ESSAYS

GENDER LAW

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The inauguration of the DUKE JOURNAL OF GENDER LAW & POLICY represents an exciting step in the institutionalization of a subject area in academic law formerly found only at the fringe of legal scholarship and law school curriculums. Often shunned as a political activity inappropriate to institutions committed to academic rigor, objectivity, and neutrality, gender law has begun to lay down roots as a disciplined set of inquiries that enhance the rigor of conventional legal study and offer tools for improving the objectivity and neutrality of law, even as it challenges the conventional meanings of those concepts.

There are two principal ways scholars have organized the field of gender law. The first is to draw together legal doctrines and analyses from conventional legal fields that seem to have special relevance to women such as employment law, family law, criminal law, and constitutional law. This approach is typical in law school “sex-based discrimination” and “women and the law” courses. The second is to identify theoretical perspectives that cross-cut conventional legal boundaries and model alternative relationships between gender and law. This more theoretical approach is common in feminist jurisprudence or feminist legal theory courses. I find a combination of these two approaches desirable but, as my own textbook in this field demonstrates,1 I believe that the alternative theoretical perspectives are what makes gender a subject in its own right, as opposed to a set of derivations from other, more well-established areas of study. The purpose of this Essay is to make gender law more accessible and more understandable as an academic field of its own by providing an overview of these perspectives. The categories I use—formal equality, substantive equality, nonsubordination theory, different voice theory, and postmodern feminism—are not mutually exclusive. They have permeable boundaries and encompass multiple themes and modes of analysis. Moreover, they do not, in themselves, capture all of the rich diversity and creativity of this maturing area of legal study. My hope, however, is that they will provide a simplified structure for understanding the common questions posed in this field and for appreciating

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1. See KATHARINE T. BARTLETT, GENDER AND LAW: THEORY, DOCTRINE AND COMMENTARY (1993). I have derived much of this Essay directly from sections of this book, with permission of the publisher, Little Brown. All rights reserved.
some of the complexity that has stimulated the initiation of this new academic publication.

I. FORMAL EQUALITY

Formal equality is the familiar principle that individuals who are alike should be treated alike, according to their actual characteristics, rather than stereotypical assumptions. The principle of formal equality can be applied either to single individuals, whose right to be treated on their own merits can be viewed as a right of individual autonomy, or to groups, whose members seek the same treatment as members of other, similarly situated groups. What makes an issue one of formal equality is that the claim is limited to treatment in relation to another, similarly situated individual or group and does not extend to demands for some particular substantive treatment.

Feminist litigators and academics advocated legal reform in the 1970s using primarily a formal equality model that emphasized the similarities between men and women and the desirability of same-treatment solutions to legal problems. They joined with their commitment to equal treatment a belief in the importance of autonomy and the desirability that both women and men be free to make their own choices, unconstrained by artificial barriers and prohibitions. The success of this approach is evidenced by the fact that most Supreme Court cases striking down sex-based classifications and practices have been grounded within a formal equality framework, as

2. A well-known example is Ruth Bader Ginsburg, now Associate Justice of the Supreme Court, who, as a litigator, challenged sex-based classifications that discriminated against men as well as those that discriminated against women. See, e.g., Kahn v. Shevin, 416 U.S. 351 (1974) (arguing that widowers should have same property tax exemption as widows); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (arguing that widowers’ Social Security benefits should be same as widows’); Craig v. Boren, 429 U.S. 190 (1976) (on brief for amicus curiae ACLU, arguing that drinking age for males should be same as that for females); Frontiero v. Richardson, 411 U.S. 677 (1973) (on brief for amicus curiae, arguing that husbands should be entitled to dependency benefits under military benefits package on same basis as wives). Justice Ginsburg’s defense of formal equality as the appropriate approach for ending sex-based discrimination is apparent in her published works as well. See, e.g., Sex and Unequal Protection: Men and Women as Victims, 11 J. FAM. L. 347 (1971); Gender and Constitution, 44 U. CIN. L. REV. 1 (1975); The Equal Rights Amendment Is The Way, 1 HARV. WOMEN’S L.J. 19 (1978); Sex Equality and the Constitution, 52 TUL. L. REV. 451 (1978); Sexual Equality Under The Fourteenth and Equal Rights Amendments, 1979 WASH. U. L.Q. 161 (1979); Ratification of the Equal Rights Amendment: A Question of Time, 57 TEX. L. REV. 919 (1979).

3. The first of these cases was Reed v. Reed, 404 U.S. 71 (1971) (invalidating statutory preference for men in appointment of estate administrators). Of the cases that followed, many struck down practices which disadvantaged men rather than women. See, e.g., Frontiero v. Richardson, 411 U.S. 677 (1973) (invalidating requirement that husbands, but not wives, prove spousal dependency in order to qualify for dependency benefits); Orr v. Orr, 440 U.S. 268 (1979) (invalidating statute that allowed only women to receive alimony); Craig v. Boren, 429 U.S. 190 (1976) (invalidating statute that established lower drinking age for females). Among the other most important cases striking down sex-based classifications within a formal equality framework are Stanton v. Stanton, 421 U.S. 7 (1975) (invalidating statute that imposed child support duties on parents for their sons longer than for their daughters); Kirchberg v. Feenstra, 450 U.S. 455 (1981) (invalidating statute that gave husbands control and management powers over marital property).
have most federal anti-discrimination statutes. Most scholars continue to adhere, in varying degrees, to empirical methods characteristic of a formal equality approach, whereby the factual assumptions of sex-based constraints are examined, stereotypes exposed, and barriers to free choice removed.

Formal equality has met the most resistance when confronted with rules and practices that distinguish between men and women on the basis of sex-unique characteristics, especially pregnancy and childbearing. As explained below, some critics of formal equality urge special measures to overcome the disadvantages of these characteristics, such as mandatory job security for women who leave work to have babies. Formal equality advocates oppose such “special” measures when comparable benefits are not provided to workers who leave work for other disabilities. While acknowledging that pregnancy and childbearing are biologically unique, these advocates contend that the differences are less significant and less relevant to employee benefit policies than the similarities. They point out that the arguments used to justify special accommodations for pregnant women are the same as those used to impose undesirable “protections” or limitations on women, such as maximum hour restrictions not imposed on men, mandatory maternity leave, and the exclusion of pregnancy from disability insurance plans. Given the dangers of special treatment, formal equality advocates prefer to view pregnancy as similar to other disabilities that men also experience, and thus entitled to treatment no worse, and no better, than those conditions.


5. As gender law has evolved, the empirical methods developed under the formal equality approach have been extended to reveal increasingly subtle patterns of sex discrimination. Such methods have been used, for example, to reveal how apparently neutral appearance and personality standards in the workplace interact with stereotypes about women to disadvantage women’s employment opportunities. See Mary Whisner, Gender-Specific Clothing Regulation: A Study in Patriarchy, 5 HARV. WOMEN’S L.J. 73 (1982); Mary F. Radford, Sex Stereotyping and the Promotion of Women to Positions of Power, 41 HASTINGS L.J. 471 (1990); Martha Chamallas, Listening to Dr. Fiske, The Easy Case of Price Waterhouse v. Hopkins, 15 VT. L. REV. 89 (1990).

6. See infra note 16.


9. See Muller v. Oregon, 208 U.S. 412, 421-22 (1908) (“[woman’s] physical structure and a proper discharge of her maternal functions . . . justify legislation to protect her from the greed as well as the passion of man”).


12. The most articulate present-day advocate for formal equality is Wendy Webster Williams, who argues across a variety of contexts that women gain more than they lose by
II. SUBSTANTIATIVE EQUALITY

While a formal equality approach judges the form of a rule, requiring that it treat women and men on the same terms without special barriers or benefits due to their sex, a substantive equality approach looks to a rule’s results or effects. It points out that equal treatment leads to outcomes that are unequal because of differences between men and women. Advocates of substantive equality demand that rules take account of these differences in order to eliminate the disadvantages they bring to women.

Just what differences should be recognized and how they should be taken into account is not, of course, self-evident. The different possibilities have resulted in several models of substantive equality, each of which reflects somewhat different substantive ideals.

One version of substantive equality attempts to remedy the effects of past discrimination. For example, women historically have been excluded either by law or by gender role expectations from having certain jobs or earning wages comparable to those earned by men.13 Affirmative action and comparable worth schemes are examples of remedial measures designed to reverse the effects of past discrimination. These remedies achieve their goals, respectively, by boosting women into occupational fields dominated historically by men14 and by restructuring wage scales to eliminate the effects of past patterns of gender-based job segregation.15

Another type of substantive equality focuses on biological differences between women and men. To counteract the disadvantages women experience as a result of their unique capacity to bear children and to breastfeed, many feminist theorists advocate special accommodations to women to eliminate these disadvantages, such as job security for women who leave the workplace to bear children.16 Legislation mandating this accommodation...
was upheld by the United States Supreme Court even though it was not available for workers who leave work for other reasons.17

Others have urged more radical substantive equality approaches that look beyond biological differences to social norms and practices that disadvantage women. Various social pressures, for example, steer women into lower-paying occupational categories, encourage their economic dependence on men, and lead them to be the primary caretakers of children. Christine Littleton proposes an “acceptance” model of substantive equality that attempts to equalize the costs of engaging in female activities, whether biologically or socially defined.21

Substantive equality theory focuses on outcomes, but does not necessarily require identical or mirror-image outcomes. Some substantive equality advocates favor equal treatment in some situations and special accommodation in others, insisting, for example, on equal access for women to men’s athletic teams, private clubs, and colleges, but on separate teams, clubs, and colleges for women to meet their special needs.22 In family law, substantive equality theorists have urged the elimination of rules favoring men while arguing for the adoption of child custody standards that take special account of women’s disproportionate investment in childrearing, and standards for property division and alimony at divorce that are more likely to eliminate society-wide disadvantages faced by women than current standards do. In each instance, the argument is not that women should be entitled to whatever is most favorable to them but that, depending on the


18. According to Department of Commerce figures, 50.7 percent of all women work in only nineteen of the 503 occupational categories. All except three of these nineteen occupations are at least sixty percent female, and all but four of the nineteen occupations pay in the bottom half of 421 ranked earnings. See U.S. BUREAU OF THE CENSUS, Women in the American Economy, Current Population Reports (Nov. 1986): 18, 23, cited in Mary Ann Mason, Beyond Equal Opportunity: A New Vision for Women Workers, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 393, 397 n.18 (1992).


21. See Christine Littleton, Reconstructing Sexual Equality, 75 CAL. L. REV. 1279 (1987). Thus, for example, she argues that society should recognize as equal, in economic terms, the job of mother and “warrior.” Id. at 1329-30.

22. See, e.g., Deborah L. Rhode, Association and Assimilation, 81 NW. U. L. REV. 106 (1986) (arguing the law should not allow all-men’s colleges, but should allow all-women’s colleges until discrimination no longer puts women at a disadvantage).


circumstances, equality sometimes requires equal treatment and sometimes requires special measures to counteract men's advantages over women.

III. NONSUBORDINATION THEORY

The nonsubordination perspective shifts the focus of attention from gender-based differences to the imbalance of power between women and men. This perspective, also known as dominance theory, makes the relevant inquiry not whether women are like or unlike men, but whether a rule or practice furthers the subordination of women. Correspondingly, similarities and differences between women and men are important under this theory not as the inevitable givens to which the law must respond, but as social constructs designed to make one set of social arrangements seem more natural or legitimate than another.

Nonsubordination theory bears a complex relationship to equality theory. Catharine MacKinnon, nonsubordination theory's most well-known proponent, has strongly criticized both formal and substantive equality approaches on the grounds that each approach maintains men as the reference point—the basic norm—to which women are compared. As a result, women's equality interest is limited to that which men have already defined for their own needs and does not extend to matters that might more nearly correspond to women's needs. At the same time, MacKinnon's principal work in the areas of sexual harassment and pornography demonstrates how purportedly neutral practices and legal concepts operate as forms of sexual discrimination which disadvantage, or "subordinate," women in relation to men. Thus, even as she presents nonsubordination theory as an alternative to equality theory, MacKinnon retains a comparative framework of analysis.

A major contribution of nonsubordination theory to feminist method is its emphasis on women's accounts of their own experiences, both as a challenge to conventional understandings of objectivity and as a source of empirical truth. According to MacKinnon, conventional understandings of objectivity disguise as point-of-view-lessness what is actually a male point of view. The turn to women's experiences to expose this disguise and to help women ascertain their own objective truths is the feminist method of "consciousness-raising."

26. For further discussion regarding the use of narratives in feminist jurisprudence see infra text accompanying notes 83-85.
The outlines of MacKinnon's dominance theory were first established in her work on sexual harassment, in which she argued that sexually predatory conduct long accepted as the normal give and take between men and women in the workplace constitutes a form of discrimination based on sex. According to her analysis, such conduct systematically demeans women as sexual objects, thereby reinforcing male control and power over women. In 1986, the United States Supreme Court recognized MacKinnon's basic theory that sexual harassment is a form of sexual discrimination, although it limited the definition of sexual harassment to conduct which is "unwelcome" and "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.' A number of feminist writers subsequently employed MacKinnon's basic insights about the invisible presence of the male perspective to show how determinations of whether particular conduct is unwelcome, or sufficiently severe or pervasive, often reincorporate prevailing gender role expectations that are based on male dominance and female submission.

The most controversial application of MacKinnon's dominance theory is the conclusion that pornography constitutes discrimination on the basis of sex. According to MacKinnon, pornography defines women in terms of their sexual use (and abuse) and constructs sexuality in terms of women's objectification for men's sexual pleasure. In eroticizing sexual violence


Feminist legal theorists have described other methods, such as "asking the woman question" and feminist practical reasoning. See Bartlett, supra, at 837-39; Heather Wishik, To Question Everything: The Inquiries of Feminist Jurisprudence, 1 BERKELEY WOMEN'S L.J. 64 (1986). To an important extent, these methods can be seen as abstracted adaptations of feminist consciousness-raising to legal reasoning. They also can be seen as manifestations of a different "women's way" of thinking. See infra Part IV.


31. Id. at 67-68 (quoting Henson v. Dundee, 682 F.2d 897, 904 (1982)). See also Harris v. Forklift Systems, Inc., 114 S.Ct. 367, 370-71 (1993) (affirming the Meritor standard, requiring an "objectively" hostile or abusive environment, but holding that harassment may be actionable even when it does not seriously affect an employee's psychological well-being or lead her to suffer injury).

32. Thus, for example, women who wear short skirts and make-up are assumed to welcome repeated sexual propositions at work, and those who participate in the sexual banter of the work place, or who initially shrug off harassing behavior as "not that big of a deal" are held to have conceded that that behavior is not sufficiently severe or pervasive to constitute harassment. Some of the feminist commentators who have addressed these kinds of issues are: Susan Estrich, Sex at Work, 43 STAN. L. REV. 813 (1991); Martha Chamallas, Feminist Constructions of Objectivity: Multiple Perspectives in Sexual and Racial Harassment Litigation, 1 TEX. J. WOMEN & THE LAW 95 (1992); Kathryn Abrams, Gender Discrimination and the Transformation of Workplace Norms, 42 VAND. L. REV. 113 (1989); Nancy Ehrenreich, Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law, 99 YALE L.J. 1177 (1990).

against women, along with the submission, pain, and humiliation it produces, pornography systematically sanctions aggressive and hurtful behavior against women. Courts have held that the First Amendment protects pornography as "free speech" and that the remedy for harmful speech is counterspeech. MacKinnon responds that this remedy is illusory because pornography silences women, defining them as sexual objects who could have nothing to say that is worth listening to. Indeed, she argues that the pretense that women are free to define themselves only strengthens the appearance of neutrality and thus, ultimately, male dominance.

Some feminist scholars, while not rejecting nonsubordination theory, have resisted firmly MacKinnon's position on pornography, particularly her disregard of the positive value of the First Amendment for women. Others have extended MacKinnon's critique of pornography and the First Amendment to other forms of "speech" that single out women or members of racial or other minorities as objects of subordination, denigration, and stigmatization.


36. Some critics of MacKinnon's analysis of pornography argue that the legal prohibition of pornography reinforces sexist stereotypes about men as "irresponsible beasts, with 'natural physiological responses' which can be triggered by sexually explicit images of women, and for which the men cannot be held accountable," and sexist stereotypes about women including that they are incapable of consent and that "'good' women do not seek and enjoy sex." Nan D. Hunter & Sylvia A. Law, Brief Amici Curiae of Feminist Anti-Censorship Taskforce, et al., in American Booksellers Association v. Hudnut, 21 U. MICH. J.L. REF. 69, 127, 129 (Fall 1987-Winter 1988); see also Mary C. Dunlap, Sexual Speech and the State: Putting Pornography in Its Place, 17 GOLDEN GATE U.L. REV. 359 (1987) (arguing society needs more, not less, sexually explicit expression, in order to address the problems of child and adult sexual abuse, AIDS and other sexually-transmitted diseases, and to improve all forms of consensual, intimate relationships). Others have argued that MacKinnon's theory of pornography, by assuming that first, men are free subjects who use pornography to construct and impose their views of sexuality on women; and second, women are involuntary actors who lack subjectivity, is a "constant reaffirmation" of male power and "an unending rewriting of the myth of male subjectivity," which makes an affirmative feminist program "problematic, to say the least." Jeanne L. Schroeder, The Taming of the Shrew: The Liberal Attempt to Tame Feminist Radical Theory, 5 YALE J. L. & FEMINISM 123, 179-80 (1992).

Supporters of MacKinnon's regulatory approach to pornography argue that it is consistent with, rather than opposed to, the First Amendment. See, e.g., Cass Sunstein, Pornography and the First Amendment, 1986 DUKE L.J. 589 (arguing pornography is "low value" speech not entitled to First Amendment protection).

37. The best scholarship along these lines focuses on the problematic effects of "hate speech" on members of racial minorities, although the examples given often include white as well as minority women. See, e.g., Mari J. Matsuda, Public Response to Racist Speech: Considering the Victim's Story, 87 MICH. L. REV. 2320 (1989); Thomas C. Grey, Discriminatory Harassment and Free Speech, 14 HARV. J.L. & PUB. POL'Y 157 (1991); Charles R. Lawrence III, If He Hollers Let Him Go: Regulating Racist Speech on Campus, 1990 DUKE L.J. 431; see also Mary Ellen Gale,
A related application of nonsubordination theory concerns rape and domestic violence. Just as the First Amendment protects pornographic constructions of women as sexual objects for men’s pleasure, the law of rape and domestic violence is said to reflect the male perspective and thus affirm men’s physical abuse of women. For example, some scholars have argued that various evidentiary rules applicable in proving rape reflect notions of consent, resistance, and self-defense that are more characteristic of men’s responses to danger than women’s. Others have stressed how women’s accounts of their experiences of rape are often undermined by the stylized descriptions of the sexual encounter presented by the defense. In addition, women’s actions are all too easily interpreted as motivated by fantasy or revenge, negating women’s claims of coercion and perpetuating assumptions that women invite abuse. Along similar lines, some scholars explain how battered women are seen as helpless victims, and thus are disadvantaged in child custody disputes. Still others use concepts from nonsubordination theory to show how procedural reforms in divorce law work against women who have been the victims of domestic violence.


38. See SUSAN ESTRICH, RAPE 1114, 1140-41 (1986). Many scholars argue that legal standards of self-defense should be flexible enough to comprehend why abused women who strike back at their abusers may stay with their batterers well beyond the point of conventional “reason,” and why they may finally act to protect themselves at a time when they do not appear to be immediately threatened. See, e.g., Lenore E.A. Walker, Battered Women Syndrome and Self-Defense, 6 NOTRE DAME J.L. ETHICS & PUB. POL’Y 321 (1992); CYNTHIA K. GILLESPIE, JUSTIFIABLE HOMICIDE, BATTERED WOMEN, SELF-DEFENSE, AND THE LAW (1989); Laura E. Reece, Women’s Defenses to Criminal Homicide and the Right to Effective Assistance of Counsel: The Need for Relocation of Difference, 1 UCLA WOMEN’S L.J. 53 (1991).


41. See, e.g., Naomi R. Cahn, Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions, 44 VAND. L. REV. 1041 (1991); Martha Mahoney, Legal Images of Battered Women: Redefining the Issue of Separation, 90 MICH. L. REV. 4 (1991); Elizabeth M. Schneider, Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse, 67 N.Y.U. L. REV. 520 (1992). These scholars have been careful to craft strategies that affirm women’s agency and counteract negative assessments of women that might undermine their claims for such legal rights as child custody. See also Joyce McConnell, Beyond Metaphor: Battered Women, Involuntary Servitude, and the Thirteenth Amendment, 4 YALE J.L. & FEMINISM 207 (1992) (arguing that treating violence against women as actionable involuntary servitude may help women from being cast entirely in roles of victims by shifting the focus away from women’s victimization and toward the unreasonableness of the batterer’s conduct).

42. See, e.g., Trina Grillo, The Mediation Alternative: Process Dangers for Women, 100 YALE L.J. 1545 (1991); Penelope Bryan, Killing Us Softly: Divorce Mediation, 40 BUFF. L. REV. 441 (1992); Lisa G. Lerman, Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute
By examining women's victimization through the nonsubordination theory lens, these writers have helped to frame abused women's situations not simply as individual problems, but as part of the overall institutional oppression of women. The central conceptual device for facilitating this institutionalized pattern is the dichotomy between the public and the private, which operates in the law to protect strangers, usually men, from one another while shielding "private" violence that harms mainly female victims.43

Nonsubordination theory has also been useful in putting issues of discrimination against homosexuals within the broader context of discrimination on the basis of sex. According to Sylvia A. Law, for example, laws that discriminate against homosexuals are a form of sex-based discrimination because they are an integral part of the same fixed heterosexual norms about gender roles that subordinate women to men.44 A number of other scholars have applied a similar line of analysis to argue that laws and other restrictions that deny individuals in homosexual relationships the opportunity to marry, be parents, or enjoy other benefits available to conventional family units are a crucial part of the maintenance of a male-dominated, heterosexual culture.45


Robin West has gone the furthest in arguing that the state has a constitutional duty to eradicate private as well as public violence. See West, Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment, 42 FLA. L. REV. 45 (1990).

Work outside of the domestic violence context that has been important in analyzing and criticizing the public/private dichotomy and its impact on women includes Frances Olsen, The Family and the Market: A Study of Ideology and Legal Reform, 96 HARV. L. REV. 1497 (1983); Carole Pateman, Feminist Critiques of the Public/Private Dichotomy, in PUBLIC AND PRIVATE IN SOCIAL LIFE 281 (S.I. Benn & G.F. Gaus eds., 1983).

In response to some of these critiques, Ruth Gavison has cautioned that while the public/private dividing line has often been used to subordinate women, privacy is still an important value for women and that the question should not be how to eliminate the public/private dichotomy but how to redraw the lines so that the dichotomy does not continue to harm women. See Ruth Gavison, Feminism and the Public/Private Distinction, 45 STAN. L. REV. 1 (1992).


IV. DIFFERENT VOICE THEORY

Equality and nonsubordination theories of gender view women's differences either as factually insignificant, as problems to be solved through remedial accommodations, or as excuses used by a corrupt system to subordinate women. In contrast, different voice theory, also referred to as connection theory, views women's differences as potentially valuable resources that might serve as a better model of social organization and law than existing "male" characteristics and values. Within different voice theory, women are said to have a greater sense of interconnectedness than men and to value relationships more than individual rights. Women are said to favor an "ethic of care" over "justice" or "rights" models of morality. They are also said to use less abstract, more contextual forms of reasoning than men which focus on the unique context of a dilemma and the on-going relationships and interdependencies of the parties. Different voice theorists argue that as to each of these distinctions, women's values have the potential to improve existing law.

Scholarship that uses women's different voice theory to promote legal reform has extended to so many conventional fields of law that it is possible to speak of the "mainstreaming" of this theory. Leslie Bender uses different voice theory to justify proposals in tort law such as a duty to rescue, the obligation of corporate officers with mass tort liability to provide personal caretaking remedies to their victims, and the legal option of physician-assisted suicide. Other scholars use different voice theory to urge workplace policies that allow workers to better integrate responsibilities to their families and employers, union policies that better acknowledge the values of connection and community, and corporate strategies that better reflect "the ethics of care, responsibility, connection and sharing."

46. Many of these comparisons are based on the work of psychologist Carol Gilligan, whose work, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982), has strongly influenced many feminist legal theorists. The most radical claims regarding differences between men's and women's values affecting law and legal theory are set forth in Robin West, Jurisprudence and Gender, 55 U. Chi. L. Rev. 1 (1988) and Leslie Bender, From Gender Differences to Feminist Solidarity: Using Carol Gilligan and an Ethic of Care in the Law, 15 Vt. L. Rev. 1 (Summer 1990). For a milder version, see Kenneth Karst, Woman's Constitution, 1984 DUKE L.J. 447.


49. Leslie Bender, Feminist (Re)torts: Thoughts on the Liability Crises, Mass Torts, and Responsibilities, 1990 DUKE L.J. 848.


Proposals to reform the tax system, bankruptcy law, international human rights law, and contracts law also incorporate the notions of responsibility and care upon which different voice theory depends.

In addition to proposals for changes in substantive law, feminist theorists have called for process and method reforms that cut deeply into conventional notions of legal practice. Carrie Menkel-Meadow proposes techniques and ethical standards for negotiation that challenge the adversarial models of adjudication that form the backbone of the American legal system. Other theorists advocate more contextualized methods of legal reasoning and decision making, not only because these methods better correspond to women’s "different voice," but also because they illuminate the "maleness" of abstract legal principles, encourage a greater respect for difference, and foster a more critical awareness of the importance of the reasoner’s own particular perspective. Some have also called for methods of judging that emphasize not only greater contextualization, but also collaborative decision making and empathy.

The biggest challenge for different voice theory is the danger that it may reinforce the subordination historically associated with the assertion of women’s differences. Although some have concluded that this historical association undermines the capacity of different voice theory to provide a positive model for feminist legal reform, the most recent applications of

62. See, e.g., Joan C. Williams, Deconstructing Gender, 87 MICH. L. REV. 797 (1989); see also Ellen C. DuBois, Mary C. Dunlap, Carol J. Gilligan, Catharine A. MacKinnon & Carrie Menkel-Meadow, Feminist Discourse, Moral Values, and the Law, 34 BUFF. L. REV. 11 (1985) (panel debate on, among other things, the viability of different voice theory or an ethic of care in feminist theory and practice). MacKinnon’s position is probably most succinctly stated in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 39 (1987) ("Women value care because men have valued us according to the care we give them . . . Women think in
different voice theory attempt to integrate a concern for relationships and responsibility within a framework that also values women's autonomy and independence. This renewed attention to women's autonomy has been shaped, in part, by responses to a set of challenges, explored below, known as postmodern feminism.

V. POSTMODERN FEMINISM

The perspectives described thus far share common assumptions about the rationality of law, the possibility of objective truth on which the law can be based, and the coherence and stability of the individual subject on whom the law acts. Postmodern feminism represents a set of critiques of these assumptions. Postmodern feminism made its entry into the law by way of the critical legal studies movement (CLS), a loose coalition of left-leaning academic scholars who, beginning in the 1970s, argued that law is indeterminate, non-objective, hierarchical, self-legitimating, overly-individualistic, and morally impoverished. While the CLS movement has faced heavy fire for its failure to develop a positive program that could survive its own critique, feminist scholars have absorbed the insights of this movement and attempted to transform them into the basis of a constructive feminist practice. Starting from the proposition that no social arrangements or legal rules are inevitable or natural, they have defined this practice in terms of support for those arrangements and rules which, under existing, non-ideal social conditions, seem most just.


A. AUTONOMY

An important target of the postmodern challenge is the law's assumption that individuals are capable of having "intent," of exercising "choice" or "consent," and of acting and thinking like "reasonable" people. The postmodern view of the individual or the "legal subject" opposes the Enlightenment view of the stable, coherent, and rational self with a more complicated view of the individual as "constituted" from multiple institutional and ideological forces that, in various ways, overlap, intersect, and even contradict each other. Although these forces join to produce a reality that the individual subject experiences as real or true, it is in fact a reality or truth that is "constructed". Under the postmodern view, the individual's experience of reality is more a function of fluctuating, constructed possibilities than a representation of what is real, rational, or in some transcendent sense, true.67

Feminist theorists have joined the postmodern view of the "constituted" individual with analyses of how the legal standards of consent, intent, and reasonableness have been constructed in gendered ways. Thus, for example, questions regarding whether women in particular circumstances consented to sexual intercourse,68 agreed to give up their child at birth,69 wanted to use birth control,70 intended to form a contract,71 or chose to abuse drugs while pregnant72 have all been analyzed from the perspective of the institutional and ideological forces that constrain and construct those choices. While recognizing and defining the often invisible constraints which make autonomy a legal fiction, however, these feminist theorists recognize that meaningful distinctions nevertheless can be made between "more" and "less" autonomy and that more autonomy remains a positive goal for women.73


73. See, e.g., Joan Williams, Gender Wars: Selfless Women in the Republic of Choice, 66 N.Y.U.
Some theorists who bring postmodern insights about the individual subject to bear on the law have focused on how the law constricts and defines the female body. Building on the work of French feminists such as Julia Kristeva, Luce Irigaray, and Hélène Cixous, for example, Marie Ashe demonstrates how a woman's physical body is constructed by the management and control of her reproductive functions. Other feminist theorists, such as Mary Joe Frug and Drucilla Cornell, have stressed concrete physical and sensual aspects of women's bodies as sources of imaginative experiences that might emancipate women from the reality—and seductions—of gender oppression.

B. ANTI-ESSENTIALISM

The critical edge of postmodern feminism has been directed not only outward, against conventional legal doctrine, but also inward, against feminist theory itself. Much of this internal criticism has been articulated as a charge of "essentialism."

There are at least three phenomena to which the charge of essentialism refers. One is a critique of false generalizations or universalisms. Much of feminist jurisprudence, as discussed above, has been directed toward exposing the extent to which the law's supposedly objective norms reflect male interests and male points of view. The charge of feminist essentialism is that in speaking about women and women's interests, feminists, too, often presuppose a particular privileged norm—that of the white, middle class, heterosexual woman—and thereby deny or ignore differences based on race, class, sexual identity, and other characteristics that inform a woman's identity. Essentialism, in this context, refers to the exclusion that results from such unstated norms. A related claim, made by feminist critical race theorists, is that race and sex often are bifurcated in legal claims of


76. Much of this analysis has been based on the work of feminist philosopher Elizabeth Spelman. Her basic claims are stated in ELIZABETH V. SPELMAN, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT (1988). See also Martha Minow, Feminist Reason: Getting It and Losing It, 38 J. LEGAL EDUC. 47 (1988); Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 STAN. L. REV. 581 (1988); Patricia A. Cain, Feminist Jurisprudence: Grounding the Theories, 5 BERKELEY WOMEN'S L.J. 191 (1989).
discrimination brought by black women, thus ignoring exclusions, often unrecognized as discrimination, based on the intersection of race and gender. 77 These criticisms have led feminist scholars to be increasingly careful of their own unstated assumptions, despite the difficulties of doing so.78

A second form of essentialism is what might be called the "naturalist" error. Again, this form of essentialism is the mirror image of a critique feminists have made against conventional legal theory—namely, the charge that legal principles are falsely assumed to be inherent, transcendent, universal, or natural, instead of socially constructed. As applied to feminist jurisprudence itself, this critique warns that treating "woman" as a self-explanatory, natural category and assuming that once certain "man-made" or false forms of oppression are removed women will find their "true" identities accepts the mistaken view of truth as absolute, findable, and final. The critique has special force against the charge that women who do not accept a particular feminist program or agenda are the victims of "false consciousness." 79 In response to this charge, feminists increasingly are moving away from the notion that the central feminist project consists in finding woman's "true" consciousness, toward a view of women's liberation that recognizes both social constraints and the creative possibilities women have to participate in their own construction.80

The third essentialist critique of feminist jurisprudence is one of gender imperialism. This critique is that feminists give too much primacy to sex as a basis of discrimination and too little to other forms of oppression, such as those based on race, class, and sexual orientation. On this ground, Angela Harris criticizes Catharine MacKinnon's analysis of a Santa Clara Pueblo tribal ordinance that denies Pueblo membership to the children of female, but not male, members of the tribe,
arguing that MacKinnon's analysis wrongly assumes that a Pueblo member's gender-based identity is more important than her tribal identity. More recently, the imperialism criticism has been made with respect to the feminist condemnation of practices in Muslim societies that subjugate women to men, especially the practice of female genital mutilation. Non-essentialists argue that by ignoring the cultural and religious significance of these practices, feminists create a theory that makes the white, Christian, American woman the standard for all women.

To combat each of these forms of essentialism, many scholars urge greater use of the narrative method. Individual and group narratives offer alternatives to the dominant stories or universal narratives on which the law is based and give voice to the actual, otherwise submerged, experiences of the dominated. Insofar as these alternatives help individuals to reveal their own, unstated assumptions and the experiences of others who do not share these assumptions, they also facilitate empathetic understanding. Paradoxically, at the same time that they reveal differences in perspective, narratives also help to create coherent identities by identifying, stabilizing, and integrating common bonds among women.


82. For a review of how different feminist theories approach such practices, see Karen Engle, Female Subjects and Public International Law: Human Rights and the Exotic Other Female, 26 N. ENG. L. REV. 1509 (1992) (arguing that advocates of women's rights must understand and acknowledge the presence of the "exotic other female" who condones female genital mutilation in her culture). Among the scholarship that could be characterized as anti-essentialist, in the sense of criticizing the feminist critiques of such practices as being cultural arrogance, are Isabelle R. Gunning, Arrogant Perception, World-Travelling and Multicultural Feminism: The Case of Female Genital Surgeries, 23 COLUM. HUM. RTS. L. REV. 189 (1982) and Lama Abu-Odeh, Post-Colonial Feminism and the Veil: Considering the Differences, 26 N. ENG. L. REV. 1527 (1992).


85. See Anne C. Dailey, Feminism's Return to Liberalism, 102 YALE L.J. 1265 (1993) (book review). Recent feminist writing has identified the potential dangers of the narrative method. Among the dangers are that narrative can simply substitute one universal narrative for another, can exclude others who have not had the same experiences, and can be too subjective or even untrue. Most who have analyzed these risks have shown how awareness of them will improve the utility of the narrative method. See, e.g., Kathryn Abrams, Hearing the Call of Stories, 79 CAL. L. REV. 971 (1991); see also Daniel A. Farber & Suzannah Sherry, Telling
VI. CONCLUSION

The determination of gender law scholars to move from the safety of critique to the vulnerable ground of positive reconstruction of law, and to turn the lens of feminist method inward, upon itself, symbolizes the contemporary premise of this emerging field of law—ongoing rather than complete, questioning rather than declarative, and self-critical rather than complacent. These characteristics make it impossible to predict the future of gender law, but at the same time make it likely that it will occupy an ever-increasing presence in legal theory and practice.
