>62</sup> 335 U.S. 464 (1948).

<sup>63</sup> 368 U.S. 57 (1961).

<sup>64</sup> See, e.g., *Goesaert v. Cleary*, 335 U.S. at 465-66; *Hoyt v. Florida*, 368 U.S. at 61-62.

<sup>65</sup> In that year, the Court struck down, on equal protection grounds, an Idaho probate law which required courts to prefer men over women in the selection of estate administrators. *Reed v. Reed*, 404 U.S. 71 (1971).

<sup>66</sup> See *Michael M. v. Superior Ct.*, 450 U.S. 464 (1981) (deciding California statutory-rape law applies only to males); *Rostker v. Goldberg*, 453 U.S. 57 (1981) (holding military registration applies only to males); *Kahn v. Shevin*, 416 U.S. 351 (1974) (finding Florida property tax exemption available only to widows).

<sup>67</sup> Woman's similarity to man was not always the basis for feminist legal argument. For example, some early feminists argued that woman's greater capacity for empathy was a strong justification for including women as jurors, along with men. See Susan Glaspell, *A Jury of Her Peers*, reprinted in *THE BEST SHORT STORIES OF 1917* 256 (1918); Carol Weisbrod, *Images of the Woman Juror*, 9 HARV. WOMEN'S L.J. 59, 70-79 (1986).

ity can be described as the right to equal treatment.

2. *Equality as a Justification for Representative Government.* When Thomas Jefferson proclaimed "all men are created equal," he probably meant to convey something more than the Aristotelian principle that likes be treated alike. American political theory, after all, evolved more directly from the liberal theory espoused by John Locke and John Stuart Mill than it did from the political theory of Aristotle. The claim that all men are created equal suggests, at the least, that an equal capacity for reason and passion is shared by all human beings, a claim to which Aristotle did not subscribe.<sup>68</sup>

Amy Gutmann, in setting forth the foundations of a liberal theory of equality, formulates two equality assumptions that she attributes to the fathers of classical liberal thought.<sup>69</sup> One assumption she derives from the utilitarians Jeremy Bentham and James Mill and the second she derives from the rationalists Immanuel Kant and John Locke. The utilitarian equality assumption is that human beings share similar passions. The rationalist equality assumption is that human beings share a capacity for reason.

As Locke probably had more influence than other liberal theorists on American political theory, I will concentrate on his equality arguments. Locke proclaims that all men are naturally in a state of freedom as well as in a state of equality. He describes this state of equality as one in which "all the power and jurisdiction is reciprocal, no one having more than another."<sup>70</sup> He then moves from this descriptive statement to the following normative principle:

[T]here being nothing more evident than that creatures of the same species and rank, promiscuously born to all the same advantages of nature and the use of the same faculties *should also be equal* one amongst another without subordination or subjection . . . .

. . . .

---

<sup>68</sup> The Stoics, by contrast, argued against Aristotle's elitism that "the very possession of the capacity to reason made men more alike than different." Sanford A. Lakoff, *Christianity and Equality*, in IX NOMOS 115, 118 (1967).

<sup>69</sup> See AMY GUTMANN, *LIBERAL EQUALITY* 18-20 (1980).

<sup>70</sup> JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT*, ch. II, para. 4 (T. Peardon ed. 1952).

... The state of nature has a law of nature to govern it, which obliges every one, and reason, which is that law, teaches all mankind who will but consult it that, *being all equal and independent, no one ought to harm another in his life, health, liberty or possessions.*<sup>71</sup>

Thus, for Locke, the belief in human equality entailed certain normative principles regarding protection of life, health, liberty and property.<sup>72</sup> Governmental action that resulted in the loss of individual liberty could be justified to the extent it was necessary to secure (equally) protection for individual life, health, liberty or property. Note that this argument does not create an affirmative obligation on the state to protect life, health, liberty or property. Instead this argument merely justifies a minimum state, a state that may (not must) sometimes interfere with individual liberty when necessary to protect a limited class of individual interests: life, health, liberty or property.

Furthermore, since the government derives its power from its citizens, it can govern legitimately only so long as the citizens consent to be governed. All citizens consent to potential governmental restrictions on their individual liberty because they gain desired security in their persons and their property. Since all consent, all should have a say in what those potential restrictions may be. If "all men are created equal," then all men should have an equal say in government.

Equal representation was certainly a founding principle of American government. But how can we reconcile this meaning of equality with America's long-term denial of female suffrage? How can the commitment to equal representation be reconciled with the denial of public office to women? The most plausible explanation is that woman's interests were believed capable of being adequately represented by men. The social contract, consent of the governed, and the running of government were all activities engaged in by men on behalf of their families.<sup>73</sup> Although Locke himself never

---

<sup>71</sup> *Id.* at ch. II, para. 4, para. 6 (emphasis added).

<sup>72</sup> Clearly, Locke's move from "is" to "ought" commits the naturalistic fallacy, but it is not my intent to critique his form of argument. My intent is to describe the argument.

<sup>73</sup> See SUSAN MOLLER OKIN, *JUSTICE, GENDER AND THE FAMILY* 8-10 (1989) (arguing that modern liberal political theorists "continue to assume that the 'individual' who is the basic subject of their theories is the male head of a fairly traditional household." *Id.* at 9.).

explicitly says that only males are parties to the social contract, he does argue that within the marriage relationship, the husband should have the final say on matters that are of mutual concern to husband and wife.<sup>74</sup> From this, one can conclude that Locke viewed the husband as the "family" representative to the social contract.<sup>75</sup>

Modern equal protection doctrine reflects the fact that women have been excluded from the political process. Based on the now famous footnote four of *Carolene Products*,<sup>76</sup> process theorists argue that courts should scrutinize more closely legal rules that burden women since women have not had sufficient access to the political arena to speak out on their own behalf. This "heightened scrutiny" requires legislative bodies to give stronger justification for laws which result in differential treatment on the basis of sex.<sup>77</sup> Requiring a stronger justification is reflective of the presumption that all persons are entitled to equal treatment regardless of sex. The requirement also serves to reduce the impact of earlier inequalities (lack of access to legislative bodies) by affording women stronger access to government via the courts.

To the extent the concept of equality means a right to equal representation, it has helped feminists form equal protection arguments asking for heightened judicial scrutiny of legislative action. The right to equal representation, however, has never been interpreted to require better representation of female interests in legislative bodies. A prime example of the limited remedies available

---

<sup>74</sup>

But the husband and wife, though they have but one common concern, yet having different understandings, will unavoidably sometimes have different wills, too; it therefore being necessary that the last determination—i.e., the rule—should be placed somewhere, it naturally falls to the man's share, as the abler and the stronger.

JOHN LOCKE, *supra* note 70, at ch. VII, para. 82 (1952).

<sup>75</sup> Locke did not believe that a husband had absolute authority over his wife within the family sphere, but he did speak of the master of the family as someone who had "a very distinct and differently limited power both as to time and extent over those several persons that are in it"—wives, children, servants and slaves. *Id.* at para. 86. He never mentions wives or women once he turns his attention away from "conjugal society" to "political society."

<sup>76</sup> *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

<sup>77</sup> Even stronger justifications are required for racial classifications. See *Korematsu v. United States*, 323 U.S. 214 (1944); *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (applying the compelling state interest test to racial classifications).

under "equal representation" arguments is demonstrated in the 1979 Supreme Court decision, *Personnel Administrator v. Feeney*.<sup>78</sup> Massachusetts had enacted a veteran's preference bill, giving job employment preferences to all veterans, ninety-eight percent of whom happened to be male. Feminists argued that the legislation violated the equal protection clause of the fourteenth amendment. The Supreme Court upheld the legislation relying on the intent requirement that the Court had recently clarified in *Washington v. Davis*.<sup>79</sup> Under the intent requirement, a law would not be struck down under the fourteenth amendment merely because its impact fell more heavily on women. So long as the purpose of the law (to benefit veterans) was nondiscriminatory (male and female veterans would benefit), the law would stand.

The Massachusetts law at issue in *Feeney* was not subjected to any sort of "heightened scrutiny." The right to "equal representation" that serves as a basis for "heightened scrutiny" in sex discrimination cases was subverted by the Court's finding that the law did not raise an issue of sex discrimination at all. And yet, if the right to equal representation means anything, surely a state legislature that hands out benefits to veterans, but not to mothers or homemakers, ought to be subject to some scrutiny.<sup>80</sup>

3. *Equality as a Distributive Goal*. Often the concept of equality is understood to refer to a principle of distributive justice that requires the distribution of goods and services to be more equal. The question of who is entitled to what goods has long been debated in political philosophy. Aristotle, for example, argued as follows:

[J]ustice involves two factors—things, and the persons to

---

<sup>78</sup> 442 U.S. 256 (1979).

<sup>79</sup> 426 U.S. 229 (1976).

<sup>80</sup> I do not mean to suggest that courts take over the legislative function in response to a plaintiff's claim that the interests of women are being ignored by the legislature. Legislative and judicial lawmaking powers are limited by our current notions of institutional competence. I do mean to raise the possibility that we rethink the notion of institutional competence. If courts are the proper body to protect women's rights to equal representation, then something more than "footnote four" review is required to realize full protection. A discussion of possible appropriate judicial remedies directed at legislative failures to respond to woman's interests is beyond the scope of this article. It is a discussion that would challenge current concepts of the way judicial and legislative power is divided and constructed. Such a challenge from feminists would be appropriate. After all, those constructions did not come from women. They were handed to us by the patriarchy. See CATHARINE MACKINNON, *TOWARD A FEMINIST THEORY*, *supra* note 10, at 237-39.

whom things are assigned—and it considers that persons who are equal should have assigned to them equal things. But here there arises a question which must not be overlooked. Equals and unequals—yes; but equals and unequals in what? This is a question which raises difficulties, and involves us in philosophical speculation on politics.<sup>81</sup>

Some liberal theorists would argue that distributive justice is satisfied so long as goods and services are distributed according to a merit principle. In answer to Aristotle's question, persons equal in merit should receive equal distributions. Accompanying the merit principle in liberal theory is the notion that every individual ought to have an equal chance to establish merit. Together these two principles form the equality theory adopted by most liberals: equality of opportunity.<sup>82</sup>

Radical egalitarians argue that distributions ought to be more equal in result, regardless of the merit principle. Some egalitarians argue for a more limited "equality of results," focusing on equal needs for basic necessities. Thus, for example, medical care and housing are goods that ought to be distributed according to need rather than merit.<sup>83</sup> John Rawls' theory can be interpreted as partly egalitarian in that it requires not only equality of opportunity, but also that "social and economic inequalities are to be arranged so that they are to the greatest benefit of the least advantaged."<sup>84</sup>

Equal opportunity has been the operative theory of equality in American political action on behalf of women. Removal of explicit barriers to opportunity was the first step. Equal protection doctrine reflects this understanding of equality, as does Title VII of the Civil Rights Act of 1964.<sup>85</sup> However, meaningful equality of opportunity has been difficult to achieve given the long-term effects of the operation of institutions built on inequality.<sup>86</sup> Substantive

---

<sup>81</sup> ARISTOTLE, *THE POLITICS OF ARISTOTLE* 129 (Ernest Barker trans. 1958).

<sup>82</sup> JAMES FISHKIN, *JUSTICE, EQUAL OPPORTUNITY, AND THE FAMILY* (1983).

<sup>83</sup> See generally, Bernard Williams, *The Idea of Equality*, in *PHILOSOPHY, POLITICS AND SOCIETY* 110 (1962), reprinted in *JUSTICE AND EQUALITY* 116 (1971).

<sup>84</sup> JOHN RAWLS, *A THEORY OF JUSTICE* 61 (1971).

<sup>85</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

<sup>86</sup> The family, for example, is one such institution. Sexual hierarchies continue to generate inequalities in families between husbands and wives and sons and daughters. Yet "equal

legislative remedies have been pursued to reverse some of these effects,<sup>87</sup> but women still earn less than men, more women live below the poverty level and child care and family responsibilities fall more heavily on women.<sup>88</sup>

In addition to legislative lobbying, feminists have fashioned substantive equality arguments in court battles as well, usually to no avail.<sup>89</sup> Equal protection doctrine in particular has not yet responded favorably to arguments based on the need to correct existing substantive inequalities between women's and men's material conditions. This failure is not due to any logical inadequacies in the concept of equality. Equality is capable of being understood to require redistributions and substantive changes in material conditions. The equal protection doctrine, however, carries with it other fourteenth amendment doctrines that prevent a judge from using equality rationales to justify substantial equalization of the sexes. The state action doctrine and the intent requirement, for example, limit the sorts of inequalities that judicial review can reach. Furthermore, long-established notions of institutional competence limit the sorts of remedies a court can fashion to correct inequalities. If an employer refuses to hire a woman because he fears she will miss work to attend to her children, a court can order the employer to reverse the decision. But if a woman refuses the job because its demands will not allow her to attend to children, a court is not likely to afford her relief by ordering the employer to provide on-site child care facilities. In both instances, the principle

---

opportunity" advocates have not generally argued for dismantling the family, or even correcting the inequalities it produces. Fishkin makes a similar point about the family and equal opportunity generally—not limited to the issue of sexual inequality. See JAMES FISHKIN, *supra* note 82.

<sup>87</sup> Displaced homemaker, parental leave and child care bills are examples of specific substantive reforms. Specific reforms such as these have been less successful than more abstract commitments to equality. President Bush recently vetoed legislation that would have created job security for those parents who needed release time from work to attend to family responsibilities.

<sup>88</sup> SUSAN MOLLER OKIN, *supra* note 73, at 3-4.

<sup>89</sup> Court battles over comparable worth are one such example. See *American Fed'n of State, County, and Mun. Employees v. Washington*, 770 F.2d 1401 (9th Cir. 1985); *Spaulding v. University of Wash.*, 740 F.2d 686 (9th Cir. 1984), *cert. denied*, 469 U.S. 1036 (1984). The abortion funding cases are another example. See *Harris v. McRae*, 448 U.S. 297 (1980), and *Maier v. Roe*, 432 U.S. 464 (1977), both holding that government can deny funding for abortions even when it grants funding for other medical procedures and conditions, including pregnancy.



of equal opportunity is implicated, but remedies that would require significant changes in the workplace are thought of as legislative remedies, not judicial ones.<sup>90</sup>

To the extent feminists have preferred to fight for sexual equality in the courts rather than the legislatures, their equality arguments have been limited by the socially constructed role of the judiciary.<sup>91</sup> Equality-of-result arguments, including egalitarian equal opportunity arguments, have not been accepted by courts in the absence of supportive legislation. Unless feminists can argue successfully for a reconceptualization of the courts' role in issues of distributive justice, egalitarian arguments ought to be directed primarily at legislatures.

Feminists who pursue equality-of-result arguments will be faced with the question that faces any egalitarian: what is the normative principle for determining how goods and services ought to be distributed? Equality is not the answer, for the goal is not to achieve equal distribution between men and women. Rather, the goal is to achieve sufficient changes in the material conditions of women's lives so that they can create themselves as freely and authentically as men. Equality arguments are a means to that end. Egalitarian equality arguments, in particular, can be used to support a redistribution of goods and services that would ensure all persons a minimum standard of living; for how can one create a "self" if one is unduly burdened by lack of food and shelter?

---

<sup>90</sup> For an excellent discussion of the limitations of constitutional equality argument, see Judith Brown, Wendy Parmet & Phyllis Baumann, *The Failure of Gender Equality: An Essay in Constitutional Dissonance*, 36 BUFFALO L. REV. 573 (1987). The authors argue that liberal interpretations of the Constitution focus on the individual's right to be free from governmental intrusions. To the extent equality is understood to impose affirmative obligations on government (or the community), is at odds with prevailing constitutional jurisprudence. The authors further argue that this understanding of equality is so at odds with liberal political thought that feminist appeals to legislatures will be viewed as pleas for special treatment and a threat to the individualistic ethic. *Id.* at 633.

Title VII equality arguments are similarly limited by the individualistic ethic. See, e.g., *EEOC v. Sears, Roebuck & Co.*, 628 F. Supp. 1264 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988) (employer's failure to hire women in high-paying commission sales jobs held to result from women's individual choices). For an excellent explanation of how employers contribute to the formation of women's job preferences and thus should be held liable under Title VII, see Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749 (1990).

<sup>91</sup> See *supra* note 80.

#### IV. SCHOOLS OF FEMINIST THOUGHT AND THE BATTLE OVER EQUALITY

##### A. Background

Equality as justice relies on the notion of similar treatment for those who are similarly situated. Although America was founded on principles of equality and freedom, sex equality was not part of the original understanding of the founders. At that time, socially constructed gender roles placed men and women into different situations. Men were expected to occupy the public sphere of business and commerce. Women were to occupy the private sphere of home and family. Sex equality, meaning similar treatment, simply made no sense in a world of such separate spheres.

Nineteenth century feminists challenged this separate spheres ideology, declaring "all men and women are created equal" and that every woman has the right to "occupy . . . such a station in society as her conscience shall dictate."<sup>92</sup> Reactions to this appeal ranged from ridicule (Who are these women? . . . old maids?)<sup>93</sup> to lighter sexist humor.<sup>94</sup> Although some progress was made through legislative channels,<sup>95</sup> early judicial responses to feminist equality

---

<sup>92</sup> Seneca Falls Convention, *Declaration of Sentiments and Resolutions*, reprinted in PAULA ROTHENBERG, *RACISM AND SEXISM* 192 (1988).

<sup>93</sup> "Who are these women? What do they want? . . . Some of them are old maids, whose personal charms were never very attractive, and who have been sadly slighted by the masculine gender in general; some of them women who have been badly mated . . ." Editorial, *The Woman's Rights Convention—The Last Act of the Drama*, N.Y. Herald, Sept. 12, 1852, reprinted in PAULA ROTHENBERG, *supra* note 92, at 196.

<sup>94</sup> In response to a petition for sexual equality, the Judiciary Committee of the New York State Legislature reported as follows:

[T]he ladies always have the best place and choicest tidbit at the table. They have the best seat in the cars, carriages, and sleighs; the warmest place in the winter, and the coolest place in the summer. They have their choice on which side of the bed they will lie, front or back. A lady's dress costs three times as much as that of a gentleman; and, at the present time, with the prevailing fashion, one lady occupies three times as much space in the world as a gentleman.

It thus appeared . . . that, if there is any inequality or oppression in the case, the gentlemen are the sufferers. They, however, have presented no petitions for redress; having, doubtless, made up their minds to yield to an inevitable destiny . . ."

*Id.* at 197-98.

<sup>95</sup> Married Women's Property Acts, for example, were passed in many states in the last part of the nineteenth century, enabling married women to own property. See DEBORAH RHODE, *JUSTICE AND GENDER* 24-26 (1989). And the Illinois legislature removed the gender

claims accepted the separate spheres ideology and reinforced the male-constructed definition of "woman." Thus, the battle for sex equality was, in part, a battle over who had the right to define "woman."

When the second wave of feminism revived the claim to sexual equality in the 1960s, the definition of "woman" as different from man remained a stumbling block. Thus, feminist litigation of the 1960s and 1970s began with an attack on the definition of "woman," arguing against laws that restricted female access to the public sphere. The arguments were framed in equality terms. Specifically, the arguments were for equal treatment and equal opportunity. Equality arguments of this sort were necessarily relational or comparative.<sup>96</sup> Equal treatment compared with whom? The answer, of course: compared with men. Thus, these early equality arguments focused on the similarities between women and men. The concept of equality at the core of these arguments became known as "formal equality."<sup>97</sup>

Problems arose, however, in those cases in which there was no clear similarity between women and men. The most obvious examples of problem cases were those involving pregnancy in the workplace.<sup>98</sup> A split occurred in the feminist community over these cases and over the meaning of equality. Some feminists remained committed to the notion of formal equality and argued that pregnancy should be treated just like any other temporary disability. These feminists were characterized as the "equal treatment" camp.<sup>99</sup> Other feminists argued that we ought to embrace a notion of equality that recognizes the uniqueness of pregnancy. These

---

restriction for Bar membership shortly before the Supreme Court rendered its decision in the *Bradwell* case. See *supra* notes 45-48 and accompanying text (discussing *Bradwell*). Congress passed similar legislation to enable women to practice law in the United States Supreme Court. See RICHARD CHUSED, *CASES, MATERIALS AND PROBLEMS IN PROPERTY* 277 (1988).

<sup>96</sup> See Kenneth Simons, *supra* note 7, at 387.

<sup>97</sup> The concept of formal equality, as opposed to substantive equality, has also been at the center of much race discrimination litigation under the equal protection clause. See, e.g., *Palmer v. Thompson*, 403 U.S. 217 (1971) (closing city swimming pools to *all* residents in response to integration requirements did not violate equal protection). See also *supra* note 60 (discussing *Palmer*).

<sup>98</sup> See, e.g., *General Electric v. Gilbert*, 429 U.S. 125 (1976) (interpreting Title VII of the Civil Rights Act of 1964); *Geduldig v. Aiello*, 417 U.S. 484 (1974) (interpreting equal protection clause of fourteenth amendment).

<sup>99</sup> See, e.g., Wendy Williams, *First Generation*, *supra* note 4.

feminists were characterized as the "special treatment" camp.<sup>100</sup>

The debate over "equal treatment" versus "special treatment" focuses on how differences between men and women ought to be regarded by the law. It is precisely this equality debate that led me at the beginning of this Essay to observe that American feminists seem obsessed with the concept of equality. The equality debate necessarily breaks down into subarguments over how women are similar to men and how they are different from men. Thus, feminist arguments over equality necessarily entail arguments about the definition of "woman." In the following part of this section, I will focus on how different schools of feminist thought perceive the category "woman" and the importance of those perceptions on the meaning of equality.

*B. Schools of Feminist Thought: Perspectives on "Woman" and "Equality"*

1. *Liberal Feminism.* Liberal feminism is rooted in the belief that women, as well as men, are rights-bearing, autonomous human beings. Rationality, individual choice, equal rights and equal opportunity are central concepts for liberal political theory. Liberal feminism, building on these concepts, argues that women are just as rational as men and that women should have equal opportunity with men to exercise their right to make rational, self-interested choices. Early liberal feminists include Mary Wollstonecraft (1759-1799) and Harriet Taylor.<sup>101</sup>

Today, liberal feminism is often associated with Betty Friedan and other founders of the National Organization of Women. Within the legal academy, it is a term associated with Ruth Bader Ginsburg, Herma Hill Kay, Wendy Williams and Nadine Taub. Liberal feminism is viewed as the dominant theory behind much of the post-*Reed v. Reed* constitutional litigation brought on behalf of women.<sup>102</sup> This litigation was spearheaded by Ruth Bader Gins-

---

<sup>100</sup> See, e.g., Linda J. Krieger & Patricia N. Cooney, *supra* note 4.

<sup>101</sup> Harriet Taylor co-authored a number of important works with John Stuart Mill. See HARRIET TAYLOR & JOHN STUART MILL, *THE SUBJECTION OF WOMEN* (1869), HARRIET TAYLOR & JOHN STUART MILL, *ENFRANCHISEMENT OF WOMEN* (1851); HARRIET TAYLOR & JOHN STUART MILL, *EARLY ESSAYS ON MARRIAGE AND DIVORCE* (1832). Taylor and Mill eventually married each other after the death of Taylor's husband. See ROSEMARIE TONG, *FEMINIST THOUGHT* 13-22 (1989).

<sup>102</sup> See *supra* note 65 (discussing *Reed v. Reed*).

burg, who was then a Professor of Law at Rutgers and subsequently at Columbia University. The post-*Reed* litigation included *Frontiero v. Richardson*,<sup>103</sup> a Supreme Court decision in which four Justices declared sex to be a suspect classification entitled to the same strict scrutiny as race. The sex classification in *Frontiero* presumed that wives, but not husbands, were dependent for purposes of computing military benefits.

Another key case was *Weinberger v. Wiesenfeld*.<sup>104</sup> Stephen Wiesenfeld's wife, Paula, was a math teacher, an employee covered by social security. When she died in childbirth, Stephen applied for social security benefits for himself and their infant son. Only benefits for the infant son were awarded. Although a woman in Stephen's situation could have received benefits as long as she was not working, such benefits—designed to enable the mother to stay home with her child—were not available to a man. Stephen, who planned to care for his infant son himself, challenged the gender classification and won. A majority of the Justices saw this primarily as an equal pay case involving discrimination against female employees (in this case Stephen's wife), who were denied family benefits that were available to male employees. At the same time, the Court recognized that the challenged classification was based on a stereotype that assumed only women wished to be caring parents.<sup>105</sup>

Liberal feminists have been criticized by more radical feminists for being concerned only with equal pay in the public sphere. Litigators, like Ruth Bader Ginsburg, have been charged as being short-sighted because they adopted an assimilationist theory of equality that would benefit women only if they acted like men.<sup>106</sup>

Let me spell out the critique a bit further. Remember that

---

<sup>103</sup> 411 U.S. 677 (1973).

<sup>104</sup> 420 U.S. 636 (1975).

<sup>105</sup> *Id.* at 652-53.

<sup>106</sup> Some feminists additionally criticize this early equality litigation because it included cases like *Craig v. Boren*, 429 U.S. 190 (1976), in which men successfully argued for rights held by women: in *Craig*, the right to buy 3.2% beer. See Debra Ratterman, *Liberating Feminist Jurisprudence*, in OFF OUR BACKS 12 (1990). Such criticisms seem misplaced to me. First of all, Ginsburg did not initiate the litigation in *Craig v. Boren* and did not view it as a central part of her litigation strategy. Furthermore, all of these cases were used by feminist litigators to educate the Justices about the danger of sexual stereotyping in general. See Ruth Bader Ginsburg & Barbara Flagg, *Some Reflections on the Feminist Legal Thought of the 1970s*, 1989 U. CHI. LEGAL F. 9, 17.

equality theory, as applied to gender, has been conceptually limited by the "similarly situated" requirement. If members of the dominant gender (men) enjoy rights that members of the nondominant gender (women) want, then the only way for women to obtain these rights under existing equal protection doctrine is to argue that, as to the right in question, women are similarly situated to men. If men are being paid X dollars for performing a job in the public sphere, then women should be entitled to the same pay for performing the same job. The equality argument is that women are workers just like men. It is this argument of similarity that makes it possible to expand women's rights. Radical feminists complain, however, that to argue on the basis of women's similarity to men merely assimilates women into an unchanged male sphere. In a sense, the result is to make women into men.

The liberal feminist response to this is that early feminist litigation was concerned with breaking down male-created categories. The point was not to make women into men, but to expand the possibilities for female life-experience by freeing women from the limitations of the male-constructed category "woman." "Woman" was to be freed from the private domestic sphere, if she so chose.

The radical feminist rejoinder is: Yes, but on whose terms? The workplace remains male-constructed. The category "worker" is male-constructed. To force women from one male-constructed category to another is not a real victory, especially if the newly constructed female worker adopts the existing patriarchal view of the world.<sup>107</sup>

Wherever one comes out on this particular debate between liberal and radical feminists, it is important to understand both sides. Both sides agree that women should not be limited by male-constructed categories. Their disagreement is over which categories are most worthy of challenge. At this level, the disagreement is political and instrumental. The disagreement becomes substantive, however, when we shift the focus to the question of what should take the place of the male-constructed category "woman." Radical feminists fear that arguments couched in equal protection terms

---

<sup>107</sup> Martha Minow tells of a similar problem involving high-school girls, who, after being admitted to previously all-male Central High in Philadelphia, along with their male cohorts began to "look down upon the girls enrolled at Girl's High." Martha Minow, *Beyond Universality*, 1989 U. CHI. LEGAL F. 115, 127-28.

alleging the similarity between women and men may ultimately be harmful because such arguments endorse entrenched patriarchal values. The new category "woman" that emerges from such arguments is still male-constructed. This concern is valid. But if radical feminists think that liberal feminist legal scholars do not share this concern, they are mistaken.

As Wendy Williams, a liberal feminist, has recently explained, the problem with the presently constructed sex categories, male and female, is that they are defined as "discontinuous complementary poles."<sup>108</sup> Furthermore, the problem with antidiscrimination law is that it

requires that we be female or male . . . before it will extend its protection. . . . Thus discontinuity and complementarity are the prerequisites to remedies under the antidiscrimination laws: A person must *be* one sex, maintain the appearance (in clothing and effect) of that sex, and prefer sex with the 'opposite' sex. If a person has complied with the requirement that he or she be properly 'sexed,' the law will then provide partial protection against penalties for being of a sex.<sup>109</sup>

Williams does not embrace the law's definition of "woman" when she argues that a woman (as defined by the law) is the victim of sex discrimination. Yet, as much as she may be troubled by the the law's construction of "woman," she is willing to use that construction to prevent even narrower definitions from limiting the possibilities of real women in the world today.

2. *Radical Feminism.* Radical feminism is not easily defined because it takes many forms. For my purposes, it will be sufficient to contrast radical feminist thought with liberal feminist thought. First, whereas liberal feminists emphasize the individual (men and women as individual human beings), radical feminists focus on women as a class, typically as a class that is dominated by another class known as men. Second, whereas liberal feminist equality arguments are based primarily on the similarities between men and women,<sup>110</sup> radical feminists tend to build arguments that focus on

---

<sup>108</sup> Wendy Williams, *First Generation*, *supra* note 4, at 105.

<sup>109</sup> *Id.* at 105-06 n.16.

<sup>110</sup> Yet some liberal feminists do argue that biological differences such as pregnancy ought

the differences between men and women. These differences, argue radical feminists, have been constructed in such a way as to contribute to women's inequality.

Radical feminists in the legal academy include Catharine MacKinnon and Christine Littleton. Littleton has argued for a reconstructed concept of sexual equality which would recognize woman's difference from man.<sup>111</sup> She calls her model "equality as acceptance."<sup>112</sup> To "accept" woman's difference, society must do something more than merely accommodate the difference. I interpret Littleton's "equality as acceptance" thesis to require the centralization of "woman" (her identity, her specificity, her difference from man) in normative debates about how the world ought to be structured. Consider the current dilemma over pregnancy in the workplace. If women had participated equally in designing the workplace from the beginning, employers would not be asked to make accommodations for pregnancy. Instead, the workplace would have been structured so that pregnant workers were not viewed as different from the norm. To move from the male-modeled workplace that currently exists to one that fully accepts women will require some fundamental changes in the model itself. We will have achieved "equality as acceptance" only when woman's difference from man is costless.<sup>113</sup>

Catharine MacKinnon argues that because men have defined women as different, equality arguments cannot succeed.

Put another way, gender is socially constructed as difference epistemologically; sex discrimination law bounds gender equality by difference doctrinally. A built-in tension exists between this concept of equality, which pre-

---

to be accounted for in equality arguments. That is, some liberal feminists join the "special treatment" camp on the issue of pregnancy. See Herma Kay, *Equality and Difference*, *supra* note 4.

<sup>111</sup> Christine Littleton, *Reconstructing Sexual Equality*, *supra* note 4.

<sup>112</sup> *Id.* at 1312-13. I endorse the rhetoric of "acceptance" as opposed to "accommodation" because "equality as accommodation" keeps man at the center and woman at the margin. However, I confess some difficulty in imagining what specific policies might constitute "acceptance" rather than "accommodation." Since we begin with a male model of just about everything, any improvement in that model strikes me as accommodation rather than acceptance. Full acceptance would require rebuilding the model from scratch with women participating equally in the rebuilding. I doubt we can move directly from a male model that excludes the female to one that fully accepts the female.

<sup>113</sup> See *id.* at 1323-35.



supposes sameness, and this concept of sex, which presupposes difference. Sex equality thus becomes a contradiction in terms, something of an oxymoron, which may suggest why we are having such a difficult time getting it.<sup>114</sup>

Recognizing that women as a class are different from men as the two sexes have been socially constructed, MacKinnon would abandon liberal equality arguments. In MacKinnon's view, "an equality question is a question of the distribution of power."<sup>115</sup> The most important difference between women and men is the difference in power. Men dominate women. Men take from women. Furthermore, men have been in control for so long that legal discourse completely ignores the reality of women's lives. Thus, equality theory, as a legal discourse, has focused on public sphere issues like pregnancy in the workplace—issues of import in male lives—rather than focusing on those long-silenced parts of female experience such as rape and other forms of sexual assault.<sup>116</sup>

Using the rhetoric of domination and sexual subordination instead of equality, radical feminists in the MacKinnon camp argue for changes in laws that will end the inequality in power. Sex equality, in this view, affirmatively requires protecting women from such things as sexual harassment, rape and battering by men. An extension of this theory is used to justify a ban on pornography because pornography is thought to contribute to women's sexual subordination.

Some liberal feminists question parts of the radical feminist agenda on grounds that special protections for women often lead to inequality. The most serious disagreement between liberal and radical feminists is over pornography. Radical feminists, especially MacKinnon, support laws that will suppress pornography.<sup>117</sup> Pornography, in their view, is male-created, and defines "woman" as a sexual object. Liberal feminists agree that most pornography is male-created and that male-created pornography defines "woman"

---

<sup>114</sup> CATHARINE MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 2, at 32-33.

<sup>115</sup> *Id.* at 40.

<sup>116</sup> "These experiences have been silenced out of the difference definition of sex equality largely because they happen almost exclusively to women. Understand: for this reason, they are considered *not* to raise sex equality issues." *Id.* at 41.

<sup>117</sup> *See id.* at 175-95 (discussing anti-pornography legislation MacKinnon supports).

as a sexual object.<sup>118</sup> But, argue liberal feminists, to allow the state to ban pornography is to give the state power to define acceptable sex. Since the current state is a creature of male power, there is no reason to believe the state will define acceptable sex in a way that is consistent with an individual woman's own definition of her sexual self.<sup>119</sup> In the pornography debate, the radical feminists' reliance on equality theory as a class-based theory (pornography contributes to woman's inequality) clashes with the liberal feminists' commitment to individual liberty.

Some liberal feminists<sup>120</sup> (as well as postmodern feminists) also challenge the radical feminists' emphasis on "woman" as a class. They argue that radical feminists fail to take account of the many differences among women, focusing only on how all women are different from men. To focus on "woman" as a unitary category is to define her in some essential way, to claim that all women are alike in some essential way.

Radical feminists respond to this challenge by denying the existence of a female essence. Radical feminists embrace totally the claim that women are socially constructed.<sup>121</sup> They do not believe that by deconstructing her we will find some underlying true essence. Rather they believe that by challenging the male construction of the category "woman," we can begin to construct our own category. We may not be able to free ourselves from socially constructed categories, but a woman-defined "woman" is at least an improvement over the present state of affairs.

3. *Cultural Feminism.* Cultural feminists,<sup>122</sup> like radical femi-

---

<sup>118</sup> Some liberal feminists worry, however, that laws used to suppress pornography will be used first against the less powerful members of society who produce pornography, specifically lesbians, who are attempting to create erotic images of women free from male-defined "woman-as-sexual-object" imagery.

<sup>119</sup> Indeed, there is no reason to believe that MacKinnon's view of acceptable sex is something that all women would embrace. See Lucinda Finley, *The Nature of Domination and the Nature of Women: Reflections on Feminism Unmodified*, 82 Nw. U.L. Rev. 352, 382 (1988).

<sup>120</sup> E.g., Wendy Williams, *First Generation*, *supra* note 4, at 107-08.

<sup>121</sup> CATHARINE MACKINNON, *TOWARD A FEMINIST THEORY*, *supra* note 10, at 109.

<sup>122</sup> Although I am carving out cultural feminists as a separate category from radical feminists, the categories are not so easily divided as my taxonomy may suggest. Cultural feminism, as I use the phrase, is often described as relational feminism; that is, feminists who focus on women's relationships. Although I cite to both Martha Fineman and Robin West as examples of legal theorists who are cultural feminists, there are significant differences between these two. Fineman, for example, is clear that women's relationships are socially con-

nists, focus on woman's difference from man. Cultural feminists, however, unlike their radical sisters, embrace woman's difference. Carol Gilligan, for example, argues that women, because of their different life experiences, speak in a "different voice" from their male counterparts.<sup>123</sup> Gilligan identifies the female voice with caring and relationships. Woman's moral vision encompasses this different voice. Woman's difference is good.

Feminists in the Gilligan camp are interested in changing institutions to give equal weight to woman's moral voice. They argue that the category "woman" has not been so much misdefined by men, as it has been ignored and undervalued. Yes, women are nurturing. Yes, women value personal relationships. These attributes are to be valued. Using equality rhetoric, cultural feminists argue for material changes in present conditions that would support woman-valued relationships.

Martha Fineman, for example, has argued for a concept of equality that recognizes and values the special relationship between mother and child.<sup>124</sup> Similarly, Robin West has charged that all modern legal theory is "masculine" because it is based on a view of human beings as primarily distinct and unconnected to each other. A properly constructed feminist jurisprudence would reflect the reality of women's lives—their essential connectedness.<sup>125</sup>

I have defined cultural feminism to include feminists who ascribe fully to the social construction thesis. In such cases, the only difference between radical and cultural feminists is that radical feminists have chosen to emphasize in their theory a negative

---

structured. They are part of what is and law ought to protect these relationships because failure to do so causes real harm to existing women. Whether these relationships ought to be preserved in their current form is a separate question. West's views, by contrast, tend towards biological determinism. Women's relationships occur because of woman's nature. For West, woman's nature is not only what is, but forms the basis for what ought to be. Thus, according to West, we ought to build legal theories to protect these relationships because these relationships are good. See *infra* notes 124-27 and accompanying text (discussing Martha Fineman's and Robin West's conception of equality).

<sup>123</sup> CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982).

<sup>124</sup> Martha Fineman, *Dominant Discourse, Professional Language and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727 (1988) [hereinafter *Dominant Discourse*]; Martha Fineman, *Implementing Equality: Ideology, Contradiction, and Social Change; A Study of Rhetoric and Results in the Regulation of the Consequences of Divorce*, 1983 WIS. L. REV. 789 [hereinafter *Implementing Equality*].

<sup>125</sup> Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1985).

aspect of "woman"—her sexual objectification—whereas, cultural feminists emphasize a positive aspect—her special bond to others.<sup>126</sup> Because their emphasis is different, radical and cultural feminists may contribute differently to the project of self-definition.<sup>127</sup>

Some cultural feminists, however, can be understood to support the concept that "woman," although currently constructed in a certain way, has a discoverable natural essence.<sup>128</sup> Whether viewed as natural or socially constructed, woman's capacity for caring and connection has provided substance for an interesting debate between radical feminist MacKinnon and cultural feminist Gilligan. Gilligan's work encourages us to value woman's view of herself and the world around her. MacKinnon, however, is suspicious of this "different voice." This voice, after all, has been constructed in response to the patriarchy. For those who subscribe to the social construction thesis, the voice is just another voice of the patriarchy. Alternatively, if there is such a thing as a natural or authentic "woman," how can we know that this is her voice? MacKinnon argues that until women cease to be victims of subordination they cannot speak for themselves.<sup>129</sup>

This argument has a certain Catch-22 effect. Woman-identified

---

<sup>126</sup> Although feminists in law tend to concentrate on the special bond between mother and child, other feminist theorists focus on the special bonds between adult women. See, e.g., MARY DALY, *GYN/ECOLOGY* (1978); AUDRE LORD, *SISTER OUTSIDER* (1984); ADRIENNE RICH, *ON LIES, SECRETS AND SILENCE* (1979).

<sup>127</sup> Radical feminists can fight against the sexual objectification of woman without intentionally creating a positive concept of woman as sexual subject. And cultural feminists can fight to protect woman's special bond to others without intentionally adopting the definition of "woman" as archetypal nurturer. Yet, in both cases, legal arguments produce rhetoric that shape our future reality. Some forms of feminist argument may reshape our concept of men more than our concept of "woman." I have in mind MacKinnon's arguments that men have all the power and that men abuse women.

<sup>128</sup> I understand Robin West to take that position. Robin West, *Feminism, Critical Social Theory and Law*, 1989 U. CHI. LEGAL F. 59, 84-96. Ruth Colker's search for the authentic self may be interpreted by some as a search for the pre-social, natural self, but I do not understand her that way. Since she equates authentic-self with aspirational-self, she appears to contemplate a dynamic feminist creation of self (in society), rather than a discovery of a pre-existing self. Ruth Colker, *Feminism, Theology, and Abortion: Toward Love, Compassion, and Wisdom*, 77 CALIF. L. REV. 1011, 1020 n.35 (1989) [hereinafter *Feminism, Theology, and Abortion*].

<sup>129</sup> CATHARINE MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 2, at 39. See also Ellen DuBois, Mary Dunlap, Carol Gilligan, Catharine MacKinnon & Carrie Menkel-Meadow, *Feminist Discourse: Moral Values and the Law—A Conversation*, 34 BUFFALO L. REV. 11, 74 (1985).

values, such as caring and connection to others, are suspect because they are values that women have created in response to the patriarchy. We value caring because that is what our oppressors have caused us to value (because we define ourselves in relation to our oppressors, we aren't really engaging in self-definition). But if all women are victims of the patriarchy, how can any woman ever claim knowledge of what is truly in woman's best interest? How can we know that any equality arguments will further the best interests of women?

There must be some way to free ourselves sufficiently from the patriarchy to engage in the project of self-definition. Feminist theorists outside the field of law have argued in favor of separatism at least as an interim step in creating a woman-defined "woman."<sup>130</sup> But legal theorists have been obsessed with equality, a concept which is inconsistent with separatism.<sup>131</sup>

4. *Postmodern Feminism.* Postmodern feminists eschew the idea of unitary truth, of objective reality. They readily admit that categories, especially gender categories, are mere social constructs. Equality, too, is a social construct. It is true that these constructs, as products of the patriarchy, are in need of a feminist reconstruction. But postmodern feminism tells us to beware of searching for a new truth to replace the old. There simply is no such thing as the essential "woman." There is no such thing as the woman's point of view. There is no single theory of equality that will work for the benefit of all women. Indeed, there is probably no single change or goal that is in the best interest of all women.

Some would argue that the concept "postmodern feminism" is an oxymoron. It is a phrase that combines two concepts—postmodernism and feminism—that cannot logically coexist. For if postmodernism views the category "woman" as being so multifarious that it denies unitariness, how can it ever ascribe to be feminist, since feminism is a theory that focuses on the unitary category "woman"?

---

<sup>130</sup> See, e.g., Radicalesbians, *The Woman Identified Woman*, reprinted in FOR LESBIANS ONLY: A SEPARATIST ANTHOLOGY 17 (Sarah L. Hoagland & Julia Penelope eds. 1988); Marilyn Frye, *Some Reflections on Separatism and Power*, reprinted in FOR LESBIANS ONLY: A SEPARATIST ANTHOLOGY, *supra*.

<sup>131</sup> But see Ruth Colker, *Feminism, Theology, and Abortion*, *supra* note 128 (arguing that feminist theology and the concept of authentic self can help us bridge the gap between social construction and self-definition).

My own answer to this supposed conundrum is that postmodern feminism does not focus on the category "woman." Rather, it focuses on the situated realities of women, plural. Postmodern feminists question earlier feminist attempts to redefine the category "woman." Any definition, even one articulated by feminists, is limiting and serves to "tie the individual to her identity as a woman."<sup>132</sup> Furthermore, feminists who support any single definition of "woman" are viewed by postmodernists as tending toward essentialism.<sup>133</sup>

One need not embrace postmodernism completely to criticize the tendency toward essentialism found in radical and cultural feminist writings. Wendy Williams, usually viewed as a liberal feminist, has raised concerns about the homogeneity of certain feminist concepts of "woman."<sup>134</sup> Similarly, Angela Harris has argued that the meta-theories of gender constructed by Catharine MacKinnon and Robin West rely on a concept of "woman" that has been abstracted from the experience of white women.<sup>135</sup> I have made a similar claim that the "woman" constructed by these theorists also appears to be heterosexual.<sup>136</sup> If feminists are fighting for maximum liberation, then equality arguments and theories aimed primarily at white heterosexual women will not accomplish that task.

At the same time, postmodern thought poses a certain dilemma. Any theory requires some degree of abstraction and generalization. Thus, if feminists embrace the particular situated realities of all individual women, plural, we will find it difficult to build a theory, singular, to combat oppression. As to the category "woman," postmodernism suggests that it is a fiction, a non-determinable identity. Linda Alcoff complains that whereas feminist definitions of "woman" tend toward essentialism, postmodernism tends toward nominalism.<sup>137</sup>

I am reluctant to classify any feminist theorists within the legal academy as purely postmodern, although a number of such schol-

---

<sup>132</sup> Linda Alcoff, *supra* note 11, at 305.

<sup>133</sup> *Id.*

<sup>134</sup> Williams, *First Generation*, *supra* note 4.

<sup>135</sup> Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

<sup>136</sup> Patricia Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERK. WOMEN'S L.J. 191 (1989-90).

<sup>137</sup> Linda Alcoff, *supra* note 11, at 307.

ars do incorporate postmodern themes in their writing. For example, strains of postmodern thought can be found in the critical feminist legal scholarship of Frances Olsen<sup>138</sup> and Deborah Rhode.<sup>139</sup> Both Katharine Bartlett and Martha Minow have focused on the importance of multiple perspectives in the construction of reality.<sup>140</sup> Margaret Jane Radin, in writing about feminism and pragmatism, echoes the postmodern feminist's rejection of abstract universal theory in favor of practical solutions to concrete situations.<sup>141</sup>

Within the legal academy, the feminist theorists most closely aligned with postmodern feminism is Drucilla Cornell. Building on the work of deconstructionist Jacques Derrida and the psychoanalytic theories of Jacques Lacan and Julia Kristeva, Cornell shows us how we might reconstruct "woman" without resorting to essentialism or unitary concepts. She names her brand of feminism "ethical feminism" and contrasts it with liberal and radical feminism.<sup>142</sup> Rather than deriving what "woman" ought to be from the reality of what is, Cornell encourages us to create, with the help of allegory and myth, an "imaginative universal,"<sup>143</sup> a mythology of the feminine in which all women can find themselves.<sup>144</sup> This ap-

---

<sup>138</sup> See, e.g., Frances Olsen, *The Sex of Law*, in *THE POLITICS OF LAW* 453, 458 (David Kairys ed. 1990); Frances Olsen, *Feminist Theory in Grand Style* (Book Review), 89 COLUM. L. REV. 1147, 1169-77 (1989) (reviewing CATHARINE MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 2) (explaining, with approval, feminist objections to grand theory, yet defending Catharine MacKinnon's grand theory as politically useful); Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983) (challenging dichotomous thinking and embracing androgyny as a goal that allows for multiplicity and diffusiveness).

<sup>139</sup> See, e.g., Deborah Rhode, *Introduction: Theoretical Perspectives on Sexual Difference*, in *THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE* 1, 7-9 (Deborah Rhode, ed. 1990); Deborah Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617 (1990).

<sup>140</sup> See Katharine Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990); Martha Minow, *Beyond Universality*, 1989 U. CHI. LEGAL F. 115; Martha Minow, *Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987).

<sup>141</sup> "If feminists largely share the pragmatist commitment that truth is hammered out piecemeal in the crucible of life and our situatedness, they also share the pragmatist understanding that truth is provisional and ever-changing." Margaret Jane Radin, *The Pragmatist and the Feminist* 13 (manuscript available from author) (forthcoming in S. CAL. L. REV. 1990).

<sup>142</sup> Drucilla Cornell, *The Doubly-Prized World: Myth, Allegory and the Feminine*, 75 CORNELL L. REV. 644 (1990).

<sup>143</sup> *Id.* at 644.

<sup>144</sup> Cornell's emphasis on the significance of myth in constructing a concept of "woman" reminds me of a remark Carolyn Heilbrun once made at a faculty workshop on writing

peal to myth carries with it a call for collective imagining, informed by women's realities, but not limited by them. Cornell's "ethical feminism" offers us the possibility of building a shared concept of "woman" that is always more than we are individually, and thus is never limiting.

## V. THE FUTURE

I have identified the four schools of feminist thought, or feminisms. There are, of course, other ways to categorize these feminisms.<sup>145</sup> Whatever the categorization, the boundaries are never as fixed as the labels make them seem. And some feminists slip in and out of the various categories.<sup>146</sup> I chose to draw the lines as I drew them to emphasize one aspect of the various feminisms: how they see the category "woman" as she is presently constructed by male society. Liberal feminists, according to my taxonomy, see "woman" defined primarily as someone confined to the private sphere.<sup>147</sup> Radical feminists see her as man's sexual object. Cultural feminists see her as caring and connected to others. Finally, postmodern feminists see her as so overly-determined that she is an absence, not a presence.<sup>148</sup>

These different perspectives reflect the variety of woman's experience. Since feminist theory is built from the real life experience of real women, our theories will necessarily be varied if they are to capture the breadth of that experience. Our theories are built to address the harms that we see. But our theories must not divide

---

women's biographies at the University of Southern California Law Center. In response to a female law professor's characterization of her life as unremarkable, Professor Heilbrun said:

But you are living an extraordinary life. It is extraordinary because you are not living one of the stories that history has made available in this culture for female lives. You are not a wife. You are not a mother. Your story as a lesbian and a professional woman is unique. You are creating a new story as you live it. And that is not an easy thing to do.

See generally CAROLYN HEILBRUN, *WRITING A WOMAN'S LIFE* (1988).

<sup>145</sup> Rosemarie Tong, for example, makes the following classifications: liberal, Marxist, radical, psychoanalytic, socialist, existentialist and postmodernist. ROSEMARIE TONG, *supra* note 101.

<sup>146</sup> Martha Fineman, for example, tells me she identifies herself more as a socialist feminist than a cultural feminist. Wendy Williams, although identified with liberal feminism, nonetheless embraces the social construction thesis of radical feminism.

<sup>147</sup> See Wendy Williams, *First Generation*, *supra* note 4.

<sup>148</sup> Luce Irigaray, *This Sex Which is Not One* in NEW FRENCH FEMINISMS 99 (Elaine Marks & Isabelle de Courtivron eds. 1981).



us. They must not prevent us from seeing the harms that others see.

Catharine MacKinnon warns that the proliferation of feminisms "in the face of women's diversity" can be viewed as a ploy of liberal pluralism.<sup>149</sup> I do not believe, however, that the mere existence of four (or more) feminisms places them in a pluralistic posture against one another. We can acknowledge the diversity of women's experience without adopting pluralism's neutral stance towards each other's theories. My theory may be right for me and your theory may be right for you, but neither theory is feminist if it ignores the reality of the other's experience.

Wendy Williams has suggested that one's starting point for theory is determined in part by "when and where we entered."<sup>150</sup> It should surprise no one that white, middle-class, college-educated women looked around themselves and noticed that their sex prevented them from equal access to the the public sphere. It should surprise no one that mothers have looked around them and seen the ways in which motherhood has shaped their lives.<sup>151</sup> Lesbian theorists speak from their experience as lesbians.<sup>152</sup> African-American theorists speak from their experiences of racial subordination.<sup>153</sup> Theorists who have been victims of sexual assault and abuse have focused on these experiences in building theory.<sup>154</sup>

---

<sup>149</sup> CATHARINE MACKINNON, *TOWARD A FEMINIST THEORY*, *supra* note 10, at xii.

<sup>150</sup> Wendy Williams, *First Generation*, *supra* note 4, at 110 (borrowing the phrase from PAULA GIDDINGS, *WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA* (1984)).

<sup>151</sup> See, e.g., ADRIENNE RICH, *OF WOMAN BORN* (1976); Martha Fineman, *Dominant Discourse*, *supra* note 124; Martha Fineman, *Implementing Equality*, *supra* note 124; Stephanie Wildman, *The Power of Women* (Book Review), 2 YALE J.L. & FEMINISM 435 (1990) (reviewing CATHARINE MACKINNON, *TOWARD A FEMINIST THEORY*, *supra* note 10).

<sup>152</sup> See, e.g., MARY DALY, *GYN/ECOLOGY* (1978); MARILYN FRYE, *THE POLITICS OF REALITY: ESSAYS IN FEMINIST THEORY* (1983); AUDRE LORDE, *SISTER OUTSIDER* (1984); ADRIENNE RICH, *ON LIES SECRETS AND SILENCE* (1979).

<sup>153</sup> See, e.g., bell hooks, *TALKING BACK: THINKING FEMINIST, THINKING BLACK* (1989); AUDRE LORDE, *SISTER OUTSIDER* (1984); Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139; Judy Scales-Trent, *Commonalities: On Being Black and White, Different, and the Same*, 2 YALE J.L. & FEMINISM 290 (1990); Patricia Williams, *On Being the Object of Property*, 14 SIGNS 1 (1988).

<sup>154</sup> See, e.g., SUSAN ESTRICH, *REAL RAPE* (1987); Lynne Henderson, *What Makes Rape a Crime* (Book Review), 3 BERK. WOMEN'S L.J. 193 (1987-88) (reviewing SUSAN ESTRICH, *REAL RAPE* (1987)); Robin West, *The Difference in Women's Hedonic Lives*, 3 WIS. WOMEN'S L.J. 81 (1987).

What we experience shapes our view of the world. For feminist theorists, our experiences as women shape our understanding of male power. Our theories reflect that understanding. We begin from where we stand. But none of the feminists I know claim to be limited to theories derived solely from their own personal experience. Rather, feminist method entails access to a broader range of women's experience.

Some feminists embrace consciousness raising as the paradigm for feminist method.<sup>155</sup> Consciousness raising may be defined broadly as a process whereby women listen to each other as we tell our personal stories. Often these are stories that have never been told before. They include stories that have been silenced by the dominant discourse. Through consciousness raising, some women gain knowledge of other women's experience and thus are able to build theory that reflects a broad range of women's experience. Indeed, the uncovering of previously-silenced stories has helped set the agenda for much feminist action.<sup>156</sup>

I began this Essay with the observation that feminist legal theorists have spent too much time debating equality and not enough time debating the meaning of self-definition for women. The equality debate has at times assumed *sub silentio* varying definitions of what "woman is" and what "woman should be." The equality debate has also assumed *sub silentio*, at a minimum, that "woman" is and, perhaps further that "woman" *should be*, a working definition or category for law.

I propose that, in the future, feminist legal theorists be more explicit about their understanding of what "woman is" and what "woman should be."<sup>157</sup> I believe this conversation about the mean-

---

<sup>155</sup> See, e.g., CATHARINE MACKINNON, TOWARD A FEMINIST THEORY, *supra* note 10; Christine Littleton, *Feminist Jurisprudence: The Difference Method Makes* (Book Review), 41 STAN. L. REV. 751 (1989) (reviewing CATHARINE MACKINNON, FEMINISM UNMODIFIED, *supra* note 2).

<sup>156</sup> For example, Betty Friedan gave voice to many previously-silenced women who were dissatisfied with their confinement to the private sphere and helped lead to legislation intended to open the public sphere for women. BETTY FRIEDAN, THE FEMININE MYSTIQUE (1963). "Speak-outs" on sexual harassment made visible a harm that the law had ignored and led to new legal interpretations of sex equality in the workplace. See CATHARINE MACKINNON, SEXUAL HARRASSMENT OF WORKING WOMEN (1979).

<sup>157</sup> Richard Wasserstrom has written insightfully about the problem of confusing what "is" with what "ought to be" in our conversations about equality. See RICHARD WASSERSTROM, *Racism and Sexism*, in PHILOSOPHY AND SOCIAL ISSUES: FIVE STUDIES 11 (1980).

ing of "woman" is, at least for the moment, much more important to feminist theory than the development of any sort of abstract equality theory. To have the conversation is to engage in the process of self-definition. We must have the conversation before we can conclude whether "woman," however defined, is a category that ought to continue.

Some feminist legal theorists have already steered away from the equality debate and focused more directly on the question of self-definition. Robin West, in particular, has focused directly on the meaning of "self" for feminist theorists, warning us to beware of postmodernism's rejection of essentialism.<sup>158</sup> Ruth Colker's recent work grapples with the meaning of authentic existence for women.<sup>159</sup> And Drucilla Cornell encourages us to continue the search for the feminine employing myth as a necessary part of the process.<sup>160</sup> I believe this discussion of the meaning of self and questioning of who defines whom is a useful development for the future of feminist legal theory.

The challenge I pose to feminist legal theorists is a challenge to develop legal theories that will support the process of self-definition—theories that will support the conversation. By focusing on the process of self-definition, I mean to suggest that we more fully acknowledge the importance of feminist method in building our substantive theories.

I have suggested that consciousness raising is the cornerstone of feminist method. Consciousness raising is about giving voice to the unknown in women's experience. Consciousness raising makes available stories that are personal and private. Consciousness raising brings new understanding by making known the unknown. Legal theories to support consciousness raising would include not only theories that protect speech, but theories that encourage the right kind of listening, a listening that privileges (temporarily) the previously silenced.

Because we have learned that the lived realities of different

---

<sup>158</sup> See Robin West, *Feminism, Critical Social Theory and Law*, *supra* note 128, at 59.

<sup>159</sup> See, e.g., Ruth Colker, *Feminism, Theology, and Abortion*, *supra* note 128, at 1011; Ruth Colker, *Feminism, Sexuality, and Self: A Preliminary Inquiry into the Politics of Authenticity* (Book Review), 68 B.U.L. REV. 217 (1988) (reviewing CATHARINE MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 2).

<sup>160</sup> Drucilla Cornell, *The Doubly-Prized World: Myth, Allegory and the Feminine*, *supra* note 142.

women are different, we need to pay attention to these differences as we discuss the meanings of "woman" for the future of feminist legal theory. Listening to other women is central to feminist method. Taking what they say seriously is essential.<sup>161</sup> Listening to what "is" in other women's lives contributes to my ability to understand what "ought to be." Debating what ought to be is different from listening to what is. Feminist method can include debates about what ought to be—debates about normative truths—but those debates must recognize our incomplete understanding of what is.

Katharine Bartlett's description of "positionality" explains the connection between partial knowledge and truth and suggests how we might see beyond our own positions of limited knowledge:

Truth is partial in that the individual perspectives that yield and judge truth are necessarily incomplete. . . . [T]he key to increasing knowledge lies in the effort to extend one's limited perspective. . . . My perspective gives me a source of special knowledge, but a limited knowledge that I can improve by the effort to step beyond it, to understand other perspectives, and to expand my sources of identity. To be sure, I cannot transcend my perspective . . . . But I can improve my perspective by stretching my imagination to identify and understand the perspectives of others.<sup>162</sup>

I agree. Understanding and knowledge come from experience. We increase our knowledge and we approach a more comprehensive truth when we include perspectives that are derived from the experiences of others along with our own. Feminist theorists have made valuable contributions to law by adding a female perspective to legal discussions. But feminist theorists should not privilege one perspective over another. Our contributions are especially valuable, not because we speak from a female perspective, but because we speak from a previously-silenced perspective.

As we continue our conversations about the meaning of "wo-

---

<sup>161</sup> "Taking all women seriously should mean respecting women's own conceptions of themselves and their interests." Martha Minow, *Beyond Universality*, *supra* note 107, at 130-31.

<sup>162</sup> Katharine Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 881-82 (1990).

man," we need to resist the privileging of one woman's perspective over another. We must pay special attention to those from whom we differ most, because we are unlikely to have accepted their perspectives as much as our own. And we must remember that the dominant discourse often silences those to whom we most need to listen. Consider, for example, the plight of lesbians and gay men who risk the loss of job and family by speaking the truth about their lives. Imagine what it must be like to live a life in secret and to construct a different truth for public view. How can we ever hear all perspectives when society attaches such costs to speaking the truth about one's self-definition?

For this reason, we should fashion feminist legal theories with a view to uncovering the silences.<sup>163</sup> At the same time, these theories should reflect our obligations to listen and to participate positively in the construction of another's self-identity. Our theories must not rely on definitions that limit another's self-conception. We must be principled in our interactions with one another, yet we must also be always open to the truth of the other's story.

Feminist method, as I conceive it, is about being in the world in a way that embraces both our separateness and our connectedness with others.<sup>164</sup> Similarly, self-definition is not solely an individual enterprise grounded in our separation from each other, nor solely a group project impervious to individual realities. Thus, we need to build feminist legal theories that support the telling of our individual truths, as well as theories that protect the space we share with others as we construct our identities. I believe it is time to recapture from the patriarchy such principles as individual autonomy,<sup>165</sup>

---

<sup>163</sup> See, e.g., Janet Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915 (1989) (arguing that courts ought to strike down laws that penalize homosexuals so that we can speak and be heard in the political process).

<sup>164</sup> The "we" (our) in this sentence is intended to encompass men as well as women. I believe the "separation thesis" and the "connection thesis" are both true for men and women, although I can only say with authority that they are both true for me. For a further discussion of the "separation thesis" and the "connection thesis" and a suggestion that the "separation thesis" is male whereas the "connection thesis" is female, see Robin West, *supra* note 125.

<sup>165</sup> Today's feminists either do not discuss a theory of individuality or they unself-consciously adopt the competitive, atomistic ideology of liberal individualism. There is much confusion on this issue in . . . feminist theory . . . . Until a conscious differentiation is made between a theory of individuality that recog-

privacy,<sup>166</sup> free speech,<sup>167</sup> intimacy and association.<sup>168</sup>

I agree with the postmodern insight that there is no single, unitary definition of "woman." Indeed, it is precisely because there is no single definition of "woman," that our conversations about the meaning of "woman" become so important. I propose that we put substantive theories (such as equality) to one side until we have continued our conversations further. In the meantime, we might turn our attention to substantive theories that will protect our method.

---

nizes the importance of the individual within the social collectivity and the ideology of individualism that assumes a competitive view of the individual, there will not be a full accounting of what a feminist theory of liberation must look like for Western society.

ZILLAH EISENSTEIN, *THE RADICAL FUTURE OF LIBERAL FEMINISM* 5 (1981).

<sup>166</sup> Privacy, as it has been constructed by male liberal theory, keeps the state out of individual space in a way that privileges male power. Thus, Catharine MacKinnon criticizes judicial reliance on privacy doctrine in the abortion decisions, because it leaves many women privately pregnant with no access to needed abortions. See CATHARINE MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 2.

<sup>167</sup> The guarantee of free speech benefits those who have the power to draw listeners: those with the greatest access to the market of ideas. The construction of "woman" is a product of this market. Both government and corporate funding of speech, from National Endowment for the Arts grants to television commercials, impact seriously on the concept of "woman" in this society. We need a concept of free speech that recognizes existing inequalities in power and re-conceives the role of the "state" in providing access to listeners.

<sup>168</sup> Intimacy and association are values that need to be extended to protect those relationships that are essential to our constructions of self. These include same-sex couples as well as other relationships with non-biological families. See Kenneth Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 635 (1980); Nancy Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459 (1990).

.