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## ARTICLE

## FEMINIST LEGAL METHODS

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*Legal methods are the basic tools that lawyers and legal scholars use. Critics of law have sought to challenge and develop alternatives to traditional methodologies. In this Article, Professor Bartlett identifies and critically examines a set of feminist legal methods. These techniques, grounded in women's experiences of exclusion, include "asking the woman question," feminist practical reasoning, and consciousness-raising. Each of these methods is both critical and constructive, and helps to reveal features of a legal issue that more traditional methods tend to overlook or suppress. Professor Bartlett then addresses the epistemological implications of feminist legal methods by examining the nature of the claims to truth that they generate. After analyzing three theories of knowledge reflected in feminist legal writing — rational empiricism, standpoint epistemology, and postmodernism — Professor Bartlett offers a fourth approach, positionality, which she believes provides for feminists the best explanation of what it means to be "right" in law. Positionality retains a concept of nonarbitrary truth based upon experience, yet because it deems truth situated and provisional rather than*

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\* Professor of Law, Duke University School of Law. Many people helped me with this Article. Among these, Paul Carrington, Peter Gabel, Rosanne Kennedy, Toni Massaro, Martha Minow, Judith Resnik, Deborah Rhode, Tom Rowe, Joseph Singer, and William Van Alstyne took the time to review a draft and to give me useful comments and suggestions. I leaned especially heavily on Chris Schroeder and Jeff Powell, who on numerous occasions put aside their own work to help me figure out mine. Twenty-seven Duke law students enrolled in my seminar in Feminist Legal Theory in the fall 1989 semester helped me to think through many of the issues I raise in this Article, primarily by pressing me to show how my own theories did not contain the same weaknesses I found in the writings of others. Finally, although they claim not to be able to understand my work, my mother Elizabeth Clark Bartlett and my grandmother Katharine Tiffany Clark passed on to me the optimism about human goodness and the human capacity for mutual understanding that grounds this work. I thank all of these people.

I had wanted to humanize and particularize the authors whose ideas I used in this Article by giving their first as well as last names. Unfortunately, the editors of the *Harvard Law Review*, who otherwise have been most cooperative, insisted upon adhering to the "time-honored" Bluebook convention of using last names only, see A UNIFORM SYSTEM OF CITATION 91 (14th ed. 1986), except when the writing is a "book," in which case the first initial is given, *id.* at 83, and except when the writing is by a student, in which case no name whatsoever is given (unless the student has a name like "Bruce Ackerman," in which case "it may be indicated parenthetically," *id.* at 91), see *id.* In these rules, I see hierarchy, rigidity, and depersonalization, of the not altogether neutral variety. First names have been one dignified way in which women could distinguish themselves from their fathers and their husbands. I apologize to the authors whose identities have been obscured in the apparently higher goals of Bluebook orthodoxy.

*external or final, it obligates feminists to use their methods to continue to extend and transform this truth.*

## I. INTRODUCTION

### A. "Doing" and "Knowing" in Law

IN what sense can legal methods be "feminist"? Are there specific methods that feminist lawyers share? If so, what are these methods, why are they used, and what significance do they have to feminist practice? Put another way, what do feminists mean when they say they are doing law,<sup>1</sup> and what do they mean when, having done law, they claim to be "right"?

Feminists have developed extensive critiques of law<sup>2</sup> and proposals for legal reform.<sup>3</sup> Feminists have had much less to say, however, about what the "doing" of law should entail and what truth status to give to the legal claims that follow. These methodological issues matter because methods shape one's view of the possibilities for legal practice and reform. Method "organizes the apprehension of truth; it determines what counts as evidence and defines what is taken as verification."<sup>4</sup> Feminists cannot ignore method, because if they seek to challenge existing structures of power with the same methods that

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<sup>1</sup> Although many individuals participate in doing and making law, see Dalton, *Where We Stand: Observations on the Situation of Feminist Legal Thought*, 3 BERKELEY WOMEN'S L.J. 1, 2 & n.2 (1987-1988), this Article is primarily about "doing law" in the limited sense encompassed by the professional activities of practicing lawyers, lawmakers, law professors, and judges.

<sup>2</sup> These critiques have ranged from attacks on specific legal rulings to deconstructions of fundamental concepts of modern law. Among the major feminist critiques of the last decade are Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 YALE L.J. 913 (1983); Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. (forthcoming 1990); Kay, *Models of Equality*, 1985 U. ILL. L. REV. 39; Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984); Littleton, *Reconstructing Sexual Equality*, 75 CALIF. L. REV. 1279 (1987); MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515 (1982) [hereinafter MacKinnon, *Agenda for Theory*]; MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635 (1983) [hereinafter MacKinnon, *Toward Feminist Jurisprudence*]; Minow, *The Supreme Court, 1986 Term — Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987); Olsen, *Statutory Rape: A Feminist Critique of Rights*, 63 TEX. L. REV. 387 (1984); Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373 (1986); Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986); Taub & Schneider, *Perspectives on Women's Subordination and the Role of Law*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 117 (D. Kairys ed. 1982); West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988); and W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts and Feminism*, 7 WOMEN'S RTS. L. REP. 175 (1982).

<sup>3</sup> These proposals cover a broad range of subject matters and political agendas. In addition to the literature cited above in note 2, see sources cited below in notes 164-70.

<sup>4</sup> MacKinnon, *Agenda for Theory*, *supra* note 2, at 527.

have defined what counts within those structures, they may instead "recreate the illegitimate power structures [that they are] trying to identify and undermine."<sup>5</sup>

Method matters also because without an understanding of feminist methods, feminist claims in the law will not be perceived as legitimate or "correct." I suspect that many who dismiss feminism as trivial or inconsequential misunderstand it. Feminists have tended to focus on defending their various substantive positions or political agendas, even among themselves. Greater attention to issues of method may help to anchor these defenses, to explain why feminist agendas often appear so radical (or not radical enough), and even to establish some common ground among feminists.

As feminists articulate their methods, they can become more aware of the nature of what they do, and thus do it better. Thinking about method is empowering. When I require myself to explain what I do, I am likely to discover how to improve what I earlier may have taken for granted. In the process, I am likely to become more committed to what it is that I have improved. This likelihood, at least, is a central premise of this Article and its primary motivation.

I begin this Article by addressing the meaning of the label "feminist," and the difficulties and the necessity of using that label. I then set forth in Part II a set of legal methods that I claim are feminist. All of these methods reflect the status of women as "outsiders," who need ways of challenging and undermining dominant legal conventions and of developing alternative conventions which take better account of women's experiences and needs. The methods analyzed in this Article include (1) identifying and challenging those elements of existing legal doctrine that leave out or disadvantage women and members of other excluded groups (asking the "woman question"); (2) reasoning from an ideal in which legal resolutions are pragmatic responses to concrete dilemmas rather than static choices between opposing, often mismatched perspectives (feminist practical reasoning); and (3) seeking insights and enhanced perspectives through collaborative or interactive engagements with others based upon personal experience and narrative (consciousness-raising).

As I develop these methods, I consider a number of methodological issues that feminists have not fully confronted and that are crucial to the potential growth of feminist legal theory and practice. I examine, for example, the relationship between feminist methods and substantive legal rules. Feminist methods emerged from feminist politics and find their justification, at least in part, in their ability to advance substantive feminist goals. Thus, one might argue that the methods

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<sup>5</sup> Singer, *Should Lawyers Care About Philosophy?* (Book Review), 1989 DUKE L.J. (forthcoming).

I describe are not really methods at all, but rather substantive, partisan rules in the not-very-well-disguised shape of method. I argue, however, that the defense of any particular set of methods must rest not on whether it is nonsubstantive — an impossibility — but whether its relationship to substantive law is defensible. I defend the substantive elements of feminist methods and argue that these methods provide an appropriate constraint upon the application of substantive rules.

Throughout my analysis of feminist legal methods, I also critically examine the place of feminist methods within the general context of legal method. I reject the sharp dichotomy between abstract, deductive (“male”) reasoning, and concrete, contextualized (“female”) reasoning because it misdescribes both conventional understandings of legal method and feminist methods themselves. The differences between the two methodologies, I argue, relate less to differences in principles of logic than to differences in emphasis and in underlying ideals about rules. Traditional legal methods place a high premium on the predictability, certainty, and fixity of rules. In contrast, feminist legal methods, which have emerged from the critique that existing rules overrepresent existing power structures, value rule-flexibility and the ability to identify missing points of view.

After describing and analyzing feminist legal methods, I examine in Part III the nature of the claims to truth that those who use these methods can make. This examination is important because the status given to assertions of knowledge or truth establishes the significance of the methods that produce those assertions. A theory of knowledge that assumes the existence of objective truth accessible through rational or empirical inquiry, for example, has different methodological implications than a theory that treats knowledge as a question of special privilege, or one that denies its existence altogether. In Part III, I explore four theories of knowledge reflected in feminist legal writings: rational empiricism, standpoint epistemology, postmodernism, and positionality. I then describe the implications of each of these theories for feminist methods and politics. I conclude that the theory of positionality offers the best explanatory grounding for feminist knowledge. Positionality rejects both the objectivism of whole, fixed, impartial truth and the relativism of different-but-equal truths. It posits instead that being “correct” in law is a function of being situated in particular, partial perspectives upon which the individual is obligated to attempt to improve. This stance, I argue, identifies experience as a foundation for knowledge and shapes an openness to points of view that otherwise would seem natural to exclude. I close the Article by explaining that feminist methods are not only useful means to reach feminist goals, but also fundamental ends in themselves.

*B. "Feminist" As a Descriptive Label*

Although this Article necessarily represents a particular version of feminism, I refer to positions as feminist in a broad sense that encompasses a self-consciously critical stance toward the existing order with respect to the various ways it affects different women "as women."<sup>6</sup> Being feminist is a political choice about one's positions on a variety of contestable social issues. As Linda Gordon writes, "feminism . . . is not a 'natural' excretion of [woman's] experience but a controversial political interpretation and struggle, by no means universal to women."<sup>7</sup> Further, being feminist means owning up to the part one plays in a sexist society; it means taking responsibility — for the existence and for the transformation of "our gendered identity, our politics, and our choices."<sup>8</sup>

Use of the label "feminist" has substantial problems. First, it can create an expectation of feminist originality or invention that feminists do not intend and cannot fulfill. This expectation itself demonstrates a preoccupation with individual achievement and ownership at odds with the feminist emphasis on collective, relational discovery.<sup>9</sup> Fem-

<sup>6</sup> As I argue later, feminist method reaches other categories of exclusion as well. *See infra* pp. 847-49.

<sup>7</sup> Gordon, *What's New in Women's History*, in *FEMINIST STUDIES/CRITICAL STUDIES* 20, 30 (T. de Lauretis ed. 1986). I favor a definition of "feminist" that allows men, as well as women, to make this choice. Some feminists disagree. *See, e.g.*, Littleton, *supra* note 2, at 1294 n.91 (claiming that women's experiences are a necessary prerequisite to being feminist); *see also* C. MACKINNON, *FEMINISM UNMODIFIED* 55-57 (1987) (noting that men can be feminized by experiences such as rape, but that such identifications with women are temporary and unusual).

<sup>8</sup> Alcoff, *Cultural Feminism Versus Post-Structuralism: The Identity Crisis in Feminist Theory*, 13 *SIGNS* 405, 432 (1988).

Rosalind Delmar's definition of feminist is, for my purposes, one of the most useful: "at the very least a feminist is someone who holds that women suffer discrimination because of their sex, that they have specific needs which remain negated and unsatisfied, and that the satisfaction of these needs would require a radical change . . . in the social, economic and political order." Delmar, *What Is Feminism?*, in *WHAT IS FEMINISM* 8, 8 (J. Mitchell & A. Oakley eds. 1986). Deborah Rhode uses a similar definition in setting forth the three core assumptions of feminist critical theories: that gender is a central category for analysis; that equality between women and men is a crucial social objective; and that such equality for all women cannot be achieved without fundamental social transformation. *See* Rhode, *Feminist Critical Theories*, 42 *STAN. L. REV.* (forthcoming 1990).

<sup>9</sup> Martha Minow makes this point in a powerful way:

Why is it so important for feminism to be distinctive, as that notion has been understood? The preoccupation with distinctiveness shows a preoccupation with pinning things down: with knowing by categorizing and dividing, claiming, naming, and blaming, and with tracking ownership of things and ideas. Some would characterize these preoccupations as male. They also fit a description of Western cultural conceptions of knowledge, in contrast to Eastern and African conceptions. Fascination with tracing distinctive ownership of things and ideas risks distracting feminists from challenging the patterns of

inists acknowledge that some important aspects of their methods and theory have roots in other legal traditions. Although permeated by bias, these traditions nonetheless have elements that should be taken seriously.<sup>10</sup> Still, labeling methods or practices or attitudes as feminist identifies them as a chosen part of a larger, critical agenda originating in the experiences of gender subordination. Although not every component of feminist practice and reform is unique, these components together address a set of concerns not reached by existing traditions.

Second, use of the label "feminist" has contributed to a tendency within feminism to assume a definition of "woman" or a standard for "women's experiences" that is fixed, exclusionary, homogenizing, and oppositional, a tendency that feminists have criticized in others.<sup>11</sup> The tendency to treat woman as a single analytic category has a number of dangers. For one thing, it obscures — even denies — important differences among women and among feminists, especially differences in race, class, and sexual orientation, that ought to be taken into account.<sup>12</sup> If feminism addresses only oppressive practices that operate against white, privileged women, it may readjust the allocation of privilege, but fail either to reconstruct the social and legal significance of gender or to prove that its insights have the power to illuminate other categories of exclusion. Assuming a unified concept of "woman" also adopts a view of the subject that has been rendered highly problematic. Poststructural feminists have claimed that woman has no core identity but rather comprises multiple, overlapping social

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thought that historically excluded women and risks forcing us to fight over the few, if any, remaining plots of ground left.

Minow, *Beyond Universality*, 1989 U. CHI. LEGAL F. 115, 131.

I discuss the feminist emphasis on collective discovery at pp. 863–65 below.

<sup>10</sup> In this belief, I am more generous than some other feminists have been to mainstream legal traditions. Although existing legal tools limit the scope of possible change, see A. LORDE, *The Master's Tools Will Never Dismantle the Master's House*, in *SISTER OUTSIDER* 110 (1984), I think it important not only to critique our traditions, but to acknowledge their useful — and in some respects subversive — features. Cf. Z. EISENSTEIN, *THE RADICAL FUTURE OF LIBERAL FEMINISM* 5 (1986) (arguing both that "the liberal underpinnings of feminist theory are essential to feminism [and that] the patriarchal underpinnings of liberal theory are also indispensable to liberalism").

<sup>11</sup> See J. GRIMSHAW, *PHILOSOPHY AND FEMINIST THINKING* 75–103 (1986); E. SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* (1988); Flax, *Post-modernism and Gender Relations in Feminist Theory*, 12 *SIGNS* 621, 633–34, 637–43 (1987); Harding, *The Instability of the Analytical Categories of Feminist Theory*, 11 *SIGNS* 645, 646–47 (1986); Minow, *Feminist Reason: Getting It and Losing It*, 38 *J. LEGAL EDUC.* 47 (1988).

<sup>12</sup> See M. FRYE, *THE POLITICS OF REALITY: ESSAYS IN FEMINIST THEORY* (1983); B. HOOKS, *FEMINIST THEORY FROM MARGIN TO CENTER* 17–65 (1984); Harris, *supra* note 2; Kline, *Race, Racism, and Feminist Legal Theory*, 12 *HARV. WOMEN'S L.J.* 115 (1989); Omolade, *Black Women and Feminism*, in *THE FUTURE OF DIFFERENCE* 247 (H. Eisenstein & A. Jardine eds. 1980); Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 *SIGNS* 631 (1980); Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 *HARV. C.R.-C.L. L. REV.* 9 (1989). For a fuller discussion of this point, see pp. 847–49 below.

structures and discourses.<sup>13</sup> Using woman as a category of analysis implies a rejection of these claims, for it suggests that members of the category share a set of common, essential, ahistorical characteristics that constitute a coherent identity.<sup>14</sup>

Perhaps the most difficult problem of all with use of the terms "feminist" and "woman" is its tendency to reinstate what most feminists seek to abolish: the isolation and stigmatization of women.<sup>15</sup> All efforts to take account of difference face this central dilemma. Although ignoring difference means continued inequality and oppression based upon difference, using difference as a category of analysis can reinforce stereotyped thinking and thus the marginalized status of those within it.<sup>16</sup> Thus, in maintaining the category of woman or its corresponding political label "feminist" to define those who are degraded on account of their sex, feminists themselves strengthen the identification of a group that thereby becomes more easily degraded.

Despite these difficulties, these labels remain useful. Although feminists have been guilty of ethnocentrism and all too often fail to recognize that women's lives are heterogeneous, that women who have had similar experiences may disagree about political agendas, and that women's gender is only one of many sources of identity, gender remains a category that can help to analyze and improve our world.<sup>17</sup> To sustain feminism, feminists must use presently understandable categories, even while maintaining a critical posture toward their use. In this Article, I retain feminist as a label, and woman as an analytical category, while trying to be sensitive to the misleading or dangerous tendencies of this practice.<sup>18</sup> I try to acknowledge the extent to which

<sup>13</sup> See *infra* pp. 877-78.

<sup>14</sup> See Fraser & Nicholson, *Social Criticism Without Philosophy: An Encounter Between Feminism and Postmodernism*, in UNIVERSAL ABANDON? THE POLITICS OF POSTMODERNISM 96, 101 (A. Ross ed. 1988).

<sup>15</sup> See D. RILEY, AM I THAT NAME?: FEMINISM AND THE CATEGORY OF "WOMEN" IN HISTORY (1988). In reviewing Denise Riley's book, Ann Snitow puts the problem as follows: "How to use the category 'women' to take the category apart; how to be a woman, and make claims for women, without having that identity overdetermine one's fate." Snitow, *What's in a Name?: Denise Riley's Categorical Imperatives*, VOICE LITERARY SUPPLEMENT, Jan.-Feb. 1989, at 36.

<sup>16</sup> See Minow, *Learning To Live with the Dilemma of Difference: Bilingual and Special Education*, LAW & CONTEMP. PROBS., Spring 1985, at 157-58.

<sup>17</sup> As Susan Bordo writes, "dominance does not require homogeneity in order to function as dominant." Bordo, *Feminist Skepticism and the "Maleness" of Philosophy*, 85 J. PHIL. 619, 623 (1988).

<sup>18</sup> On this point, Clare Dalton writes:

[I]t may not be possible, ultimately, to 'transcend' the kinds of categories our current ways of thinking and imagining condemn us to use in order to make sense of our experience. But being self-conscious about the particular *set* of categories inhering in particular doctrine may at least enable us to expand our repertoire, and enlarge the

feminist methods and theory derive from, or are related to, familiar legal traditions. I also try to avoid — to the extent one can — the ever-present risks of ethnocentrism and of unitary and homogenizing overgeneralizations.<sup>19</sup> Where I fail, I hope I will be corrected, and that no failures, or corrections, will ever be deemed final.

## II. FEMINIST DOING IN LAW

When feminists “do law,” they do what other lawyers do: they examine the facts of a legal issue or dispute, they identify the essential features of those facts, they determine what legal principles should guide the resolution of the dispute, and they apply those principles to the facts. This process unfolds not in a linear, sequential, or strictly logical manner, but rather in a pragmatic, interactive manner. Facts determine which rules are appropriate, and rules determine which facts are relevant.<sup>20</sup> In doing law, feminists like other lawyers use a full range of methods of legal reasoning<sup>21</sup> — deduction, induction, analogy, and use of hypotheticals, policy, and other general principles.<sup>22</sup>

In addition to these conventional methods of doing law, however, feminists use other methods. These methods, though not all unique to feminists, attempt to reveal features of a legal issue which more traditional methods tend to overlook or suppress. One method, asking the woman question, is designed to expose how the substance of law may silently and without justification submerge the perspectives of women and other excluded groups. Another method, feminist practical reasoning, expands traditional notions of legal relevance to make legal decisionmaking more sensitive to the features of a case not

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number of concrete alternatives available to use . . . , even while recognizing the limits of our culture.

Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1113 n.507 (1985) (emphasis in original); see also *infra* note 159.

<sup>19</sup> See *infra* pp. 847–49.

<sup>20</sup> See K. SCHEPPELE, *LEGAL SECRETS* 95 (1988).

The mutual construction of facts and rules is an iterative process in which the facts of the case determine the legal categories that will be invoked which in turn determine how the facts will be sorted into those that are relevant and those that are irrelevant, which in turn determines which rules are to be invoked.

*Id.*

<sup>21</sup> See Littleton, *Feminist Jurisprudence: The Difference Method Makes* (Book Review), 41 STAN. L. REV. 751, 763–71 & 763 n.60 (1989).

<sup>22</sup> The literature about these and other conventional legal methods is legion. A few of the important works include S. BURTON, *AN INTRODUCTION TO LAW AND LEGAL REASONING* (1985); M. EISENBERG, *THE NATURE OF THE COMMON LAW* (1988); M. GOLDING, *LEGAL REASONING* (1984); E. LEVI, *AN INTRODUCTION TO LEGAL REASONING* (1949); N. MAC-CORMICK, *LEGAL REASONING AND LEGAL THEORY* (1978); Gordley, *Legal Reasoning: An Introduction*, 72 CALIF. L. REV. 138 (1984); and Wellman, *Practical Reasoning and Judicial Justification: Toward an Adequate Theory*, 57 U. COLO. L. REV. 45 (1985).

already reflected in legal doctrine. A third method, consciousness-raising, offers a means of testing the validity of accepted legal principles through the lens of the personal experience of those directly affected by those principles. In this Part, I describe and explore the implications of each of these feminist methods.

### A. Asking the Woman Question

A question becomes a method when it is regularly asked. Feminists across many disciplines regularly ask a question — a set of questions, really — known as “the woman question,”<sup>23</sup> which is designed to identify the gender implications of rules and practices which might otherwise appear to be neutral or objective. In this section, I describe the method of asking the woman question in law as a primary method of feminist critique, and discuss the relationship between this method and the substance of feminist goals and practice. I also show how this method reaches beyond questions of gender to exclusions based upon other characteristics as well.

1. *The Method.* — The woman question asks about the gender implications of a social practice or rule: have women been left out of consideration? If so, in what way; how might that omission be corrected? What difference would it make to do so? In law, asking the woman question means examining how the law fails to take into account the experiences and values that seem more typical of women than of men, for whatever reason, or how existing legal standards and concepts might disadvantage women. The question assumes that some features of the law may be not only nonneutral in a general sense, but also “male” in a specific sense. The purpose of the woman question is to expose those features and how they operate, and to suggest how they might be corrected.<sup>24</sup>

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<sup>23</sup> See, e.g., Gould, *The Woman Question: Philosophy of Liberation and the Liberation of Philosophy*, in *WOMEN AND PHILOSOPHY: TOWARD A THEORY OF LIBERATION* 5 (C. Gould & M. Wartofsky eds. 1976) (discussing the woman question in philosophy); Hawkesworth, *Feminist Rhetoric: Discourses on the Male Monopoly of Thought*, 16 *POL. THEORY* 444, 452–56 (1988) (examining the treatment of the woman question in political theory). The first use of the term “woman question” of which I am aware is in S. DE BEAUVOIR, *THE SECOND SEX* at xxvi (1957).

<sup>24</sup> In her thoughtful article on feminist jurisprudence, Heather Wishik suggests a series of questions that could all be characterized as “asking the woman question.” See Wishik, *To Question Everything: The Inquiries of Feminist Jurisprudence*, 1 *BERKELEY WOMEN’S L.J.* 64, 72–77 (1985). Wishik proposes that feminists ask:

(1) What have been and what are now all women’s experiences of the ‘Life Situation’ addressed by the doctrine, process, or area of law under examination? (2) What assumptions, descriptions, assertions and/or definitions of experience — male, female, or ostensibly gender neutral — does the law make in this area? . . . (3) What is the area of mismatch, distortion, or denial created by the differences between women’s life experiences and the law’s assumptions or imposed structures? . . . (4) What patriarchal interests are served by the mismatch? . . . (5) What reforms have been proposed in this

Women have long been asking the woman question in law. The legal impediments associated with being a woman were, early on, so blatant that the question was not so much whether women were left out, but whether the omission was justified by women's different roles and characteristics. American women such as Elizabeth Cady Stanton and Abigail Adams may seem today all too modest and tentative in their demands for improvements in women's legal status.<sup>25</sup> Yet while social stereotypes and limited expectations for women may have blinded women activists in the eighteenth and nineteenth centuries, their demands for the vote, for the right of married women to make contracts and own property, for other marriage reforms, and for birth control<sup>26</sup> challenged legal rules and social practices that, to others in their day, constituted the God-given plan for the human race.

Within the judicial system, Myra Bradwell was one of the first to ask the woman question when she asked why the privileges and immunities of citizenship did not include, for married women in Illinois, eligibility for a state license to practice law.<sup>27</sup> The opinion of the United States Supreme Court in Bradwell's case evaded the gender

area of law or women's life situation? How will these reform proposals, if adopted, affect women both practically and ideologically? . . . (6) In an ideal world, what would this woman's life situation look like, and what relationship, if any, would the law have to this future life situation? . . . and (7) How do we get there from here?

*Id.* at 72-75.

<sup>25</sup> See C. DEGLER, *AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT 189-90* (1980) (describing eighteenth- and nineteenth-century conceptions of individualism for women as partial and tentative, as illustrated by arguments of Mary Wollstonecraft and Abigail Adams); see also Minow, *Rights of One's Own* (Book Review), 98 HARV. L. REV. 1084 (1985) (analyzing Elizabeth Cady Stanton's use of an "old scheme of ideas" which could not adequately capture her own more radical, if somewhat inconsistent, views). Some early reform efforts, of course, were quite radical in scope. The Seneca Falls Convention of 1848, generally considered the "official" beginning of the first women's rights movement, adopted a bold declaration which demanded for women full equality with men. See J. LINDGREN & N. TAUB, *THE LAW OF SEX DISCRIMINATION 14-16* (1988).

<sup>26</sup> For historical treatments of these activities, see B. BERG, *THE REMEMBERED GATE: ORIGINS OF AMERICAN FEMINISM* (1978); W. CHAFE, *THE AMERICAN WOMAN* (1972); N. COTT, *THE BONDS OF WOMANHOOD: "WOMAN'S SPHERE" IN NEW ENGLAND 1780-1835* (1977); *A HERITAGE OF HER OWN: TOWARD A NEW SOCIAL HISTORY OF AMERICAN WOMEN* (N. Cott & E. Pleck eds. 1979); C. DEGLER, *supra* note 25; E. DUBOIS, *FEMINISM AND SUFFRAGE: THE EMERGENCE OF AN INDEPENDENT WOMEN'S MOVEMENT IN AMERICA, 1848-1969* (1978); S. EVANS, *BORN FOR LIBERTY: A HISTORY OF WOMEN IN AMERICA* (1989); E. FLEXNER, *CENTURY OF STRUGGLE* (1959); G. LERNER, *THE MAJORITY FINDS ITS PAST: PLACING WOMEN IN HISTORY* (1979); L. NICHOLSON, *GENDER AND HISTORY: THE LIMITS OF SOCIAL THEORY IN THE AGE OF THE FAMILY 43-66* (1986); W. O'NEILL, *EVERYONE WAS BRAVE: THE RISE AND FALL OF FEMINISM IN AMERICA* (1969); and M. RYAN, *WOMANHOOD IN AMERICA: FROM COLONIAL TIMES TO THE PRESENT* (2d ed. 1979).

<sup>27</sup> See *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873). For a detailed historical analysis of the *Bradwell* case, see Olsen, *From False Paternalism to False Equality: Judicial Assaults on Feminist Community, Illinois 1869-1895*, 84 MICH. L. REV. 1518 (1986).

issue,<sup>28</sup> but Justice Bradley in his concurring opinion set forth the "separate spheres" legal ideology underlying the Illinois law:

[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization . . . indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.<sup>29</sup>

Women, and sometimes employers, continued to press the woman question in challenges to sex-based maximum work-hour legislation,<sup>30</sup> other occupation restrictions,<sup>31</sup> voting limitations,<sup>32</sup> and jury-exemption rules.<sup>33</sup> The ideology, however, proved extremely resilient.

Not until the 1970's did the woman question begin to yield different answers about the appropriateness of the role of women assumed by law. The shift began in 1971 with the Supreme Court's ruling on a challenge by Sally Reed to an Idaho statute that gave males pref-

<sup>28</sup> The Court declared, simply, that the privileges and immunities clause did not apply to her claim, and that the fourteenth amendment did not transfer protection of the right to practice law to the federal government. See *Bradwell*, 83 U.S. (16 Wall.) at 138-39.

<sup>29</sup> *Id.* at 141 (Bradley, J., concurring in the judgment).

<sup>30</sup> See *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding against an employer challenge an Oregon statute prohibiting employment of women in certain establishments for more than ten hours per day). "That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious," the *Muller* court declared. *Id.* at 421.

[H]istory discloses the fact that woman has always been dependent upon man. . . . [S]he is so constituted that she will rest upon and look to him for protection; that her physical structure and a proper discharge of her maternal functions . . . justify legislation to protect her from the greed as well as the passion of man.

*Id.* at 421-22.

<sup>31</sup> See *Goesaert v. Cleary*, 335 U.S. 464 (1948) (upholding a Michigan statute distinguishing between wives and daughters of owners of liquor establishments and all other women, and prohibiting the latter from serving as bartenders).

<sup>32</sup> See, e.g., *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 178 (1874) (holding that the right to vote was not among the privileges and immunities of United States citizenship and thus states could limit "that important trust to men alone"); *In re Lockwood*, 154 U.S. 116 (1894) (upholding Virginia's reading of its statute providing that any "person" admitted to practice in any state could also practice in Virginia to mean any "male" person).

<sup>33</sup> Gwendolyn Hoyt challenged Florida's automatic exemption of women from juries. See *Hoyt v. Florida*, 368 U.S. 57 (1961). Although women in Florida had a right to serve on juries, the automatic exemption meant that they did not have the same duty to serve as men; consequently, the jury of "peers" made available to women defendants systematically underrepresented women. In denying Hoyt's challenge to a jury that had no women, the Supreme Court reiterated Justice Bradley's reasoning in *Bradwell* focusing on the special role and responsibilities of woman: "Woman is still regarded as the center of home and family life." *Id.* at 62.

erence over females in appointments as estate administrators.<sup>34</sup> Although the Court in *Reed* did not address the separate spheres ideology directly, it rejected arguments of the state that "men [are] as a rule more conversant with business affairs than . . . women,"<sup>35</sup> to find the statutory preference arbitrary and thus in violation of the equal protection clause.<sup>36</sup> This decision was followed by a series of other successful challenges by women arguing that beneath the protective umbrella of the separate spheres ideology lay assumptions that disadvantage women in material, significant ways.<sup>37</sup>

Although the United States Supreme Court has come to condemn explicitly the separate spheres ideology when revealed by gross, stereotypical distinctions, the Court majority has been less sensitive to the effects of more subtle sex-based classifications that affect opportunities for and social views about women. The Court ignored, for example, the implications for women of a male-only draft registration system in reserving combat as a male-only activity.<sup>38</sup> Similarly, in upholding a statutory rape law that made underage sex a crime of males and not of females, the Court overlooked the way in which

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<sup>34</sup> See *Reed v. Reed*, 404 U.S. 71 (1971).

<sup>35</sup> Brief for Appellee at 12, *Reed* (No. 70-4). The Idaho court's opinion, which the Supreme Court reversed, had suggested that the Idaho legislature might reasonably have concluded that "in general men are better qualified to act as an administrator than are women." *Reed v. Reed*, 93 Idaho 511, 514, 465 P.2d 635, 638 (1970).

<sup>36</sup> See *Reed*, 404 U.S. 71.

<sup>37</sup> See, e.g., *Stanton v. Stanton*, 421 U.S. 7 (1975) (holding that a sex-based difference in age of majority for purposes of child support obligations by parents is not justified by the assumption that girls tend to mature and marry earlier than boys and have less need to continue their education); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (plurality opinion) (rejecting a rule requiring a female member of the armed services to prove her spouse's dependency while automatically assuming the dependency of the spouse of a male member as not justified by a conclusion that a husband in our society is generally the breadwinner).

Many of the successful challenges to sex-based discrimination have been brought by men challenging the stereotypes underlying statutes that, on their surface, at least, favored women. See, e.g., *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (finding that the single-sex admissions policy of a state nursing school is not justified by the stereotyped view of nursing as an exclusively women's job); *Caban v. Mohammed*, 441 U.S. 380 (1979) (finding that a law allowing adoption of out-of-wedlock children without their father's, but not without their mother's, consent is not justified by the assumption that mothers, but not fathers, have a significant parental interest in their children); *Orr v. Orr*, 440 U.S. 268 (1979) (holding that a statute requiring husbands, but not wives, to pay alimony is not justified by the assumption that wives are always the dependent spouses); *Craig v. Boren*, 429 U.S. 190 (1976) (holding that different drinking ages for females and males are not justified by higher incidence of traffic arrests and accidents involving liquor by males); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (concluding that the availability of social security survivor's benefits to mothers but not fathers is not justified by the notion that men are more likely than women to be the primary supporters of their spouses and children).

<sup>38</sup> See *W. Williams*, *supra* note 2, at 181-90 (criticizing *Rostker v. Goldberg*, 453 U.S. 57 (1981), which upheld a male-only draft registration requirement on the ground that only men were eligible for combat).

assumptions about male sexual aggression and female sexual passivity construct sexuality in limiting and dangerous ways.<sup>39</sup>

Pregnancy has been a special problem for the Court. In 1974, Carolyn Aiello and other women asked the woman question by challenging California's singling-out of pregnancy as virtually the only medical condition excluded from its state employee disability plan.<sup>40</sup> Revealing a telling blindness, the Supreme Court's answer to the question defined the relevant groups to compare in a way that severed the connection between gender and pregnancy. "The program divides potential recipients into two groups — pregnant women and nonpregnant persons."<sup>41</sup> Although only women are in the first group, "the second includes members of both sexes."<sup>42</sup> Because women as well as men are in the group who could receive benefits under the plan, the Court concluded that the exclusion of "pregnant persons" could not be discrimination based on sex.<sup>43</sup>

Dissatisfied, feminists continued to refine the woman question about pregnancy, and increasingly supplied their own clear answers to the questions they posed: Do exclusions based on pregnancy disadvantage women? (Of course, because only women can become pregnant.) What are the reasons for singling out pregnancy for exclusion? (Because the inclusion of pregnancy is costly; usually it is also a voluntary condition.) Are other disabilities costly? (Yes.) Are other covered disabilities voluntary? (Yes, some are, like cosmetic surgery and sterilization.)<sup>44</sup> Are there other reasons for treating pregnancy differently? (Well, now that you mention it, pregnant women should be home, nesting.)<sup>45</sup>

Feminists' persistent questioning led to an Act of Congress in 1978, The Pregnancy Discrimination Act,<sup>46</sup> which established the legal con-

<sup>39</sup> See *id.* (criticizing *Michael M. v. Superior Ct.*, 450 U.S. 464 (1981), which upheld a statute criminalizing male, but not female, involvement in underage sex on the grounds that the state had a legitimate interest in preventing illegitimate teenage pregnancies, which only males can cause); Olsen, *supra* note 2 (same).

<sup>40</sup> See *Geduldig v. Aiello*, 417 U.S. 484 (1974).

<sup>41</sup> *Id.* at 497 n.20.

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

<sup>43</sup> See *id.* at 496-97 ("There is no risk from which men are protected and women are not."). The Court adopted this same conclusion in reviewing a challenge to the exclusion of pregnancy from a private employer's disability plan under title VII. See *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976).

<sup>44</sup> See *Geduldig*, 417 U.S. at 499-500 (Brennan, J., dissenting).

<sup>45</sup> See Bartlett, *Pregnancy and the Constitution: The Uniqueness Trap*, 62 CALIF. L. REV. 1532 (1974); Comment, *Geduldig v. Aiello: Pregnancy Classifications and the Definition of Sex Discrimination*, 75 COLUM. L. REV. 441 (1975); see also W. Williams, *supra* note 2, at 190-200 (reviewing the Supreme Court's stereotyped notions of women).

<sup>46</sup> The Pregnancy Discrimination Act became § 701(k) of title VII.

The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women

nection between gender and pregnancy. The nature of that connection remains contested. Do rules granting pregnant women job security not available to other workers violate the equality principle that has been broadened to encompass pregnancy? The Supreme Court has said "no."<sup>47</sup> Although feminists have split over whether women have more to lose than to gain from singling out pregnancy for different, some would say "favored," treatment,<sup>48</sup> they agree on the critical question: what are the consequences for women of specific rules or practices?

Feminists today ask the woman question in many areas of law. They ask the woman question in rape cases when they ask why the defense of consent focuses on the perspective of the defendant and what he "reasonably" thought the woman wanted, rather than the perspective of the woman and the intentions she "reasonably" thought she conveyed to the defendant.<sup>49</sup> Women ask the woman question when they ask why they are not entitled to be prison guards on the same terms as men;<sup>50</sup> why the conflict between work and family responsibilities in women's lives is seen as a private matter for women to resolve within the family rather than a public matter involving restructuring of the workplace;<sup>51</sup> or why the right to "make and

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affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work  
 . . . .

<sup>42</sup> U.S.C. § 2000e (1982).

<sup>47</sup> See *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987).

<sup>48</sup> Compare W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 370-74 (1984-1985) [hereinafter W. Williams, *Equality's Riddle*] (noting, with qualifications, the advantages of an equal-treatment approach) with Krieger & Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 GOLDEN GATE U.L. REV. 513 (1983) (arguing that women have more to gain from the special-treatment approach). Chris Littleton has recast this debate in terms of "symmetrical" vs. "asymmetrical" models of equality. See Littleton, *supra* note 2, at 1291-301. The line-up of feminist groups on each side of *California Federal Savings & Loan Association v. Guerra*, 479 U.S. 272 (1987), demonstrates the breadth of the division on the equal-treatment/special-treatment issue. See Strimling, *The Constitutionality of State Laws Providing Employment Leave for Pregnancy: Rethinking Geduldig After Cal Fed*, 77 CALIF. L. REV. 171, 194 n.108 (1989).

A number of scholars recently have attempted to combine aspects of the equal-treatment and special-treatment approaches. See, e.g., J. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989) [hereinafter J. Williams, *Deconstructing Gender*] (urging a combination of equal-treatment and special-treatment approaches, in order to deinstitutionalize the gendered structure of society); Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J. 1 (1985) (urging "episodic analysis" whereby women receive treatment different from men only during episodes of reproductive activity when their needs differ); Strimling, *supra*, at 205 (advocating "nonstigmatizing distinctions based on actual, biologically created needs").

<sup>49</sup> See S. ESTRICH, *REAL RAPE* 92-104 (1987).

<sup>50</sup> See W. Williams, *supra* note 2, at 188 n.75 (criticizing *Dothard v. Rawlinson*, 433 U.S. 321 (1977)).

<sup>51</sup> See Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination*

enforce contracts" protected by section 1981 forbids discrimination in the *formation* of a contract but not discrimination in its *interpretation*.<sup>52</sup> Asking the woman question reveals the ways in which political choice and institutional arrangement contribute to women's subordination. Without the woman question, differences associated with women are taken for granted and, unexamined, may serve as a justification for laws that disadvantage women. The woman question reveals how the position of women reflects the organization of society rather than the inherent characteristics of women. As many feminists have pointed out, difference is located in relationships and social institutions — the workplace, the family, clubs, sports, childrearing patterns, and so on — not in women themselves.<sup>53</sup> In exposing the hidden effects of laws that do not explicitly discriminate on the basis of sex, the woman question helps to demonstrate how social structures embody norms that implicitly render women different and thereby subordinate.

Once adopted as a method, asking the woman question is a method of critique as integral to legal analysis as determining the precedential value of a case, stating the facts, or applying law to facts. "Doing law" as a feminist means looking beneath the surface of law to identify the gender implications of rules and the assumptions underlying them and insisting upon applications of rules that do not perpetuate women's subordination. It means recognizing that the woman question always has potential relevance and that "tight" legal analysis never assumes gender neutrality.

2. *The Woman Question: Method or Politics.* — Is asking the woman question really a method at all, or is it a mask for something else, such as legal substance, or politics? The American legal system has assumed that method and substance have different functions, and that method cannot serve its purpose unless it remains separate from, and independent of, substantive "bias." Rules of legal method, like rules of legal procedure, are supposed to insulate substantive rules from arbitrary application. Substantive rules define the rights and obligations of individuals and legal entities (what the law is); rules of method and procedure define the steps taken in order to ascertain and

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*Analysis in Restructuring the Workplace*, 24 HARV. C.R.-C.L. L. REV. 79 (1989); Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983); Taub, *From Parental Leaves to Nurturing Leaves*, 13 N.Y.U. REV. L. & SOC. CHANGE 381 (1985); J. Williams, *Deconstructing Gender*, *supra* note 48; W. Williams, *Equality's Riddle*, *supra* note 2, at 374-80.

<sup>52</sup> Cf. *The Supreme Court, 1988 Term — Leading Cases*, 103 HARV. L. REV. 137, 330 (1989) (criticizing *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989), which held that § 1981 does not reach cases of sexual harassment in the workplace because it protects only formation, not interpretation, of the employment contract).

<sup>53</sup> See, e.g., S. DE BEAUVOIR, *supra* note 23; Harris, *supra* note 2, at 32; Littleton, *supra* note 2, at 1306-07; Minow, *supra* note 2, at 34-37.

apply that substance (how to invoke the law and to make it work).<sup>54</sup> Separating rules of method and procedure from substantive rules, under this view, helps to ensure the regular, predictable application of those substantive rules. Thus, conventional and reliable ways of working with substantive rules permit one to specify in advance the consequences of particular activities. Method and process should not themselves have substantive content, the conventional wisdom insists, because method and process are supposed to protect us from substance which comes, "arbitrarily," from outside the rule. Within this conventional view, it might be charged that the method of asking the woman question fails to respect the necessary separation between method and substance. Indeed, asking the woman question seems to be a "loaded," overtly political activity, which reaches far beyond the "neutral" tasks of ascertaining law and facts and applying one to the other.

Of course, not only feminist legal methods but *all* legal methods shape substance;<sup>55</sup> the difference is that feminists have been called on it. Methods shape substance, first, in the leeway they allow for reach-

<sup>54</sup> See S. BURTON, *supra* note 22, at 2-3. Although rules of legal method and procedural rules are similar in the way I describe here, they refer to somewhat different activities in the law. Legal methods identify and interpret rules of substance and process. Procedural rules govern the manner in which legal claims are asserted and processed. For a discussion of the purposes of the procedure/substance distinction in constraining authority and imposing regularity, see Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 726-28 (1975).

The substance/procedure distinction in law has been examined in many different contexts. See, e.g., Cook, "Substance" and "Procedure" in the Conflict of Laws, 42 YALE L.J. 333 (1933) (discussing the substance/procedure distinction in the conflict of laws); Cover, *supra* (discussing the relationship between rules of procedure and substantive law); Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984) (advocating the separation of "decision rules" and "conduct rules" in criminal law); Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974) (discussing the substance/procedure distinction in the context of *Erie* problems); Hazard, *The Effect of the Class Action Device upon the Substantive Law*, 58 F.R.D. 307 (1973) (discussing the substantive effects of class action law); Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 44-52 (discussing lawyers' use of litigation strategy to affect substantive results of cases).

In the case of both legal method and legal process, as Jeff Powell has pointed out in conversations with me, an infinite number of levels of meta-rules might be added on to further protect us from the "arbitrary" application of those rules — process as well as substantive rules — that already exist. I am not concerned here with the question of how many such levels of rules might be desirable, but only whether *some* rules of application might be desirable to ensure *some* level of regularization in the application of other rules.

<sup>55</sup> See Mossman, *Feminism and Legal Method: The Difference It Makes*, 3 WIS. WOMEN'S L.J. 147, 163-65 (1987). Sir Henry Maine offered the classic view of the substantive content of methods. See H. MAINE, *DISSERTATIONS ON EARLY LAW AND CUSTOM* 389 (1886) (noting that "substantive law has . . . the look of being gradually secreted in the interstices of procedure"); see also Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976) (exploring the various substantive implications of the different forms of legal rules).

ing different substantive results. Deciding which facts are relevant, or which legal precedents apply, or how the applicable precedents should be applied, for example, leaves a decisionmaker with a wide range of acceptable substantive results from which to choose. The greater the indeterminacy, the more the decisionmaker's substantive preferences, without meaningful methodological constraints, may determine a particular outcome.<sup>56</sup> Not surprisingly, these preferences may follow certain patterns<sup>57</sup> reflecting the dominant cultural norms.

Methods shape substance also through the hidden biases they contain. A strong view of precedent in legal method, for example, protects the status quo over the interests of those seeking recognition of new rights.<sup>58</sup> The method of distinguishing law from considerations of policy, likewise, reinforces existing power structures and masks exclusions or perspectives ignored by that law.<sup>59</sup> The endless academic debates over originalism, interpretivism, and other theories of constitutional interpretation<sup>60</sup> demonstrate further that methodological principles convey substantive views of law and make a difference to legal results.

Does recognition of the substantive consequences of method make the distinction between method and substance incoherent and pointless? If methods mask substance, why not dispose with method altogether and analyze every legal problem as one of substance alone? There is both a practical and a normative reason to treat legal methods as at least *somewhat* distinct from the substance of law. The practical reason is the virtual impossibility of thinking directly from substance to result in law, except in the most superficial of senses, without methods. Consider, for example, whether a rule against discrimination in the workplace against women with children applies only to hiring policies, or whether it requires particular employee benefits, such as on-the-job childcare or liberal parenting-leave policies? In resolving this question, how relevant are such factors as the previous application of other antidiscrimination rules, the childrearing respon-

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<sup>56</sup> See Mossman, *supra* note 55, at 158.

<sup>57</sup> Judith Resnik, for example, has shown how distinguishing a question of law from a question of fact may have systematic effects on which kinds of litigants win or lose lawsuits at the appellate level. See Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 998-1005, 1013-14 (1984).

<sup>58</sup> A well-known exception is *Ex parte Young*, 209 U.S. 123 (1908). For a historical analysis of the range of views on the role of precedent within legal method, see Collier, *Precedent and Legal Authority: A Critical History*, 1988 WIS. L. REV. 771.

<sup>59</sup> See Mossman, *supra* note 55, at 157-58; Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 30-33 (1984).

<sup>60</sup> For a review of the most significant works in this debate, and one of the most coherent statements of the "originalist" position, see Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U.L. REV. 226 (1988). The basic statement of the "non-originalist" position remains Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980).

sibilities actually born by a claimant, or by mothers in general, the cost of particular benefits to employers, or the possible ramifications of the rule as applied for the free market system? Further substantive rules will help to resolve these issues, but even their application assumes some set of background principles about which facts matter and which sources of interpretation are available to decisionmakers.

Such background principles, or methods, are not only inevitable, but desirable, because they can help to preserve the integrity of the substantive rules which the legal system produces. Feminists, as well as nonfeminists, have a stake in this integrity. As Toni Massaro points out, not all substantive rules are bad rules,<sup>61</sup> and feminists will want to ensure faithful application of the good ones. Whether all decisionmakers can be entirely faithful to the methodological constraints imposed upon them, the existence of these constraints can make a difference.<sup>62</sup>

The real question is neither whether there is such a thing as method — method is inevitable — nor whether methods have substantive consequences — also inevitable — but whether the relationship between method and substance is “proper.”<sup>63</sup> Some relationships are improper. A purely result-oriented method in which decisionmakers may decide every case in order to reach the result they think most desirable, for example, improperly exerts no meaningful constraints on the decisionmaker. Also improper is a method that imposes arbitrary or unjustified constraints, such as one that requires a decisionmaker to decide in favor of all female claimants or against all employers.

In contrast, the method of asking the woman question establishes a justifiable relationship to legal substance. This method helps to expose a certain kind of bias in substantive rules. Asking the woman question does not require decision in favor of a woman. Rather, the method requires the decisionmaker to search for gender bias and to reach a decision in the case that is defensible in light of that bias. It demands, in other words, special attention to a set of interests and concerns that otherwise may be, and historically have been, overlooked. The substance of asking the woman question lies in *what* it seeks to uncover: disadvantage based upon gender. The political

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<sup>61</sup> See Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099, 2120 (1989) (“Discretion may license a decisionmaker to ignore the rules we think are worthy of support, in favor of her private agenda or personal experiential understanding.”).

<sup>62</sup> Newman, *Between Legal Realism and Neutral Principles: The Legitimacy of Institutional Values*, 72 CALIF. L. REV. 200 (1984) (arguing that despite the existence of some indeterminacy in law, many conscientious judges reach results contrary to their personal predilections out of respect for the orderly development of law).

<sup>63</sup> In his discussion of procedural rules, Robert Cover makes the distinction between “proper” and “improper” ways of relating substance and process. See Cover, *supra* note 54, at 721.

nature of this method arises only because it seeks information that is not supposed to exist. The claim that this information may exist — and that the woman question is therefore necessary — is political, but only to the extent that the stated or implied claim that it does not exist is *also* political.

Asking the woman question confronts the assumption of legal neutrality, and has substantive consequences only if the law is not gender-neutral. The bias of the method is the bias toward uncovering a certain kind of bias. The bias disadvantages those who are otherwise benefited by law and legal methods whose gender implications are *not* revealed. If this is “bias,” feminists must insist that it is “good” (or “proper”) bias, not “bad.”<sup>64</sup>

3. *Converting the Woman Question into the Question of the Excluded.* — The woman question asks about exclusion. Standing alone, and as usually posed in feminist legal method, it asks about the exclusion of women. Feminists have begun to observe, however, that any analysis using the general category of woman is itself exclusionary, because it treats as universal to women the interests and experiences of a particular group of women — namely white, and otherwise privileged women.<sup>65</sup> Adrienne Rich calls this problem “white solipsism.”<sup>66</sup>

It is not surprising that white women, identifying the oppression they experience primarily as gender-based, have come to describe their feminism as a politics of “women.” It is also not surprising that in a movement which grounds its claims to truth in experience, white women would develop a feminism that closely corresponds to their own experiences as white women. Like the male world that feminists seek to expose as partial, the world of feminism betrays the partiality of its makers.

The problem is how to correct this failing while maintaining feminism’s ability to analyze the social significance of gender. Elizabeth Spelman argues that one cannot do so merely by adding an analysis of the race issue to an analysis of the gender issue because race changes how women experience gender.<sup>67</sup> Not simply an additional basis for

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<sup>64</sup> See Cain, *Good and Bad Bias: A Comment on Feminist Theory and Judging*, 61 S. CAL. L. REV. 1945 (1988).

<sup>65</sup> See E. SPELMAN, *supra* note 11; Harris, *supra* note 2; Minow, *supra* note 2; see also Fraser & Nicholson, *supra* note 14, at 97–98 (arguing that use of categories like sexuality, mothering, and reproduction as cross-cultural phenomena risks projecting socially dominant features by some onto others).

<sup>66</sup> A. RICH, *Disloyal to Civilization: Feminism, Racism, Gynophobia*, in ON LIES, SECRETS, AND SILENCES 299 (1979); see also E. SPELMAN, *supra* note 11, at 116, 128.

<sup>67</sup> A common example of the additive approach is the reference to “women and blacks.” The unstated but powerful implications of such a reference, Spelman argues, is that black women belong to only one category (women) or the other (blacks), usually the latter. See E. SPELMAN, *supra* note 11, at 114–15.

oppression, race is a *different* basis for oppression that entails different kinds of subordination and requires different forms of liberation.<sup>68</sup> For this reason, analysis of gender must occur not apart from but within the contexts of multiple identities.

To correct feminism's exclusionary failing, Spelman suggests that in speaking of "women," the speaker should name explicitly which women she means.<sup>69</sup> This suggestion deserves intensive efforts, though the job is anything but easy. The category of women includes innumerable other categories, and the mention of any of these categories will leave unmentioned many others. One cannot talk about "black women" (as Spelman often does), for example, without implying that one is talking about *heterosexual* black women. One cannot talk about heterosexual black women without implying that one is talking about heterosexual *able-bodied* women. Any category, no matter how narrowly defined, makes assumptions about the remaining characteristics of the group that fail to take account of members of the group who do not have those characteristics.<sup>70</sup> Spelman's suggestion, therefore, requires distinctions between those categories that should be separately recognized, and those that need not be. The speaker can make such distinctions based upon her understanding about which characteristics are most important to recognize given current social realities. But this is tricky business that requires great sensitivity to multiple, invisible forms of exclusion that many people face. The privileged who attempt this business must recognize the ever-present risks of solipsism without succumbing to a paralyzing paranoia about those risks.<sup>71</sup>

Using the "woman" question as a model for deeper inquiry into the consequences of overlapping forms of oppression could also help to correct the problem Spelman identifies. This inquiry would require a general and far-reaching set of questions that go beyond issues of gender bias to seek out other bases of exclusion: what assumptions are made by law (or practice or analysis) about those whom it affects? Whose point of view do these assumptions reflect? Whose interests are invisible or peripheral? How might excluded viewpoints be identified and taken into account?

Extended beyond efforts to identify oppression based only upon gender, the woman question can reach forms of oppression made invisible not only by the dominant structures of power but also by the efforts to discover bias on behalf of women alone. These forms

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<sup>68</sup> See *id.* at 125.

<sup>69</sup> See *id.* at 186.

<sup>70</sup> See Minow, *supra* note 11, at 51.

<sup>71</sup> See D. FUSS, *ESSENTIALLY SPEAKING: FEMINISM NATURE & DIFFERENCE* 1 (1989) (arguing that the "perceived threat of essentialism" fosters paranoia that "foreclose[s] more ambitious investigations of specificity and difference").

of oppression differ from gender subordination in kind as well as in degree, and those who have not experienced them are likely to find them difficult to recognize. The difficulty in recognizing oppression one has not experienced, however, makes the necessity of a "method" all the more apparent. As I indicated earlier, a method neither guarantees a particular result nor even the right result. It does, however, provide some discipline when one seeks something that does not correspond to one's own interests.

Will this expanded inquiry dilute the coherence of gender critique? Far from it. As Spelman writes, fine-tuning feminism to encompass the breadth and specificity of oppressions actually experienced by different women — and even some men — can only make feminism clearer and stronger.<sup>72</sup> Coherence, or unity,<sup>73</sup> is possible only when feminism's underlying assumptions speak the truth for many, not a privileged few.

### B. Feminist Practical Reasoning

Some feminists have claimed that women approach the reasoning process differently than men do.<sup>74</sup> In particular, they say that women are more sensitive to situation and context, that they resist universal principles and generalizations, especially those that do not fit their own experiences, and that they believe that "the practicalities of everyday life" should not be neglected for the sake of abstract justice.<sup>75</sup> Whether these claims can be empirically sustained,<sup>76</sup> this reasoning process has taken on normative significance for feminists, many of whom have argued that individualized factfinding is often superior to the application of bright-line rules,<sup>77</sup> and that reasoning from context allows a greater respect for difference<sup>78</sup> and for the perspectives of the powerless. In this section, I explore these themes through a discussion of a feminist version of practical reasoning.

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<sup>72</sup> See E. SPELMAN, *supra* note 11, at 175-77.

<sup>73</sup> See *infra* p. 886.

<sup>74</sup> See C. GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982); M. BELENKY, B. CLINCHY, N. GOLDBERGER & J. TARULE, WOMEN'S WAYS OF KNOWING: THE DEVELOPMENT OF SELF, VOICE, AND MIND (1986); Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985); Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986).

<sup>75</sup> M. BELENKY, B. CLINCHY, N. GOLDBERGER & J. TARULE, *supra* note 74, at 149.

<sup>76</sup> Some of the literature challenging the claims that women reason differently from men is cited in note 174 below.

<sup>77</sup> Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 321-26 (1988); Sherry, *supra* note 74, at 604-13.

<sup>78</sup> See Minow & Spelman, *Passion for Justice*, 10 CARDOZO L. REV. 37, 53 (1988); Scales, *supra* note 2, at 1388.

1. *The Method.* — As a form of legal reasoning, practical reasoning has many meanings invoked in many contexts for many different purposes.<sup>79</sup> I present a version of practical reasoning in this section that I call “feminist practical reasoning.” This version combines some aspects of a classic Aristotelian model of practical deliberation with a feminist focus on identifying and taking into account the perspectives of the excluded. Although this form of reasoning may not always provide clear decision methods for resolving every legal dispute, it builds upon the “practical” in its focus on the specific, real-life dilemmas posed by human conflict — dilemmas that more abstract forms of legal reasoning often tend to gloss over. In focusing on the “real” rather than the abstract, practical reasoning has some kinship to legal realism and critical legal studies, but there are important differences which I will explore in this section.

(a) *Practical Reasoning.* — According to Amélie Rorty, the Aristotelian model of practical reasoning holistically considers ends, means, and actions in order to “recognize and actualize whatever is best in the most complex, various, and ambiguous situations.”<sup>80</sup> Prac-

<sup>79</sup> See, e.g., Burton, *Symposium: The Works of Joseph Raz: Law as Practical Reason*, 62 S. CAL. L. REV. 747 (1989) (arguing in favor of “practical reason” in law, as an alternative to Holmes’ view of law as predictions of what courts will do); Farber, *Brilliance Revisited*, 72 MINN. L. REV. 367 (1987) (using the concept of “common sense” to argue against counterintuitive or “brilliant” legal scholarship); Farber & Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615, 1649–50 (1987) (advocating practical reasoning as a reform-promoting alternative to foundationalism in first amendment scholarship); Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787 (1989) (applauding Holmes’ “pragmatism”); Hawthorn, *Practical Reason and Social Democracy: Reflections on Unger’s Passion and Politics*, 81 NW. U.L. REV. 766, 766 (1987) (arguing that more modest conclusions similar to those of Unger might be reached more realistically by “pragmatic” means, without “drastic reconstructive proposals”); Kronman, *Alexander Bickel’s Philosophy of Prudence*, 94 YALE L.J. 1567 (1985) (describing “prudentialism,” with approval, as the political philosophy of Alexander Bickel); Kronman, *Practical Wisdom and Professional Character*, in PHILOSOPHY AND LAW 203, 223 (J. Coleman & E. Paul eds. 1987) (using the concept of “practical wisdom” to argue for a particular view of the professional character of lawyers which combines visualization and detachment); Michelman, *The Supreme Court, 1985 Term — Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 24 (1986) (urging “practical reason” as the path to understanding the republican tradition of civic dialogue); Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 838 (1988) (arguing that practical reasoning, which encompasses a set of methods for finding “beliefs about matters that cannot be verified by logic or exact observation,” is not a distinctively legal form of reasoning, but it yields determinative outcomes in many legal problems); Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 31–32 (1985) (endorsing “practical reason” as the model of public discussion through which people can rise above private interest in pursuit of the public good); Wellman, *supra* note 22 (arguing that practical reasoning provides the most valid basis for a theory of judicial justification). For a critique of “practical legal studies” as a “liberal/moderate/conservative response to the radicalism of Critical Legal Studies,” see Feinman, *Practical Legal Studies and Critical Legal Studies*, 87 MICH. L. REV. 724, 731 (1988). See also Tushnet, *Anti-Formalism in Recent Constitutional Theory*, 83 MICH. L. REV. 1502, 1534–36 (1985) (arguing that the social conditions necessary for the sound exercise of “practical reason” do not exist).

<sup>80</sup> A. RORTY, *MIND IN ACTION* 272 (1988). According to Rorty, an essential component of

tical reasoning recognizes few, if any, givens. What must be done, and why and how it should be done, are all open questions, considered on the basis of the intricacies of each specific factual context.<sup>81</sup> Not only the resolution of the problem, but even what counts as a problem emerges from the specifics of the situation itself, rather than from some foreordained definition or prescription.

Practical reasoning approaches problems not as dichotomized conflicts, but as dilemmas with multiple perspectives, contradictions, and inconsistencies. These dilemmas, ideally, do not call for the choice of one principle over another, but rather "imaginative integrations and reconciliations,"<sup>82</sup> which require attention to particular context. Practical reasoning sees particular details not as annoying inconsistencies or irrelevant nuisances which impede the smooth logical application of fixed rules. Nor does it see particular facts as the *objects* of legal analysis, the inert material to which to apply the living law. Instead, new facts present opportunities for improved understandings and "integrations." Situations are unique, not anticipated in their detail, not generalizable in advance. Themselves generative, new situations give rise to "practical" perceptions and inform decisionmakers about the desired ends of law.<sup>83</sup>

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the Aristotelian form of practical reasoning is its deliberation about appropriate ends. *See id.* So understood, practical reasoning in law requires not only determining how to best meet certain specified goals, but also constantly reevaluating, with the aid of new information and experience, which ends to pursue.

<sup>81</sup> John Dewey's conception of the continuum of ends and means conveys a similar notion. According to Dewey, human activity is not directed toward the achievement of distinct, fixed ends. Instead, it represents an integration of ends and means, whereby goals are provisional, and the means toward achieving them are intrinsically as well as extrinsically significant. My reading of Dewey comes from Grey, cited above in note 79, at 854-55.

This view of the means-ends continuum contrasts with the utilitarian dichotomy between the two. According to Amélie Rorty, Aristotelian practical reasoning or *phronesis* became transformed, through the work of Hobbes, Hume, Mandeville, and Kant, into a utilitarian, ends-means instrumentalism. *See* A. RORTY, *supra* note 80, at 271-82. The work of a number of prominent legal theorists on practical reasoning epitomizes the transformation that Rorty describes. *See, e.g.,* A. KENNY, *WILL, FREEDOM AND POWER* 70-71 (1975); J. RAZ, *PRACTICAL REASON AND NORMS* 12 (1975); Wellman, *supra* note 22, at 88-115.

<sup>82</sup> A. RORTY, *supra* note 80, at 274. Rorty writes:

When we are conflicted, we are not torn by the large dichotomized conflicts between altruism and egoism, or between principles of morality and the psychology of desire and interest. Our conflicts are those between particular thoughtful desires or thoughtful habits that cannot all be simultaneously realized or enacted, because they eventually undermine each other. The resolutions of such conflicts rarely involve denying or suppressing one side, for both sides of intrapsychic conflicts, like both sides of political conflicts, represent functional contributions to thriving. Such conflicts are at least sometimes best resolved by imaginative integrations and reconciliations . . . rather than by abstract selection and denial.

*Id.* Rorty speaks of moral rather than legal decisionmaking, but her descriptions of the dilemmas that occur apply to both.

<sup>83</sup> *See* M. NUSSBAUM, *THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY* 301-05 (1986). Nussbaum writes that ethical choice must be "seized in

The issue of minors' access to abortion exemplifies the generative, educative potential of specific facts. The abstract principle of family autonomy seems logically to justify a state law requiring minors to obtain their parents' consent before obtaining an abortion. Minors are immature and parents are the individuals generally best situated to help them make a decision as difficult as whether to have an abortion. The actual accounts of the wrenching circumstances under which a minor might seek to avoid notifying her parent of her decision to seek an abortion, however, demonstrate the practical difficulties of the matter. These actual accounts reveal that many minors face severe physical and emotional abuse as a result of their parents' knowledge of their pregnancy. Parents force many minors to carry to term a child that the minor cannot possibly raise responsibly; and only the most determined minor will be able to relinquish her child for adoption, in the face of parental rejection and manipulation.<sup>84</sup> Actual circumstances, in other words, yield insights into the difficult problems of state and family decisionmaking that the abstract concept of parental autonomy alone does not reveal.

Practical reasoning in the law does not, and could not, reject rules. Along the specificity-generality continuum of rules, it tends to favor less specific rules or "standards," because of the greater leeway for individualized analysis that standards allow.<sup>85</sup> But practical reasoning in the context of law necessarily works from rules. Rules represent accumulated past wisdom, which must be reconciled with the contingencies and practicalities presented by fresh facts. Rules provide signposts for the appropriate purposes and ends to achieve through law.<sup>86</sup> Rules check the inclination to be arbitrary and "give constancy and stability in situations in which bias and passion might distort

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a confrontation with the situation itself, by a faculty that is suited to confront it as a complex whole." *Id.* at 300-01.

<sup>84</sup> See Brief for Petitioners at 6-25, *Hodgson v. Minnesota*, 110 S. Ct. 400 (1989) (Nos. 88-1125 & 88-1309).

<sup>85</sup> Some of the most basic literature on the distinctions and tradeoffs between "rules" and "standards" includes Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983); Kennedy, *supra* note 55; and Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955).

Those feminists and critical scholars most concerned about unchecked prejudice and power reject loose standards and forms of reasoning like practical reasoning in favor of specific formal rules. See Held, *Feminism and Moral Theory*, in *WOMEN AND MORAL THEORY* 119 (E. Kittay & D. Meyers eds. 1987); Matsuda, *Public Responses to Racist Speech: Considering the Victims' Story*, 87 MICH. L. REV. 2320, 2325 (1989); P. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 406-08 (1987); see also Fineman, *The Politics of Custody and the Transformation of American Custody Decision Making*, 22 U.C. DAVIS L. REV. 829 (1989) (arguing that the "best interests of the child" standard has led to greater concentration of power in hands of child "advocates" and child welfare professionals); see also Delgado, Dunn, Brown, Lee & Hubbert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359.

<sup>86</sup> See M. NUSSBAUM, *supra* note 83, at 305.

judgment. . . . Rules are necessities because we are not always good judges."<sup>87</sup>

Ideally, however, rules leave room for the new insights and perspectives generated by new contexts. As noted above, the practical reasoner believes that the specific circumstances of a new case may dictate novel readings and applications of rules, readings and applications that not only *were not*, but *could not* or *should not* have been determined in advance.<sup>88</sup> In this respect, practical reasoning differs from the view of law characteristic of the legal realists, who saw rules as open-ended by necessity, not by choice.<sup>89</sup> The legal realist highly valued predictability and determinacy, but assumed that facts were too various and unpredictable for lawmakers to frame determinate rules.<sup>90</sup> The practical reasoner, on the other hand, finds undesirable as well as impractical the reduction of contingencies to rules by which all disputes can be decided in advance.<sup>91</sup>

<sup>87</sup> *Id.* at 304.

<sup>88</sup> See M. NUSSBAUM, *supra* note 83, at 298–306. One critique of the practical reasoning I describe is that even if flexibility in the application of rules is desirable in some cases, as a general matter fixed rules are necessary to let individuals know what the law is and predict the consequences of their actions. Insofar as practical reasoning permits law to be made *as it is applied* rather than before the facts arise to which law is applied, the argument goes, law ceases to be a rule-bound activity; and where rules do not constrain decisionmaking their very reason for being disappears. See Schauer, *Is the Common Law Law?* (Book Review), 77 CALIF. L. REV. 455, 455–56 (1989).

This critique misapprehends both the rule-boundedness of our legal system and the rule-openness of practical reasoning. As to our legal system, Professor Melvin Eisenberg has demonstrated that the model of common law pervasive in American jurisprudence has incorporated a practice of rule "enrichment" that goes well beyond those instances that require filling a gap in the law. See M. EISENBERG, *supra* note 22, at 6–7. This practice also extends, Eisenberg shows, to the process of statutory and constitutional interpretation. See *id.* at 196 n.35; see also Grey, *supra* note 79, at 819 (noting that Holmes considered law to be "guidelines, rules of thumb, instruments of inquiry designed as practical aids to making sound decisions" rather than "mathematical axioms"). Actors often cannot accurately predict the consequences of their actions, not only because clarity does not exist, but because of the richness of interpretative possibilities within our rule-based system. We can, and do, live in a system that is less rule-bound than we may commonly suppose.

As to practical reasoning, I emphasize that neither the ideal nor the expected practice approaches the state of being rule-free. As I have stated, rules are critical to practical reasoning, which attempts to reconcile accumulated past wisdom, represented by rules, with the contingencies and practicalities of fresh facts.

<sup>89</sup> Perhaps the clearest statement of this view of law comes from Justice Cardozo:

No doubt the ideal system, if it were attainable, would be a code at once so flexible and so minute, as to supply in advance for every conceivable situation the just and fitting rule. But life is too complex to bring the attainment of this ideal within the compass of human powers.

B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 143 (1921).

<sup>90</sup> See Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465, 471 (1988). Legal realist scholars did not find this desired predictability in abstract rules and legal concepts, and therefore attempted "to develop new kinds of general rules that would be useful in predicting legal outcomes." *Id.*

<sup>91</sup> Chris Schroeder and Lawrence Baxter first suggested to me the distinction between the

Another important feature of practical reasoning is what counts as justification. The legal realist view is that rules allow a certain range of manipulation; judges may select on the basis of unstated, external considerations those interpretations that best serve those considerations. Thus, the "real reason" for a decision — the social goals the decisionmaker chooses to advance — and the reasons offered in a legal decision may differ.<sup>92</sup> Practical reasoning, on the other hand, demands more than *some reasonable* basis for a particular legal decision. Decisionmakers must offer their *actual* reasons — the same reasons "that form its effective intentional description."<sup>93</sup> This requirement reflects the inseparability of the determinations of means and ends; reasoning is itself part of the "end," and the end cannot be reasonable apart from the reasoning that underlies it. It reflects, further, the commitment of practical reasoning to the decisionmaker's acceptance of responsibility for decisions made. Rules do not absolve the decisionmaker from responsibility for decisions. There are choices to be made and the agent who makes them must admit to those choices and defend them.<sup>94</sup>

(b) *Feminist practical reasoning.* — Feminist practical reasoning builds upon the traditional mode of practical reasoning by bringing to it the critical concerns and values reflected in other feminist meth-

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impracticability and the undesirability of a completely comprehensive system of rules. Professor Eisenberg makes a similar distinction between the by-product and the enrichment model of common law decisionmaking. See M. EISENBERG, *supra* note 22, at 6. Under the by-product model, courts are justified in filling in law not already specified in previous cases, but "only insofar as is necessary to resolve the dispute before it, and no further." *Id.* Under the enrichment model, on the other hand, "the establishment of legal rules to govern social conduct is treated as desirable in itself — although subordinated in a variety of important ways to the function of dispute-resolution — so that the courts consciously take on the function of developing certain bodies of law . . ." *Id.*

<sup>92</sup> See Singer, *supra* note 90, at 472.

<sup>93</sup> A. RORTY, *supra* note 80, at 283; see also Michelman, *supra* note 79, at 31 (linking having one's own reasons for action with the positive or ethical notion of freedom); Singer, *supra* note 59, at 32 (arguing that judges should "feel free honestly to express what they really were thinking about when they decided the case" in order to "clarify the moral and political views at stake in legal controversies"). For a general discussion of the problem of judicial candor, which also collects the standard scholarly positions on this subject, see Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731 (1987).

<sup>94</sup> On the desirability of accepting this kind of responsibility, see Singer, cited above in note 90, at 533. See also Michelman, *supra* note 79, at 15, 35 (criticizing objective legal standards for absolving decisionmakers of responsibility for the fates of individual parties); Mossman, *supra* note 55, at 157–58 (criticizing neutral principles of interpretation for carrying with them the "absence of responsibility on the part of the male judges for any negative outcome"); Sunstein, *supra* note 79, at 69–72 (proposing that rationality review should consider only the real, not the hypothetical, reasons for legislation). On the unavoidability of taking responsibility, see B. SMITH, *CONTINGENCIES OF VALUE: ALTERNATIVE PERSPECTIVES FOR CRITICAL THEORY* 159–60 (1988), which argues that "since the contingency of all value cannot be evaded, whoever does the *urging* cannot ultimately suppress, or ultimately evade taking responsibility for, the *particularity* of the perspective from which he does so." *Id.* (emphasis in original).

ods, including the woman question. The classical exposition of practical reasoning takes for granted the legitimacy of the community whose norms it expresses, and for that reason tends to be fundamentally conservative.<sup>95</sup> Feminist practical reasoning challenges the legitimacy of the norms of those who claim to speak, through rules, for the community. No form of legal reasoning can be free, of course, from the past or from community norms, because law is always situated in a context of practices and values.<sup>96</sup> Feminist practical reasoning differs from other forms of legal reasoning, however, in the strength of its commitment to the notion that there is not one, but many overlapping communities to which one might look for "reason." Feminists consider the concept of community problematic,<sup>97</sup> because they have demonstrated that law has tended to reflect existing structures of power. Carrying over their concern for inclusionism from the method of asking the woman question, feminists insist that no one community is legitimately privileged to speak for all others. Thus, feminist methods reject the monolithic community often assumed in male accounts of practical reasoning,<sup>98</sup> and seek to identify perspectives not represented in the dominant culture from which reason should proceed.<sup>99</sup>

Feminist practical reasoning, however, is not the polar opposite of a "male" deductive model of legal reasoning. The deductive model

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<sup>95</sup> See Singer, *supra* note 90, at 540 (arguing that modern theorists who separate law from politics and seek community consensus through existing community practices are conservative); see also Singer, *supra* note 5, at 731 (describing "Practical Legal Studies" as a "liberal/moderate/conservative response to the radicalism of Critical Legal Studies").

<sup>96</sup> An excellent discussion of this point, along with an analysis of the law as an instrumental means to achieve socially useful goals, appears in Grey, cited above in note 79, at 805-15.

<sup>97</sup> See Abrams, *Law's Republicanism*, 97 YALE L.J. 1591, 1606-07 (1988) (noting that "localities have a disturbing history of intolerance toward non-conforming groups"); Sullivan, *Rainbow Republicanism*, 97 YALE L.J. 1713, 1721 (1988) (criticizing the failure of "republicanism" to nurture private associations through which "deviance, diversity, and dissent" are possible).

<sup>98</sup> See Letter from Joseph W. Singer to Katharine Bartlett (Sept. 12, 1989) (on file at the Harvard Law School Library).

<sup>99</sup> Martha Minow has explored how judges do, and do not, attempt to consider nondominant perspectives in deciding cases. See Minow, *supra* note 2. A remarkable statement recognizing the necessity of this search appears in a dissenting opinion by Judge Cudahy in a case upholding the validity of an employer's fetal protection policy which affected fertile women but not fertile men. See *UAW v. Johnson Controls, Inc.*, 886 F.2d 871, 902 (7th Cir. 1989) (en banc) (Cudahy, J., dissenting). This statement reads:

It is a matter of some interest that, of the twelve federal judges to have considered this case to date, none has been female. This may be quite significant because this case, like other controversies of great potential consequence, demands, in addition to command of the disembodied rules, some insight into social reality. What is the situation of the pregnant woman, unemployed or working for the minimum wage and unprotected by health insurance, in relation to her pregnant sister, exposed to an indeterminate lead risk but well-fed, housed and doctored? Whose fetus is at greater risk? Whose decision is this to make?

*Id.*

assumes that for any set of facts, fixed, pre-existing legal rules compel a single, correct result. Many commentators have noted that virtually no one, male or female, now defends the strictly deductive approach to legal reasoning.<sup>100</sup> Contextualized reasoning is also not, as some commentators suggest,<sup>101</sup> the polar opposite of a "male" model of abstract thinking. All major forms of legal reasoning encompass processes of both contextualization and abstraction. Even the most conventional legal methods require that one look carefully at the factual context of a case in order to identify similarities and differences between that case and others.<sup>102</sup> The identification of a legal problem, selection of precedent, and application of that precedent, all require an understanding of the details of a case and how they relate to one another. When the details change, the rule and its application are likely to change as well.

By the same token, feminist methods require the process of abstraction, that is, the separation of the significant from the insignificant.<sup>103</sup> Concrete facts have significance only if they represent some generalizable aspect of the case. Generalizations identify what matters and draw connections to other cases. I abstract whenever I fail to identify every fact about a situation, which, of course, I do always.<sup>104</sup> For feminists, practical reasoning and asking the woman question may make more facts relevant or "essential" to the resolution of a legal case than would more nonfeminist legal analysis. For example, feminist practical reasoning deems relevant facts related to the woman question — facts about whose interests particular rules or legal reso-

<sup>100</sup> See, e.g., Bennett, *Objectivity in Constitutional Law*, 132 U. PA. L. REV. 445, 495 (1984) ("Mechanical" jurisprudence has no visible contemporary adherents."); Stick, *Can Nihilism Be Pragmatic?*, 100 HARV. L. REV. 332, 363-65 (1986) (asserting that outside a "core area," in which the application of legal rules is certain, "only the most unreconstructed logical positivist" accepts a strict deductive model of legal reasoning); see also Soper, *Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute*, 75 MICH. L. REV. 473, 476 (1977) ("Not since Blackstone has the view that judges only 'find' and do not 'make' the law been preached with any fervor from academic pulpits . . .").

<sup>101</sup> See, e.g., Matsuda, *Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice*, 16 N.M.L. REV. 613, 618-24 (1986); Menkel-Meadow, *supra* note 74, at 45-46; Scales, *supra* note 2, at 1376-78.

<sup>102</sup> See S. BURTON, *supra* note 22, at 59-60; M. GOLDING, *supra* note 21, at 44-46.

<sup>103</sup> Cf. K. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 48 (1960) (arguing that a concrete fact is significant because it is "representative of a wider abstract category of facts" (emphasis in original)).

<sup>104</sup> Martha Nussbaum addresses the need for generalizations based upon past experience as well as new detail; she states that practical wisdom would be "arbitrary and empty" if every situation were truly "new and nonrepeatable." M. NUSSBAUM, *supra* note 83, at 306. Nussbaum views the relationship between the universal and the particular as one of "two-way illumination": "Although . . . the particular takes priority, they are partners in commitment and share between them the honors given to the flexibility and responsiveness of the good judge." *Id.*; see also Gould, *supra* note 23, at 25-31 (developing a concept of "concrete universality" requiring appreciation of and generalizations about both similarities and differences among concrete situations).

lutions reflect and whose interests require more deliberate attention. Feminists do not and cannot reject, however, the process of abstraction. Thus, though I might determine in a marital rape case that it is relevant that the wife did not want sexual intercourse on the day in question, it will probably not be relevant that the defendant gave a box of candy to his mother on St. Valentine's Day or that he plays bridge well.<sup>105</sup> No matter how detailed the level of particularity, practical reasoning like all other forms of legal analysis requires selecting and giving meaning to *certain* particularities. Feminist practical reasoning assumes that no a priori reasons prevent one from being persuaded that a fact that seems insignificant *is* significant, but it does not require that every fact be relevant. Likewise, although generalizations that render detail irrelevant require examination, they are not a priori unacceptable.

Similarly, the feminist method of practical reasoning is not the polar opposite of "male" rationality. The process of finding commonalities, differences, and connections in practical reasoning is a rational process. To be sure, feminist practical reasoning gives rationality new meanings. Feminist rationality acknowledges greater diversity in human experiences<sup>106</sup> and the value of taking into account competing or inconsistent claims.<sup>107</sup> It openly reveals its positional partiality by stating explicitly which moral and political choices underlie that partiality,<sup>108</sup> and recognizes its own implications for the distribution and exercise of power.<sup>109</sup> Feminist rationality also strives to integrate emotive and intellectual elements<sup>110</sup> and to open up the possibilities of new situations rather than limit them with prescribed categories of

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<sup>105</sup> See *infra* pp. 858-62.

<sup>106</sup> See Minow, *supra* note 2, at 60-61; see also J. Williams, *Deconstructing Gender*, *supra* note 48, at 805 (arguing on behalf of "a new kind of rationality, one not so closely tied to abstract, transcendental truths, one that does not exclude so much of human experience as Western rationality traditionally has done").

<sup>107</sup> See Minow, *supra* note 2, at 61-62; see also Wiggins, *Deliberation and Practical Reason*, in PRACTICAL REASONING 144, 145 (J. Raz ed. 1978) (arguing that practical reasoning must account for competing claims).

<sup>108</sup> See Haraway, *Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective*, 14 FEMINIST STUD. 575, 590 (1988); *supra* p. 854.

<sup>109</sup> See Haraway, *supra* note 108, at 590; Minow, *supra* note 2, at 65-66; see also Flax, *supra* note 11, at 633 (describing the need to be sensitive to interconnections between knowledge and power); Minow & Spelman, *supra* note 78, at 57-60 (calling for "a direct human gaze between those exercising power and those governed by it"); Gabel & Harris, *Building Power and Breaking Images: Critical Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369, 375 (1982-1983) (suggesting a focus on "counter-hegemonic" law practice that draws attention to issues of power distribution).

<sup>110</sup> See M. BELENKY, B. CLINCHY, N. GOLDBERGER & J. TARULE, *supra* note 74, at 134, 176-82; see also Brennan, *Reason, Passion, and "The Progress of the Law,"* 10 CARDOZO L. REV. 3 (1988) (noting that rational judicial decisionmaking requires passion); M. NUSSBAUM, *supra* note 83, at 307-09.

analysis.<sup>111</sup> Within these revised meanings, however, feminist method is and must be understandable. It strives to make more sense of human experience, not less, and is to be judged upon its capacity to do so.

2. *Applying the Method.* — Although feminist practical reasoning could apply to a wide range of legal problems, it has its clearest implications where it reveals insights about gender exclusion within existing legal rules and principles. In this subsection, I show how one appellate court has dealt with the validity of the common law marital exemption to rape, in order to illustrate the tradition of contextual reasoning in the common law, which practical reasoning extends, and to point out what additional features a feminist practical reasoning approach might add to this tradition.

The example is the 1981 New Jersey Supreme Court case, *State v. Smith*.<sup>112</sup> In rejecting the defendant's marital-exemption defense in a criminal prosecution for rape, the court engaged in a multi-layered process of reasoning; it examined the history of the exemption, the strength and evolution of the common law authority, the various justifications offered by the state for the exemption, the surrounding social and legal context in which the defendant asserted the defense, and the particular actions of the defendant in this case that gave rise to the prosecution. This process of reasoning deserves close analysis because it differs markedly from the abstract, formalistic reasoning used by other courts considering related issues.<sup>113</sup>

In his opinion for a unanimous court, Justice Pashman began with an examination of the source of the common law marital exemption to rape. It found the basis for the exemption "in a bare, extra-judicial declaration made some 300 years ago"<sup>114</sup> by Sir Matthew Hale: "But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract

<sup>111</sup> Cf. Johann, *An Ethics of Emergent Order*, in JAMES M. GUSTAFSON'S THEOCENTRIC ETHICS 103, 109 (H. Beckley & C. Swezey eds. 1988).

<sup>112</sup> 85 N.J. 193, 426 A.2d 38 (1981).

<sup>113</sup> The courts that have faced issues relating to the marital rape exemption in recent years have used very formalistic styles of reasoning to avoid application of the exemption. See, e.g., *State v. Rider*, 449 So. 2d 903, 904 (Fla. Dist. Ct. App. 1984) (finding no common law "interspousal exception," and stating that even if it had existed, legislative abolition of codified common law crime of rape abolished the exemption); *Commonwealth v. Chretien*, 383 Mass. 123, 131-32, 417 N.E.2d 1203, 1209 (1981) (holding that the state Domestic Violence Act, by implication, eliminated the marital rape exemption); *People v. Liberta*, 64 N.Y.2d 152, 152-53, 474 N.E.2d 567, 570-71, 485 N.Y.S.2d 207, 210-11 (1984) (applying a statutory exception to the marital rape exemption). Also following formalistic styles of reasoning, other courts have upheld the marital rape exemption. See, e.g., *People v. Hawkins*, 157 Mich. App. 767, 404 N.W.2d 662 (1987) (holding a statute abrogating common law spousal exemption where one party has filed for divorce not applicable, because although the wife had filed for divorce, the court lacked subject matter jurisdiction due to the wife's failure to satisfy the state's residency requirements).

<sup>114</sup> 85 N.J. at 200, 426 A.2d at 41.

the wife hath given up herself in this kind unto her husband, which she cannot retract."<sup>115</sup> From this authority, the court determined that the common law exemption to rape "derived from the nature of marriage at a particular time in history."<sup>116</sup> At that time, marriages were "effectively permanent, ending only by death or an act of Parliament."<sup>117</sup> The court reasoned that the rule was stated "in absolute terms, as if it were applicable without exception to all marriage relationships,"<sup>118</sup> because marriage itself was not retractable at the time of Lord Hale. But things have changed. "In the years since Hale's formulation of the rule," the court observed, "attitudes towards the permanency of marriage have changed and divorce has become far easier to obtain."<sup>119</sup> Moreover, even during Lord Hale's time, the court surmised, the rule may not have applied in all situations, as when a judicial separation was granted. The court drew from its historical analysis a tentative conclusion, but reserved the ultimate question in the case for fuller analysis: "The rule, formulated under vastly different conditions, need not prevail when those conditions have changed."<sup>120</sup>

The court then explored the major justifications "which might have constituted the common law principles adopted in this State,"<sup>121</sup> including the notion that the woman was the property of her husband or father, the concept that a husband and wife were one person, and the justification that a wife consents to sexual intercourse with her husband.<sup>122</sup> The court engaged in a detailed analysis of each justification. The property notion, it concluded, was never valid in this country in that rape statutes "have always aimed to protect the safety and personal liberty of women."<sup>123</sup> The marital unity concept could not now be valid, the court decided, given the other crimes against a wife, such as assault and battery, of which a husband could be convicted, and because in many other areas of the law the "'principle' of marital unity was discarded in this State long before the commission of defendant's alleged crime."<sup>124</sup> The implied-consent justification, the court reasoned, is not only "offensive to our valued ideals of personal liberty," but is "not sound where the marriage itself is not

<sup>115</sup> *Id.* (quoting 1 M. HALE, HISTORY OF THE PLEAS OF THE CROWN \*629).

<sup>116</sup> *Id.* at 201, 426 A.2d at 42.

<sup>117</sup> *Id.* (citing H. CLARK, LAW OF DOMESTIC RELATIONS 280-82 (1968)).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 204, 426 A.2d at 43 (footnote omitted).

<sup>122</sup> *See id.* at 205, 426 A.2d at 44.

<sup>123</sup> *Id.* at 204, 426 A.2d at 44.

<sup>124</sup> *Id.* at 205, 426 A.2d at 44 (citing as examples the Married Women's Acts, abolition of spousal tort immunity, alienability of a wife's interest in property held in tenancy by the entirety, the rule allowing wife to use her own surname, and indictment of husband and wife for conspiracy).

irrevocable."<sup>125</sup> The court noted that under the facts of this case — a year before the attack, a judge allegedly had ordered defendant to leave the marital home following another violent incident, the parties lived apart in different cities, the defendant broke into his wife's apartment at about 2:30 a.m., "over a period of a few hours, repeatedly beat her, forced her to have sexual intercourse and committed various other atrocities against her person," and caused her to require medical care at a hospital<sup>126</sup> — the husband could not claim that consent was implied.<sup>127</sup>

The *Smith* court's analysis is typical of many judicial opinions which "interpret" the common law and statutes by delving deeply into historical and policy considerations.<sup>128</sup> Thus, its use of practical reasoning has deep roots in American jurisprudence. I use it as an example because it demonstrates a conventional model upon which feminist practical reasoning can usefully build.

The *Smith* case helps to show, for example, how the particular facts of a case do not just present the problem to be solved, but also instruct the decisionmaker about what the ends and means of law ought to be. The circumstances of the estrangement, the middle-of-the-night break-in (two doors were broken to get inside), and defendant's repeated attacks and "atrocities" illustrate a kind of broken relationship that puts into perspective the interests a state might have in spousal reconciliation, in preventing false recriminations, or in marital privacy. Faced with the abstract question whether the marital exemption to rape should be available to husbands who have separated from their wives, more serene images come to the minds of most judges, even those who have experienced unhappy marriages. The concrete facts of *Smith* present one picture that might not readily surface to inform decisionmakers about what legal rules are practical and wise.

The *Smith* case also illustrates how practical reasoning respects, but does not blindly adhere to, legal precedent. In contrast to courts that have followed more formalistic approaches,<sup>129</sup> the *Smith* court saw itself as an active participant in the formulation of legal authority.

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<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 197, 426 A.2d at 40.

<sup>127</sup> *See id.* at 207, 426 A.2d at 45. The Virginia Supreme Court used similar reasoning to reach the same result. *See Weishaupt v. Commonwealth*, 227 Va. 389, 405, 315 S.E.2d 847, 855 (1984) (holding that a wife had manifested her intent to end the marriage, thereby revoking her implied consent). *But see Kizer v. Commonwealth*, 228 Va. 256, 260-62, 321 S.E.2d 291, 293-94 (1984) (holding that although the spouses had separated, the marital exemption constituted a defense to the charge of rape because the wife did not manifest an objective intent to terminate the marriage).

<sup>128</sup> *See M. EISENBERG, supra note 22, at 196 n.35.*

<sup>129</sup> *See supra note 113.*

Without ignoring the importance to law of consistency and tradition, the Court took an approach sensitive to the human factors that a more mechanical application of precedent might ignore.

Although the *Smith* case illustrates some of the attributes of a highly contextual, pragmatic approach to decisionmaking, feminist practical reasoning would pursue some elements further than the court did. For example, feminist practical reasoning would more explicitly identify the perspective of the woman whose interest a marital rape exemption entirely subordinates to that of her estranged husband. This recognition would help to demonstrate how a rule may ratify gender-based structures of power, and thus provide the court stronger grounds for finding the exemption inapplicable to the *Smith* facts. On the other hand, feminist practical reasoning would also require more explicit recognition of the interests that supported the exemption and that the court too summarily dismissed. For example, the court rejected without discussion the state's interest in the reconciliation of separated spouses that the marital rape exemption was intended in part to serve. It also failed to address the state's concern about the evidentiary problems raised in marital rape cases.<sup>130</sup> The facts of the *Smith* case illustrate the weakness of these state interests. A more forthright analysis of them would have given a fuller picture of the issues, as well as guidance for other courts to which these factors may seem more significant.<sup>131</sup>

A fuller, practical-reasoning approach would also have given greater attention to the "due process" notice interests of the defendant who, when he acted, may have thought his actions were legal. Despite the heinous nature of the defendant's actions in this case, practical reasoning requires the examination of all perspectives, including those that a court might ultimately reject. The *Smith* court examined some relevant factors in its due process analysis, such as whether the court's ruling would be unexpected, the relationship between the exemption and the rule to which the exemption applied, and the type of crime.<sup>132</sup> It failed, however, to examine the role social conditioning plays in acculturating men to expect, and demand, sex. Such an examination,

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<sup>130</sup> The *Smith* court mentioned this and other purposes, but did not analyze them. See 85 N.J. at 204 n.4, 426 A.2d at 43 n.4 (citing Note, *The Marital Rape Exemption*, 52 N.Y.U. L. REV. 306, 313-16 (1977)).

<sup>131</sup> In upholding the distinction between marital and nonmarital sexual assault, for example, the Colorado Supreme Court in *People v. Brown*, 632 P.2d 1025 (Colo. 1981), accepted without critical examination the view that the distinction encourages the preservation of family relationships, as well as "averts difficult emotional issues and problems of proof inherent in this sensitive area." *Id.* at 1027.

<sup>132</sup> See 85 N.J. 208-10, 426 A.2d at 45-47. For a discussion of the inevitable hardships resulting from the "postponement" of rules until action is complete, see B. CARDOZO, cited above in note 89, at 142-49. Justice Cardozo concludes that "cases are few in which ignorance has determined conduct." *Id.* at 145.

repeated in other cases, may help to identify the real problems society has to face in rape reform, and to challenge more deeply both male and female expectations about sex.

3. *Feminist Practical Reasoning: Method or Substance?* — The *Smith* case raises further questions about the relationship between feminist method and substance. Do feminists reason contextually in order to avoid the application of rules — like the marital rape exemption — to which they substantively object? Or can the substantive consequences of feminist practical reasoning be justified as a proper means of moving from rules to results in specific cases?

Whether the relationship between feminist practical reasoning and legal substance is a “proper” one<sup>133</sup> depends upon some crucial assumptions about legal decisionmaking. If one assumes that methods can and should screen out political and moral factors from legal decisionmaking, practical reasoning is not an appropriate mode of legal analysis. To the contrary, its open-endedness would seem to provide the kind of opportunity for deciding cases on the basis of political or moral interests that method, operating independently from substance, is supposed to eliminate.

On the other hand, if one assumes that one neither can nor should eliminate political and moral factors from legal decisionmaking, then one would hope to make these factors more visible. If political and moral factors are necessarily tied into any form of legal reasoning, then bringing those factors out into the open would require decisionmakers to think self-consciously about them and to justify their decisions in the light of the factors at play in the particular case.

Feminists, not surprisingly, favor the second set of assumptions over the first. Feminists’ substantive analyses of legal decisionmaking have revealed to them that so-called neutral means of deciding cases tend to mask, not eliminate, political and social considerations from legal decisionmaking.<sup>134</sup> Feminists have found that neutral rules and procedures tend to drive underground the ideologies of the decisionmaker, and that these ideologies do not serve women’s interests well. Disadvantaged by hidden bias, feminists see the value of modes of legal reasoning that expose and open up debate concerning the un-

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<sup>133</sup> See *supra* p. 846.

<sup>134</sup> See, e.g., Minow, *supra* note 2, at 34–45 (describing how unstated norms and assumptions about differences affect substantive legal decisionmaking); Mossman, *supra* note 55, at 156–63 (arguing that traditional methods of characterizing the legal issue, choosing legal precedent and interpreting statutes mask political choices); see also Kairys, *Legal Reasoning*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE*, *supra* note 2, at 11, 11–17 (arguing that the stare decisis principle serves primarily an ideological rather than a functional role); Gabel & Harris, *supra* note 109, at 373 (arguing that legal reasoning is an “ideological form of thought” that “presupposes both the existence of and the legitimacy of existing hierarchical institutions” (emphasis in original)); Singer, *supra* note 59, at 6, 30–39, 43–47 (arguing that legal reasoning obscures political and moral commitment and fails to transcend contradictory value choices).

derlying political and moral considerations. By forcing articulation and understanding of those considerations, practical reasoning forces justification of results based upon what interests are actually at stake.

The "substance" of feminist practical reasoning consists of an alertness to certain forms of injustice that otherwise go unnoticed and unaddressed. Feminists turn to contextualized methods of reasoning to allow greater understanding and exposure of that injustice. Reasoning from context can change perceptions about the world, which may then further expand the contexts within which such reasoning seems appropriate, which in turn may lead to still further changes in perceptions. The expansion of existing boundaries of relevance based upon changed perceptions of the world is familiar to the process of legal reform. The shift from *Plessy v. Ferguson*<sup>135</sup> to *Brown v. Board of Education*,<sup>136</sup> for example, rested upon the expansion of the "legally relevant" in race discrimination cases to include the actual experiences of black Americans and the inferiority implicit in segregation.<sup>137</sup> Much of the judicial reform that has been beneficial to women, as well, has come about through expanding the lens of legal relevance to encompass the missing perspectives of women and to accommodate perceptions about the nature and role of women.<sup>138</sup> Feminist practical reasoning compels continued expansion of such perceptions.

### C. Consciousness-Raising

Another feminist method for expanding perceptions is consciousness-raising.<sup>139</sup> Consciousness-raising is an interactive and collaborative process of articulating one's experiences and making meaning

<sup>135</sup> 163 U.S. 537 (1896).

<sup>136</sup> 347 U.S. 483 (1954).

<sup>137</sup> Professor Paul Mishkin provided me with this example.

<sup>138</sup> See, e.g., *Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975) (invalidating sex-based differences in the age of majority for child support purposes because the assumption that the female is destined for the home and that the male is destined for the marketplace has become outmoded); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (plurality opinion) (invalidating a sex-based dependency presumption on grounds that gross, stereotypical distinctions between the sexes relegate females to an inferior legal status without regard to their actual capabilities); *Reed v. Reed*, 404 U.S. 71 (1971) (invalidating a sex-based presumption in favor of men in the appointment of estate administrators, based upon change in perceptions about the appropriate role of women).

<sup>139</sup> Catharine MacKinnon sees consciousness-raising as *the* method of feminism. "Consciousness-raising is the major technique of analysis, structure of organization, method of practice, the theory of social change of the women's movement." MacKinnon, *Agenda for Theory*, *supra* note 2, at 519. Many feminist legal thinkers have emphasized the importance of consciousness-raising to feminist practice and method. See, e.g., Law, *Equality: The Power and Limits of the Law* (Book Review), 95 *YALE L.J.* 1769, 1784 (1986); Matsuda, *supra* note 101, at 618-22; Scales, *supra* note 2, at 1401-02; Schneider, *supra* note 2, at 602-04. For historical perspectives on consciousness-raising in the American women's movement, see C. HYMOWITZ & M. WEISSMAN, *A HISTORY OF WOMEN IN AMERICA* 351-55 (1978); and G. LERNER, cited above in note 26, at 42-44.

of them with others who also articulate their experiences. As Leslie Bender writes, "Feminist consciousness-raising creates knowledge by exploring common experiences and patterns that emerge from shared tellings of life events. What were experienced as personal hurts individually suffered reveal themselves as a collective experience of oppression."<sup>140</sup>

Consciousness-raising is a method of trial and error. When revealing an experience to others, a participant in consciousness-raising does not know whether others will recognize it. The process values risk-taking and vulnerability over caution and detachment. Honesty is valued above consistency, teamwork over self-sufficiency, and personal narrative over abstract analysis. The goal is individual and collective empowerment, not personal attack or conquest.

Elizabeth Schneider emphasizes the centrality of consciousness-raising to the dialectical relationship of theory and practice. "Consciousness-raising groups start with personal and concrete experience, integrate this experience into theory, and then, in effect, reshape theory based upon experience and experience based upon theory. Theory expresses and grows out of experience but it also relates back to that experience for further refinement, validation, or modification."<sup>141</sup> The interplay between experience and theory "reveals the social dimension of individual experience and the individual dimension of social experience"<sup>142</sup> and hence the political nature of personal experience.<sup>143</sup>

Consciousness-raising operates as feminist method not only in small personal growth groups, but also on a more public, institutional level, through "bearing witness to evidences of patriarchy as they occur, through unremitting dialogues with and challenges to the patriarchs, and through the popular media, the arts, politics, lobbying, and even

<sup>140</sup> Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 9 (1988) (citations omitted); see also Z. EISENSTEIN, *FEMINISM AND SEXUAL EQUALITY: CRISIS IN LIBERAL AMERICA* 150-57 (1984) (stressing the importance of building feminist consciousness out of sex-class consciousness); T. DE LAURETIS, *ALICE DOESN'T: FEMINISM, SEMIOTICS, CINEMA* 185 (1984) (describing consciousness-raising as "the collective articulation of one's experience of sexuality and gender — which has produced, and continues to elaborate, a radically new mode of understanding the subject's relation to social-historical reality"); J. MITCHELL, *WOMAN'S ESTATE* 61 (1971) (maintaining that through consciousness-raising, women proclaim the painful and transform it into the political).

<sup>141</sup> Schneider, *supra* note 2, at 602 (footnote omitted).

<sup>142</sup> *Id.* at 603.

<sup>143</sup> See *id.* at 602-04. Hence the feminist phrase: "The personal is the political." MacKinnon's explanation of this phrase is perhaps the best: "It means that women's distinctive experience as women occurs within that sphere that has been socially lived as the personal — private, emotional, interiorized, particular, individuated, intimate — so that what it is to *know* the *politics* of woman's situation is to know women's personal lives." MacKinnon, *Agenda for Theory*, *supra* note 2, at 535.

litigation."<sup>144</sup> Women use consciousness-raising when they publicly share their experiences as victims of marital rape,<sup>145</sup> pornography,<sup>146</sup> sexual harassment on the job,<sup>147</sup> street hassling,<sup>148</sup> and other forms of oppression and exclusion, in order to help change public perceptions about the meaning to women of events widely thought to be harmless or flattering.

Consciousness-raising has consequences, further, for laws and institutional decisionmaking more generally. Several feminists have translated the insights of feminist consciousness-raising into their normative accounts of legal process and legal decisionmaking. Carrie Menkel-Meadow, for example, has speculated that as the number of women lawyers increases, women's more interactive approaches to decisionmaking will improve legal process.<sup>149</sup> Similarly, Judith Resnik has argued that feminist judging will involve more collaborative decisionmaking among judges.<sup>150</sup> Such changes would have important implications for the possibilities for lawyering and judging as matters of collective engagement rather than the individual exercise of judgment and power.

<sup>144</sup> Bender, *supra* note 140, at 9-10. In a recent example of litigation as consciousness-raising, three women filed a lawsuit against *Hustler Magazine* for "libel, invasion of privacy, intentional infliction of emotional injury, 'outrage,'" and various civil rights claims, following publication of a pornographic cartoon and photographs. Some of this material referred specifically to anti-pornography activist Andrea Dworkin, who was one of the plaintiffs. See *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188 (9th Cir. 1989). The lawsuit, which was dismissed on motion for summary judgment, sought \$150 million in damages for both direct harm caused to the women who are the subjects of such pornographic material, and the indirect harm of the material to other women "who are afraid to exercise [political freedoms on behalf of women] for fear of an ugly, pornographic representation of them appearing in such a magazine." *Id.* at 1191. The plaintiffs in this case probably did not expect to prevail on their claims, or to be awarded damages on the scale they sought. Such a lawsuit, however, can contribute to public education and dialogue on the issues it raises. Parties, of course, are subject to sanctions for pursuing "frivolous" litigation. In *Dworkin*, the Ninth Circuit denied a request for double costs and attorneys' fees pursuant to rule 38 of the *Federal Rules of Appellate Procedure* and 28 U.S.C. § 1912, but suggested that if the plaintiffs raise similar contentions in subsequent cases, sanctions may be appropriate. See 867 F.2d at 1200-01.

<sup>145</sup> See, e.g., L. WALKER, *THE BATTERED WOMAN* 1-9 (1979); E. PIZZEY, *SCREAM QUIETLY OR THE NEIGHBORS WILL HEAR* (1977).

<sup>146</sup> See, e.g., L. LOVELACE & M. MCGRADY, *ORDEAL* (1980), discussed in C. MACKINNON, *supra* note 7, at 10-14, 234-35.

<sup>147</sup> See, e.g., C. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 25-55 (1979).

<sup>148</sup> See, e.g., West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 *WIS. WOMEN'S L.J.* 81, 106-08 (1987).

<sup>149</sup> See Menkel-Meadow, *supra* note 74, at 55-58.

<sup>150</sup> See Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 *S. CAL. L. REV.* 1877, 1942-43 (1988); see also Sherwin, *Philosophical Methodology and Feminist Methodology: Are They Compatible?*, in *FEMINIST PERSPECTIVES: PHILOSOPHICAL ESSAYS ON METHOD AND MORALS* 13, 19 (L. Code, S. Mullett & C. Overall eds. 1988) (linking consciousness-raising with interactive processes of thought).

The primary significance of consciousness-raising, however, is as meta-method. Consciousness-raising provides a substructure for other feminist methods — including the woman question and feminist practical reasoning — by enabling feminists to draw insights and perceptions from their own experiences and those of other women and to use these insights to challenge dominant versions of social reality.

Consciousness-raising has done more than help feminists develop and affirm counter-hegemonic perceptions of their experiences. As consciousness-raising has matured as method, disagreements among feminists about the meaning of certain experiences have proliferated. Feminists disagree, for example, about whether women can voluntarily choose heterosexuality,<sup>151</sup> or motherhood;<sup>152</sup> or about whether feminists have more to gain or lose from restrictions against pornography,<sup>153</sup> surrogate motherhood,<sup>154</sup> or about whether women should be

<sup>151</sup> Compare, e.g., Rich, *Compulsory Heterosexuality and Lesbian Existence*, SIGNS, Summer 1980, at 4 (arguing that compulsory heterosexuality is the central social structure perpetuating male domination) and A. DWORKIN, INTERCOURSE (1987) (arguing that heterosexual intercourse oppresses women) and C. MACKINNON, *supra* note 7, at 7 (arguing that heterosexuality "organizes women's pleasure so as to give us a stake in our own subordination") with Colker, *Feminism, Sexuality and Self: A Preliminary Inquiry into the Politics of Authenticity* (Book Review), 68 B.U.L. REV. 217, 259-60 (1988) (arguing that either exclusive lesbianism or heterosexuality may prevent women from coming closer to their "authentic sexuality").

<sup>152</sup> Compare S. FIRESTONE, THE DIALECTIC OF SEX: THE CASE FOR FEMINIST REVOLUTION (1970) (arguing that motherhood is a primary source of oppression for women) and Macintyre, "Who Wants Babies?" *The Social Construction of "Instincts,"* in SEXUAL DIVISIONS AND SOCIETY: PROCESS AND CHANGE 150 (D. Barker & S. Allen eds. 1976) (exploring how the concept of maternal instincts fulfills societal norms of reproduction) with A. RICH, OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION (1976) (arguing that although motherhood is oppressive under patriarchy, it is also the source of creativity and joy) and Rossi, *A Biosocial Perspective on Parenting*, DAEDALUS, Spring 1977, at 1 (defending motherhood within a dialectical view that takes both biology and social behavior into account) and B. SICHTERMANN, FEMINITY: THE POLITICS OF THE PERSONAL 17-31 (1986) (arguing that women's desire to have children derives from physical need).

<sup>153</sup> Compare C. MACKINNON, *supra* note 7, at 163-97 (defending the civil rights ordinance against pornography because of the harm to women caused by defining sex in terms of male dominance and female submission) and A. DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN (1981) (describing ways in which pornography harms women) with Dunlap, *Sexual Speech and the State: Putting Pornography in Its Place*, 17 GOLDEN GATE U.L. REV. 359 (1987) (arguing that restrictions on pornography are undesirable because they would prevent necessary public debate on sexual issues) and WOMEN AGAINST CENSORSHIP (V. Burstyn ed. 1985) (collecting essays opposing censorship of pornography) and Hollibaugh, *Desire for the Future: Radical Hope in Passion and Pleasure*, in PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY 401 (C. Vance ed. 1984) (arguing that some pornography can improve healthy sexual expression for women).

<sup>154</sup> Compare B. ROTHMAN, RECREATING MOTHERHOOD: IDEOLOGY AND TECHNOLOGY IN A PATRIARCHAL SOCIETY 229-45 (1989) (arguing against surrogate motherhood) with M. FIELD, SURROGATE MOTHERHOOD (1988) (arguing that surrogate parent contracts should be neither criminalized nor legally enforceable) and L. ANDREWS, BETWEEN STRANGERS: SURROGATE MOTHERS, EXPECTANT FATHERS, & BRAVE NEW BABIES 252-72 (1989) (disputing claims of feminists who oppose surrogacy).

subject to a military draft.<sup>155</sup> They disagree about each other's roles in an oppressive society: some feminists accuse others of complicity in the oppression of women.<sup>156</sup> Feminists disagree even about the method of consciousness-raising; some women worry that it sometimes operates to pressure women into translating their experiences into positions that are politically, rather than experientially, correct.<sup>157</sup>

These disagreements raise questions beyond those of which specific methods are appropriate to feminist practice. Like the woman question and practical reasoning, consciousness-raising challenges the concept of knowledge. It presupposes that what I thought I knew may not, in fact, be "right." How, then, will we know when we *have* got it "right"? Or, backing up one step, what does it mean to *be* right? And what attitude should I have about that which I claim to know? The next Part will focus on these questions.

### III. FEMINIST KNOWING IN LAW

A point — perhaps *the* point — of legal methods is to reach answers that are legally defensible or in some sense "right." Methods themselves imply a stance toward rightness. If being right means having discovered some final, objective truth based in a fixed physical or moral reality, for example, verification is possible and leaves no room for further perspectives or for doubt. On the other hand, if being right means that one has expressed one's personal tastes or interests which have no greater claim to validity than those of anyone else, being right is a rhetorical device used to assert one's own point of view, and verification is both impossible and pointless.

In this section, I explore several feminist explanations for what it means to be "right" in law.<sup>158</sup> I look first at a range of positions that have emerged from within feminist theory. These include the three positions customarily included in feminist epistemological discussions:

<sup>155</sup> Compare W. Williams, *supra* note 2, at 189 (reporting her opposition to single-sex draft) with Scales, *Militarism, Male Dominance and Law: Feminist Jurisprudence As Oxymoron*, 12 HARV. WOMEN'S L.J. 25, 42 (1989) (arguing that "militarism *normalizes* the oppression of women" (emphasis in original)).

<sup>156</sup> See C. MACKINNON, *supra* note 7, at 198–205 (accusing women who defend first amendment values against restrictions on pornography of collaboration).

<sup>157</sup> See Colker, *supra* note 151, at 253–54 (noting that consciousness-raising may influence women to adopt "inauthentic" expressions of themselves).

<sup>158</sup> Separating attitude about knowledge from the knowledge itself might appear a hopeless task. My attitude toward knowing is, in a sense, a claim about what I know. Moreover, my attitude about knowing, like other claims, may itself be strategic. Cf. C. WEEDON, *FEMINIST PRACTICE AND POSTSTRUCTURALIST THEORY* 131–35 (1987) (offering a strategic rationale for a radical feminist critique); W. Williams, *Equality's Riddle*, *supra* note 48, at 351–52 (justifying equal-treatment over special-treatment theory for tactical reasons). Despite the analytical overlap, the separation of issues of attitude from other knowledge claims enables greater focus on these issues.

the rational/empirical position, standpoint epistemology, and postmodernism.<sup>159</sup> In addition I examine a fourth stance called positionality,<sup>160</sup> which synthesizes some aspects of the first three into a new, and I think more satisfactory, whole. I evaluate each position from the same pragmatic viewpoint reflected in the feminist methods I have described: how can that position help feminists, using feminist methods, to generate the kind of insights, values, and self-knowledge that feminism needs to maintain its critical challenge to existing structures of power and to reconstruct new, and better, structures in their place? These criteria are admittedly circular: I evaluate theories of knowledge by how well they make sense in light of that which feminists claim as knowledge and in light of the methods used to obtain knowledge. This circularity, however, is consistent with one of the central features of the version of feminism I advocate. Any set of values and truths, including those of feminists, must make sense within the terms of the social realities that have generated them. Any explanation of that verification must also operate in the context in which verifications take place — in practice.

#### *A. The Rational/Empirical Position*

Feminists across many disciplines have engaged in considerable efforts to show how, by the standards of their own disciplines, to improve accepted methodologies. These efforts have led to the unraveling of descriptions of women as morally inferior, psychologically unstable, and historically insignificant — descriptions these disciplines long accepted as authoritative and unquestionable.<sup>161</sup>

Similarly, feminists in law attempt to use the tools of law, on its own terms, to improve law. Using the methods discussed in Part II

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<sup>159</sup> Sandra Harding, Mary Hawkesworth, and others use these categories. See S. HARDING, *THE SCIENCE QUESTION IN FEMINISM* 24–28 (1986); Hawkesworth, *Knowers, Knowing, Known: Feminist Theory and Claims of Truth*, 14 *SIGNS* 533, 535–37 (1989). I define these categories somewhat differently than either Harding or Hawkesworth to reflect the categories into which feminists doing law have seemed to fall.

In using these categories, I am mindful of Leslie Bender's observation that labels and categorizations are divisive and cause ideas to "become fixed instead of remaining fluid and growing." Bender, *supra* note 140, at 5 n.5. Regretfully, I find the labels necessary to order, describe and clarify differences in ways of thinking. See *supra* note 18.

<sup>160</sup> This term I have adapted from Linda Alcoff's description of the appropriate feminist view toward the concept of "woman." See Alcoff, *supra* note 8, at 428–36.

<sup>161</sup> See, e.g., R. BLEIER, *SCIENCE AND GENDER: A CRITIQUE OF BIOLOGY AND ITS THEORIES ON WOMEN* (1984) (analyzing the androcentric bias of biology); N. CHODOROW, *THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER* (1978) (reinterpreting, within psychoanalytic theory, the Freudian account of mothering); C. GILLIGAN, *supra* note 74 (demonstrating that conventional stages of moral development underlying psychological theory are invalid because drawn from study groups that did not include women); G. LERNER, *supra* note 26 (reformulating objects of historical inquiry to include women's experiences).

of this Article, feminists often challenge assumptions about women that underlie numerous laws and demonstrate how laws based upon these assumptions are not rational and neutral, but rather irrational and discriminatory. When engaged in these challenges, feminists operate from a rational/empirical position that assumes that the law is not objective, but that identifying and correcting its mistaken assumptions can make it more objective.

When feminists challenged employment rules that denied disability benefits to pregnant women, for example, they used empirical and rational arguments about the similarity between pregnancy and other disabilities.<sup>162</sup> Faced with state laws designed to address the disadvantages experienced by pregnant women in the workplace, some feminists argued that such "special treatment" for pregnant women reinforces stereotypes about women and should be rejected under the equality principle. Other feminists argued that pregnancy affects only women and that lack of accommodation for it will prevent women from achieving equality in the workplace.<sup>163</sup> Each side of the debate defended a different concept of equality, but the underlying argument focused upon which is the most rational, empirically sound and legally supportable interpretation of equality.

In other areas of the law, feminists have also operated from within this rational/empirical stance. Susan Estrich, for example, argues that the correction of certain factual inaccuracies can better achieve the purposes of rape law — to prevent rape, to protect women, and to punish rapists. Estrich contends, for example, that the assumption that women mean "yes" when they say "no" is false and that a rational rape law would define consent so that "no means no."<sup>164</sup>

Feminists also argue that particular reforms in child custody law would more rationally meet the law's express purpose of protecting the best interests of the child. Some feminists favor the tender-years doctrine or the maternal-preference rule, on the ground that women are likely to be the actual caretakers of children,<sup>165</sup> and that the bias against women of the white, male judges who decide custody cases makes such a rule necessary to give women a fair shot at custody.<sup>166</sup>

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<sup>162</sup> See *supra* pp. 841-42; see also W. Williams, *Equality's Riddle*, *supra* note 48, at 335-58 (arguing that although pregnancy is unique for some purposes, it resembles other disabilities for the purposes of disability benefit plans).

<sup>163</sup> See *supra* note 48.

<sup>164</sup> S. ESTRICH, *supra* note 49, at 102. Estrich argues also that rape law would be more rational if a negligence standard were applied to the defendant's intent. See *id.* at 92-104.

<sup>165</sup> See, e.g., Klaff, *The Tender Years Doctrine: A Defense*, 70 CALIF. L. REV. 335 (1982).

<sup>166</sup> See, e.g., P. CHESLER, *MOTHERS ON TRIAL: THE BATTLE FOR CHILDREN AND CUSTODY* 239-68 (1986); Sheppard, *Unspoken Premises in Custody Litigation*, 7 WOMEN'S RTS. L. REP. 229, 233 (1982); Uviller, *Fathers' Rights and Feminism: The Maternal Presumption Revisited*, 1 HARV. WOMEN'S L.J. 107, 121-23 (1978); see also Polikoff, *Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 7 WOMEN'S RTS. L. REP. 235, 237-

Other feminists argue that applying the best-interests-of-the-child test on a case-by-case basis will produce the fairest and most neutral child-custody decisions.<sup>167</sup> Still other feminists advocate a primary caretaker presumption on the empirical ground that a child's primary caretaker is most likely to be the parent in whose custody the child's best interests lies,<sup>168</sup> and that this standard minimizes the potential intimidation that can be exercised against a risk-averse parent who has invested the most in the child's care.<sup>169</sup> Finally, some feminists favor rules that promote joint custody, based upon empirical claims about which rules best serve the interests of children and women.<sup>170</sup>

All of these arguments from the rational/empirical stance share the premise that knowledge is accessible and, when obtained, can make law more rational. The relevant empirical questions are often very difficult ones: if parents, usually men, who fall behind in their child support obligations face almost certain jail sentences, will they be more likely to make their child support payments on time?<sup>171</sup> If state law singles out pregnancy as the only condition for which job security is mandated, how much additional resistance to hiring women, if any, is likely to be created, and what impact on the stereotyping of women, if any, is likely to result?<sup>172</sup> The rational/empirical position presumes, however, that answers to such questions can be improved — that there is a "right" answer to get — and that once gotten, that answer can improve the law.

Some feminists charge that improving the empirical basis of law or its rationality is mere "reformism" that cannot reach the deeper

39 (1982) (discussing male bias in decisionmaking, but favoring a primary-caretaker presumption).

<sup>167</sup> See, e.g., Schulman & Pitt, *Second Thoughts on Joint Child Custody: Analysis of Legislation and Its Implications for Women and Children*, 12 GOLDEN GATE U.L. REV. 539, 552 (1982); Scott & Derdeyn, *Rethinking Joint Custody*, 45 OHIO ST. L.J. 455, 484-95 (1984).

<sup>168</sup> See, e.g., Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 560-65 (1984) (advocating a preference for primary caretakers in cases involving young children); Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 770-74 (1988) (advocating the use of the primary-caretaker rule in all custody cases); Polikoff, *supra* note 166, at 237-39.

The question of a child's "best interests" is, of course, as much a normative as an empirical question. See Bartlett & Stack, *Joint Custody, Feminism and the Dependency Dilemma*, 2 BERKELEY WOMEN'S L.J. 9, 11 (1986); Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, LAW & CONTEMP. PROBS., Summer 1975, at 226, 258-61.

<sup>169</sup> See Olsen, *The Politics of Family Law*, 2 J.L. & INEQUALITY 1, 19 (1984); see also Mnookin & Kornhauser, *Bargaining in the Shadow of the Law*, 88 YALE L.J. 950, 979 (1979) (arguing that the best-interests standard disadvantages the more risk-averse parent); Fineman, *supra* note 168, at 772 (arguing that the best-interests test disadvantages the lower-income parent because of need to hire experts).

<sup>170</sup> See, e.g., Bartlett & Stack, *supra* note 168.

<sup>171</sup> This was one of the principal research questions in D. CHAMBERS, *MAKING FATHERS PAY: THE ENFORCEMENT OF CHILD SUPPORT* (1979).

<sup>172</sup> See W. Williams, *Equality's Riddle*, *supra* note 48, at 355.

gendered nature of law.<sup>173</sup> This charge unfortunately undervalues the enormous transformation in thinking about women that the empirical challenge to law, in which all feminists have participated, has brought about. Feminist rational/empiricism has begun to expose the deeply flawed factual assumptions about women that have pervaded many disciplines, and has changed, in profound ways, the perception of women in this society.<sup>174</sup> Few, if any, feminists, however, operate entirely within the rational/empirical stance, because it tends to limit attention to matters of factual rather than normative accuracy, and thus fails to take account of the social construction of reality through which factual or rational propositions mask normative constructions.<sup>175</sup> Empirical and rational arguments challenge existing assumptions about reality and, in particular, the inaccurate reality conveyed by stereotypes about women. But if reality is not representational or objective and not above politics, the method of correcting inaccuracies ultimately cannot provide a basis for under-

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<sup>173</sup> Christine Littleton and Catharine MacKinnon, for example, associate rational/empirical efforts to open up more opportunities for women with "assimilationism" or "liberal feminism," which, in retaining its focus on individualism, provides no basis from which to challenge the way in which women's individuality has been determined by men rather than freely chosen, or to validate any of the choices that individuals make. See Littleton, *supra* note 21, at 754-63; C. MACKINNON, *supra* note 7, at 137.

<sup>174</sup> The most well-known example outside of law is Carol Gilligan's challenge to Lawrence Kohlberg's paradigm of moral reasoning. In showing that Kohlberg had erred in drawing his study sample too narrowly by excluding women, Gilligan uncovered a source of systematic bias that ran throughout the discipline of psychology. See C. GILLIGAN, *supra* note 74, at 18-21. Confronted with a more inclusive and thus representative study group, psychologists could recognize the error within the terms of their own discipline. Disputes persist about the significance and validity of Gilligan's findings, which have kept alive the empirical debate. Compare Auerbach, Blum, Smith & Williams, *Commentary on Gilligan's In a Different Voice*, 11 FEMINIST STUD. 149 (1985) (criticizing Gilligan's developmental stages theory for ignoring social factors and arguing that Gilligan's interview material does not support her generalizations) and 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) (arguing that Gilligan exaggerates the duality in moral development) and Nails, *Social-Scientific Sexism: Gilligan's Mismeasure of Man*, 50 SOC. RES. 643 (1983) (questioning social-scientific research that leads to the oppression of disadvantaged groups) with Flanagan & Adler, *Impartiality and Particularity*, 50 SOC. RES. 576 (1983) (suggesting that the flaws and limitations of the Kohlberg thesis also constrain Gilligan). See also Kerber, Greeno, Maccoby, Luria, Stack & Gilligan, *On In a Different Voice: An Interdisciplinary Forum*, 11 SIGNS 304 (1986). Despite these disputes, Gilligan's work has moved the discipline in more rational, empirically correct directions, with revolutionary implications for many other disciplines. See generally WOMEN AND MORAL THEORY, *supra* note 85 (exploring in a collection of essays the potential of feminist research, especially that begun by Gilligan, to redirect and enhance moral theory).

<sup>175</sup> Feminists have made significant contributions to understandings about the social construction of reality. See generally S. DE BEAUVOIR, *supra* note 23 (describing how men have defined women as other and created a myth of woman); S. HARDING, *supra* note 159 (arguing that science is gendered); MacKinnon, *Agenda for Theory*, *supra* note 2 (arguing that gender is a social construct that embodies male sexual dominance).

standing and reconstructing that reality. The rational/empirical assumption that principles such as objectivity and neutrality can question empirical assumptions within law fails to recognize that knowability is itself a debatable issue. I explore positions that challenge, rather than presuppose, knowability in the following sections.

### *B. Standpoint Epistemology*

The problem of knowability in feminist thought arises from the observation that what women know has been determined — perhaps overdetermined<sup>176</sup> — by male culture. Some of the feminists most concerned about the problem of overdetermination have adopted a “standpoint epistemology”<sup>177</sup> to provide the grounding upon which feminists can claim that their own legal methods, legal reasoning, and proposals for substantive legal reform are “right.”

Feminist standpoint epistemology identifies woman’s status as that of victim, and then privileges that status by claiming that it gives access to understanding about oppression that others cannot have. It grounds this privilege in the contention that pain and subordination provide the oppressed “with a motivation for finding out what is wrong, for criticizing accepted interpretations of reality and for developing new and less distorted ways of understanding the world.”<sup>178</sup> The experience of being a victim therefore reveals truths about reality that non-victims do not see.

Women know the world is out there. Women know the world is out there because it hits us in the face. Literally. We are raped, battered, pornographed, defined by force, by a world that begins, at least, entirely outside us. No matter what we think about it, how we try to think it out of existence or into a different shape for us to inhabit, the world remains real. Try some time. It exists independent of our

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<sup>176</sup> Cf. Alcoff, *supra* note 8, at 416 (describing Derrida’s and Foucault’s view that “we are overdetermined . . . by a social discourse and/or cultural practice”); J. MITCHELL, *supra* note 140, at 99–122. Juliet Mitchell defines overdetermination as “a complex notion of ‘multiple causation’ in which the numerous factors can reinforce, overlap, cancel each other out, or contradict one another.” J. MITCHELL, *PSYCHOANALYSIS AND FEMINISM* 309 n.12 (1974). The concept of overdetermination appears to have originated with Freud, *see id.*, who used it to explain the causes of hysterical symptoms and the content of dreams. *See* S. FREUD, *The Aetiology of Hysteria*, in 1 SIGMUND FREUD: COLLECTED PAPERS 183, 213 (1959); S. FREUD, *The Interpretation of Dreams*, in *THE BASIC WRITINGS OF SIGMUND FREUD* 181, 338 (A. Brill trans. & ed. 1938).

<sup>177</sup> Sandra Harding finds the roots of the standpoint approach in Hegel’s analysis of the relationship between master and slave, which was elaborated by Engels, Marx, and Lukacs, and extended to feminist theory by Jane Flax, Hilary Rose, Nancy Hartsock, and Dorothy Smith. *See* S. HARDING, *supra* note 159, at 26.

<sup>178</sup> A. JAGGAR, *FEMINIST POLITICS AND HUMAN NATURE* 370 (1983).

will. We can tell that it is there, because no matter what we do, we can't get out of it.<sup>179</sup>

Feminists have located the foundation of women's subordination in different aspects of women's experiences. Feminist post-Marxists find this foundation in women's activities in production, both domestic and in the marketplace;<sup>180</sup> others emphasize women's positions in the sexual hierarchy,<sup>181</sup> in women's bodies,<sup>182</sup> or in women's responses to the pain and fear of male violence.<sup>183</sup> Whatever the source, however, these feminists claim that the material deprivation of the oppressed gives them a perspective — an access to knowledge — that the oppressors cannot possibly have.<sup>184</sup>

Standpoint epistemology has contributed a great deal to feminist understandings of the importance of our respective positioning within society to the "knowledge" we have. Feminist standpoint epistemologies question "the assumption that the social identity of the observer is irrelevant to the 'goodness' of the results of research," and reverse the priority of a distanced, "objective" standpoint in favor of one of experience and engagement.<sup>185</sup>

Despite the valuable insights offered by feminist standpoint epistemology, however, it does not offer an adequate account of feminist knowing. First, in isolating gender as a source of oppression, feminist legal thinkers tend to concentrate on the identification of woman's true identity beneath the oppression and thereby essentialize her characteristics. Catharine MacKinnon, for example, in exposing what she finds to be the total system of male hegemony, repeatedly speaks of "women's point of view,"<sup>186</sup> of "woman's voice,"<sup>187</sup> of empowering women "on our own terms,"<sup>188</sup> of what women "really want,"<sup>189</sup> and of standards that are "not ours."<sup>190</sup> Ruth Colker sees the discovery of women's "authentic self"<sup>191</sup> as a difficult job given the social con-

<sup>179</sup> C. MACKINNON, *supra* note 7, at 57.

<sup>180</sup> See Hartsock, *The Feminist Standpoint: Developing the Ground for a Specifically Feminist Historical Materialism*, in *DISCOVERING REALITY: FEMINIST PERSPECTIVES ON EPISTEMOLOGY, METAPHYSICS, METHODOLOGY, AND PHILOSOPHY OF SCIENCE* 283 (S. Harding & M. Hintikka eds. 1983).

<sup>181</sup> See MacKinnon, *Agenda for Theory*, *supra* note 2.

<sup>182</sup> See generally Z. EISENSTEIN, *THE FEMALE BODY AND THE LAW* (1988); West, *supra* note 2.

<sup>183</sup> See West, *supra* note 148, at 94.

<sup>184</sup> See MacKinnon, *Agenda for Theory*, *supra* note 2, at 534-38.

<sup>185</sup> S. HARDING, *supra* note 159, at 162.

<sup>186</sup> See C. MACKINNON, *supra* note 7, at 88, 91, 160.

<sup>187</sup> See *id.* at 195.

<sup>188</sup> See *id.* at 22.

<sup>189</sup> See *id.* at 83.

<sup>190</sup> See *id.* at 76.

<sup>191</sup> See Colker, *supra* note 151, at 218.

structions imposed upon women, but nonetheless, like MacKinnon, insists upon it as a central goal of feminism. Robin West, too, assumes that woman has a "true nature" upon which to base a feminist jurisprudence.<sup>192</sup>

Although the essentialist positions taken by these feminists often have strategic or rhetorical value,<sup>193</sup> these positions obscure the importance of differences among women and the fact that factors other than gender victimize women. A theory that purports to isolate gender as a basis for oppression obscures these factors and even reinforces other forms of oppression.<sup>194</sup> This error duplicates the error of other legal theories that project the meaning speakers give to their own experiences onto the experiences of others.<sup>195</sup>

In addition to imposing too broad a view of gender, standpoint epistemologists also tend to presuppose too narrow a view of privilege.

<sup>192</sup> See West, *supra* note 2, at 4. West devoted an earlier article to the need for a "phenomenological critique" of women's subjective experiences, which West suggested could be accomplished by women "speaking the truth about the quality of our internal lives." West, *supra* note 148, at 144. In *Jurisprudence and Gender*, West seems to have partially resolved the ambiguities she earlier saw in women's nature to find women's experience to be one of connection in contrast to the experience of separation presupposed in all modern legal theory. See West, *supra* note 2, at 1-3; see also West, *Feminism, Critical Social Theory and Law*, 1989 U. CHI. LEGAL F. 59, 96 (rejecting the anti-essentialism of critical social theory).

Other feminists also assume that women have an essential, discoverable identity, but do not seem to claim a privileged knowledge based on this identity. See, e.g., Finley, *Transcending Equality Theory: A Way out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1139-40 (1986) (attributing certain unique, "mystical" qualities to pregnancy); Sherry, *supra* note 74, at 584-85 (defining the "basic feminine sense of self," which is "connected to the world" in a way the male self is not (quoting N. CHODOROW, *supra* note 161, at 169)).

<sup>193</sup> See D. FUSS, *supra* note 71, at 20 (distinguishing between "deploying" essentialism for strategic purposes and "lapsing into" essentialism by mistake).

<sup>194</sup> Angela Harris and Patricia Cain, from different perspectives, each make this point specifically about MacKinnon and West. See Harris, *supra* note 2 (criticizing West and MacKinnon for "essentialism," which brackets race and results in black women's voices being ignored); Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L.J. (forthcoming 1990) (challenging the exclusion of lesbian experience from feminist legal theory). Elizabeth Spelman and Martha Minow make the point more generally about feminist theory. See E. SPELMAN, *supra* note 11; Minow, *supra* note 11; *supra* pp. 847-49.

<sup>195</sup> The minority critique of critical legal studies (CLS) has given this theme particular prominence. See, e.g., Dalton, *The Clouded Prism*, 22 HARV. C.R.-C.L. L. REV. 435 (1987) (highlighting the differences in background between critical legal scholars and minority scholars); Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301 (1987) (arguing that the CLS critique of legal rules and rights and its championing of informal decisionmaking offer little hope of curbing racism); Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987) (suggesting that critical scholars attend to the "distinct normative insights" of victims of social oppression); Williams, *supra* note 85 (criticizing the CLS rejection of rights and ignoring the importance of rights in the lives of blacks); see also D. BELL, AND WE ARE NOT SAVED 51-74 (1987) (arguing that whites have gained more than blacks from the civil rights movement). For a counter-critique, see Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989), which challenges the "racial distinctiveness thesis."

I doubt that being a victim is the only experience that gives special access to truth. Although victims know something about victimization that non-victims do not, victims do not have exclusive access to truth about oppression. The positions of others — co-victims, passive bystanders, even the victimizers — yield perspectives of special knowledge that those who seek to end oppression must understand.

Standpoint epistemology's claim that women have special access to knowledge also does not account for why all women, including those who are similarly situated, do not share the same interpretations of those situations — "a special explanation of non-perception."<sup>196</sup> One account argues that the hold of patriarchal ideology, which "intervenes successfully to limit feminist consciousness,"<sup>197</sup> causes "false consciousness." Although feminist legal theorists rarely offer this explanation explicitly, it is implicit in theories that associate with women certain essential characteristics, variance from which connotes a distortion of who women really are or what they really want.<sup>198</sup>

False consciousness surely does not satisfactorily explain women's different perceptions of their experiences. Such an explanation negates the standpoint claim that experience itself, not some external or objective standard, is the source of knowledge. In addition, to suggest that one's consciousness is "false," and thus another's "true," is at odds with the assumption of MacKinnon and others that male patriarchy has totally constructed women's perceptions for its own purposes.<sup>199</sup> If male patriarchy is as successful as MacKinnon claims, on what basis can some women pretend to escape it?

MacKinnon herself recognizes the unfeasibility of false consciousness as an explanation for women's different perceptions;<sup>200</sup> yet throughout her writings, her branding of women with whom she does not agree as collaborators<sup>201</sup> and rejection of the suggestion that feminism is either subjective or partial implies this explanation.<sup>202</sup> Colker

<sup>196</sup> Charles Taylor uses this phrase in describing the general phenomenon of false consciousness. See C. TAYLOR, *PHILOSOPHY AND THE HUMAN SCIENCES* 95 (1985).

<sup>197</sup> Z. EISENSTEIN, *supra* note 140, at 153.

<sup>198</sup> See Colker, *supra* note 151, at 217-22, 217 n.2 (declaring that feminists aspire to discover their authentic selves). West labels mistakes in describing women's realities as "false," see West, *supra* note 148, at 114, or as "lies," see *id.* at 126, 127, 144.

<sup>199</sup> See, e.g., MacKinnon, *Toward Feminist Jurisprudence*, *supra* note 2, at 638 (describing male domination as "metaphysically nearly perfect").

<sup>200</sup> See *id.* at 637-38 n.5. MacKinnon also rejects the explanation that women's different perceptions are based upon different subjective experiences; as constructions of men, she argues, women cannot be subjects. See *id.* Having rejected both of these explanations, MacKinnon concludes that women's different perceptions are proof of women's contradictory situation: "Feminism affirms women's point of view by revealing, criticizing, and explaining its impossibility." *Id.* at 637. I accept this conclusion, but do not think it is consistent with MacKinnon's other work which reflects the false-consciousness view.

<sup>201</sup> See C. MACKINNON, *supra* note 7, at 198-205, 216-28.

<sup>202</sup> See C. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 116 (1989).

is sensitive to the problem of selecting one version of women's experience as politically correct, but she also remains trapped in the contradiction between the claim that women have "authentic selves" and the claim that they are victims of someone else's fantasy.<sup>203</sup>

A final difficulty with standpoint epistemology is the adversarial we/they politics it engenders. Identification from the standpoint of victims seems to require enemies, wrongdoers, victimizers.<sup>204</sup> Those identified as victims ("we") stand in stark contrast to others ("they"), whose claim to superior knowledge becomes not only false but suspect in some deeper sense: conspiratorial, evil-minded, criminal. You (everyone) must be either with us or against us. Men are actors — not innocent actors, but evil, corrupt, irredeemable. They conspire to protect male advantage and to perpetuate the subordination of women.<sup>205</sup> Even women must choose sides, and those who chose badly are condemned.<sup>206</sup>

This adversarial position hinders feminist practice. It impedes understanding by would-be friends of feminism and paralyzes potential sympathizers.<sup>207</sup> Even more seriously, it misstates the problem that women face, which is not that men act "freely" and women do not, but that both men and women, in different but interrelated ways, are confined by gender.<sup>208</sup> The mystifying ideologies of gender construction control men, too, however much they may also benefit from them. As Jane Flax writes, "Unless we see gender as a social relation, rather than as an opposition of inherently different beings, we will not be able to identify the varieties and limitations of different wom-

<sup>203</sup> See Colker, *supra* note 151, at 255–60.

<sup>204</sup> Mary Hawkesworth associates this linkage with the "rhetoric of oppression." See Hawkesworth, *supra* note 23, at 445–48. In another article, Hawkesworth describes a related phenomenon whereby feminist treatments of knowledge shift "from a recognition of misinformation about women to a suspicion concerning the dissemination of disinformation about women." Hawkesworth, *supra* note 159, at 538–39.

<sup>205</sup> Thus, MacKinnon writes, "men author scripts to their own advantage" and "set conditions" which maintain their own power and the subordination of women. See MacKinnon, *Sexuality, Pornography and Method: "Pleasure Under Patriarchy,"* 99 ETHICS 314, 316 (1989). Although sometimes careful to distinguish male power as a system from the power individual men have, or do not have, see Littleton, *supra* note 2, at 1318, Chris Littleton also frequently slips into the conspiratorial mode. See *id.* at 1302 ("[T]he terms of social discourse have been set by men who, actively or passively, have ignored women's voices . . ."); *id.* at 1333 (suggesting that men have "[taken] the best for themselves and assign[ed] the rest to women"); see also C. MACKINNON, *supra* note 7, at 198–205, 216–28.

<sup>206</sup> See *supra* note 201. For an example of how bitter exchanges between feminists carried on in this framework can become, see *The 1984 James McCormick Mitchell Lecture: Feminist Discourse, Moral Values, and the Law — A Conversation*, 34 BUFFALO L. REV. 11, 68–76 (1985). MacKinnon extends her side of the argument in C. MACKINNON, *supra* note 7, at 305 n.6. For an insightful feminist commentary on this exchange, see Colker, cited above in note 151, at 249–50.

<sup>207</sup> See Hawkesworth, *supra* note 23, at 447.

<sup>208</sup> See Flax, *supra* note 11, at 629.

en's (or men's) powers and oppressions within particular societies."<sup>209</sup> In short, gender reform must entail not so much the conquest of the now-all-powerful enemy male, as the transformation of those ideologies that maintain the current relationships of subordination and oppression.

### C. Postmodernism

The postmodern or poststructural critique of foundationalism resolves the problem of knowability in a quite different way.<sup>210</sup> While standpoint epistemology relocates the source of knowledge from the oppressor to the oppressed, the postmodern critique of foundationalism questions the possibility of knowledge, including knowledge about categories of people such as women. This critique rejects essentialist thinking as it insists that the subject, including the female subject, has no core identity but rather is constituted through multiple structures and discourses that in various ways overlap, intersect, and contradict each other.<sup>211</sup> Although these structures and discourses "overdetermine" woman and thereby produce "the subject's experience of differentiated identity and . . . autonomy,"<sup>212</sup> the postmodern view posits that the realities experienced by the subject are not in any way transcendent or representational, but rather particular and fluctuating,

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<sup>209</sup> *Id.* at 641. As Flax also writes, women cannot be "free of determination from their own participation in relations of domination such as those rooted in the social relations of race, class, or homophobia," while men are not. *Id.* at 642.

<sup>210</sup> Postmodernism and poststructuralism are often used interchangeably, although each term has a somewhat unique genealogy. Postmodernism, originally used to describe a movement in art and architecture, has been used by Jean-Francois Lyotard and Fredric Jameson to describe the general character of the present age. For Lyotard, whose concern is primarily epistemological, the postmodern condition has resulted from the collapse of faith in the traditional "Grand Narratives" that have legitimated knowledge since the Enlightenment. See J. LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* 37-41, 51, 60 (G. Bennington & B. Massumi trans. 1984). For Jameson, who focuses mainly on changes in the cultural realm, postmodernism characterizes the "cultural dominant" of the "logic of late capitalism." Jameson, *Postmodernism, or the Cultural Logic of Late Capitalism*, 146 *NEW LEFT REV.* 53, 55 (1984).

Poststructuralism refers to a series of regional analyses that have undermined notions of foundationalism and of a unified self-transparent subject. As a movement that has undermined the ideals and the project of the Enlightenment, poststructuralism has contributed to the general condition of postmodernism. I am grateful to Rosanne Kennedy for clarifying these distinctions for me.

In this Article, I use the terms postmodernism and poststructuralism more or less interchangeably, and I am concerned primarily with the critique of foundationalism that both postmodernism and poststructuralism have produced. For the most concise, comprehensive statement of the Enlightenment beliefs which postmodernism and poststructuralism reject that I have found, see Flax, cited above in note 11, at 624-25.

<sup>211</sup> See Alcoff, *supra* note 8, at 415-16; Schultz, *Room To Maneuver (f) or a Room of One's Own? Practice Theory and Feminist Practice*, 14 *LAW & SOC. INQUIRY* 123, 132 (1989).

<sup>212</sup> Coombe, *Room For Manoeuver: Toward a Theory of Practice in Critical Legal Studies*, 14 *LAW & SOC. INQUIRY* 69, 85 (1989).

constituted within a complex set of social contexts. Within this position, being human, or female, is strictly a matter of social, historical, and cultural construction.<sup>213</sup>

Postmodern critiques have challenged the binary oppositions in language, law, and other socially-constituting systems, oppositions which privilege one presence — male, rationality, objectivity — and marginalize its opposite — female, irrationality, subjectivity.<sup>214</sup> Postmodernism removes the grounding from these oppositions and from all other systems of power or truth that claim legitimacy on the basis of external foundations or authorities. In so doing, it removes external grounding from any particular agenda for social reform. In the words of Nancy Fraser and Linda Nicholson, postmodern social criticism “floats free of any universalist theoretical ground. No longer anchored philosophically, the very shape or character of social criticism changes; it becomes more pragmatic, ad hoc, contextual, and local.”<sup>215</sup> There are no external, overarching systems of legitimation; “[t]here are no special tribunals set apart from the sites where inquiry is practiced.” Instead, practices develop their own constitutive norms, which are “plural, local, and immanent.”<sup>216</sup>

The postmodern critique of foundationalism has made its way into legal discourse through the critical legal studies movement. The feminists associated with this movement have stressed both the indeterminacy of law and the extent to which law, despite its claim to neutrality and objectivity, masks particular hierarchies and distributions of power. These feminists have engaged in deconstructive projects that have revealed the hidden gender bias of a wide range of laws and legal assumptions.<sup>217</sup> Basic to these projects has been the critical insight that not only law itself, but also the criteria for legal validity and legitimacy, are social constructs rather than universal givens.<sup>218</sup>

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<sup>213</sup> See Fraser & Nicholson, *supra* note 14, at 83–91; Rabine, *A Feminist Politics of Non-Identity*, 14 FEMINIST STUD. 11, 25–26 (1988); Gould, *supra* note 23, at 7.

<sup>214</sup> See Z. EISENSTEIN, *supra* note 140, at 20; Poovey, *Feminism and Deconstruction*, 14 FEMINIST STUD. 51 (1988).

<sup>215</sup> Fraser & Nicholson, *supra* note 14, at 85.

<sup>216</sup> *Id.* at 87.

<sup>217</sup> See, e.g., Dalton, *supra* note 18; Olsen, *supra* note 51; Bender, *supra* note 140.

<sup>218</sup> Although feminist legal theory has taken seriously the postmodern critique of foundationalism, it has yet to make much sense or use of the postmodern critique of the subject. Marie Ashe has argued that the poststructural subject, defined as “a being that is maintained only through interactive exchanges within a social order,” Ashe, *Mind's Opportunity: Birthing a Poststructuralist Feminist Jurisprudence*, 38 SYRACUSE L. REV. 1129, 1165 (1987), “appears utterly at odds with the notions of individual autonomy and personhood valued as fundamental in the liberal legal tradition.” *Id.* at 1151. The direction in which Ashe urges feminist jurisprudence should move, however, appears to turn on the existence of certain “real” experiences on the part of women who are pregnant and bear children, which are at odds, she suggests, with the reality assumed by law. In universalizing these experiences and speaking of the “inner

Although the postmodern critique of foundationalism has had considerable influence on feminist legal theory, some feminists have cautioned that this critique poses a threat not only to existing power structures, but to feminist politics as well.<sup>219</sup> To the extent that feminist politics turns on a particular story of woman's oppression, a theory of knowledge that denies that an independent, determinate reality exists would seem to deny the basis of that politics. Without a notion of objectivity, feminists have difficulty claiming that their emergence from male hegemony is less artificial and constructed than that which they have cast off, or that their truths are more firmly grounded than those whose accounts of being women vary widely from their own.<sup>220</sup> Thus, as Deborah Rhode observes, feminists influenced by postmodernism are "left in the awkward position of maintaining that gender oppression exists while challenging [their] capacity to document it."<sup>221</sup>

Feminists need a stance toward knowledge that takes into account the contingency of knowledge claims while allowing for a concept of truth or objectivity that can sustain an agenda for meaningful reform. The postmodern critique of foundationalism is persuasive to many feminists, whose experiences affirm that rules and principles asserted as universal truths reflect particular, contingent realities that reinforce their subordination. At the same time, however, feminists must be able to insist that they have identified unacceptable forms of oppression and that they have a better account of the world free from such

discourses of mothers," Ashe seems to abandon the poststructural view. See Ashe, *Law-Language of Maternity: Discourse Holding Nature in Contempt*, 22 *NEW ENG. L. REV.* 521, 527 (1988).

Drucilla Cornell has hinted at a concept of gender differentiation drawn from poststructural theory that might prove fruitful for feminist legal practice. Building on the importance of the excluded "Other" in the construction of woman, she suggests that "what we are as subjects [can never be] fully captured by gender categories," that an interrelational intersubjectivity is more than the sum of its parts, and that immanent in the gender system is a "more than this" which has the potential for freeing us from the false choice between universality and absolute difference. See Cornell & Thurschwell, *Feminism, Negativity, Intersubjectivity*, in *FEMINISM AS CRITIQUE* 143, 161-62 (S. Benhabib & D. Cornell eds. 1987). Cornell makes the same basic point with respect to law generally, not connected with feminist themes, in Cornell, *Post-Structuralism, the Ethical Relation, and the Law*, 9 *CARDOZO L. REV.* 1587, 1627 (1988) ("[D]isjuncture between the ethical and the real preserves the ideal as a redemptive perspective which can maintain its critical force precisely because it is not actually identified with what is . . ."). Cornell, however, has yet to explain the significance of her highly theoretical analysis for feminist practice.

<sup>219</sup> See, e.g., Bordo, *Feminism, Postmodernism, and Gender-Scepticism*, in *FEMINISM/POST-MODERNISM* 133 (L. Nicholson ed. 1990); Fraser & Nicholson, *supra* note 14, at 83; Poovey, *supra* note 214, at 51. Robin West attacks postmodern social theorists on the different ground that their concepts of power, knowledge, morality, and the self ignore the types of nondiscursive, violent silencing experienced by women and also women's different experiences of selfhood. See West, *supra* note 192.

<sup>220</sup> As Linda Alcoff asks, "Why is a right-wing woman's consciousness constructed via social discourse but a feminist's consciousness not?" Alcoff, *supra* note 8, at 419.

<sup>221</sup> D. RHODE, *supra* note 8.

oppression. Feminists, according to Linda Alcoff, “need to have their accusations of misogyny validated rather than rendered ‘undecidable.’”<sup>222</sup> In addition, they must build from the postmodern critique about “how meanings and bodies get made,” Donna Haraway writes, “not in order to deny meanings and bodies, but in order to build meanings and bodies that have a chance for life.”<sup>223</sup>

To focus attention on this project of rebuilding, feminists need a theory of knowledge that affirms and directs the construction of new meanings. Feminists must be able to both deconstruct *and* construct knowledge. In the next section, I develop positionality as a stance toward knowledge from which feminists may trust and act upon their knowledges, but still must acknowledge and seek to improve their social groundings.

#### *D. Positionality*

Positionality is a stance from which a number of apparently inconsistent feminist “truths” make sense. The positional stance acknowledges the existence of empirical truths, values and knowledge, and also their contingency. It thereby provides a basis for feminist commitment and political action, but views these commitments as provisional and subject to further critical evaluation and revision.

Like standpoint epistemology, positionality retains a concept of knowledge based upon experience. Experience interacts with an individual’s current perceptions to reveal new understandings and to help that individual, with others, make sense of those perceptions. Thus, from women’s position of exclusion, women have come to “know” certain things about exclusion: its subtlety; its masking by “objective” rules and constructs; its pervasiveness; its pain; and the need to change it. These understandings make difficult issues decidable and answers non-arbitrary.<sup>224</sup>

Like the postmodern position, however, positionality rejects the perfectibility, externality, or objectivity of truth. Instead, the positional knower conceives of truth as situated and partial. Truth is situated in that it emerges from particular involvements and relationships. These relationships, not some essential or innate characteristics of the individual, define the individual’s perspective and provide the location for meaning, identity, and political commitment.<sup>225</sup> Thus, as discussed above,<sup>226</sup> the meaning of pregnancy derives not just from its biological characteristics, but from the social place it occupies —

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<sup>222</sup> Alcoff, *supra* note 8, at 419.

<sup>223</sup> Haraway, *supra* note 108, at 580.

<sup>224</sup> *See id.* at 585.

<sup>225</sup> *See* Alcoff, *supra* note 8, at 435.

<sup>226</sup> *See supra* p. 843.

how workplace structures, domestic arrangements, tort systems, high schools, prisons, and other societal institutions construct its meaning.<sup>227</sup>

Truth is partial in that the individual perspectives that yield and judge truth are necessarily incomplete. No individual can understand except from some limited perspective. Thus, for example, a man experiences pornography as a man with a particular upbringing, set of relationships, race, social class, and sexual preference, and so on, which affect what "truths" he perceives about pornography. A woman experiences pregnancy as a woman with a particular upbringing, race, social class, set of relationships, sexual preference, and so on, which affect what "truths" she perceives about pregnancy. As a result, there will always be "knowers" who have access to knowledge that other individuals do not have, and no one's truth can be deemed total or final.<sup>228</sup>

Because knowledge arises within social contexts and in multiple forms, the key to increasing knowledge lies in the effort to extend one's limited perspective. Self-discipline is crucial.<sup>229</sup> My perspective gives me a source of special knowledge, but a limited knowledge that I can improve by the effort to step beyond it, to understand other

<sup>227</sup> See Finley, *supra* note 192 (exploring different ways in which legal doctrines and social institutions construct the meaning of pregnancy); Littleton, *supra* note 2, at 1306-07 (arguing that "difference . . . is created by the relationship of women to particular and contingent social structures" (emphasis omitted)).

<sup>228</sup> In Iris Murdoch's Platonic dialogue *Art and Eros*, Socrates expresses a view of truth that, in simultaneously denying and affirming truth, comes close to the concept of positional knowledge:

Any high thinking of which we are capable is faulty. . . . We are not gods. What you call the whole truth is only for them. So our truth must include, must *embrace* the idea of the second best, that all our thought will be incomplete and all our art tainted by selfishness.

I. MURDOCH, *Art and Eros: A Dialogue About Art*, in *ACASTOS: TWO PLATONIC DIALOGUES* 62 (1986) (emphasis in original).

Chris Schroeder observes that the notion of "unknowable yet indispensable truths is central to many religions." Schroeder, *Foreword, A Decade of Change in Regulating the Chemical Industry*, *LAW & CONTEMP. PROBS.*, Summer 1983, at 13 n.45 (citing R. NEIBUHR, *CHRIST AND CULTURE* 233-41 (1951)).

<sup>229</sup> A number of legal writers in other theoretical contexts have sought to incorporate the notion of effort as a component of truth-seeking. See, e.g., B. JACKSON, *LAW, FACT AND NARRATIVE COHERENCE* 5 (1988) (emphasizing "integrity in relation to one's own subjectivity"); Cornell, *supra* note 218, at 1625 (describing "a self that constantly seeks to divest itself of sovereign subjectivity"); Minow, *supra* note 2, at 95 (advocating "deliberate attention to our own partiality"); Schultz, *supra* note 211, at 137 (describing "the practice of 'self-consciousness'"); Sherwin, *supra* note 150 (urging "suspicion" of examinations limited to one's own perspective); see also Donovan, *Beyond the Net: Feminist Criticism As a Moral Criticism*, *DENVER Q.*, Winter 1983, at 56 (describing Iris Murdoch's orientation toward increasing one's sense of realities beyond the self); Lewis, *From This Day Forward: A Feminine Moral Discourse of Homosexual Marriage*, 97 *YALE L.J.* 1783, 1792 (1988) ("Stretching the moral imagination is a question of willpower . . .").

perspectives, and to expand my sources of identity.<sup>230</sup> To be sure, I cannot transcend my perspective; by definition, whatever perspective I currently have limits my view. But I can improve my perspective by stretching my imagination to identify and understand the perspectives of others.<sup>231</sup>

Positionality's requirement that other perspectives be sought out and examined checks the characteristic tendency of all individuals — including feminists — to want to stamp their own point of view upon the world.<sup>232</sup> This requirement does not allow certain feminist positions to be set aside as immune from critical examination.<sup>233</sup> When feminists oppose restrictive abortion laws, for example, positionality compels the effort to understand those whose views about the sanctity of potential human life are offended by assertion of women's unlimited right to choose abortion. When feminists debate the legal alternative of joint custody at divorce, positionality compels appreciation of the desire by some fathers to be responsible, co-equal parents. And (can it get worse?) when feminists urge drastic reform of rape laws, positionality compels consideration of the position of men whose social conditioning leads them to interpret the actions of some women as "inviting" rather than discouraging sexual encounter.

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<sup>230</sup> Neither postmodernism nor standpoint epistemology fosters or even makes possible this attitude. The privilege that standpoint epistemology grants to a particular perspective leaves little reason to look beyond that perspective for further truth. Postmodernism, by denying any meaningful basis for making qualitative judgments between perspectives, leaves no reason to stretch beyond one's current perspective in order to improve it.

<sup>231</sup> One might question, as does Barbara Herrnstein Smith, whether, given one's dependence on one's perspective, it is possible to will one's choices about perspective. See B. SMITH, *supra* note 94, at 176. I argue here, however, that the will to transcend one's perspective helps to enlarge or transform that perspective, even though at any point in the never-ending transformation one is configured by a single, limiting perspective.

<sup>232</sup> I have already discussed how many feminists remain unaware of all of the subtle ways in which they marginalize the perspectives of those who are not white, middle-class, heterosexual, temporarily able-bodied and so on. See *supra* pp. 847–49. I believe that most feminists want to improve their sensitivities on this score. Positionality, however, requires more than to improve one's understanding of those points with which one sympathizes. Positionality requires self-criticism also on those points that one does not wish to concede, such as those I discuss in this section.

<sup>233</sup> The absence of a self-critical account is the principal difficulty I have with Christine Littleton's presentation of feminist method (interpreting Catherine MacKinnon) as that of believing women's accounts of sexual use and abuse by men. See Littleton, *supra* note 21, at 764–65. Neither Littleton nor MacKinnon bring into their discussions of feminist method the necessity for feminists to be critical of themselves or of other women. See *id.* at 764–65; MacKinnon, *Agenda for Theory*, *supra* note 2, at 510. Self-criticism does not even enter into their respective discussions of consciousness-raising, where it could play an enormously valuable role. See Schneider, *supra* note 2, at 602. Although feminists want to give full voice to women whose accounts of their experiences have for so long been ignored or devalued, feminists cannot assume that women's accounts will always be truthful or valid, or for that matter that men's accounts will always be untruthful or invalid.

Although I must consider other points of view from the positional stance, I need not accept their truths as my own. Positionality is not a strategy of process and compromise that seeks to reconcile all competing interests. Rather, it imposes a twin obligation to make commitments based on the current truths and values that have emerged from methods of feminism, and to be open to previously unseen perspectives that might come to alter these commitments. As a practical matter, of course, I cannot do both simultaneously, evenly, and perpetually.<sup>234</sup> Positionality, however, sets an ideal of self-critical commitment whereby I act, but consider the truths upon which I act subject to further refinement, amendment, and correction.

Some "truths" will emerge from the ongoing process of critical reexamination in a form that seems increasingly fixed or final. Propositions such as that I should love my children, that I should not murder others for sport, or that democracy is as a general matter better than authoritarianism seem so "essential" to my identity and my social world that I experience them as values that can never be overridden, even as standards by which I may judge others.<sup>235</sup> These truths, indeed, seem to confirm the view that truth does exist (it must; these things are true) if only I could find it. For feminists, the commitment to ending gender-based oppression has become one of these "permanent truths." The problem is the human inclination to

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<sup>234</sup> This ideal seems beyond human capacity, because people must act upon judgments as if those judgments are correct, and the need for stability seems to require that they deem some judgments true, at least for a time. As Chris Schroeder told me, "Continual reappraisal is impossible, except for God, who has no need for it."

<sup>235</sup> One of the most well-known, and most powerful, of lists of such propositions was invented by Arthur Leff, who concluded both that truth is humanly constructed, and that some standards could be known:

All I can say is this: it looks as if we are all we have. Given what we know about ourselves, and each other, this is an extraordinarily unappetizing prospect; looking around the world, it appears that if all men are brothers, the ruling model is Cain and Abel. Neither reason, nor love, nor even terror, seems to have worked to make us "good," and worse than that, there is no reason why anything should. Only if ethics were something unspeakable by us, could law be unnatural and therefore unchallengeable. As things now stand, everything is up for grabs.

Nevertheless:

Napalming babies is bad.

Starving the poor is wicked.

Buying and selling each other is depraved.

Those who stood up to and died resisting Hitler, Stalin, Amin, and Pol Pot — and General Custer too — have earned salvation.

Those who acquiesced deserve to be damned.

There is in the world such a thing as evil.

[All together now:] Sez who?

God help us.

Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1249. Charles Taylor refers to values that are incomparably more important than others — those that define my identity and give "me a sense of wholeness, of fullness of being as a person or self" — as "hypergoods." C. TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* 63 (1989).

make this list of "truths" too long, to be too uncritical of its contents, and to defend it too harshly and dogmatically.

Positionality reconciles the existence of reliable, experience-based grounds for assertions of truth upon which politics should be based, with the need to question and improve these grounds. The understanding of truth as "real," in the sense of produced by the actual experiences of individuals in their concrete social relationships, permits the appreciation of plural truths. By the same token, if truth is understood as partial and contingent, each individual or group can approach its own truths with a more honest, self-critical attitude about the value and potential relevance of other truths.

The ideal presented by the positionality stance makes clear that current disagreements within society at large and among feminists — disagreements about abortion, child custody, pornography, the military, pregnancy, and motherhood, and the like — reflect value conflicts basic to the terms of social existence. If resolvable at all, these conflicts will not be settled by reference to external or pre-social standards of truth. From the positional stance, any resolutions that emerge are the products of human struggles about what social realities are better than others. Realities are deemed better not by comparison to some external, "discovered" moral truths or "essential" human characteristics, but by internal truths that make the most sense of experienced, social existence. Thus, social truths will emerge from social relationships and what, after critical examination, they tell social beings about what they want themselves, and their social world, to be.<sup>236</sup> As Charles Taylor writes, "What better measure of reality do we have in human affairs than those terms which on critical reflection and after correction of the errors we can detect make the best sense of our lives?"<sup>237</sup>

In this way, feminist positionality resists attempts at classification either as essentialist on the one hand, or relativistic on the other.<sup>238</sup> Donna Haraway sees relativism and essentialism, or what she calls totalization, as mirror images, each of which makes seeing well dif-

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<sup>236</sup> Charles Taylor describes this concept as the "best account" we have of ourselves. See C. TAYLOR, *supra* note 235, at 58. Nel Noddings calls it "the best picture I have of myself." See N. NODDINGS, *CARING: A FEMININE APPROACH TO ETHICS AND MORAL EDUCATION* 5 (1984); see also Johann, *supra* note 111, at 109 (arguing that reasoned ethical values are those which "fulfill our quest for good order"); Kay, *Preconstitutional Rules*, 42 OHIO ST. L.J. 187, 207 (1981) (arguing that principles of constitutional interpretation should "attempt to shape the unruly facts of the world and of our natures into such forms as will best serve our own purposes"); Leff, *supra* note 235, at 1249 (arguing that by speaking ethics, we can challenge law, and make ourselves better).

<sup>237</sup> C. TAYLOR, *supra* note 235, at 57.

<sup>238</sup> Cf. H. ARENDT, *BETWEEN PAST AND FUTURE* (1961); R. BERNSTEIN, *BEYOND OBJECTIVISM AND RELATIVISM* (1985); R. RORTY, *THE CONSEQUENCES OF PRAGMATISM* 167 (1982); B. SMITH, *supra* note 94.

ficult: "Relativism and totalization are both 'god tricks' promising vision from everywhere and nowhere equally and fully . . . ." <sup>239</sup> Positionality is both nonrelative and nonarbitrary. It assumes some means of distinguishing between better and worse understanding; truth claims are significant or "valid" for those who experience that validity. <sup>240</sup> But positionality puts no stock in fixed, discoverable foundations. If there is any such thing as ultimate or objective truth, I can never, in my own lifetime, be absolutely sure that I have discovered it. I can know important and non-arbitrary truths, but these are necessarily mediated through human experiences and relationships. There can be no universal, final, or objective truth; there can be only "partial, locatable, critical knowledges"; <sup>241</sup> no aperspectivity — only improved perspectives.

Because provisional truth is partial and provisional, the nature of positional truth-seeking differs from that assumed under either a relativist or an essentialist stance. Positional meanings are what Moira Gatens calls meanings in "*becoming* rather than being, [in] *possibilities* rather than certainty and [in] meaning or *significance* rather than truth." <sup>242</sup> The attitude of positional understanding assumes that arrival is not possible; indeed, there is no place at which we *could* finally arrive. Truth-seeking demands "ceaseless critical engagement"; as Gatens writes, "there cannot be an unadulterated feminist theory which would announce our arrival at a place where we could say we are 'beyond' patriarchal theory and patriarchal experience." <sup>243</sup> Not only is truth unfixed, but the human capacity to attain it is limited. Iris Murdoch's Socrates captures the point dynamically: "We put the truth into a conceptual picture because we feel it can't be expressed in any other way; and then truth itself forces us to criticize the picture." <sup>244</sup>

A stance of positionality can reconcile the apparent contradiction within feminist thought between the need to recognize the diversity of people's lives and the value in trying to transcend that diversity. Feminists, like those associated with the critical legal studies movement, understand that when those with power pretend that their

<sup>239</sup> Haraway, *supra* note 108, at 584.

<sup>240</sup> Cf. C. TAYLOR, *supra* note 235, at 111 (arguing that social theory can be validated through the "changed quality of the practice it enables").

<sup>241</sup> Haraway, *supra* note 108, at 584.

<sup>242</sup> Gatens, *Feminism, Philosophy and Riddles Without Answers*, in *FEMINIST CHALLENGES* 13, 26 (C. Pateman & E. Gross eds. 1986) (emphasis in original).

<sup>243</sup> *Id.* at 29.

<sup>244</sup> I. MURDOCH, *Above the Gods: A Dialogue About Religion*, in *ACASTOS: TWO PLATONIC DIALOGUES*, *supra* note 228, at 85; see also B. SMITH, *supra* note 94, at 179 ("[T]he best' is always both heterogeneous and variable: . . . it can never be better than a state of affairs that remained more or less than good for *some people*, or got considerably better for many of them in *some respects*, or became, for a while, rather better on the whole." (emphasis in original)).

interests are natural, objective and inevitable, they suppress and ignore other diverse perspectives. This understanding compels feminists to make constant efforts to test the extent to which they, also, unwittingly project their experiences upon others. To understand human diversity, however, is also to understand human commonality. From the positional stance, I can attain self-knowledge through the effort to identify not only what is different, but also what I have in common with those who have other perspectives. This effort, indeed, becomes a "foundation" for further knowledge.<sup>245</sup> I achieve meaning in my own life when I come to know myself in knowing others.<sup>246</sup> In fact, it is when I cease to recognize my mutual relatedness with others that I inevitably project my own experiences upon them to make "identification with them impossible."<sup>247</sup>

Because of its linkage between knowledge and seeking out other perspectives, positionality provides the best foothold from which feminists may insist upon both the diversity of others' experiences, and their mutual relatedness and common humanity with others. This dual focus seeks knowledge of individual and community, apart and as necessarily interdependent. As others have noted, much of the recent scholarship that attempts to revive ideals of republicanism and the public virtue has given inadequate attention to the problem of whose interests are represented and whose are excluded by expressions of the "common" or "public" interest.<sup>248</sup> Positionality locates the source of community in its diversity and affirms Frank Michelman's conclusions about human commonality: "The human universal becomes difference itself. Difference is what we most fundamentally have in common."<sup>249</sup>

All three of the methods discussed in this Article affirm, and are enhanced by, the stance of positionality. In asking the woman ques-

<sup>245</sup> See, e.g., Cornell, *Toward a Modern/Postmodern Reconstruction of Ethics*, 133 U. PA. L. REV. 291, 360-68 (1986); Holler, *Is There a Thou "Within" Nature? A Dialogue with H. Richard Niebuhr*, 17 J. RELIGIOUS ETHICS 81, 83 (1989); Minow, *supra* note 16, at 206; see also Gabel, *Creationism and the Spirit of Nature*, TIKKUN, Sept.-Oct. 1987, at 62 (arguing that we can know "with certainty" from "our own fundamental need for the confirmation and love of others," that "this need fundamentally motivates all living things").

<sup>246</sup> See Gabel, *supra* note 245, at 59-60 (stating that we can only understand, and correct, ourselves, by approaching others as "differentiated presences like ourselves and putting ourselves in their place in order to comprehend them").

<sup>247</sup> Holler, *supra* note 245, at 82. Holler writes: "insofar as we are severed from the community of diverse beings, we are unaware of our own being, and, like Narcissus, we will see that community only in our own image." *Id.* at 83.

<sup>248</sup> See, e.g., Bell & Bansal, *The Republican Revival and Racial Politics*, 97 YALE L.J. 1609 (1988); Young, *Impartiality and the Civic Public: Some Implications of Feminist Critiques of Moral and Political Theory*, in FEMINISM AS CRITIQUE, *supra* note 218, at 66.

<sup>249</sup> Michelman, *supra* note 79, at 32. Michelman incorporates points made by Drucilla Cornell and Martha Minow. See Cornell, *supra* note 245, at 368-69; Minow, *supra* note 16, at 206.

tion, feminists situate themselves in the perspectives of women affected in various ways and to various extents by legal rules and ideologies that purport to be neutral and objective. The process of challenging these rules and ideologies, deliberately, from particular, self-conscious perspectives, assumes that the process of revealing and correcting various forms of oppression is never-ending. Feminist practical reasoning, likewise, exposes and helps to limit the damage that universalizing rules and assumptions can do; universalizations will always be present, but contextualized reasoning will help to identify those currently useful and eliminate the others. Consciousness-raising links that process of reasoning to the concrete experiences associated with growth from one set of moral and political insights to another. Positional understanding enhances alertness to the special problems of oppressive orthodoxies in consciousness-raising, and the insights developed through collaborative interaction should remain open to challenge, and not be held hostage to the unfortunate tendency in all social structures to assume that some insights are too politically "correct" to question.<sup>250</sup>

Positional understanding requires efforts both to establish good law and to keep in place, and renew, the means for deconstructing and improving that law. In addition to focusing on existing conditions, feminist methods must be elastic enough to open up and make visible new forms of oppression and bias. Reasoning from context and consciousness-raising are self-renewing methods that may enable continual new discoveries. Through critical practice, new methods should also evolve that will lead to new questions, improved partial insights, better law, and still further critical methods.

#### IV. CONCLUSION: FEMINIST METHODS AS ENDS

I have argued that feminist methods are means to feminist ends: that asking the woman question, feminist practical reasoning, and consciousness-raising are methods that arise from and sustain feminist practice. Having established the feminist stance of positionality, I now want to expand my claim to argue that feminist methods are also ends in themselves. Central to the concept of positionality is the assumption that although partial objectivity is possible, it is transitional, and therefore must be continually subject to the effort to reappraise, deconstruct, and transform. That effort, and the hope that must underlie it, constitute the optimistic version of feminism to

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<sup>250</sup> See Dimen, *Politically Correct? Politically Incorrect?*, in PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY 139 (C. Vance ed. 1984) ("The appearance of political correctness in feminism creates a contradiction."); Bottomley, Gibson & Meteyard, *Dworkin; Which Dworkin? Taking Feminism Seriously*, 14 J.L. & Soc'y 47, 56 (1987); Colker, *supra* note 151, at 253-54.

which I adhere. Under this version, human flourishing means being engaged in the world through the kinds of critical yet constructive feminist methods I have described. These methods can give feminists a way of doing law that expresses who they are and who they wish to become.

This is, I contend, a goal central to feminism: to be engaged, with others, in a critical, transformative process of seeking further partial knowledges from one's admittedly limited habitat. This goal is the grounding of feminism, a grounding that combines the search for further understandings and sustained criticism toward those understandings. Feminist doing is, in this sense, feminist knowing. And vice versa.