

# LIBERAL JURISPRUDENCE AND ABSTRACTED VISIONS OF HUMAN NATURE: A FEMINIST CRITIQUE OF RAWLS' THEORY OF JUSTICE

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## I. INTRODUCTION

This essay presents the thesis, derived from feminist theory,<sup>1</sup> that Rawls' "theory of justice"<sup>2</sup> fails because of its central choice of abstraction as a method of inquiry. Abstraction as a methodology encompasses the belief that visions of social life can be constructed without reference to the concrete realities of social life. The choice of abstraction is a key move that allows Rawls to ignore powerful alternative constructions, and gives his theory an attractive internal logic. This internal logic, or "moral geometry,"<sup>3</sup> is then tested against intuitive impressions of what goes on in the concrete world.<sup>4</sup> The choice of abstraction as a starting place, however, makes any meaningful reality check impossible.

To test this thesis, this essay reviews the most abstract component of Rawls' theory, the original position.<sup>5</sup> The decision to abstract all but a select body of knowledge out of the original position strengthens the internal logic of the theory and ultimately reveals it as one that must be accepted on faith alone. I reach this conclusion by considering the assumptions about human nature that are built into the original position, and the equally plausible counterassumptions that are abstracted out.

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1. Feminist theory encompasses a wide range of disciplines and points of view. For purposes of this article, "feminist theory" refers to the body of scholarly literature produced by self-identified feminists inquiring into the role of gender in shaping social relations, and searching for the path to a just world. See, e.g., H. Trask, *Eros and Power, The Promise of Feminist Theory* (1986). This article attempts to apply feminist theory to an existing paradigm in response to the challenge presented by professors Scales and Johnson in their Article at p. 433 of this symposium.

2. J. RAWLS, *A THEORY OF JUSTICE* (1971).

3. *Id.* at 121.

4. Rawls calls the identity of intuitive judgment and reasoned principle the "reflective equilibrium," and suggests that his theory is an attempt to approach that point. *Id.* at 48-51. Rawls has given increased recognition to the importance of the reflective equilibrium in recent years. See, e.g., J. Rawls, *Justice as Fairness, Political not Metaphysical*, 14 PHIL. AND PUB. AFFAIRS 224 (1985). This use of the reflective equilibrium shows greater recognition of the significance of collective, intuitive judgment and is thus less subject to the critique presented here. I thank Thomas Grey for this insight.

5. The reader unfamiliar with Rawls' theory and the concept of the original position is directed to Section II of this article.

Because Rawls offers no reason for his choices from among equally valid assumptions, it is impossible to embark upon the journey through his elaborate moral geometry without taking an *a priori* leap of faith. Thus while the Theory of Justice is impressive in its critical power within the framework of liberal jurisprudence, it fails to convince the unconvinced that it is a theory of justice preferable to intuitively attractive alternatives.<sup>6</sup>

The primary tenet of feminist theory, that the personal is the political,<sup>7</sup> and the primary method of feminist inquiry, consciousness raising,<sup>8</sup> are the sources of this critique. This essay will begin by reviewing the primary elements of Rawls' theory and feminist theory. It will next note the assumptions about human nature inherent in Rawls' theory, and will then suggest equally plausible counterassumptions derived from feminist thought.

## II. RAWLS' DEFENSE OF LIBERALISM: AN INTRODUCTION TO THE METHODOLOGY OF ABSTRACTION IN A *THEORY OF JUSTICE*

Rawls' neo-Kantian defense of liberalism is one of the most widely read and carefully constructed extant in modern Anglo-American jurisprudence.<sup>9</sup> It is complex, internally logical, and comprehensive. It is, in fact, beautiful as a text. It has fit, in that each piece of the argument builds carefully upon the preceding piece. It has heart, in that it strives to achieve the most important of theoretical tasks: the development of a social order that will protect and promote the human spirit.

The social order defended by the theory is an improved version of American liberal democracy. In Rawls' world, which he modestly does not designate a utopia, the rights of the individual to personal autonomy and political recognition are paramount.<sup>10</sup> In a significant critique of pure

6. In fairness to Rawls, he does state, "I do not claim for the principles of justice proposed that they are necessary truths or derivable from such truths. A conception of justice cannot be deduced from self-evident premises or conditions on principles; instead, its justification is a matter of the mutual support of many considerations, of everything fitting together into one coherent view." RAWLS, *supra* note 2, at 21.

7. See *infra* text accompanying note 33.

8. See C. MacKinnon, "Feminism, Marxism, Method and the State: An Agenda For Theory," in *The Signs Reader, Women, Gender, and Scholarship* (1983) (discussing consciousness raising as method) and *infra* text accompanying note 34.

9. See *Reading Rawls Critical Studies of A Theory of Justice* (1975) for a sampling of the many critical responses to Rawls. See also Grey, *The First Virtue*, 25 Stan. L. Rev. 286 (1973). The bright green paperback edition of Rawls' book sits on the shelves of many law professors and is a standard text in jurisprudence courses. The book was first copyrighted in 1971, with earlier versions of the Theory in circulation since 1958. Reading Rawls, *supra*, at xi.

10. Rawls' first principle of justice is that "each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others." RAWLS, *supra* note 2, at 60. Rawls goes on to state that the "basic liberties of citizens are, roughly speaking, political liberty (the right to vote and to be eligible for public office) together with freedom of speech and assembly; liberty of conscience and freedom of thought; freedom of the person along with the right to hold (personal) property; and freedom from arbitrary arrest and seizure as defined by the concept of the rule of law." *Id.* at 61.

utilitarianism, and, perhaps unintentionally, of the existing American social order, Rawls' theory also suggests the need for full recognition of the equality principle,<sup>11</sup> going so far as to suggest modified redistribution of wealth to the least advantaged in order to rectify inherent inequalities.<sup>12</sup> The method by which Rawls proves true the good in this social order is complex. For purposes of this essay, a minimal restatement is offered.

The central abstraction in the theory is called the original position.<sup>13</sup> Imagine, Rawls suggests, a group of people deciding what kind of political structure they would like to live under. Rawls places these people in an imaginary spot behind what he calls the "veil of ignorance."<sup>14</sup> Behind the veil, these people do not know who they will be when they emerge in the real world.<sup>15</sup> They do not know whether they will be rich or poor, male or female, black or white, talented or untalented, swift or slow. Not knowing their future status, Rawls argues, these people will decide upon two principles—the liberty principle and the difference principle—for development of a political order that will allow maximum pursuit of each individual's chosen life plan.<sup>16</sup>

The liberty principle encompasses basic civil liberties, such as individual freedom and political recognition.<sup>17</sup> The difference principle adopts equality as a primary goal, with the proviso that distributional decisions should aid, or at least not make worse, the condition of the least advantaged members of society.<sup>18</sup> A constitutional democracy is a social order that can be true to these two principles, Rawls suggests.<sup>19</sup>

In this democracy, individuals have the full range of individual liberties—free speech, freedom of religion, freedom of conscience, freedom of the person, and equal political rights.<sup>20</sup> The difference principle will compensate for the lost worth of liberty that arises from "the inability to take advantage of one's rights and opportunities as a result of poverty and ignorance, and a lack of means generally."<sup>21</sup>

11. See *infra* text accompanying note 18.

12. Rawls suggests, for example, that the government must subsidize political debate in order to avoid "excessive attention" to the demands of the wealthy. *Id.* at 226.

13. Introduced in *id.* at 118.

14. See *id.* at 136–42.

15. *Id.* at 137. In addition to ignorance of their own social status, parties behind the veil do not know their personal psychology, their generational status, or their conception of the good. They will not know the circumstances of the particular society they will live in. To concretize for Rawls, they do not know whether they will be a hopeful peasant child in a third-world country or a gloomy retired banker in New York City. They must create a world that would protect the interests of both of those people.

16. *Id.* at 550.

17. See *id.* at 61.

18. See *id.* at 76–83, discussing the difference principle, and at 83–90, discussing the role of equality in the difference principle.

19. *Id.* at 195, and the discussion of Political Justice and the Constitution, *id.* at 221–28.

20. *Id.* See also the discussion of the concept of liberty, *id.* at 201 and 211.

21. *Id.* at 204.

The use of the original position and the veil of ignorance are classically abstract theory-building devices reminiscent of other well-known philosophical abstractions, such as the state of nature. The use of veil imagery is itself interesting. In much of veil imagery—the bridal veil, the Muslim veil—it is women-as-object behind the veil. Women, representing in patriarchal discourse intuition, emotion, sexuality, nurturing and the antithesis of reason, would disrupt the cool theory-building Rawls proposes. Behind Rawls' veil, woman-thinking, the terrifying Other, is abstracted out.<sup>22</sup>

Rawls gives explicit priority to abstraction, following the Kantian tradition.<sup>23</sup> He states repeatedly that he intends to carry social contract theory to a "higher level of abstraction."<sup>24</sup> He begins his theory at the highest level of abstraction—the original position—gradually admitting more reference to concrete reality as the theory becomes more solid. The Theory, Rawls allows, is subject to challenge with observations from the day-to-day of human life.<sup>25</sup> It is only safe to do this, however, once we have accepted the primary value of liberty. Our understanding of reality will be controlled and improved because we started at the rarefied level and experienced certain revelations there. Our darker impulses will be suppressed because abstraction will have revealed what justice as fairness has to offer us.<sup>26</sup>

The theory of justice as fairness is constructed around the original position. In that imaginary and abstract starting place, rational men<sup>27</sup> are free of knowledge of themselves. Thus free, they will inevitably choose Rawls' two principles of justice, giving primacy to liberty, and considering a limited scheme of distributional fairness. Given the limited knowledge Rawls would attribute to deliberators in the original position, their choice does seem inevitable. This inevitability, however, arises from the very abstraction Rawls created. It is not a separate truth.

The push to abstraction is understandable. Like the push to objectivity and formalism in law,<sup>28</sup> it avoids the war of wills. Rawls suggests that

22. Simone de Beauvoir developed the theory of "women as other" in *THE SECOND SEX* (1953).

23. Rawls recognizes Kant's ethical works, along with Locke's second *TREATISE OF GOVERNMENT*, as "definitive of the contract tradition," RAWLS, *supra* note 2 at 11 n.4, and states that "[t]he notion of the veil of ignorance is implicit, I think, in Kant's ethics." *Id.* at 140-41.

24. *Id.* at 3, 11. See also *id.* at vii. ("What I have attempted to do is to generalize and carry to a higher order of abstraction the traditional theory of the social contract as represented by Locke, Rousseau, and Kant.")

25. *Id.* at 199.

26. Rawls elaborates a four-stage sequence for lifting the veil of ignorance. *Id.* at 195-201.

27. The usage of "men" for "people" is found throughout *A THEORY OF JUSTICE*.

28. The history of the American intellectual struggle against subjectivity is discussed in E. PURCELL, *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE* (1973), and Horwitz, *The Doctrine of Objective Causation*, in *THE POLITICS OF LAW* (1982). For an eloquent argument in favor of scientific rationalism, see MOORE, *Tolerance and the Scientific Outlook* in WOLFF, MOORE, AND MARCUSE, *A CRITIQUE OF PURE TOLERANCE* (1965).

without an agreed starting place, without a common way of looking at the world, we could never conclude that one theory of justice is preferable to another.<sup>29</sup> Thus he abstracts out as much as possible, ostensibly to avoid skewing the outcome. His goal is identity. There is really only one person on the abstract side of the veil of ignorance, because everyone there has the same limited information. My objection is that unavoidably the person behind the veil is John Rawls. Abstraction never achieves the clarity of vision Rawls promises. The abstraction is necessarily weighted to derive a theory consistent with the liberal tradition, and alternative conceptions of the nature of humankind are ignored. The following section discusses a feminist critique of abstraction and develops some alternative conceptions of human nature derived from feminist thought.

### III. FEMINIST IDEAS ABOUT ABSTRACTION, THEORY-BUILDING, AND JUSTICE

The body of emerging scholarship known as feminist theory, as rich and diverse as it is, is characterized by some basic tenets. First is the charge of androcentrism in mainstream scholarship—the charge that traditional scholarly discourse largely ignores the lives and voices of women.<sup>30</sup> Second is the charge of dualism. Dualism is the oppositional understanding of intuition, experience, and emotion as the inferior antitheses of logic, reason, and science, coupled with a tendency to equate women with the former grouping and men with the latter.<sup>31</sup> A related dualism

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29. In discussing the "priority problem"—the problem of "assigning weights to competing principles of justice,"—Rawls states, "No doubt any conception of justice will have to rely on intuition to some degree. Nevertheless, we should do what we can to reduce the direct appeal to our considered judgments. For if men balance final principles differently, as presumably they often do, then their conceptions of justice are different. The assignment of weights is an essential and not a minor part of a conception of justice. If we cannot explain how these weights are to be determined by reasonable ethical criteria, the means of rational discussion have come to an end. An intuitionist conception of justice is, one might say, but half a conception. We should do what we can to formulate explicit principles for the priority problem, even though the dependence on intuition cannot be eliminated entirely." RAWLS, *supra* note 2, at 41.

30. Gerda Lerner credits the historian Mary Beard for first arguing that mainstream historiography focuses on men's history—war, politics, business—and omits the experience of women. G. LERNER, *THE MAJORITY FINDS ITS PAST, PLACING WOMEN IN HISTORY* (1979) at xxii. Lerner's book in itself defies the androcentric tradition, asking the questions, "What were women doing? How were they doing it? What was their own understanding of their place in the world?" *Id.* at xxv, and "What would the past be like if women were placed at the center of inquiry? What would the past be like if man were regarded as women's 'other'?" *Id.* at xxxi.

31. As Myra Jehlen stated:

Feminist thinking is really rethinking, an examination of the way certain assumptions about women and the female character enter into the fundamental assumptions that organize all our thinking. For instance, assumptions such as the one that makes intuition and reason opposite terms parallel to female and male may have axiomatic force in our culture, but they are precisely what feminists need to question—or be reduced to checking the arithmetic, when the issue lies in the calculus.

Jehlen, *Archimedes and the Paradox of Feminist Criticism*, in *Feminist Theory, A Critique of Ideology*

places men in the public domain—politics, law, paid work—and women in the private—home, absence of law, unpaid work.<sup>32</sup> From these critiques of mainstream scholarship, feminists have derived two insights. The first is that the personal is political.<sup>33</sup> By this it is meant that what happens in the daily lives of real people has political content in the same way as does what we normally think of as politics—the structure of economic systems and governments. That is, who makes breakfast, who gets a paycheck, who gets whistled at in the street—all the experiences of daily life are a part of the distribution of wealth and power in society. The second insight is that consciousness raising—collective focus on the particularities of real-life experience—is essential to truth-seeking.<sup>34</sup>

As Helene Cixous exclaimed, “I wished that woman would write and proclaim this unique empire so that other women, other unacknowledged sovereigns, might exclaim: I, too, overflow; my desires have invented new desires, my body knows unheard-of songs.”<sup>35</sup>

In developing feminist theory, women are increasingly willing to critique mainstream theory, and to sing unheard of songs. An important element of this project is the rejection of existing abstractions that constrain our vision. Abstraction is a key methodology in mainstream juris-

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189 (1982). See also Vickers, *Memoirs of an Ontological Exile: Methodological Rebellion of Feminist Research*, in *FEMINISM IN CANADA: FROM PRESSURE TO POLITICS* 30 (1982) (“The rationalist tradition, within which our scholarly disciplines can be placed, derives its rationale from a presumption that the liberated man can transcend his passions, his prejudices, and even his death, through an elevation of his reason and a suppression of his nonreason. As we will see, the elevation of this premise into canons of method has helped men hide key aspects of human life. It is against such canons and such hiding that the key methodological rebellions of feminist research are directed.”); Olsen, *The Family and the Market*, 96 *HARV. L. REV.* 1497, 1575–77; F. Olsen, *The Sex of Law* (unpublished paper).

32. See J. KELLY, *WOMEN, HISTORY, AND THEORY* (1984) at 51–62. Kelly argued, “woman’s place is not a separate sphere or domain of existence, but a position within social existence generally.” *Id.* at 57.

33. This is really a restatement of the decontextualization critique, that is, the criticism of any method of inquiry that avoids consideration of real life context and experience. See, e.g., Vickers, *supra* note 31, at 34.

34. Consciousness raising is the deliberate sharing of personal experiences in dialogue with others in order to better understand the human condition. The history of consciousness raising and its centrality to the women’s movement is discussed in C. HYMOWITZ AND M. WEISSMAN, *A HISTORY OF WOMEN IN AMERICA* 351–55 (1978), and in G. LERNER, *THE MAJORITY FINDS ITS PAST, PLACING WOMEN IN HISTORY* (1979). Lerner states that consciousness raising groups “become a community, a substitute family. It provides a noncompetitive, supportive environment of like-minded sisters. Many see it in a model for the good society of the future, which would conceivably include enlightened men. It is interesting that feminists have unwittingly revitalized the mode of cooperation by which American women have traditionally lightened their burdens and improved their lives, from quilting bees to literary societies and cooperative child-care centers.” *Id.* at 43.

35. Cixous, “The Laugh of the Medusa” translation by Keith Cohen and Paula Cohen, in *The Signs Reader*, *supra* note 8, at 279.

prudence, inviting feminist critique. Abstraction as a methodology is criticized by feminist scholars because abstraction is the first step down the road of androcentric ignorance.<sup>36</sup> The refusal to acknowledge context—to acknowledge the actual lives of human beings affected by a particular abstract principle—has meant time and again that women's well-grounded, experiential knowledge is subordinated to someone else's false abstract presumptions.

Legal history is rife with examples. The abstract principle that women as the weaker sex belong in a separate sphere, protected and cared for by men, supported the rule preventing married women from owning property.<sup>37</sup> In their life experience, however, many women went uncared for, and were required to provide for themselves through their own resources.<sup>38</sup> Women's experiential reality confronted the male-created abstraction of women's privileged sphere, and eventually women succeeded in altering the abstraction.<sup>39</sup>

Similarly, women who are currently told that strict enforcement of the

36. As Susan Griffin states:

But when a theory is transformed into an ideology, it begins to destroy the self and self-knowledge. Originally born of feeling, it pretends to float above and around feeling. Above sensation. It organizes experience according to itself, without touching experience. By virtue of being itself, it is supposed to know. To invoke the name of this ideology is to confer truthfulness. No one can tell it anything new. Experience ceases to surprise it, inform it, transform it. It is annoyed by any detail which does not fit into its world view.

Griffin, *The Way of All Ideology*, in *FEMINIST THEORY, A CRITIQUE OF IDEOLOGY*, *supra* note 31, at 273.

37. The ideology of the separate sphere is discussed in Taub & Schneider, *Perspective on Women's Subordination and the Role of Law*, in *THE POLITICS OF LAW* (1982). See also N. COTT, *THE BONDS OF WOMENHOOD* (1971), for a discussion of the historical context of separate sphere theory.

38. Annette Kolodny reports repeated instances of women taking over upon the death or incapacity of their husbands during the course of westward migration. One 1856 description depicts the wife of a broken man who "yoked and unyoked the oxen, gathered fuel, cooked their food . . . drove the team, hunted wood and water . . . and for months performed the coarser offices that properly belong to the other sex." A. KOLODNY, *THE LAND BEFORE HER, FANTASY AND EXPERIENCE OF THE AMERICAN FRONTIER* 238 (1985), quoting E. FARNHAM, *CALIFORNIA INDOORS AND OUT, OR, HOW WE FARM, MINE, AND LIVE GENERALLY IN THE GOLDEN STATE* (1856). Abigail Duniway, nineteenth century Oregon feminist, also wrote of the independence and toughness required of women on the western frontier. A. DUNIWAY, *PATHBREAKING, AN AUTOBIOGRAPHICAL HISTORY OF THE EQUAL SUFFRAGE MOVEMENT IN PACIFIC COAST STATES* (1914).

39. See M. Matsuda, *The West and the Legal Status of Women: Explanations of Frontier Feminism*, in *LANGUM, LAW IN THE WEST* (1985) (discussing the role of feminist activists in altering the legal status of women in the nineteenth century western United States). The separate sphere ideology, replayed as the public-private distinction, remains problematic for women. Feminist theorists continue to tackle this abstraction. See, e.g., Olsen, *The Family and the Market*, 96 *HARV. L. REV.* 1497, 1501 (1983); Powers, *Sex Segregation and the Ambivalent Directions of Sex Discrimination*, 55 *Wisc. L. REV.* 55, 70-87 (1979).

legal guarantee of equal pay for equal work has created an abstract condition called "equality" look at their own experience as underpaid workers, and then redefine "equality" as equal pay for work of equal value.<sup>40</sup> This is not to suggest that the abstraction of "equality" lacks instrumental value to feminists. Rather, for women, the pursuit of equal rights as an abstract goal was developed around the struggle for tangible manifestations of equality in their daily lives: the vote, the ownership of property, and pay equity.<sup>41</sup> This connection to the concrete has made women particularly conscious of the ever looming paradoxes and abuses inherent in the equality principle.<sup>42</sup>

Time and again women have found that their own experiences are more valuable truth-seeking tools than the abstractions of others. Many women report feelings of craziness when their own experience fails to comport with the dominant theory of what they should feel.<sup>43</sup> The way out of this craziness is talk with other women about women's experience. This talk,

40. See, e.g., A. COOK, *COMPARABLE WORTH: THE PROBLEM AND STATES' APPROACH TO WAGE EQUITY* (1984); Feldberg, *Comparable Worth: Toward Theory and Practice in the United States*, 10 *SIGNS* (1984).

41. I would suggest that it is no accident that feminist legal scholarship continues to focus primarily on specific issues such as rape, battering, child support, employment, and criminal defense of female offenders. Feminist scholars have, of necessity, found themselves on the front line of real-life struggle.

42. In the context of race, Alan Freeman suggests that "antidiscrimination law as it has evolved from 1954 to the present has served more to rationalize the continued presence of racial discrimination in our society than it has to solve the problem." Freeman, *Antidiscrimination Law: A Critical Review*, in *THE POLITICS OF LAW* 96 (1982). Feminist writings discussing the equality paradox include Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 *TEX. L. REV.* (1984); N. Taub, *supra* note 37; Williams, *The Equality Crisis*, 8 *Women's Rts. L. Rep.* 175 (1982); K. Powers, *supra* note 39; Freedman, *Sex Equality, Sex Difference, and the Supreme Court*, 92 *YALE L.J.* 913 (1983) (suggesting a normative approach to equal protection analysis).

43. Combahee River Collective, *A Black Feminist Statement* (1977), reprinted in *BUT SOME OF US ARE BRAVE* (1982). The Collective offers this description:

Black feminists often talk about their feelings of craziness before becoming conscious of the concepts of sexual politics, patriarchal rule, and, most importantly, feminism, the political analysis and practice that we women use to struggle against our oppression. The fact that racial politics and indeed racism are pervasive factors in our lives did not allow us, and still does not allow most Black women, to look more deeply into our own experiences and define those things that make our lives what they are and our oppression specific to us. In the process of consciousness-raising, actually life-sharing, we began to recognize the commonality of our experiences and, from the sharing and growing consciousness, to build a politics that will change our lives and inevitably end our oppression.

*Id.* at 15.

Marilyn Frye shows how consciousness raising has taught women to respond cautiously to apparent craziness. She describes her response to an angry black critic:

It seemed that what our critic was saying must be right; but what she was saying didn't seem to make any sense.

She seemed crazy to me.

That stopped me.

I paused and touched and weighed that seeming. It was familiar. I know it as deceptive, defensive. I know it from both sides; I have been thought crazy by others too righteous too timid and too defended to grasp the enormity of our difference and the significance of their offenses.

M. FRYE, *THE POLITICS OF REALITY, ESSAYS IN FEMINIST THEORY* 112 (1983).



or consciousness raising, has taught women several things.<sup>44</sup> First, that they are not crazy—or at least not alone in their craziness. Second, that consciousness raising is a useful method for theory-building.<sup>45</sup> Third, that conversation with empathetic peers is a good in and of itself—that is, it has spiritual and humane value. And finally, it has taught distrust of theory built without the foundation of contextual understanding.<sup>46</sup>

A critique of Rawls' theory of justice that is informed by feminist distrust of abstraction does not pick apart the foundation of American liberalism. Rather, it points out that the foundation is not there. The Theory of Justice rests on ideology, on air, on faith. For those disenchanted with the prospects for enriched human life under dominant legal ideology, there remains solid ground upon which to build a new theory of justice.

In addition to providing a methodological critique of abstraction, feminism suggests an alternative substantive theory of justice. What is the feminist conception of the good and of the right? Feminism is a theory-in-progress, collectively formed. It would be somewhat unfeminist for one woman to write a book called *The Feminist Theory of Justice*.<sup>47</sup>

44. For an interesting example of consciousness raising in practice, see E. BULKIN, M. PRATT & B. SMITH, *YOURS IN STRUGGLE, THREE FEMINIST PERSPECTIVES ON ANTI-SEMITISM AND RACISM* (1984). In this work, three feminists who describe themselves as of "very different identities and backgrounds—white Christian-raised southerner, Afro-American, Ashkenazi Jew," relate their personal experiences and thoughts on racism and sexism. *Id.* at introduction. In the Appendix to her section of the book, Elly Bulkin lists questions for advanced consciousness raising, such as "Recall a situation in which you confronted the internalized anti-Semitism of another Jew," noting first that she assumes the reader has already gone through basic "essential CR questions about one's earliest recollections of racism and anti-Semitism." *Id.* at 194, 198.

45. Catherine MacKinnon discusses consciousness raising as a method of both theory and practice; see *supra* note 8, at 227.

46. Nikki Giovanni expressed her distrust of abstract theory building in these spontaneous remarks:

While I was in philosophy in college there was a question, and I used to drive my teacher crazy: You're on a big ship and the ship is sinking. There is a lifeboat that can only hold eight people. There are nine of you. What would you do?

All of my classmates would immediately begin to say "So and so would have to go," or those who were calling themselves brave would say, "I would jump overboard and die." I said, "There must be a solution. If there are nine of us with a lifeboat that only holds eight, there must be a solution." And the professor would say, because I made a C in that course, "That is not an answer." I said, "When I get to the point that I am on a big ship and there are nine of us with a lifeboat that holds eight *then* I would deal with that. But I will not sit here and kill somebody for the convenience of this class."

You cannot accept somebody else's premises on what your life could be. A. THOMAS, *LIKE IT IS* 80–81 (1981) (interview with Nikki Giovanni).

47. As Gerda Lerner states:

Our professional contacts with other feminist scholars therefore take on a significance far greater than that of the traditional scholarly exchange. We have become a community of scholars, vitally interested and involved in each other's work, trying to combat within ourselves and one another the competitiveness which is structured into our institutional and professional life and to substitute for it a new and as yet untested model of supportive and engaged scholarship.

The reluctance to state a conventional theory of feminism renders articles such as this one problematic. The restatement of feminist theory offered here is admittedly clumsy, but, the author believes necessary if feminist thought is to become a part of jurisprudential discourse. G. LERNER, *THE MAJORITY FINDS ITS PAST, PLACING WOMEN IN HISTORY* vii (1979).

Anthologies and coauthored books are more characteristic of feminist statements, and are themselves a form representing the feminist idea of collective effort.<sup>48</sup> In response to Rawls' admirable effort, a few feminist alternatives are worth consideration.

Feminism differs from intuitionism in that it does suggest a methodology—consciousness raising—for derivation of first principles.<sup>49</sup> Through the shared experience of women's lives and through concrete struggle against patriarchy—including, historically, the struggle for formal equality, for reproductive freedom, and against violence against women—feminists are deriving a conception of the good. Within feminist theory, the particulars of that good are the subject of lively debate, while the general is becoming a matter of consensus.

The feminist utopia looks something like this: it is a place without hierarchy, where children are nourished and told they are special, where gardens grow wheat and roses too, where the desire to excel at the expense of another is thought odd, where love is possible, and where the ordinary tragedies of human life are cushioned by the care and concern of others.<sup>50</sup>

This admittedly sentimental utopian vision is presented here for comparison with the just world suggested by Rawls. Rawls' theory is not

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48. See, e.g., E. BULKIN, M. PRATT, & B. SMITH, *YOURS IN STRUGGLE, THREE FEMINIST PERSPECTIVES ON ANTI-SEMITISM AND RACISM* (1984); *Writing and Sexual Difference* (1982) (thirteen authors and four respondents); *The Signs Reader, Women, Gender, and Scholarship*, supra note 8 (fourteen authors); *Feminist Theory, A Critique of Ideology*, supra note 31 (1982) (fourteen authors).

49. Catherine MacKinnon, a pioneer in the application of feminist theory to jurisprudence, focuses on the role of consciousness raising as a method of legal philosophy. See MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, THE SIGNS READER, 227 (1983).

50. For various conceptions of the feminist utopian vision, see *WOMEN IN SEARCH OF UTOPIA* (1984).

The bread and roses dream is the historical legacy of women's organized struggle for social change in America. Women who struck against inhumane conditions in the Lawrence, Massachusetts Mills in 1912 gave left these words to history:

Our lives shall not be sweated  
from birth until life closes,  
hearts can starve as well as bodies,  
Give us Bread and give us Roses.

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As we come marching, marching  
We bring the greater days;  
The rising of the women  
Means the rising of us all.  
No more the drudge and idler,  
Ten that toil where one reposes,  
But a sharing of life's glories,  
Bread and Roses, Bread and Roses

from a poem by J. Oppenheimer, *Bread and Roses*, inspired by the Lawrence strike of 1912.

Temma Kaplan noted the example of early 20th century Barcelona, where women acquired female consciousness from the shared routines of housework, laundry, church, and market. This consciousness, which led to concrete action for social change, was characterized by "placing human need above other social and political requirements and human life above property, profit, and even individual rights, female consciousness creates the vision of a society that has not yet appeared."

teleological. He focuses on procedural principles for allowing maximum individual pursuit of individual ends. He would neither endorse nor oppose the feminist utopia, attempting instead to avoid preliminary debate over right and good.

Rawls argues that it is impossible to convince the unconvinced without

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Kaplan, *Female Consciousness and Collective Action: The Case of Barcelona 1910-1918* in *FEMINIST THEORY, A CRITIQUE OF IDEOLOGY*, 55 (1982).

The vision of a homey, nurturing place has long been part of the American female experience. Annette Kolodny records the recurring dream of home, garden, and family in the writings of pioneer women. She quotes one Iowa pioneer in 1856, "Sometimes a vision of a pleasant home with a garden and flowers and creeping vines, and children and husband dear all at home, no more to roam, comes over me, and I confess I look forward to its reality with anticipated pleasure." A. KOLODNY, *THE LAND BEFORE HER, FANTASY AND EXPERIENCE OF THE AMERICAN FRONTIERS 1630-1860* (1984). Kolodny comments in the preface to her book on attitudes toward the American frontier:

For myself, I have long ceased to lament the absence of adventurous conquest in women's fantasies before 1860 and have come now to regret men's incapacity to fantasize tending the garden. For, given the choice, I would have had women's fantasies take the nation west rather than the psychosexual dramas of men intent on possessing a virgin continent. In the women's fantasies, at least, the garden implied home and community, not privatized economic mastery.

Less sentimental versions of the home and garden vision are frequently offered by successful women in the 80's. Sylvia Law stated in an interview, "We need to cultivate tomatoes and relationships with people we respect and enjoy. Friends help us know who we are and what we believe. After years of conforming in a male-dominated hierarchy, we need warmth, spontaneity, and schmoozing." 16 *Syllabus, ABA Legal Educ. Section I* (March 1985). Marge Piercy expresses her vision in poetry stating:

I want to be with people who submerge  
in the task, who go into the fields  
to harvest  
and to work in a row and pass the bags  
along,  
who stand in the line and haul  
in their places,  
who are not parlor generals and  
field deserters  
but move in a common rhythm  
when the food must come in or  
the fire be put out

From "To be of Use" in M. PIERCY, *TO BE OF USE* (1973). Audre Lorde defines the good life as one in touch with the erotic:

The principal horror of any system which defines the good in terms of profit rather than in terms of human need, or which defines human need to the exclusion of the psychic and emotional components of that need—the principal horror of such a system is that it robs our work of its erotic value, its erotic power and life appeal and fulfillment. Such a system reduces work to a travesty of necessities, a duty by which we earn bread or oblivion for ourselves and those we love. But this is tantamount to blinding a painter and then telling her to improve her work, and to enjoy the act of painting. It is not only next to impossible, it is also profoundly cruel.

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When I speak of the erotic, then, I speak of it as an assertion of the life force of women; of that creative energy empowered, the knowledge and use of which we are not reclaiming in our language, our history, our dancing, our loving, our work, our lives.

A. Lorde, *Uses of the Erotic: The Erotic as Power*, from A. LORDE, *SISTER OUTSIDER* (1984).

limiting the sphere of assumptions and possibilities, at least preliminarily.<sup>51</sup> If we just look at the world and argue, he seems to say, we will never convince. I would respond as a feminist that there is no other way. To argue at the level of abstraction proves nothing and clouds our vision. What we really need to do is to move forward through Rawls' veil of ignorance, losing knowledge of existing abstractions. We need to return to concrete realities, to look at our world, rethink possibilities, and fight it out on this side of the veil, however indelicate that may be. By ignoring alternative visions of human nature, and by limiting the sphere of the possible, Rawls creates a gridlock in which escape from liberalism is impossible, and dreams of the seashore futile.

#### IV. ASSUMPTIONS ABOUT HUMAN NATURE ABSTRACTED INTO THE ORIGINAL POSITION

This section explains the assumptions about human nature that lock us into Rawls' grid. All reasoning made from the original position is made within the construct of limited assumptions about human possibilities. This section notes some of the major assumptions that are worked into the original position. I will propose feminist counterassumptions, and ask whether it is logical for Rawls to choose one set of assumptions over another. If there is no logical basis for choice, then the elaborate construct of justice as fairness is flawed from the outset.

Rawls assumes self-interest and mutual disinterest.<sup>52</sup> In the original position, no one knows what advantages they will have or what plan they will have for their life. They do know, however, that they will want to maximize their advantages and carry out their plan.<sup>53</sup> They know that in general they will not be concerned with the relative disadvantage of others, nor particularly concerned about promoting the plans of others. They will be concerned for others only under two circumstances. First, they may

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51. In defending the restrictions on information in the original position, Rawls states, "Without these limitations on knowledge the bargaining problem of the original position would be hopelessly complicated. Even if theoretically a solution were to exist, we would not, at present anyway, be able to determine it." J. Rawls, *supra* note 2.

Rawls does recognize the felt experience of justice—the intuitive sense of what is right that human beings apply in their daily lives. He would apply and test this intuitive sense against rationally derived principles in order to reach "reflective equilibrium." There is, thus, even in Rawls' world, room for consciousness raising, although the dialogue he envisions as approaching reflexive equilibrium is one among classical moral philosophers. *Id.* at 50 (suggesting comparison of the "few main lines represented by the family of traditional doctrines").

52. *Id.* at 13. ("[t]he parties in the initial situation [are seen] as rational and mutually disinterested. This does not mean that the parties are egoists, that is, individuals with only certain kinds of interests, say in wealth, prestige, and domination. But they are conceived as not taking an interest in one another's interests").

53. *Id.* at 126 ("men are not indifferent as to how the greater benefits produced by their collaboration are distributed, for in order to pursue their ends they each prefer a larger to a lesser share").

end up with a conception of the good that includes altruism as a plan for life: They may be saints or heroes.<sup>54</sup> Second, they may come to see that there is personal advantage in assisting others to maximize their talents.<sup>55</sup> Nondancers might decide to support dancers because of the nondancers' self-interest in dance appreciation.

Rawls admits that persons in the original position "have a certain psychology, since various assumptions are made about their beliefs and interests."<sup>56</sup> In addition to assumptions about themselves, those persons have "general facts" about society, psychology, and social life.<sup>57</sup>

The facts that the original clones know about real life are interesting. They know that there will be scarcity of goods and advantages. They know that they will prefer larger shares of these. They know that conflict is inherent in social life and that cooperation is preferable only to the extent that cooperation is mutually rewarding. Rawls is not always explicit about all of these facts, but they are implicitly a part of the unchanging state of human affairs that Rawls accepts as factual.<sup>58</sup>

Rawls also presumes a serious world in which people are constrained to justice. They need to know what's in it for them. He speaks of duties, obligations, shame—dismal words suggesting a noncelebratory outlook on life.<sup>59</sup> People are happy, he says, when they are carrying out their life plans.<sup>60</sup> One of the most important of primary goods is self-respect—a sense of worth and of power to pursue one's own ends. Associative ties, cooperation, and family, are means to this same individual end.<sup>61</sup>

Persons in the original position, viewing the world of human possibilities as Rawls does, and knowing nothing of their own place in that world, would quite likely choose the two principles of justice as fairness. In a world where everyone looks after themselves, and where mutual concern is merely an extension of self-interest, people are wise to place primary value on liberty. Liberty is less important in a context of trust and love, but this is not the context Rawls accepts as a fact admissible

54. *See id.* at 129.

55. Everyone, Rawls suggests, should be able to form "associative ties . . . since they tend to reduce the likelihood of failure and to provide support against the sense of self-doubt when mishaps occur." *Id.* at 441.

56. *Id.* at 121.

57. *Id.* at 137.

58. *See, e.g., id.* at 126–30, discussing the circumstances of justice. ("[t]he circumstances of justice obtain whenever mutually disinterested persons put forward conflicting claims to the division of social advantages under conditions of moderate scarcity"). *Id.* at 128. The "circumstances" are the conditions that compel a theory of justice.

59. Carol Gilligan recognizes the morality of obligation as part of female consciousness, but her description of obligation differs from Rawls'. Rawls' concept of duty implies constraint and forced conformity. Gilligan, in contrast, suggests that doing for others is part of a female sense of self-worth. C. GILLIGAN, IN *A DIFFERENT VOICE* 64–105 (1982). I thank Amy Kastely for this insight.

60. J. Rawls, *supra* note 2, at 550.

61. *See id.*, discussion of cooperation at 126–27.

in the original position.<sup>62</sup> "Nothing would be gained," he states, "by attributing benevolence to the parties in the original position."<sup>63</sup>

The problem with the general facts let into the original position is that they are not facts at all. Rawls cites no indication of consensus as to the facts of human nature, psychology, or social life. He ignores the dominant trend of scholarship that suggests little agreement over the degree to which various aspects of human nature are culturally, biologically, or historically determined.<sup>64</sup> A rudimentary knowledge of history and anthropology tells us that the potentialities of the human personality are far from fixed in the twentieth century western liberal conception.<sup>65</sup>

The point here is that Rawls works a limited list of presumptions about the human condition into the original position. The list of possibilities that Rawls ignores and abstracts out of consideration is equally instructive. Feminist theory suggests alternative conceptions that, while like Rawls' are not provable, show how Rawls made some determinative choices in describing the original position.

62. *Id.* at 191. Rawls argues that if altruism means concern for the ends of others, a conference of altruists could never derive any principles of justice, trapped as they would be, à la Alphonse and Gaston, in the circular desire to do what makes the other happy. At least one egoist is needed, Rawls suggests, to allow the others their altruism. *Id.* at 189-91.

63. *Id.*

64. Hierarchy, dominance, and competition are elements of "human nature" questioned by feminist scholars. Heidi Hartmann suggests that patriarchy preceded capitalism, but that it is not a universal or essential element of human society. *Capitalism, Patriarchy, and Job Segregation by Sex*, THE SIGNS READER, 193 (1982). For a feminist critique of sociobiological assumptions of hierarchy in human nature, see Haraway, *Animal Sociology and a Natural Economy of the Body Politic, Part I: A Political Physiology of Dominance*, in THE SIGNS READER 123 (1982) (discussing the failure of social biologists to escape their ideology and pre-conceptions in conducting "scientific" research). See also S. Gould, *Cardboard Darwinism*, XXXIII NEW YORK REVIEW OF BOOKS, No. 14, 47 (1986) (suggesting a sophisticated Darwinism that accounts for altruism as more than an individual survival technique).

65. Two ethnographies illustrating alternative cultures characterized by care for others and mutual interdependency are J. LINNEKIN, *CHILDREN OF THE LAND, EXCHANGE AND STATUS IN A HAWAIIAN COMMUNITY* (1985) (describing the role of exchange of commodities, labor, and kinship in the survival of a rural native Hawaiian community at Keanae, Maui) and C. STACK, *ALL OUR KIN, STRATEGIES FOR SURVIVAL IN A BLACK COMMUNITY* (1974) (describing the role of exchange and domestic networks among women in the survival of a Black, urban, low-income community). While Linnekin and Stack are anthropologists making no explicit feminist claims, their work is informed by a woman's view—by a quickness of vision in documenting the details of kinship and exchange as life-giving practices.

Rawls makes a claim that is in a sense anthropological when he states that "persons are not indifferent as to how the greater benefits produced by their collaboration are distributed, for in order to pursue their ends, they each prefer a larger to a lesser share." The village of Keanae, as described by Linnekin, provides a striking counterpoint. In Keanae, giving goods and services to others creates power and status, and having more than others is a mark of shame. Linnekin describes the example of a woman who lived in a larger, more modern home than her neighbors. This behavior was criticized as "social climbing," and resulted in part in the women's social isolation. J. LINNEKIN *supra* note 65, at 144. Critics of the anthropologists "exchange" model would add that Hawaiian giving is motivated by feelings of pride and self-worth rather than the need for status achievement. I thank Professor Lilikalā Dorton for this perspective.

Feminist theory suggests that we can achieve identity of interest on the real-life side of the veil. In that world, people would not be moved solely by self-interest, but also by feelings of love, intimacy, and care for others. They would be in a perpetual state of mutual concern. Rawls begins to consider this possibility when he discusses families and social unions, but his dominant idea is that it is personally advantageous for individuals to join social unions. Feminist experience suggests there is something beyond personal advantage—a collectivist way of thinking that presumes it natural, joyful, and easy to care for others.<sup>66</sup> There is an element of self-interest in this proposition, but it is not a dismal struggle for individual advantage within the merely-convenient context of social union that Rawls proposes.

Another counterassumption is that this may not be a world of an endless mad grab for limited goods. First, it may be possible for all of us to achieve happiness by deciding we don't want the goods anymore. The desire for wealth and property may be the product of false consciousness and consumerist, patriarchal traditions.<sup>67</sup> The desire for power and achievement may be a product of never learning to rejoice at the excellence of others, of never learning to play for the sake of playing rather than winning. Second, the scarcity of goods may be an illusion. Science and technology, good fortune and good weather, cooperation and creativity, may change the availability of most of the goods we covet.

This leaves the problem of distribution of such Rawlsian goods as self-respect and excellences, or natural talents and assets.<sup>68</sup> The whole concept of self-respect presumes that others will try to interfere with our plans. Self-respect is defined by Rawls as being left alone to pursue one's own ends. Again, this is a nonsensical concept unless one presumes that individualism is the only possible creed of human conduct. Similarly, excellences are the subject of envy only if it is presumed that we can't rejoice at the gifts of others, and that they won't rejoice in the use of their gifts to help us without some *quid pro quo*.

This leads to another counterassumption, one that challenges Rawls' stern view of what feels good. Achievement, carrying out a plan, excel-

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66. See generally, *Women in search of Utopia* (1984).

67. Indeed, some would propose that with alternative priorities and methods of distribution, every person living on this planet today could live in a state of relative leisure. Angela Davis, for example, foresees a world in which women are freed from the drudgery of individualized, unpaid housework. Davis argues that "[t]eams of trained and well-paid workers, moving from dwelling to dwelling, engineering technologically advanced cleaning machinery, could swiftly and efficiently accomplish what the present-day housewife does so arduously and primitively." A. DAVIS, *WOMEN RACE AND CLASS* 223 (1981).

68. Defined in J. Rawls, *supra* note 2, at 440. Again, Rawls' version of self-respect starts from the presumption of mutual disinterest. "Surely," Rawls asserts, "it is natural to experience a loss of self-esteem, a weakening of our sense of the value of accomplishing our aims, when we must accept a lesser prospect of life for the sake of others." *Id.* at 181, 443.

lence feel good to him.<sup>69</sup> Feminist thought, derived through consciousness raising, considers the possibility that humor, modesty, conversation, spontaneity, laziness, and enjoying the talents and differences of others also feel good.<sup>70</sup> Because Rawls imposes a limited view of what feels good upon the deliberators in the original position, they adopt a limited formula for redistribution. This ignores the possibility that we can take collective pleasure in knowing that there is some rare and fine advantage that only a few can have, and that we can all celebrate when those few are chosen. Sports fans might understand this.

It seems that what really hurts, and this Rawls seeks to avoid, is when those rare and fine advantages are distributed not by grace, but by arbitrary privilege.<sup>71</sup> If this is the real problem, then perhaps justice requires elimination of class differences. My purpose here is not to construct or prove true other theories of justice, but only to point out that Rawls' theory arises from Rawls' unproven premises, and that different premises suggest different results.<sup>72</sup>

## V. CONCLUSION

There are many hopeful counterpremises that Rawls ignores, and the method of abstraction allows him to do this. Rawls might characterize the counterassumptions suggested here as alternative conceptions of the good that will be considered in the abstract in the original position. That response is not good enough. It doesn't explain why the presumptions of self-interest and mutual disinterest are not abstracted out, but taken as given, while the possibility of collectivism is just another possibility that saints may choose on the real-life side of the veil.

Rawls' technique may have value, but it is unfair to achieve consensus by fiat. What we really have to do is to leave the original position, and argue on the common ground of this planet earth. We have to consider the possibility that we can all choose to be saints and that we can set up institutions that allow us to do this. Once we have explored the real-life

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69. Rawls states, "When activities fail to satisfy the Aristotelian Principle, they are likely to seem dull and flat, and to give us no feeling of competence or a sense that they are worth doing. A person tends to be more confident of his value when his abilities are both fully realized and organized in ways of suitable complexity and refinement." *Id.* at 440.

70. See *supra* note 50.

71. J. Rawls, *supra* note 2, at 72. ("Intuitively, the most obvious injustice of the system of natural liberty is that it permits distributive shares to be improperly influenced by these factors so arbitrary from a moral point of view.") *Id.*

72. Rawls asks that critics "be tolerant of simplifications if they reveal and approximate the general outlines of our judgments. Objections by way of counterexamples are to be made with care, since these may tell us only what we know already, namely that our theory is wrong somewhere," for moral philosophy is as yet primitive. *Id.* at 52.



potential of humankind in a concrete context, it may then be valuable to go back behind the veil and rework the theory with a set of general facts about human nature that are more fairly derived. I suspect, however, that once we have the answers on this side of the veil, we won't need to resort to abstraction. The proof will lie in the lives we will live.

This essay has criticized in particular Rawls' quickness to use abstraction. This is not to suggest that theory and abstraction are without value. The suggestion made here is a more modest one. Theory has value, as long as we remember that real people create theory and that real people live their lives in worlds affected by theory. Half of those people are women, and their experiences can teach us something about justice.

John Rawls has written a valuable book that feminist students of jurisprudence will continue to read and struggle with as they search for a just world.

This essay is an attempt to engage in traditional jurisprudential discourse with a female voice. Unlike the fields of history and literary criticism, mainstream jurisprudence has not yet experienced the nudge of feminism.<sup>73</sup> While in other academic realms feminist criticism has evolved into multi-layered schools, genres, and stages, feminist jurisprudence remains nascent.<sup>74</sup> This essay is typical of first-stage criticism in that it attempts to deconstruct a standard text, suggesting only the possibility of gynocentric reconstruction.<sup>75</sup>

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73. The beginnings of a body of work identifiable as feminist jurisprudence include, inter alia, the writings of Catherine MacKinnon, *see, e.g.*, MacKinnon, *Feminism, Marxism, Method, and the State*, *supra* note 49; MacKinnon, *Toward Feminist Jurisprudence*, 34 STAN. L. REV. 703 (1981-82); Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 3 (1984). *See also* Poland, *Toward a Theory of Law and Patriarchy* in *THE POLITICS OF LAW* (1982); Scales, *Towards a Feminist Jurisprudence*, 56 IND. L. REV. 375 (1980-81). Articles and books of interest to feminist legal scholars are collected in the critical legal studies bibliography of feminist legal scholarship, available from Professor Frances Olsen, UCLA School of Law, or Professor Mary Jo Frug, New England School of Law.

74. First-stage, compensatory feminist historiography, for example, focused on the role of notable women in the events already identified as significant by male-dominated scholarship. Second-stage feminist historiography focused on previously unnoticed events and processes that formed the center of women's lives. For a history of feminist historiography, *see* G. LERNER, *supra* note 47, at 65-67, suggesting questions and problems regarding Black women in history. Similarly, in literary criticism, earlier feminist work pointed out the sexist stereotypes and absences in dominant, male literature. Second-stage criticism focused instead on the works of women writers, searching for uniquely female language, structure, and sign. Elaine Showalter identifies four models of feminist literary criticism—biological, linguistic, psychoanalytic, and cultural—each with a body of supporting scholarship. *See* Showalter, *Feminist Criticism in the Wilderness* in *WRITING AND SEXUAL DIFFERENCE* (1982). Feminist literary criticism has, in fact, evolved to the point of supporting a critique of the critique. *See, e.g.*, Jehlen, *supra* note 31. Jehlen's argument that "the problem, if we as feminists want to address our whole culture is to deal with what we do not like but recognize as nonetheless, valuable, serious, good," is in part the justification for this essay addressing Rawls.

75. For a good example of much needed first-stage feminist legal criticism, *see* Frug, *Re-reading Contracts: A Feminist Analysis of a Contracts Case Book* 34 AM. U. L. REV. 1065 (1985). This article is, in part, inspired by Frug's example.

Some may call this thrashing;<sup>76</sup> I prefer to call it dialogue. Implicit in this critique of Rawls is the belief that the enterprise of jurisprudence is worthwhile, and that feminists will gain from careful consideration of mainstream texts. This essay is one small effort in that direction, in anticipation of a great flowering of feminist jurisprudence in the coming years.

There is, as Rawls suggests, a place called Justice, and it will take many voices to get there.

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76. The criticism of doctrine or theory as "indeterminate, contradictory, non-objective, historicist, and socially, contingent" is referred to, inter alia, as irrationalism, nihilism, or trashing. Stick, *Can Nihilism Be Pragmatic?*, 100 HARV. L. REV. \_\_\_\_ (forthcoming Dec. 1986). See also Kelman, *Trashing*, 36 STAN. L. REV. 293 (1984).