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FEMINIST LEGAL THEORY: A LIBERAL
RESPONSE

GREGORY BASSHAM*

Over the last two decades, mainstream liberal jurisprudence has confronted four major insurgencies: New Right constitutionalism,¹ critical legal studies,² the economic analysis of law,³ and feminist legal theory.⁴ The first three of these movements have provoked vigorous and sustained liberal counterattacks.⁵ But liberals thus far have been slow to respond to what is rapidly emerging as the most powerful contemporary challenge to liberal jurisprudence: feminist legal theory.⁶ In this article, I offer a liberal critique of selected anti-liberal themes in recent feminist legal thought.

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1. See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

2. See, e.g., MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (1987); ROBERTO M. UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1986).

3. See, e.g., RICHARD A. POSNER, *THE ECONOMIC ANALYSIS OF LAW* (3d ed. 1986).

4. For useful introductions, see DEBORAH L. RHODE, *JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW* (1989); Katherine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990); Cass R. Sunstein, *Feminism and Legal Theory*, 101 HARV. L. REV. 826 (1988) (book review).

5. See, e.g., ERWIN CHEMERINSKY, *INTERPRETING THE CONSTITUTION* (1987) (critiquing New Right constitutionalism); BERNARD SCHWARTZ, *THE NEW RIGHT AND THE CONSTITUTION: TURNING BACK THE LEGAL CLOCK* (1990) (same); ANDREW ALTMAN, *CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE* (1990) (critiquing critical legal studies); Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987) (same); RONALD DWORKIN, *A MATTER OF PRINCIPLE* 237-89 (1985) (critiquing the economic analysis of law).

6. For an outstanding exception, see WILL KYMLICKA, *CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION* 238-92 (1990).

Feminist legal theory, like feminist theory generally, "is extremely diverse, in both premisses and conclusion."⁷ What feminist legal theorists have in common is a commitment to three basic claims: (1) that gender is a central category of analysis in law;⁸ (2) that important aspects of mainstream legal doctrine and theory were "developed with men's experience and interests in mind [and] are incapable of adequately recognizing women's needs or incorporating women's experiences;"⁹ and (3) that significant changes are needed in the law in order to promote greater equality between the sexes.

A good deal of recent feminist legal scholarship is consistent with liberal legal and political theory, broadly understood. Feminists who argue, for example, that many purportedly "neutral" legal practices and rules are actually male-biased¹⁰ are not *eo ipso* rejecting legal liberalism. For a central premise of modern liberal theory is that the state must treat each of its citizens with equal consideration and respect.¹¹ Liberalism itself thus requires legal officials to be alert to any hidden gender implications of ostensibly neutral legal standards and concepts. My interest here, however, is not in the large and impressive body of recent feminist scholarship that demonstrates how badly mainstream liberal jurisprudence has often failed to live up to its own guiding principles. Instead, I shall focus on three prominent themes in feminist legal theory that directly challenge fundamental premises of liberal jurisprudence: (a) that the current gender-neutral "difference" approach to sex discrimination issues should be replaced by a gender-sensitive "dominance" approach; (b) that women reason in a "different voice" morally, a voice that has wrongly been ignored or slighted in liberal legal doctrine and scholar-

7. *Id.* at 238.

8. *Cf.* Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617, 619 (1990).

9. KYMLICKA, *supra* note 6, at 238.

10. *See, e.g.*, SUSAN ESTRICH, REAL RAPE 92-104 (1987) (criticizing the way current rape law focuses on what the defendant "reasonably" believed the woman wanted, rather than on the intentions the woman "reasonably" believed she conveyed to the defendant); Christine A. Littleton, *Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women*, 1989 U. CHI. LEGAL F. 23 (arguing that current legal views of battered women fail to reflect women's own experience of being in battering relationships); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983) (arguing that work-family conflicts should not be viewed as private matters to be resolved by individuals but as public matters requiring restructuring of the workplace).

11. *See, e.g.*, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 180 (1978); KYMLICKA, *supra* note 6, at 4.

ship; and (c) that pornography should not be viewed as protected speech, but as a legally actionable form of sex discrimination against women. I shall argue that none of these criticisms of liberal jurisprudence succeeds.

I. GENDER EQUALITY AND DISCRIMINATION

For much of our nation's history, women were denied basic rights of equal citizenship and were openly discriminated against in education, employment, and other areas of public and private life.¹² Not until 1964, with the passage of Title VII of the 1964 Civil Rights Act, did it become unlawful for most employers to discriminate on the basis of sex. Not until 1971 did the Supreme Court rule that invidious sex-based classifications by the state presumptively violate the Fourteenth Amendment's guarantee of equal protection of the laws.¹³

Current sex discrimination law has two major strands: equal protection analysis and Title VII equal employment opportunity law. The first prohibits most forms of deliberate gender discrimination by the state: it permits sex-based classifications only if they are "substantially related" to "important" governmental objectives.¹⁴ The second prohibits both direct and indirect sex discrimination in employment. Employment practices involving intentional sex discrimination (so-called "disparate treatment") are permissible only if it can be proven that sex is a "bona fide occupational qualification" for the position.¹⁵ Employment practices which, while facially neutral, have an adverse "disparate impact" on either men or women are lawful only if it can be shown that the practices constitute a "business necessity."¹⁶

Both major strands of current sex discrimination law reflect what Catharine MacKinnon calls a "difference" approach to gender discrimination.¹⁷ That approach asks

12. See generally RHODE, *supra* note 4, at 9-50.

13. See *Reed v. Reed*, 404 U.S. 71 (1971).

14. See *Craig v. Boren*, 429 U.S. 190, 199-200 n.7 (1976).

15. See *UAW v. Johnson Controls, Inc.*, 111 S. Ct. 1196, 1204 (1991); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989); *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977).

16. See *Ward's Cove Packing Co. v. Atonio*, 490 U.S. 642, 659 (1989); *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 986 (1988); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

17. See CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 32-45 (1987) [hereinafter *FEMINISM UNMODIFIED*]; CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 215-34 (1989) [hereinafter *FEMINIST THEORY*].

whether there are any genuine differences between men and women that might serve to justify differential treatment of the sexes. It views gender discrimination, not as a matter of substantive inequality or disadvantage between the sexes, but as a failure to respect the requirement of "formal equality" that similarly situated persons be treated similarly. Thus, where men and women are, for whatever reason, not "similarly situated" with respect to important business or regulatory interests, it may be unfair but it will not be actionably discriminatory to treat them differently.

This difference approach to sex discrimination law has been heavily criticized by feminist legal theorists. Four major criticisms have been advanced: (1) that the basic principle of the difference approach—the requirement that like cases be treated alike—"verges on tautology;"¹⁸ (2) that as a practical matter, the difference approach "has both over- and undervalued gender differences;"¹⁹ (3) that the difference approach is blind to gender discrimination that occurs in contexts in which cross-gender comparisons cannot be made;²⁰ and (4) that the difference approach "affords no basis for challenging rules which structure the work place to fit men's life experiences and needs, but not women's."²¹ I shall consider each of these criticisms in turn.

The charge that the difference approach verges on tautology rests on a confusion between tautologousness and abstractness. A tautology (e.g. "All men are men" or "It's raining or it's not raining") is a logical truth, i.e. a statement that is true simply in virtue of its logical form.²² The statement "equals should be treated equally" is tautologous only if the predicate "should be treated equally" is built into the notion of those who count as "equals." But this is not how the statement is normally used in moral and political discourse. Normally, the statement is used to express an abstract, but not logically true, principle of political morality, namely, that individuals who are alike in every *relevant* respect (not in absolutely every respect)

18. RHODE, *supra* note 4, at 81.

19. *Id.* at 3.

20. See, e.g., FEMINIST THEORY, *supra* note 17, at 223; Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1305-06 (1987); Stephanie M. Wildman, *The Legitimation of Sex Discrimination: A Critical Response to Supreme Court Jurisprudence*, 63 OR. L. REV. 265, 281-82 (1984).

21. Mary E. Becker, *Prince Charming: Abstract Equality*, 1987 SUP. CT. REV. 201, 234.

22. See T.J. RICHARDS, *THE LANGUAGE OF REASON* 156-57 (1978).

ought to be treated alike.²³ Thus construed, the principle of formal equality is informative, but only minimally so. To be useful, the principle must be supplemented by principles of substantive equality, that is, principles that specify criteria for determining the relevance of differences.²⁴ And this, of course, is exactly what the legal architects of contemporary sex discrimination law have done in developing a body of rules and standards for determining when impermissible sex-based discrimination occurs.

A second common criticism of the difference approach is that courts, in applying it, have regularly tended both to over- and undervalue gender differences. As Deborah Rhode expresses the point:

In some instances, biology has determined destiny, while in other contexts, women's particular needs have gone unacknowledged and unaddressed. Too often courts have treated gender as a matter of immutable difference rather than as a cultural construct open to legal challenge and social change. Reliance on "real difference" has deflected attention from the process by which differences have been attributed and from the groups that are under-represented in that process. Such an approach has often done more to reflect sex-based inequalities than to challenge them.²⁵

To consider this charge as carefully as it deserves would require a lengthy review of modern sex discrimination case-law. Such a review cannot be undertaken here. But three points are worth noting. First, given the fact that women's groups have themselves been sharply divided over the nature and significance of gender differences,²⁶ it is hardly surprising that courts should sometimes make mistakes in applying such broad standards as "business necessity" or "important governmental objective." Second, it is striking that virtually all of the cases commonly cited as examples of judicial over- or undervaluation of gender differences date from the relatively early years of the current women's movement.²⁷ There is little evidence that courts have regularly been swayed by overt sexist stereotypes over the course of the last decade or so. Finally, as I shall

23. See JOEL FEINBERG, *SOCIAL PHILOSOPHY* 99-100 (1973).

24. See generally MICHAEL QUINN, *JUSTICE AND EGALITARIANISM: FORMAL AND SUBSTANTIVE EQUALITY IN SOME RECENT THEORIES OF JUSTICE* (1991).

25. RHODE, *supra* note 4, at 3.

26. See Bartlett, *supra* note 4, at 842 n.48; Rhode, *supra* note 8, at 623 n.22.

27. See generally RHODE, *supra* note 4, at 86-125.

argue below, it is doubtful whether the leading feminist alternatives to the difference approach succeed in avoiding the very problems at issue here.

A third common objection to the difference approach is that it is often blind to instances of sex-based discrimination in cases in which cross-gender comparisons are difficult or impossible. A case frequently cited in this connection is *Geduldig v. Aiello*.²⁸ At issue there was a California disability insurance program for state employees that singled out pregnancy as virtually the only long-term disability excluded from coverage. Notoriously, the Court ruled that the program did not discriminate on the basis of sex, but instead rested on a gender-neutral distinction between pregnant and nonpregnant persons.²⁹

Feminists have rightly condemned this absurdly artificial analysis. As Stephanie Wildman notes,

Without a pregnant man with whom to compare the treatment of pregnant women, the Court was unable to see, or refused to see, that disadvantageous disparate treatment of women on account of pregnancy could seriously affect their participation in the paid labor force, as well as in other social spheres.³⁰

The lesson Wildman draws from *Geduldig* is that the difference approach is poorly equipped to detect gender-based discrimination whenever "real differences" exist between men and women.

This, however, is a mistake. The difference approach asks exactly the right questions about the disability plan at issue in *Geduldig*: Was the plan's exclusion of pregnancy-related disabilities a gender-based classification? (Yes.) If so, were there any governmental interests sufficiently important to justify the disparate treatment? (No.) Nevertheless, Wildman does point to an important problem which difference theorists too often overlook: the difficulty of determining whether men and women truly are "similarly situated" for purposes of discrimination analysis.

Consider the following argument:

(1) A person is discriminated against only if she is treated less favorably than someone who is similarly situated to her.

28. 417 U.S. 484 (1974).

29. *See id.* at 496-97 n.20.

30. Wildman, *supra* note 20, at 281-82.

(2) Under California's disability plan, no one was treated less favorably than others who were similarly situated to them; in particular, no pregnant women were treated less favorably than similarly situated men. Therefore

(3) No one was discriminated against under California's disability plan.

This is a valid argument the conclusion of which, we have seen, is false. It follows that one or both of the premises must be false. Feminist critics of the difference approach have argued that we should reject (1). But (1), properly understood, is a necessary truth. It simply cashes out part of what we mean by "discriminatory treatment." It follows, therefore, that (2) must be false. But it is not altogether easy to see why (2) is false. It is tempting to say that men and women are not similarly situated in the one respect that matters in this case: their respective capacities to become pregnant. But this would be to misunderstand what difference theorists mean when they speak of "similarly situated" individuals. As we have seen, when difference theorists assert that similarly situated individuals ought to be treated similarly, they are asserting an abstract principle of justice, namely, that individuals who are identical in every morally relevant respect ought to be treated the same. In this case, there were no morally relevant differences between California's male and female state employees. Both shared an equally compelling interest in being able to engage in reproductive activity without risk of losing their jobs or incurring crippling expenses.³¹ The fact that California taxpayers or state employees could save money by discriminating against reproductively active women was not a sufficient justification for such invidious disparate treatment.

This brings us to the fourth and most important feminist argument against the difference approach: that it reinforces longstanding patterns of gender discrimination by taking male-defined norms as the standard against which to weigh women's claims to equal treatment. As Catharine MacKinnon notes,

[V]irtually every quality that distinguishes men from women is already affirmatively compensated in this society. Men's physiology defines most sports, their needs define auto and health insurance coverage, their socially-designed biographies define workplace expectations and successful career patterns, their perspectives and con-

31. Cf. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1584 (2d ed. 1988).

cerns define quality in scholarship, their experiences and obsessions define merit, their objectification of life defines art, their military service defines citizenship, their presence defines family, their inability to get along with each other—their wars and rulerships—defines history, their image defines god, and their genitals define sex. For each of their differences from women, what amounts to an affirmative action plan is in effect, otherwise known as the structure and values of American society.³²

None of this counts as a form of discrimination under the current difference approach to gender discrimination.³³ That approach asks only whether men and women are similarly situated with respect to important business or regulatory interests. It does not ask whether women have been unfairly disadvantaged in the quest for social goods by past discrimination or by male-biased standards of merit or desert. In this way, the difference approach may indeed serve to reinforce rather than to challenge persistent patterns of gender discrimination and disadvantage.

Consider how the difference approach applies in the area of employment discrimination. Many high-paying or otherwise desirable jobs require their holders to travel, work long, inflexible hours, or both. These jobs presuppose, in other words, “that the person, gender neutral, who is qualified for them will be someone who is not the primary caretaker of a preschool child.”³⁴ Since women are still overwhelmingly expected to be the primary caretakers of young children in our society, they will tend to do worse than men in competing for such jobs. However, so long as these facially gender-neutral job qualifications are a legitimate “business necessity,” any adverse disparate impact they may have on women will be permissible under current sex discrimination law.

As this example makes clear, the difference approach is incapable of bringing about real equality between the sexes. What is needed, according to MacKinnon, is a theory of sex discrimination that focuses not on questions of gender difference, but on the socially pervasive reality of gender domination. The alternative test of actionable sex discrimination she proposes is simple: “[D]oes a practice participate in the subor-

32. FEMINISM UNMODIFIED, *supra* note 17, at 36.

33. *Cf.* KYMLICKA, *supra* note 6, at 241 (on which I rely in this and the following paragraph).

34. FEMINISM UNMODIFIED, *supra* note 17, at 37.

dination of women to men, or is it no part of it?"³⁵ On this broadened conception of sex discrimination, "[s]exual harassment, battering, legally recognized rape, and other forms of coercive sex, job segregation, the low economic value assigned to women's work, the lack of reproductive freedom for women (including the lack of financially available abortion), the conflation of sex with violence and with subjugating objectification in pornography"—in short, "all practices and social relations that contribute to the subordination of women, or that result from women's subordinate status, are and should be legally actionable forms of sex discrimination."³⁶

MacKinnon clearly believes that this dominance approach to sex discrimination is inconsistent with the basic principles of liberal jurisprudence.³⁷ But this is a mistake according to Will Kymlicka, a leading contemporary defender of liberalism. In Kymlicka's view, liberalism's core commitment to treating individuals with equal concern and respect is fully consistent with, and in fact requires, something like MacKinnon's dominance approach to issues of gender inequality and discrimination.³⁸ I shall argue that Kymlicka is wrong about this: MacKinnon's dominance approach really is fundamentally inconsistent with core liberal principles that rightly enjoy broad public support.

We should begin by asking whether MacKinnon's dominance approach is, in fact, consistent with treating individuals with equal concern and respect. Political theorists differ widely over what concrete implications follow from the abstract requirement that governments treat individuals as worthy of equal concern and respect.³⁹ But few would dispute that an anti-discrimination principle that fails to protect members of one sex against overt and wholly arbitrary discrimination fails to treat such persons as equals. A major worry about MacKinnon's dominance approach is that it would leave men largely unprotected against just such discrimination.

As MacKinnon notes, many of the leading sex discrimination cases decided over the last two decades were brought (and won) by male plaintiffs.⁴⁰ Modern sex discrimination doctrine, although it permits affirmative action programs that are sub-

35. FEMINIST THEORY, *supra* note 17, at 248.

36. Lucinda M. Finley, *The Nature of Domination and the Nature of Women: Reflections on Feminism Unmodified*, 82 Nw. U. L. REV. 352, 356 (1988) (book review).

37. See generally FEMINISM UNMODIFIED, *supra* note 17, at 215-28.

38. See KYMLICKA, *supra* note 6, at 246-47.

39. See *id.* at 4; DWORKIN, *supra* note 11, at 179-83.

40. FEMINISM UNMODIFIED, *supra* note 17, at 35.

stantially related to important governmental objectives,⁴¹ prohibits arbitrary discrimination against either sex. MacKinnon's dominance approach, by contrast, explicitly accords special treatment to women. Gender-based discrimination against men would be unlawful on her proposed test only if it "participate[s] in the subordination of women to men."⁴² As I shall argue below, it is difficult to say with any confidence what sorts of conduct or practices violate this vague standard.⁴³ But it is clear that at least many instances of deliberate discrimination against men would pass MacKinnon's test. For this reason, it fails to treat individuals with the equal consideration and respect they deserve.

MacKinnon's dominance approach is also inconsistent with liberalism's commitment to neutrality with respect to contested conceptions of the good.⁴⁴ MacKinnon's approach assumes that equality is the dominant, lexically prior political value. Thus, the fact that anti-pornography laws might result in the suppression of works of serious artistic or literary merit is shrugged off by MacKinnon with the remark, "[I]f a woman is subjected, why should it matter that the work has other value?"⁴⁵ Similarly, the fact that sweeping judicially-ordered comparable worth reforms might have serious repercussions for the nation's economic health is not seen as a good reason why courts should refrain from treating market-driven pay inequities as actionable forms of sex discrimination.⁴⁶ By contrast, current sex discrimination law does not view equality as a sovereign good that invariably trumps such competing values as individual liberty, individual rights, or the common good. It recognizes that there may be "important governmental objectives"⁴⁷ that on occasion override the state's interest in promoting gender equality. Strikingly, MacKinnon offers no argument why equality should be viewed as the supreme political virtue, or why judges should treat it as such in interpreting

41. See *Johnson v. Santa Clara Transp. Agency*, 480 U.S. 616, 628-30 (1987); *TRIBE*, *supra* note 31, at 1569.

42. *FEMINIST THEORY*, *supra* note 17, at 248.

43. See *infra* text accompanying notes 48-61.

44. See, e.g., Will Kymlicka, *Liberal Individualism and Liberal Neutrality*, 99 *ETHICS* 883, 883-84 (1989); Charles Larmore, *PATTERNS OF MORAL COMPLEXITY* 44-47 (1987); *DWORKIN*, *supra* note 5, at 191-92. For a feminist critique of this conception of liberalism, see Robin L. West, *Liberalism Rediscovered: A Pragmatic Definition of the Liberal Vision*, 46 *U. PITT. L. REV.* 673 (1985).

45. *FEMINISM UNMODIFIED*, *supra* note 17, at 152-53.

46. See *id.* at 36.

47. *Craig v. Boren*, 429 U.S. 190, 199-200 n.7 (1976).

and applying statutory and constitutional prohibitions against gender discrimination. Yet such an argument is clearly needed, since there is little evidence that the nation now views, or has ever viewed, equality as a sovereign and overriding social and political value.

Finally, MacKinnon's dominance approach conflicts with liberal jurisprudence's commitment to the ideal of the rule of law.⁴⁸ That ideal requires, among other things,⁴⁹ that government give fair warning to "the world in language that the common world will understand, of what the law intends to do if a certain line is passed."⁵⁰ The dominance approach runs afoul of this ideal by employing a test of actionable gender discrimination that is so vague that it provides no meaningful guidance to citizens and transforms judges into "knight-errant[s], roaming at will in pursuit of . . . [their] own ideal of beauty or of goodness."⁵¹

MacKinnon argues that judges should regard any social relations or practices that "participate in the subordination of women to men"⁵² as unlawful forms of sex discrimination. But of course there are wide disagreements, not least among feminist groups, about what sorts of practices do contribute to the subordination of women. Does "special" treatment for pregnant women and working mothers do more to advance or to set back the cause of women's equality?⁵³ Do affirmative action quotas for women contribute to greater equality between the sexes or do they serve rather to reinforce gender stereotypes and provoke resentment from more qualified males who are passed over for hiring and promotion?⁵⁴ Does the legal enforcement of surrogate mother contracts serve to "subordinate" women to men?⁵⁵ Do all-female schools and associations help to empower women by providing "support,

48. See ALTMAN, *supra* note 5, at 23-27.

49. For discussions of the concept of the rule of law, see LON L. FULLER, *THE MORALITY OF LAW* 33-94 (rev. ed. 1969); JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 210-29 (1979); JOHN RAWLS, *A THEORY OF JUSTICE* 235-43 (1971).

50. *McBoyle v. United States*, 283 U.S. 25, 27 (1931); *see also Grayned v. Rockford*, 408 U.S. 104, 108 (1972).

51. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 141 (1921).

52. *FEMINIST THEORY*, *supra* note 17, at 248.

53. For contrasting positions, see sources cited in Bartlett, *supra* note 4, at 842 n.48, and Rhode, *supra* note 8, at 623 n.22.

54. For a helpful overview, see RHODE, *supra* note 4, at 184-90.

55. For a full discussion of the relevant issues, see MARTHA FIELD, *SURROGATE MOTHERHOOD* (1991).

solidarity, and self-esteem"⁵⁶ for a subordinate group, or do they harm women by perpetuating disempowering gender stereotypes?⁵⁷ Do reproductive technologies and liberal abortion laws that permit couples to select the sex of their child respect or violate women's right not to be subordinated to men?⁵⁸ Do laws denying the right of homosexual couples to marry "participate" in men's subjugation of women?⁵⁹ These are but a few of the difficult and controversial questions that must be asked and answered by unelected judges under MacKinnon's dominance test of actionable sex discrimination. That test is so open-ended, and the source of judges' authority to apply it is so obscure, that it is impossible to reconcile it with the ideal of the rule of law.

MacKinnon, it seems, would be untroubled by this conclusion. She speaks slightly of such examples of "male supremacist jurisprudence" as "standards for scope of judicial review, norms of judicial restraint, reliance on precedent, separation of powers, and the division between public and private law."⁶⁰ From a woman's perspective, she asserts, "the rule of law and the rule of men are one thing."⁶¹ But to pursue lasting gender equality by abandoning the ideal of the rule of law is not only dangerous—for the rule of law is a hard-won and essential protection for both men and women against arbitrary and oppressive state action—but is also likely to prove self-defeating. For once the ideal of the rule of law has been abandoned, there can be no security that the gains women have achieved will be preserved.

None of this, of course, is to suggest that liberals cannot support far-reaching legislative action to promote greater gender equality in the workplace, in education, and in other areas of public life. Indeed, liberalism's commitment to autonomy and equal opportunity may require liberals to support such egalitarian initiatives as government-mandated maternity and parental leave, day care, flex-time, shorter work weeks, and affirmative action. But liberals must reject, and are right to

56. RHODE, *supra* note 4, at 298.

57. *See generally id.* at 288-99.

58. *See generally* TEST-TUBE WOMEN (Rita Arditti et al. eds., 1984); SEX SELECTION OF CHILDREN (Neil G. Bennett ed., 1983).

59. *See generally* Alissa Friedman, *The Necessity for State Recognition of Same Sex Marriage: Constitutional Requirements and Evolving Notions of Family*, 3 BERKELEY WOMEN'S L.J. 134 (1988); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187.

60. FEMINIST THEORY, *supra* note 17, at 238.

61. *Id.* at 170.

reject, attempts such as MacKinnon's to pursue the goal of gender equality by radically redefining the concept of gender discrimination.

II. WOMEN'S MORALITY AND THE LAW

A central theme in some strands of recent feminist thought has been that women reason "in a different voice" morally, a voice that has long been wrongly ignored or downplayed in "male-stream" moral, political, and legal theory.⁶² In this section, I shall consider this claim primarily as it relates to legal theory and doctrine.

Much of the recent interest in a distinctively feminine ethic can be traced to the pathbreaking work of Harvard developmental psychologist Carol Gilligan.⁶³ Gilligan's studies of women's moral development found that men and women often approach moral problems in markedly different ways. Women, she concluded, "tend to value relationships and connections—an 'ethic of care'—whereas men tend to place a higher premium on abstraction, rights, autonomy, separation, formality, and neutrality—an 'ethic of justice.'"⁶⁴ Modern theories of morality and moral development have generally either ignored this "different voice" or treated it as inferior to an ethic of justice. But an ethic of justice, Gilligan argued, is importantly incomplete unless it is supplemented by an ethic of care.⁶⁵

How exactly does an ethic of care differ from an ethic of justice? According to Joan Tronto, the main differences can be grouped under the following three heads:

1. moral capacities: learning moral principles (justice) versus developing moral dispositions (care);
2. moral reasoning: solving problems by seeking principles that have universal applicability (justice) versus seeking responses that are appropriate to the particular case (care);

62. For a representative sampling of the (by now) voluminous literature, see CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982); NEL NODDINGS, *CARING: A FEMININE APPROACH TO ETHICS AND MORAL EDUCATION* (1984); Annette C. Baier, *What Do Women Want in a Moral Theory?*, 19 *NOUS* 53 (1985); Symposium, *In a Different Voice: An Interdisciplinary Forum*, 11 *SIGNS* 304 (1986); *WOMEN AND MORAL THEORY* (Eva F. Kittay & Diana T. Meyers eds., 1987).

63. See GILLIGAN, *supra* note 62; see also Carol Gilligan, *Reply*, 11 *SIGNS* 324 (1986); Carol Gilligan, *Moral Orientation and Moral Development*, in *WOMEN AND MORAL THEORY*, *supra* note 62, at 19.

64. Sunstein, *supra* note 4, at 827-28.

65. See GILLIGAN, *supra* note 62, at 100.

3. moral concepts: attending to rights and fairness (justice) versus attending to responsibilities and relationships (care).⁶⁶

As Tronto's summary makes clear, a feminist ethic of care shares much in common with a number of more familiar moral theories, including contemporary virtue ethics,⁶⁷ communitarianism,⁶⁸ pragmatist ethics,⁶⁹ and Christian agapism.⁷⁰ It should thus be seen as part of a broader movement that is critical of what is seen as contemporary liberalism's excessive emphasis on such values as objectivity, impartiality, universality, abstractness, rule-based decision-making, individualism, and autonomy.

Although it is still too early to make any firm predictions about the long-term success or failure of the feminist critique of liberal normative theory, there can be little doubt that the critique is important and merits very careful consideration. Four aspects of that critique strike me as particularly suggestive. First, I think it must be admitted, as feminist critics have charged, that liberal theorists of justice have unduly "neglected the development of the affective capacities underlying our

66. KYMLICKA, *supra* note 6, at 265 (paraphrasing Joan C. Tronto, *Beyond Gender Difference to a Theory of Care*, 12 SIGNS 644, 648 (1987)).

67. See generally PHILIPPA FOOT, VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY (1978); ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY (2d ed. 1984); G.E.M. ANSCOMBE, *Modern Moral Philosophy*, 33 PHIL. 1 (1958); JAMES D. WALLACE, VIRTUES AND VICES (1978); N.J.H. DENT, THE MORAL PSYCHOLOGY OF THE VIRTUES (1984); VIRTUES: CONTEMPORARY ESSAYS ON MORAL CHARACTER (Robert B. Kruttschwitz & Robert C. Roberts eds., 1987); 13 MIDWEST STUDIES IN PHILOSOPHY: ETHICAL THEORY: CHARACTER AND VIRTUE (Peter A. French et al. eds., 1988) [hereinafter CHARACTER AND VIRTUE]; RICHARD TAYLOR, VIRTUE ETHICS: AN INTRODUCTION (1991).

68. See, e.g., MICHAEL SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982); 2 CHARLES TAYLOR, PHILOSOPHY AND THE HUMAN SCIENCES: PHILOSOPHICAL PAPERS (1985); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986). See generally Amy Gutmann, *Communitarian Critics of Liberalism*, 14 PHIL. & PUB. AFFAIRS 308 (1985).

69. See, e.g., JOHN DEWEY, THEORY OF VALUATION (1939); C.I. LEWIS, AN ANALYSIS OF KNOWLEDGE AND VALUATION (1946); Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1966 (1990); Bartlett, *supra* note 4, at 849-63.

70. See, e.g., ANDERS NYGREN, EROS AND AGAPE (1932); PAUL RAMSEY, BASIC CHRISTIAN ETHICS 92-132 (1950); M.C. D'ARCY, THE MIND AND HEART OF LOVE (1959); William K. Frankena, *Love and Principle in Christian Ethics*, in FAITH AND PHILOSOPHY 203 (Alvin Plantinga ed., 1964); GENE OUTKA, AGAPE: AN ETHICAL ANALYSIS (1972); cf. NODDINGS, *supra* note 62, at 99-100.

sense of justice."⁷¹ Recent theorists of justice have concentrated heavily on the question, Which abstract principles of justice are best? and have largely ignored the equally important question, How will individuals best be equipped to act morally?⁷² By so doing, such theorists have overlooked or given short shrift to the morally crucial fact that "people will only develop an effective 'sense of justice' if they learn a broad range of moral capacities, including the capacity for sympathetic and imaginative perception of the particular situation."⁷³ Second, feminist critics have argued forcefully that justice theorists have understated the extent to which morality "consists in attention to, understanding of, and emotional responsiveness toward the individuals with whom one stands"⁷⁴ in a web of ongoing relationships. The quality of our everyday moral lives depends heavily on the quality of our daily and hourly interactions with co-workers, family members, and other particular others with whom we stand in such ongoing relationships. Yet justice theorists, with their emphasis on individual rights, impartiality, and universality, have largely neglected this important realm of particular others in everyday moral life. Third, and relatedly, justice theorists can be faulted for having devoted painstaking attention to such justice concepts as "ought," "right," and "obligation," while virtually ignoring such important virtue concepts as "care," "compassion," and "empathy."⁷⁵ Finally, feminist ethicists of care have argued cogently that recent theorists of justice have at times been guilty of the vices of excessive abstraction, formalistic rigidity, and insensitivity to context.⁷⁶

Critics, however, have voiced a number of important concerns about a distinctively feminine ethic of care. Some have

71. KYMLICKA, *supra* note 6, at 266.

72. See Tronto, *supra* note 66, at 657 n.46.

73. KYMLICKA, *supra* note 6, at 266.

74. Lawrence Blum, *Gilligan and Kohlberg: Implications for Moral Theory*, 98 ETHICS 472, 473 (1988).

75. See, e.g., Baier, *supra* note 62, at 56-57; FOOT, *supra* note 67, at 1-18; cf. David Solomon, *Internal Objections to Virtue Ethics*, in CHARACTER AND VIRTUE, *supra* note 67, at 428; SUSAN MOLLER OKIN, JUSTICE, GENDER AND THE FAMILY (1990) (arguing that liberal theorists have devoted insufficient attention to the justice or injustice of the gendered family).

76. See, e.g., RHODE, *supra* note 4, at 316-17; Virginia Held, *Feminism and Moral Theory*, in WOMEN AND MORAL THEORY, *supra* note 62, at 111, 116-18; Bartlett, *supra* note 4, at 849-63; Martha Minow & Elizabeth V. Spelman, *Passion for Justice*, 10 CARDOZO L. REV. 37, 53 (1988); Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 395-96 (1984); cf. Steven D. Smith, *The Pursuit of Pragmatism*, 100 YALE L.J. 409, 431-440 (1990) (discussing similar charges made by contemporary legal pragmatists).

questioned whether Gilligan's "different voice" in fact exists or, if it does, whether this voice is exclusively or even predominantly female.⁷⁷ Others have argued that it is strategically dangerous to promote a feminine ethic of care, since this may reinforce longstanding stereotypes about women's place being "in the home."⁷⁸ Still others have charged that the notion of "caring" is too vague to provide determinate guidance in concrete cases;⁷⁹ that it is difficult or impossible for an ethic of care to provide an adequate account of ethical relationships between strangers;⁸⁰ that moral principles are needed to avoid capricious decision-making and to order our priorities when we confront conflicting opportunities or responsibilities for caring;⁸¹ and that the emphasis ethicists of care place on preserving relationships and providing care risks valorizing relationships in which women are seriously abused or exploited.⁸²

These are serious criticisms and concerns, and it remains to be seen whether ethicists of care can successfully respond to them. Here I would like to consider a related issue: namely the extent to which an ethic of care can be extended from the realm of morality to the realm of law. I shall argue that such an extension is more problematic than many care theorists have assumed.

At the outset, it is important to distinguish two quite different claims about the role an ethic of care ought to play in the law. The first and more common claim is that the prevailing ethic of justice in law needs to be supplemented by an ethic of care.⁸³ On this view, the basic principles of liberal jurispru-

77. See, e.g., John M. Broughton, *Women's Rationality and Men's Virtues: A Critique of Gender Dualism in Gilligan's Theory of Moral Development*, 50 SOC. RES. 597 (1983); Tronto, *supra* note 66, at 646-52.

78. See, e.g., Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989); FEMINISM UNMODIFIED, *supra* note 17, at 38-39; Tronto, *supra* note 66, at 652-56.

79. See, e.g., KYMLICKA, *supra* note 6, at 280-82; Held, *supra* note 76, at 118-20.

80. See, e.g., George Sher, *Other Voices, Other Rooms? Women's Psychology and Moral Theory*, in WOMEN AND MORAL THEORY, *supra* note 62, at 178, 183; Claudia Card, *Caring and Evil*, 5 HYPATIA 101, 102 (1990).

81. See, e.g., Held, *supra* note 76, at 118-20; JEAN GRIMSHAW, PHILOSOPHY AND FEMINIST THINKING 219 (1986); Joan M. Shaughnessy, *Gilligan's Travels*, 7 J.L. & INEQUALITY 1, 26 (1988); KYMLICKA, *supra* note 6, at 267-69; Sher, *supra* note 80, at 180-81.

82. See, e.g., Card, *supra* note 80, at 106; Barbara Houston, *Caring and Exploitation*, 5 HYPATIA 115, 116-17 (1990).

83. See, e.g., Michael Stocker, *Duty and Friendship: Toward a Synthesis of Gilligan's Contrastive Positions*, in WOMEN AND MORAL THEORY, *supra* note 62, at

dence are essentially sound but those principles need to be augmented (and thus qualified) by principles that emphasize the "feminine" values of caring, responsibility, and personal connectedness. The second and less common claim is that the ethic of justice should be largely or wholly replaced by an ethic of care.⁸⁴ It is this second, more radical claim that I wish to consider here.

The fundamental problem with this more radical ethic of care is that rule-based decision-making is far more central to law than it is to morality. Thus, although in ethics there are powerful traditions which hold that rules ought to play a relatively minor role in moral theory and deliberation,⁸⁵ there are no similar traditions in law.⁸⁶ On the contrary, legal theorists from Aquinas⁸⁷ to Finnis⁸⁸ and from Austin⁸⁹ to Hart⁹⁰ have

56, 67; Lawrence Kohlberg, 2 *ESSAYS IN MORAL DEVELOPMENT* 340 (1984); Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on Women's Lawyering Process*, 1 *BERKELEY WOMEN'S L.J.* 39, 48 (1985); Kenneth Karst, *Women's Constitution*, 1984 *DUKE L.J.* 447, 471; GILLIGAN, *supra* note 62, at 33; Diana T. Meyers, *The Socialized Individual and Individual Autonomy: An Intersection Between Philosophy and Psychology*, in *MOTHERING: ESSAYS IN FEMINIST THEORY* 231 (Joyce Trebilcot ed., 1983).

84. See, e.g., NODDINGS, *supra* note 62; Tronto, *supra* note 66, at 657-58 n.46; Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 *YALE L.J.* 1373, 1385-86 (1986); Sara Ruddick, *Preservative Love and Military Destruction: Some Reflections on Mothering and Peace*, in *WOMEN AND MORAL THEORY*, *supra* note 62, at 139; Lynne N. Henderson, *Legality and Empathy*, 85 *MICH. L. REV.* 1574, 1576-77 (1988).

85. See generally Solomon, *supra* note 75 (discussing virtue ethics); OUTKA, *supra* note 70, at 94-122 (discussing various forms of situation ethics); J.J.C. Smart, *An Outline of a System of Utilitarian Ethics*, in J.J.C. SMART & BERNARD WILLIAMS, *UTILITARIANISM: FOR AND AGAINST* 42-57 (defending a version of act-utilitarianism that regards moral rules as mere rules of thumb).

86. The closest analogues are perhaps certain extreme forms of "rule skepticism," characteristic of some strands of American Legal Realism, which denied that there are any authoritative legal rules at all. See, e.g., JEROME FRANK, *LAW AND THE MODERN MIND* 257 (1930). Such theories are now widely seen to have rested on confusions. See, e.g., H.L.A. HART, *THE CONCEPT OF LAW* 132-37 (1961); THEODORE M. BENDITT, *LAW AS RULE AND PRINCIPLE* 1-42 (1978); ROBERT S. SUMMERS, *INSTRUMENTALISM AND AMERICAN LEGAL THEORY* 161-66 (1982).

87. See SAINT THOMAS AQUINAS, *SUMMA THEOLOGICA* I-II, q. 90, a. 4 (Anton C. Pegis ed., 1945) (c.1270) (defining "law" as "an ordinance of reason for the common good, promulgated by him who has the care of the community").

88. See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 276 (1980) (defining "law," in part, as "rules made, in accordance with regulative legal rules, by a determinate legal authority . . . for a 'complete' community, and buttressed by sanctions in accordance with the rule-guided stipulations of adjudicative institutions").

89. See JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 10

been united in seeing law as an essentially rule-governed activity.

Because law essentially is, in Lon Fuller's famous phrase, "the enterprise of subjecting human conduct to the governance of rules,"⁹¹ there are significant limits on the extent to which an ethic of care can be incorporated into legal theory and practice. As Frederick Schauer notes in a major recent study of the subject,⁹² rule-based decision-making fosters a number of important legal values. It promotes the values of stability and predictability by enabling individuals to rely on past decisions and to make choices and commit resources based on those expectations.⁹³ It furthers the values of liberty and rightful authority by limiting the allocation of power to those we think should exercise power.⁹⁴ And it promotes the value of efficiency by discouraging the continual relitigation of legal issues and freeing judges and other legal decision-makers from the necessity of continually rethinking such issues *de novo*.⁹⁵ These values would be seriously undermined by a jurisprudence that strongly privileges responsibilities over rights, relationships over fairness, and context-specific judgment over rule-based decision-making.

This is not, of course, to suggest that an ethic of care has no part to play in an effective and morally defensible legal order. The central insight of an ethic of care—that moral and legal reasoning which "operates at the level of abstract principles risks neglecting the actual people and pain involved in a particular problem"⁹⁶—has been unduly neglected in mainstream liberal jurisprudence. My point is simply that the natural home of an ethic of care lies in the realm of morality rather than in law, and that there are substantial difficulties in

(Noonday Press 1954) (1832) (defining "law" as "a rule laid down for the guidance of an intelligent being by an intelligent being having power over him").

90. See HART, *supra* note 86, at 77-96 (arguing that a legal system is a union of obligation-imposing ("primary") and power-conferring ("secondary") rules).

91. FULLER, *supra* note 49, at 74.

92. FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND LIFE* (1991).

93. See *id.* at 137-38, 157; see also MELVIN A. EISENBERG, *THE NATURE OF THE COMMON LAW* 16 (1988).

94. See SCHAUER, *supra* note 92, at 159; see also Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 314-15 (1985).

95. See SCHAUER, *supra* note 92, at 145.

96. Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597, 1628 (1990) (attributing this view to Carol Gilligan).

extending such an ethic from the one realm to the other. In the realm of morality, a strong case can be made that there is a sphere of vital importance—that of the “particular other”—that is poorly captured by such justice-based notions as impartiality, universality, autonomy, and individual rights. In law, however, the sphere of the particular other is necessarily much more circumscribed, for two related reasons. First, law is properly directed at the common good rather than at the merely private good of individuals or of individual rulers.⁹⁷ For this reason, judges and other legal decision-makers have an institutional duty to be fair and impartial in their official dealings, even to those to whom they are connected in networks of care. Second, as we saw earlier, law, unlike morality, is an intrinsically and pervasively rule-governed activity. As a result, the kinds of highly contextual, situation-specific modes of reasoning that may be suitable in many moral contexts will generally be out of place in the law, where, in Justice Brandeis’ oft-quoted phrase, it is often “more important that the applicable rule of law be settled than that it be settled right.”⁹⁸

In short, the argument advanced by some feminist legal theorists that the prevailing ethic of justice in American jurisprudence should be abandoned in favor of a feminist ethic of care cannot be sustained. An ethic of care may, to some extent, be a useful and needed supplement or corrective to standard justice-based approaches to legal doctrine and scholarship. But to go beyond this and insist that an ethic of care should largely or wholly supplant these standard approaches would be to abandon deeply rooted ideals that are fundamental to any legal regime premised on the rule of law.

III. THE FEMINIST CRITIQUE OF PORNOGRAPHY

We turn finally to one of the most widely discussed and controversial strands in recent feminist legal thought: the feminist critique of pornography. That critique takes a number of different forms, not all of which are clearly inconsistent with the basic principles of liberal jurisprudence. Here I shall be concerned with the explicitly anti-liberal feminist claim, argued most forcefully by Catharine MacKinnon and Andrea Dworkin, that pornography is a form of sex discrimination against

97. See generally FINNIS, *supra* note 88, at 154-56; JACQUES MARITAIN, *MAN AND THE STATE* 12-27 (1951).

98. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

women that should be prohibited regardless of any literary or other social value it may possess.

Until recently, as Joel Feinberg notes, "the demand for legal restraints on pornography came mainly from 'sexual conservatives,' those who regarded the pursuit of erotic pleasure for its own sake to be immoral or degrading, and its public depiction obscene."⁹⁹ Beginning in the 1970s, however, these conservatives were joined by an unlikely ally: liberal and radical feminists who had been in the forefront of the sexual revolution.¹⁰⁰ According to these new critics, pornography should be regulated or prohibited, not because explicit depictions of erotic pleasure are inherently sinful or corrupting, but because pornography harms women in at least three well-documented ways.

First, there is a large and growing body of evidence that women are often harmed in the production of pornography.¹⁰¹ "[I]n many cases, women, mostly very young and often the victims of sexual abuse as children, are forced into pornography and brutally mistreated thereafter. The participants have been beaten, forced to commit sex acts, imprisoned, bound and gagged, and tortured."¹⁰² Abuses appear widespread in the \$8 billion a year, mob-controlled pornography industry.¹⁰³

Second, there is "highly suggestive"¹⁰⁴ evidence that at least one kind of pornography—that which depicts sexual violence against women—is causally linked to higher rates of rape

99. JOEL FEINBERG, 2 *THE MORAL LIMITS OF THE CRIMINAL LAW* 143 (1985).

100. For early feminist critiques of pornography, see SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN, AND RAPE* 393-94 (1975); Robin Morgan, *Pornography and Rape: Theory and Practice*, in *GOING TOO FAR* 165 (Robin Morgan ed., 1977); Symposium, *Degradation of Women Versus Right of Free Speech*, 8 *N.Y.U. REV. L. & SOC. CHANGE* 181 (1978-79); *TAKE BACK THE NIGHT: WOMEN ON PORNOGRAPHY* (Laura Lederer ed., 1980); ANDREA DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* (1981).

101. For helpful background material, see ATTORNEY GENERAL'S COMM'N ON PORNOGRAPHY, U.S. DEP'T OF JUSTICE, *FINAL REPORT* 767-86, 856-69 (1986) [hereinafter *FINAL REPORT*]. See also *FEMINISM UNMODIFIED*, *supra* note 17, at 179-83.

102. Cass R. Sunstein, *Pornography and the First Amendment*, 1986 *DUKE L.J.* 589, 595.

103. The figure estimates are from FRANKLIN M. OSANKA & SARAH LEE JOHANN, *SOURCEBOOK ON PORNOGRAPHY* 3 (1989). The link between pornography and organized crime is extensively explored in *FINAL REPORT*, *supra* note 101, at 1037-238.

104. Sunstein, *supra* note 102, at 598.

and other forms of sexual aggression directed against women.¹⁰⁵ As Cass Sunstein notes:

Some laboratory studies show a reduced sensitivity to sexual violence on the part of men who have been exposed to pornography. Men questioned after such exposure seem more prepared to accept rape and other forms of violence against women, to believe that women derive pleasure from violence, to associate sex with violence; they also report a greater likelihood of committing rape themselves. And after being exposed to violent pornography, some men report having aggressive sexual fantasies In light of the relevant findings, it is highly plausible to believe that the general climate reinforced by pornography contributes to an increased level of sexual violence against women.¹⁰⁶

Finally, feminist critics contend that pornography harms women by reinforcing sexist attitudes and stereotypes that lead to unlawful sex discrimination and foster gender inequality.¹⁰⁷ In pornography, Susan Brownmiller charges, women and their bodies are "stripped, exposed, and contorted for the purpose of ridicule to bolster that 'masculine esteem' which gets its kick and sense of power from viewing females as anonymous, panting playthings, adult toys, dehumanized objects to be used, abused, broken and discarded."¹⁰⁸ In this way, she says, "[p]ornography is the undiluted essence of anti-female propaganda."¹⁰⁹

Because of the various harms to women that result from pornographic speech, many feminists have argued that pornography is and should be a legally actionable form of sex discrimination—a violation of women's civil rights.¹¹⁰ A model ordinance to this effect, drafted by Catharine MacKinnon and

105. See, e.g., EDWARD DONNERSTEIN ET AL., *THE QUESTION OF PORNOGRAPHY: RESEARCH FINDINGS AND POLICY IMPLICATIONS* (1987); *PORNOGRAPHY AND SEXUAL AGGRESSION* (Neil Malamuth & Edward Donnerstein eds., 1984); FINAL REPORT, *supra* note 101, at 773-80. See generally OSANKA & JOHANN, *supra* note 103, at 130-252. For a discussion of some of the methodological difficulties in establishing such a causal link, see DONALD A. DOWNS, *THE NEW POLITICS OF PORNOGRAPHY* 169-72 (1989).

106. Sunstein, *supra* note 102, at 598.

107. See, e.g., FEMINISM UNMODIFIED, *supra* note 17, at 169-95.

108. BROWN MILLER, *supra* note 100, at 393-94.

109. *Id.* at 394.

110. See, e.g., FEMINISM UNMODIFIED, *supra* note 17, at 163-213; Finley, *supra* note 36, at 364-74. Not all feminists, of course, support such efforts. See, e.g., WOMEN AGAINST CENSORSHIP (Varda Burstyn ed., 1985) (collecting essays opposing this and other attempts to censor pornography).

Andrea Dworkin, was first proposed in Minneapolis in 1983 and adopted the following year in Indianapolis.¹¹¹ In the form enacted in Indianapolis, the ordinance prohibited four practices it labeled discriminatory: (a) "trafficking" in pornography,¹¹² (b) "forcing" pornography on a person in any place of employment, school, home, or public place,¹¹³ (c) "coercing, intimidating, or fraudulently inducing" a person into performing or appearing in a pornographic production or work,¹¹⁴ and (d) assaulting or injuring a person "in a way that is directly caused by specific pornography."¹¹⁵ The ordinance defined "pornography" for purposes of the enactment as "the graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following:

- (1) Women are presented as sexual objects who enjoy pain or humiliation; or
- (2) Women are presented as sexual objects who experience sexual pleasure in being raped; or
- (3) Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or
- (4) Women are presented as being penetrated by objects or animals; or
- (5) Women are presented in scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual; or
- (6) Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or display."¹¹⁶

In 1985, Indianapolis' antipornography ordinance was struck down by the Seventh Circuit Court of Appeals in *Ameri-*

111. For a detailed discussion of the events surrounding the anti-pornography movements in Minneapolis and Indianapolis, see DOWNS, *supra* note 105, at 34-143.

112. See *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 325 (7th Cir. 1985). The ordinance defined "trafficking" as the "production, sale, exhibition, or distribution of pornography."

113. *Id.* at 325-26.

114. *Id.* at 325.

115. *Id.* at 326.

116. *Id.* at 324. Materials judged to be pornographic only in virtue of part (6) of this definition were exempted from the trafficking provision.

can Booksellers Association, Inc. v. Hudnut,¹¹⁷ a decision summarily affirmed the following year by the Supreme Court.¹¹⁸ I shall argue that these cases were correctly decided, since the ordinance in question (a) was excessively vague, (b) was constitutionally overbroad, and (c) constituted impermissible viewpoint discrimination by the state.

Courts have long held that a law is void on its face if it is so vague that persons of "common intelligence must necessarily guess at its meaning and differ as to its application."¹¹⁹ Such laws offend the due process requirement of fair notice,¹²⁰ open the door to arbitrary and discriminatory enforcement,¹²¹ and, in cases of restrictions on expression, often have an unacceptable "chilling" effect on protected speech as potential violators practice self-censorship rather than risk prosecution or liability.¹²² By failing to define such key terms as "sexually explicit," "subordination," "sexual object," and "degradation," none of which have a clear meaning or application in ordinary usage, the Indianapolis ordinance violates all three of these measures of impermissible vagueness.¹²³

The ordinance is also overbroad since it sweeps within its ambit works that have serious literary, artistic, political, or scientific value.¹²⁴ By failing to exempt works of significant social value, the ordinance runs afoul of the well-established first amendment principle that laws that directly target "high value" speech are prohibited unless they are narrowly tailored to achieve some exceptionally compelling governmental interest.¹²⁵

117. 771 F.2d 323 (7th Cir. 1985).

118. *Hudnut v. American Booksellers Ass'n, Inc.*, 475 U.S. 1001 (1986).

119. *Connally v. General Constr. Co.*, 269 U.S. 386, 391 (1926). See also *Grayned v. Rockford*, 408 U.S. 104, 108 (1972).

120. See, e.g., *Papachristou v. Jacksonville*, 405 U.S. 156, 162 (1972).

121. See, e.g., *Kolender v. Lawson*, 461 U.S. 352, 358 (1983); *Grayned*, 408 U.S. at 108.

122. See, e.g., *Smith v. Goguen*, 415 U.S. 566, 573 (1974); *Grayned*, 408 U.S. at 109.

123. See Brief Amici Curiae of Feminist Anti-Censorship Taskforce et al., reprinted in 21 MICH. J.L. REFORM 76, 111 (1987-88) [hereinafter FACT Brief].

124. A statute is constitutionally "overbroad" if its prospective reach includes constitutionally protected activities or materials. See *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940). See generally Henry P. Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1.

125. See, e.g., *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972); *Rust v. Sullivan*, 111 S. Ct. 1759, 1780-81 (1991) (Blackmun, J., dissenting). See generally Paul B. Stephan, *The First Amendment and Content Discrimination*, 68

Finally, by discriminating on its face between approved and disapproved ways of depicting women, the ordinance violates one of the "fixed star[s] in our constitutional constellation:" the principle "that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."¹²⁶ As Judge Easterbrook notes in his majority opinion in *Hudnut*:

Under the ordinance graphic sexually explicit speech is "pornography" or not depending on the perspective the author adopts. Speech that "subordinates" women and also, for example, presents women as enjoying pain, humiliation, or rape, or even simply presents women in "positions of servility or submission or display" is forbidden, no matter how great the literary or political value of the work taken as a whole. Speech that portrays women in positions of equality is lawful, no matter how graphic the sexual content. This is thought control. It establishes an "approved" view of women, of how they may react to sexual encounters, of how the sexes may relate to each other. Those who espouse the approved view may use sexual images; those who do not, may not.¹²⁷

In an impassioned response to the *Hudnut* decision, Catharine MacKinnon argues that this reading of the ordinance elides the crucial fact that the law was directed at harm rather than viewpoint.¹²⁸ Its purpose, she claims, was to prevent sexual violence and other concrete harms to women, not to suppress expression of a particular point of view. This response, however, rests on a confusion about what it means for a restriction on speech to be "viewpoint-based." As Laurence Tribe notes, "[a]ll viewpoint-based regulations are targeted at some supposed harm, whether it be linked to an unsettling ideology like Communism or Nazism or to socially shunned practices like adultery."¹²⁹ What distinguishes viewpoint-based restrictions is that they are expressly or deliberately aimed at either excluding some perspective or point of view from the "market-

VA. L. REV. 203 (1982); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983).

126. West Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

127. American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323, 328 (7th Cir. 1985).

128. See FEMINISM UNMODIFIED, *supra* note 17, at 212. For a similar claim, see Sunstein, *supra* note 102, at 612-13.

129. TRIBE, *supra* note 31, at 925.

place of ideas,"¹³⁰ or restricting the expression of one point of view while favoring or endorsing another.¹³¹ The fact that the Indianapolis ordinance, like any other viewpoint-based regulation, was ultimately aimed at the prevention of harm, cannot obscure the fact that it also discriminated on its face between "approved" and "disapproved" ways of portraying women and relations between the sexes.

An alternative response to Easterbrook's argument would be to concede that the ordinance in question was viewpoint-based, but to deny that this should have been regarded as fatal. As Cass Sunstein points out, the special hostility with which courts have traditionally viewed viewpoint restrictions is largely due to two perceived dangers: (a) the evil of "factional tyranny" (where government power is usurped by one or more private groups), and (b) the evil of "self-interested representation" (where rulers "seek to insulate themselves and to promote their interests at the expense of the ruled").¹³² Neither of these evils is seriously threatened by restrictions on violent or degrading pornography. So given that the value of such pornography is almost universally conceded to be low, and that such materials do (as Judge Easterbrook expressly concedes)¹³³ cause all of the various harms feminists claim, why shouldn't courts apply a less stringent standard of review to such restrictions and, in fact, sustain them?

The answer, as Geoffrey Stone explains, is that government

cannot suppress graphic sexually explicit expression because it portrays women as sexual objects who enjoy humiliation and rape without opening the door to other

130. Examples include the Sedition Act of 1798 (prohibiting "false, scandalous, and malicious" writings against the government); the Espionage Act of 1917 (prohibiting expression critical of the war and the draft); and the Smith Act (prohibiting advocacy of the violent overthrow of the government). For additional examples, see Stone, *supra* note 125, at 199.

131. See, e.g., *Schacht v. United States*, 398 U.S. 58 (1970) (invalidating a federal statute that prohibited unauthorized wearing of an armed forces uniform in a theatrical or motion-picture production if such a portrayal "tend[s] to discredit that armed force"). In this case, the viewpoint discrimination was apparent on the face of the statute. Viewpoint-based restrictions, however, can also be facially neutral. See, e.g., *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) (striking down a tax levied exclusively on large-circulation newspapers in Louisiana, where the purpose of the tax was clearly to punish or silence opponents of Governor Huey Long).

132. Sunstein, *supra* note 102, at 610-11.

133. *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 329 (7th Cir. 1985).

forms of viewpoint-based suppression. If viewpoint-based restrictions are permissible in this context, there is no principled basis for distinguishing other speech that may also be harmful.¹³⁴

The fact is that many sorts of protected speech cause demonstrable harm. This is certainly true, as Judge Easterbrook emphasizes,¹³⁵ of the political speech of Klansmen, Nazis, and other like-minded purveyors of hatred and intolerance. But it is also clearly true of many forms of non-political speech that impinge more directly on the cause of women's equality. For despite feminist claims that pornography is "[c]entral to the institutionalization of male dominance,"¹³⁶ there can be little doubt that pornography causes much less harm to women than do many far more pervasive media images of violence,¹³⁷ machismo,¹³⁸ and gender inequality.¹³⁹ To permit viewpoint-based restrictions on pornography would thus open the door to similar restrictions across a vast swatch of currently protected expression. As Stone argues,¹⁴⁰ this is a door that is best left closed.

Having said this much, it is important to note that not all forms of antipornography legislation are necessarily inconsistent with conventional legal doctrine and liberal jurisprudence. Cass Sunstein, for example, has argued forcefully that a narrowly drawn, harm-based regulation aimed specifically at low-value violent pornography can be justified on conventional legal grounds.¹⁴¹ Such a regulation would avoid the problems of vagueness and overbreadth that proved fatal to the Indianapolis antipornography ordinance. By targeting only those

134. Geoffrey R. Stone, *Anti-pornography Legislation as Viewpoint-Discrimination*, 9 HARV. J.L. & PUB. POL'Y 461, 480 (1986).

135. See *Hudnut*, 771 F.2d at 328.

136. FEMINISM UNMODIFIED, *supra* note 17, at 146.

137. See, e.g., DOWNS, *supra* note 105, at 189-91 (citing and discussing studies that suggest that nonexplicit materials that depict violence against women, such as R-rated slasher films, do more harm than hard-core pornographic materials that do not sexualize violence against women).

138. See generally FEINBERG, *supra* note 99, at 150-55 (discussing "the cult of the macho" and the harms it produces).

139. See FACT Brief, *supra* note 123, at 101 (noting that in mainstream advertising and television women are routinely depicted as people "primarily concerned with the whiteness of their wash, the softness of their toilet tissue, and . . . [other] inconsequential matters who are incapable of taking significant, serious roles in societal decision-making").

140. Stone, *supra* note 134, at 480.

141. See Sunstein, *supra* note 102, at 624-27; cf. DOWNS, *supra* note 105, at 194-98 (arguing that a fourth prong should be added to the current *Miller* test of obscenity to deal with violent obscene materials).

sexually explicit materials that eroticize violence against women, it would extend only to those materials linked most clearly and directly to concrete harms against women. And by focusing explicitly on harm rather than viewpoint, it would avoid the peculiarly troubling concerns associated with viewpoint-based regulations.

In sum, none of the three radical feminist critiques examined in this paper is successful. This is not to say, however, that they are wholly groundless. On the contrary, each of them can usefully be seen as indefensible extensions of more moderate feminist critiques that are both sound and important. Our legal system has done much too little to foster true gender equality; it has placed undue emphasis on abstract rights and rules; and it has too long ignored the concrete and substantial harms that hard-core pornographic materials may cause. None of these more moderate critiques goes to the heart of liberal jurisprudence. None, that is, tends to show that the core principles of liberal legal thought are insupportable. But they do challenge liberals to re-examine the implications of those principles and to rethink many traditional assumptions about gender and the law that have long served to harm and disadvantage women.

