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Ruth Bader Ginsburg
Ruth.Ginsburg@chicagounbound.edu

Barbara Flagg
Barbara.Flagg@chicagounbound.edu

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Some Reflections on the Feminist Legal Thought of the 1970s*

Hon. Ruth Bader Ginsburg† and Barbara Flagg‡

I am so pleased the *Legal Forum* has invited me to take part in this symposium on "Feminism in the Law." The very occurrence of the symposium is exhilarating, a sign of large change in women's relationship to the law.

Consider as examples of "the way it was," a few remembrances of things past. I entered law school in 1956. The dean hosted a dinner early in the fall for the nine women in an entering class of over five hundred. After dinner, the good dean asked each of us to tell about our plans: Why were we in law school occupying a seat that could be held by a man?

When it came time to look for a job, we faced locked doors in every quarter of the profession. Firms and judges in those pre-Title VII days announced—without apology or attempt to dissemble—women are not wanted here. Among the ironies, legal aid would accept women as criminal defenders, but U.S. Attorneys' offices would not assign women to the criminal division.

When I began teaching law in 1963, few women appeared on the roster of students, no more than four or five in a class of over one hundred; in 1967, less than two percent of the nation's law teachers were women.¹ Law school textbooks in that decade contained such handy advice as "land, like woman, was meant to be possessed."² The prevailing attitude was captured accurately in the rumination attributed to Harvard University's president when the Vietnam draft call was at its height: We shall be left with the blind, the lame, and the women.³

* Judge Ginsburg delivered this speech, prepared in collaboration with Professor Flagg, as the Keynote Address for *The University of Chicago Legal Forum* Symposium held October 14-15, 1988.

† United States Circuit Judge, United States Court of Appeals for the District of Columbia Circuit, Washington D.C.

‡ Assistant Professor of Law, Washington University, St. Louis.

¹ See Donna Fossum, *Women Law Professors*, 1980 Am Bar Found Res J 903, 905-06.

² Curtis J. Berger, *Land Ownership and Use: Cases, Statutes, and Other Materials* 139 (Little, Brown, 1968).

³ Statement by Harvard President Pusey. See Ruth Bader Ginsburg, *Women at the*

The changes we have witnessed since that time are considerable. Women are no longer locked out, they are not curiosities in any part of the profession,⁴ and bright minds, including those assembled here, are inquiring how women's participation should affect the way law business is conducted, and the shape and direction of legal development.

Turning to the theme of this symposium, I have it on good authority that when Socrates said, "The unexamined life is not worth living for a *person*," he used the word "anthropos"—human being—rather than "andros"—man.⁵ Close and caring examination into the life of woman as well as man is of vital concern to this audience. The feminist jurisprudence of the 1980s, represented in its remarkable diversity and vibrancy by the participants in this symposium, is united in its insistence on probing examination of gender in the law. I cannot count myself among the 1980s players in this league; philosophy is not my *métier*, and the agenda of what I will think about is now set by the litigants whose cases troop before me in court each month. I had the good fortune, however, to participate intensively in the sex equality litigation of the 1970s,⁶

Bar—*A Generation of Change*, 2 U Puget Sound L Rev 1, 4 (1978).

⁴ On the bright side, in 1986, 41 percent of first-year J.D. students were women, up from four percent in 1965. Marina Angel, *Women in Legal Education: What It's Like to Be Part of A Perpetual First Wave or The Case of The Disappearing Women*, 61 Temple L Rev 799, 801 (1988). On the less bright side, although about 20 percent of those in full-time law teaching are women, a disproportionate number are employed in non-tenure track positions. Richard Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 U Pa L Rev 537, 557 (1988) (15.9 percent of tenured or tenure track faculty (including clinical teachers) are women; 40.0 percent of contract status clinical faculty and 68.4 percent of contract status legal writing instructors are women.) By January of 1988 women deans headed only 9 of the 174 ABA accredited law schools. Angel, 61 Temple L Rev at 802.

Correspondingly, at many law firms a lower tier is in place known as the "mommy track." A sensitive editorial some months ago commented: "Working mothers are now the norm: the sphere of women's activity has broadened dramatically. But the sphere of men's activity has barely changed." Geneva Overholser, *The Editorial Notebook: So Where's the Daddy Track?*, NY Times A26 (Aug 25, 1988). I once remarked, and remain of the view, that a principal, and most challenging, component of the "affirmative action plan" women need centers on men: giving them instruction, encouragement, and incentives "to share more evenly with women the joys, responsibilities, worries, upsets, and sometimes tedium of raising children from infancy to adulthood." My dream for my children and their children, I recounted, is of a world "of men and women who, in combination, forge new, shared patterns of career and parenthood, and strive to create a society that facilitates those patterns." Ruth Bader Ginsburg, *Some Thoughts on the 1980's Debate over Special Versus Equal Treatment for Women*, 4 J Law & Ineq 143, 146, 150 (1986).

⁵ ὁ δὲ ἀνέγεραστος βίος οὐ βιωτὸς ἀνθρώπῳ, Plato, *Apology* 38A.

⁶ See Ruth B. Cowan, *Women's Rights Through Litigation: An Examination of the American Civil Liberties Union Women's Rights Project, 1971-76*, 8 Colum Hum Rts L Rev 373 (1976); see also Margaret Berger, *Litigation on Behalf of Women* (Ford Foundation,

and I would like to share with you some thoughts on what that litigation was about and how it bears on the jurisprudence of the 1980s.

First, I will tell you how my participation came to be. In 1970, students at Rutgers, where I was then teaching mainly Civil Procedure, asked for a seminar on women and the law. So I undertook to read anything one could find on the subject in case reports and legal texts. That proved not to be a burdensome venture. So little had been written, one could manage it all in a matter of weeks. At the same time, the New Jersey affiliate of the American Civil Liberties Union ("ACLU") began to refer to me complaints of a kind the affiliate had not seen before: teachers forced out of the classroom when their pregnancy began to show, women whose employers provided health insurance with family coverage only for male employees, and parents whose school-age daughters were excluded from publicly-funded educational programs open only to boys.

I was lucky to be in the right place, at the right time. My post on a law faculty gave me the leeway to accomplish the work, and the ACLU had the resources to start up, in 1971, a Women's Rights Project. (I note that the ACLU involvement meant men would be working alongside women in this effort, and that was important to me. I firmly believe that feminist endeavors, to realize their full potential, must deeply involve members of both sexes.)

The 1970s cases in which I participated under ACLU auspices all rested on the same fundamental premise: that the law's differential treatment of men and women, typically rationalized as reflecting "natural" differences between the sexes, historically had tended to contribute to women's subordination—their confined "place" in man's world—even when conceived as protective of the fairer, but weaker and dependent-prone sex.⁷ The arguments addressed to the courts were designed to reveal and to challenge the assumptions underpinning traditional sex-specific rules, and to move the Supreme Court in the direction of a constitutional principle that would provide for heightened, thoughtful review of gender classifications. I will return to that fundamental premise and litigation in the 1970s shortly. First, however, to convey the setting against which our briefs and precious minutes in court played, I will quickly survey terrain familiar to many people here: the pre-1971 state of constitutional law regarding gender-based classifications.

1980).

⁷ See, for example, note 19.

There were no founding mothers at the 1787 Constitutional Convention, and the founding fathers had decided views about women's place in society. John Adams, for instance, despite the imprecations of his extraordinary wife, Abigail, had this to say about those who counted among "We the People" in his home state of Massachusetts:

[I]t is dangerous to open [the subject of] alter[ing] the qualifications of voters; there will be no end of it. New claims will arise; women will demand the vote, lads from twelve to twenty-one will think their rights are not enough attended to, and every man who has not a farthing will demand an equal voice with any other in all acts of state. It tends to confound and destroy all distinctions, and prostrate all ranks to the common level.⁸

As Adams' statement indicates, and as Justice Marshall recalled last year,⁹ "We the People," as originally understood, left out the majority of the adult population: slaves, free blacks, debtors, paupers, Indians, and women. As framed in 1787, the Constitution was intended to be a document of governance by and for an elite—white propertied adult males, people free from dependence on others, and therefore considered to be trustworthy citizens, not susceptible to influence or control by masters, overlords, or supervisors.¹⁰

Women's status under the nation's fundamental law continued largely unaltered at the Constitutional Convention's centennial. In 1887, women were still thirty-three years away from securing the right to vote. And the Fourteenth Amendment, added to the Constitution in 1868, despite its grandly general, growth-susceptible Equal Protection Clause, did not inspire feminists of that day. In fact, the amendment alarmed them, for its second section added to the Constitution for the first time the word "male," and linked that word to the word "citizens."¹¹ The suggestion seemed to be

⁸ *Letter to James Sullivan*, in Charles Francis Adams, ed, 9 *The Works of John Adams* 375-78 (Little, Brown, 1850-56).

⁹ Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 *Harv L Rev* 1 (1987).

¹⁰ See Linda K. Kerber, "Ourselves and Our Daughters Forever": *Women and the Constitution 1787-1876*, in 6 *This Constitution: A Bicentennial Chronicle* 25, 26, 27 (Project '87 of the American Historical Association and the American Political Science Association, Spring 1985).

¹¹ US Const, amend XIV, § 2. This section provides for reduction in the number of Representatives when the state denies "male citizens" the right to vote. The intent was to assure grant of the franchise to black men.

that, even if women counted as citizens, as they did for some purposes, they were properly regarded (like children) as something less than full citizens.¹²

Ratification in 1920 of the Nineteenth Amendment, which secured to women citizens the right to vote, stimulated no dynamic change in constitutional interpretation. More than a generation later, in 1948, in a case titled *Goesaert v Cleary*,¹³ the High Court said it was permissible for the State of Michigan to put the plaintiffs, a bar-owning mother and daughter, out of business, by legislating that women could not tend bar, except as wives and daughters of male tavern owners. Supreme Court Justice Jackson explained the prevailing view most candidly in *Fay v New York*,¹⁴ a 1947 decision upholding wholesale exemption of women from jury service. Justice Jackson wrote:

The contention that women should be on the jury is not based on the Constitution, it is based on a changing view of the rights and responsibilities of women . . . which has progressed in all phases of life, . . . but has achieved constitutional compulsion on the states only in the grant of the franchise by the Nineteenth Amendment.¹⁵

Except for the vote, in other words, the Constitution remained an empty cupboard for people seeking to promote the equal stature of women and men as individuals under the law.

In 1961, again in the context of jury service, a unanimous Warren Court demonstrated the constancy of the Court's hold-the-line position. The Court said, in *Hoyt v Florida*,¹⁶ that it was rational, and therefore constitutional, for a state to spare women the obligation to serve on juries, in recognition of women's place at "the center of home and family life."¹⁷ Never mind that the complainant was a woman on trial for murdering her philandering, abusive husband. She suspected that women sitting in judgment on her case would better understand her plight and plea. Nevertheless, the Warren Court simply adhered to the baseline set by the Supreme Court in the 1870s, at the turn of the century, and in

¹² See *Minor v Happersett*, 88 US (21 Wall) 162 (1874) (women qualify as persons and citizens within the Fourteenth Amendment's compass, as do children, but status as a woman citizen does not carry with it the right to vote).

¹³ 335 US 464 (1948).

¹⁴ 332 US 261 (1947).

¹⁵ *Id* at 290.

¹⁶ 368 US 57 (1961).

¹⁷ *Id* at 62.

the 1940s. That baseline tied tightly into the prevailing “separate-spheres” mentality, or breadwinner-homemaker dichotomy: It was a man’s lot, by nature, to be breadwinner, head of household, representative of the family outside the home; and it was woman’s lot, by nature, not only to bear, but alone to rear children, to follow the head of household in the place and mode of living he chose, and to keep the home in order.

The Court responded as it did into the 1960s because the Justices did not comprehend the differential treatment of men and women in jury-selection and other legal contexts as in any sense *burdensome* to women. (From a Justice’s own situation in life and attendant perspective, his immediate reaction to a gender discrimination challenge would likely be: But I treat my wife and daughters so well, with such indulgence.) To turn in a new direction, the Court first had to gain an understanding that legislation apparently designed to benefit or protect women could have the opposite effect. Laws prescribed the maximum number of hours or the time of day women could work, or the minimum wages they could receive; laws barred females from “hazardous” or “inappropriate” occupations (lawyering in the nineteenth century, bartending in the twentieth); remnants of the common-law regime denied to married women rights to hold or manage property, to sue or be sued in their own names, or to get credit from a financial institution (thus protecting them from their own folly or misjudgment). All these prescriptions were premised on the assumption that women could not fend for themselves; they needed a “big brother” to lean on.¹⁸ Until the Supreme Court perceived that women were unfairly constrained, indeed sealed into a subordinate role, by laws of this kind, the Justices could not be expected to grapple with the formulation of constitutional doctrine capable of curtailing that injustice.

The ACLU Women’s Rights Project in the 1970s was hardly so bold or so prescient as to essay articulation of a comprehensive theoretical vision of a world in which men did not define women’s place. The endeavor was less lofty, more immediately and practically oriented; it was, as I earlier stated, to pursue a series of cases that might illuminate the most common instances of gender distinctions in the law,¹⁹ and thereby provide a basis for the evolution

¹⁸ See Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U Cin L Rev 1 (1975).

¹⁹ The Brief for Appellant, *Reed v Reed*, 404 US 71 (1971), contained an Appendix at 69-88 presenting a “small sample” of then “current legislative prescriptions.” Typical entries included:

Ga Code Ann § 74-108 (Michie 1933): Parental power.

of constitutional doctrine and attendant legislative change. I will mention three principal cases in which the Project participated to give you a sense of the effort: *Reed v Reed*,²⁰ *Frontiero v Richardson*,²¹ and *Weinberger v Wiesenfeld*.²²

*Reed v Reed*²³ was the turning point case. Decided in 1971, Sally Reed's case invalidated an Idaho statute that afforded men (in the particular case, Sally's estranged husband Cecil) an automatic preference over women for estate administration purposes. (The estate was that of Sally's son Richard, who had committed suicide after the local court transferred him to his father's custody when he was no longer "of tender years.") Two years later, in *Frontiero v Richardson*,²⁴ the Court held it unconstitutional to deny to female military officers housing and medical benefits covering their husbands on the same automatic basis as those family benefits were accorded to male military officers for their wives. Air Force Lieutenant Sharron Frontiero saw the measures as a denial of equal pay to her. In each instance, the statute in question presumed a wife's, but not a husband's, dependent status. *Reed* and *Frontiero* were ideal way pavers. Both presented gender distinctions rooted in sex-role stereotypes, distinctions defended solely on grounds of administrative convenience.

Legislation embodying the "separate spheres" mentality, but not susceptible of plausible compensatory rationalization, seemed in the 1970s the most promising focus of attention, and *Wein-*

Until majority, the child shall remain under the control of the father, who is entitled to his services and the proceeds of his labor.

Ky Rev Stat Ann § 404.010(2) (1969): Effect of marriage on wife's property; separate estate; subjection of estate to debts.

A married woman shall never be the joint maker of a note or a surety on any bond or obligation of another, other than her husband, without the joinder of her husband with her in making such contract unless her separate estate has been set apart for that purpose by mortgage or other conveyance.

Cal Pen Code § 415 (Deering 1960): Disturbing the peace: Horse racing or shooting in unincorporated town: Profanity: Punishment.

Every person who maliciously and willfully disturbs the peace or quiet of any neighborhood or person, by loud or unusual noise, by tumultuous or offensive conduct, . . . or indecent language within the presence or hearing of women or children, in a loud and boisterous manner, is guilty of a misdemeanor

Ohio Rev Code Ann § 3103.02 (Page 1960): The head of the family.

The husband is the head of the family. He may choose any reasonable place or mode of living and the wife must conform thereto.

²⁰ 404 US 71 (1971).

²¹ 411 US 677 (1973).

²² 420 US 636 (1975).

²³ 404 US 71.

²⁴ 411 US 677.

*berger v Wiesenfeld*²⁵ fit that bill. When Paula Polatschek, a math teacher, died in childbirth in 1972, her husband, Stephen Wiesenfeld, applied for Social Security benefits for himself and their infant son, whom Stephen hoped to care for personally. He discovered that the Social Security Act awarded child-in-care benefits only to mothers, not to fathers. Stephen Wiesenfeld challenged this gender-based distinction, and ultimately won a unanimous judgment in the Supreme Court. The majority of Justices considered *Wiesenfeld*, like *Frontiero*, dominantly as an equal pay case: Paula's gainful employment netted the family less than a man's work. The Court also saw the law as discriminating against Stephen, who wanted to be a caring parent.²⁶ Each of these views accurately described a facet of the case.

In *Reed*, *Frontiero*, and *Wiesenfeld* the Court took a closer look at the challenged classifications than would be expected under the rational basis test generally applicable at that time to group classifications not based on race.²⁷ The initial strategy, pursued in *Reed* and *Frontiero*, was to argue for strict scrutiny of gender distinctions, in part by drawing an analogy between sex- and race-based classifications.²⁸ That tack was modified in briefing *Wiesenfeld*. It was by then clear that one could not garner five votes for labeling sex a "suspect classification." But it was also apparent from the results in *Reed* and *Frontiero* that doctrinal specificity was not immediately necessary.

The driving force of the litigation was never a reflexive "me too," coattails-riding notion that if race classifications were suspect down the line, sex classifications should be too. Instead, the objective was to obtain thoughtful consideration of the assumptions underlying, and the purposes served by, sex-based classifications. In *Reed* the unanimous Court said very little, but commentators recognized that "some special sensitivity to sex as a classifying factor" was implicit in the Court's judgment.²⁹ The *Frontiero* court di-

²⁵ 420 US 636.

²⁶ The baby's perspective was taken by then Justice Rehnquist. He said it appeared irrational to distinguish between mothers and fathers when the issue is "whether a child of a deceased contributing worker should have the opportunity to receive the full-time attention of the only parent remaining to it." *Id.* at 655.

²⁷ See generally Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv L Rev 1 (1972).

²⁸ The briefs sounded other themes as well; they attempted, among other things, to indicate that changes in women's stature were occurring worldwide. See, for example, Brief for Appellants in *Reed* at 54-55 and n 52 (cited in note 19), citing United Nations Charter Preamble and recent decisions of the West German Federal Constitutional Court.

²⁹ See Gunther, 86 Harv L Rev at 34 (cited in note 27).

vided on the appropriate rationale. A plurality of four ranked sex a suspect criterion, perhaps taking that stride too swiftly with only one building block—*Reed*—then in place.³⁰ In *Wiesenfeld* and a number of cases thereafter, the High Court settled on a genuinely intermediate position, a standard tighter than the generally applicable minimum rationality test, but more supple than the strictest scrutiny.

In essence, the Court instructed Congress and state legislatures: rethink, and reanalyze, your position on these questions. Should you determine that compensatory legislation is in fact warranted, we have left you a corridor in which to move. But your classifications must be refined, tied to an income test, for example, and not grossly drawn solely by reference to sex. The Court's heightened mode of review persists, captured in equal protection jargon by the statement that, to survive court review, a classification must bear a substantial relationship to an important governmental objective.³¹

Some observers have portrayed the 1970s litigation as assimilationist in outlook, insistent on formal equality, opening doors only to comfortably situated women willing to accept men's rules and be treated like men, even a misguided effort that harmed more women than it helped.³² These critics question the advocacy of strict scrutiny for gender classifications as in *Reed* and *Frontiero*, the representation furnished male plaintiffs as in *Wiesenfeld*, and the heavy focus on classifications that could be characterized as burdening both men and women.

Such comment seems to me not fair. The litigation of the 1970s helped unsettle previously accepted conceptions of men's and women's separate spheres,³³ and thereby added impetus to efforts ongoing in the political arena to advance women's opportunities and stature. An appeal to courts at that time could not have been expected to do much more.

³⁰ See Ruth Bader Ginsburg, *The Burger Court's Grapplings with Sex Discrimination*, in Vincent Blasi, ed, *The Burger Court: The Counter Revolution That Wasn't* 132, 135 (Yale University Press, 1983).

³¹ See *Craig v Boren*, 429 US 190, 197 (1976); see also *Mississippi Univ. for Women v Hogan*, 458 US 718, 724 (1982).

³² See, for example, Mary Becker, *Prince Charming: Abstract Equality*, 1987 Sup Ct Rev 201, 212-13 and n 39, 218-24; and David Cole, *Strategies of Difference: Litigating for Women's Rights in a Man's World*, 2 J Law & Ineq 33, 55-56 (1984).

³³ For accurate description of, and cogent commentary on, the Supreme Court's performance in the 1970s and ensuing years, see Wendy W. Williams, *Sex Discrimination: Closing the Law's Gender Gap*, in Herman Schwartz, ed, *The Burger Years: Rights and Wrongs in the Supreme Court 1969-1986* 109-24 (Viking, 1987).

I repeat a key point that tends to be overlooked in some current analyses. The Supreme Court needed basic education before it was equipped to turn away from the precedents in place, decisions like *Goesaert v Cleary*³⁴ and *Hoyt v Florida*.³⁵ The Justices received relevant education as the 1970s wore on, publicly from the press and the briefs filed in court; privately, I suspect, from the aspirations of women, particularly the daughters, in their own families and communities. A teacher from outside the club, or the home crowd, seeking to open minds, however, knows she must keep it comprehensible and digestible, not too complex or intimidating, or risk losing her audience. That is all the more evident when her listeners have a long, heavy, and varied docket to manage; when they appreciate the value of consensus in collegial court statements about the law; and when they sense the limits of the judicial role in the republic the United States Constitution serves.

The logical progression from the 1970s litigation, it seems to me, is to another arena, not to the courts with their distinctly limited capacity, but to the legislature. Once the law books have been cleared of prescriptions of the kind Sally Reed, Sharron Frontiero, and Stephen Wiesenfeld challenged, what should one strive to enact instead? If women were dominant in our legislatures, what would their program be? Would they put through laws granting leave singularly to pregnant workers, with a guaranteed right to return to the job? Or would they press instead for legislation like the Family and Medical Leave Act,³⁶ a measure that takes the woman at work as the model or motivator, but spreads out to shelter others: men and women who need time off not only to care for a newborn, but to attend to a seriously ill child, spouse, elderly parent or self? We do not yet have legislation of this sort,³⁷ but the very idea of it is no longer an impossible dream.

The feminist movement today is a house of many gables, with rooms enough to accommodate all who have the imagination and determination to think and work in a common cause. Some con-

³⁴ 335 US 464 (1948).

³⁵ 368 US 57 (1961).

³⁶ HR 925, 100th Cong, 1st Sess (Feb 3, 1987), in 133 Cong Rec H528 (daily ed Feb 3, 1987). The family leave legislation proposed in the 100th Congress originated as a benefit solely for pregnant workers and developed into a more encompassing response to the stresses of modern family life. See Anne Radigan, *Concept & Compromise: The Evolution of Family Leave Policy in the U.S. Congress* (Women's Research and Education Institute, 1988).

³⁷ Passage in the 100th Congress was blocked on October 7, 1988 when the proponents of the legislation failed to garner the 60 votes needed to limit Senate debate. See 142 Cong Rec S15069 (daily ed Oct 7, 1988) (reporting 50 to 46 cloture vote).

tributors inquire whether gender-neutral concepts can bridge biological and cultural differences between men and women.³⁸ Others focus on differences in the ways women, in general, and men, in general, assess and ascribe value, perceive and resolve moral and legal problems. To the extent that women's "voice" is distinct, these analysts urge that we take care to include that voice in the realm of legal discourse.³⁹ Another approach advocates a role for law in reducing the social value differentials attached to culturally male and culturally female occupations and lifestyles.⁴⁰

Other theorists explore terrain beyond the compass of equality and difference. Their work challenges fundamental structures of existing legal thought and recommends avenues of reconstruction that implement distinctively feminist values.⁴¹ A magnetic strand

³⁸ The inquirers offer an array of responses. Compare, for example, Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 NYU Rev L & Soc Change 325, 369 (1984-85) (treatment of pregnancy-related disabilities in the employment context should be based on an androgynous model that "take[s] into account the normal range of human characteristics—including pregnancy") and Alison Jaggar, *On Sexual Equality*, 84 Ethics 275 (1974) (social institutions should not differentiate between women and men) with Linda J. Krieger and Patricia N. Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 Golden Gate U L Rev 513 (1983) (biological differences mandate different treatment designed to yield equality of outcomes; gender-specific positive action is necessary to achieve equality in institutions designed for male prototype).

Other feminist commentators find reproductive differences relevant for some purposes and recommend special legal analyses of those limited exceptions. Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 Berkeley Women's L J 1 (1985) (pregnancy should be treated as an "episodic" difference, only temporarily relevant; the principle applicable to biological differences is equality of opportunity); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U Pa L Rev 955 (1984) (distinguishing laws concerning reproductive differences from run-of-the-mine sex-based classifications; the former should receive strict scrutiny when the prescriptions in fact perpetuate the inequality of women); Ann C. Scales, *Towards a Feminist Jurisprudence*, 56 Ind L J 375 (1981) (law must account specially for pregnancy and breastfeeding, but differential treatment should not spread to other areas).

³⁹ For example, Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 Berkeley Women's L J 39 (1985) (discussing transformative possibilities of values of care, responsibility, and relationship); Kenneth L. Karst, *Woman's Constitution*, 1984 Duke L J 447 (constitutional law bears revision to include women's distinctive morality); Ann E. Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 Yale L J 913 (1983) (women's perspectives essential to analysis of sex discrimination). Psychologist Carol Gilligan, who describes significant differences in the ways boys and girls approach moral dilemmas, has influenced several legal commentators; according to Gilligan, boys tend to adopt individualistic, rights-based analyses, while girls are more likely to approach and resolve problems with emphasis on the interconnections between individuals. Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press, 1982).

⁴⁰ Christine Littleton, *Reconstructing Sexual Equality*, 75 Cal L Rev 1279 (1987).

⁴¹ For example, Robin West, *Jurisprudence and Gender*, 55 U Chi L Rev 1 (1988) (modern legal theory, both liberal and critical, reflects structures of men's but not women's

emphasizes dominance and subordination, testing policies and practices by asking whether they "integrally contribute . . . to the maintenance of an underclass or a deprived position because of gender status."⁴² Today's speakers with this emphasis are advancing an idea South Carolinian Sarah Grimke expressed, no doubt to hostile audiences, in 1838: "All I ask of our brethren," that brave woman said, "is that they will take their feet off from our necks."⁴³

Another line of inquiry reminds us that analysis requires an analyst, a perspective from which a problem is addressed. The proposition that the observer is part of the process of observation, that the knower is not detached from, but affects and is affected by the known object, is pervasive in contemporary philosophy,⁴⁴ and is impressively represented in feminist jurisprudence.⁴⁵

experience); Lynne N. Henderson, *Legality and Empathy*, 85 Mich L Rev 1574 (1987) (empathy properly plays a significant role in legal analysis); Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 Colum L Rev 1118 (1986) (equality analysis is inherently male-biased); Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives From the Women's Movement*, 61 NYU L Rev 589 (1986) (feminist method recognizes interrelationship between theory and practice); Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 Harv L Rev 1497 (1983) (market/family dichotomy radically limits possible avenues of reform).

⁴² Catharine A. MacKinnon, *The Sexual Harassment of Working Women: A Case of Sex Discrimination* 117 (Yale University Press, 1979). Several of her essays are collected in Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, 1987). Thoughtful reviews of that work include Christina B. Whitman, *Law and Sex*, 86 Mich L Rev 1388 (1988); Cass Sunstein, *Feminism and Legal Theory*, 101 Harv L Rev 826 (1988).

⁴³ Sarah Grimke, *Letters on the Equality of the Sexes and the Condition of Women* 10 (1838).

⁴⁴ For example, William Ralph Boyce Gibson, translator, Edmund Husserl, *Ideas: General Introduction to Pure Phenomenology* (Humanities Press, 1967); Jean Paul Sartre, *Being and Nothingness: An Essay in Phenomenological Ontology*, excerpted in Wade Baskin, ed, *Of Human Freedom* 56-98 (Philosophical Library, 1966) (on file with *The University of Chicago Legal Forum*); Gertrude Elizabeth Margaret Anscombe, translator, Ludwig Wittgenstein, *Philosophical Investigations* (Blackwell, 1963).

⁴⁵ Martha Minow, *Foreword: Justice Engendered*, 101 Harv L Rev 10 (1987) (examining unstated assumptions of differences analysis and proposing alternatives which take the existence of multiple perspectives into account); Martha Minow, *When Difference Has Its Home: Group Homes for the Mentally Retarded, Equal Protection and Legal Treatment of Difference*, 22 Harv CR-CL L Rev 111 (1987) (Justice Stevens' *Cleburne* opinion tries to adopt the perspective of the mentally retarded); Marie Ashe, *Mind's Opportunity: Birthing a Poststructuralist Feminist Jurisprudence*, 38 Syracuse L Rev 1129 (1987) (poststructuralist themes, such as the relationship between knowledge and power, may provide new avenues for development of feminist legal theory); Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 Yale L J 1373 (1986) (identifying feminism with critique of objectivity); see also Clare Dalton, *Where We Stand: Observations on the Situation of Feminist Legal Thought*, 3 Berkeley Women's L J 1 (1987-88) (feminist theory must struggle against temptation to assert necessary, universal, and ahistorical truths; feminism is most powerful as a post-modern project.)

Different styles of feminist analysis undeniably produce conflicting responses in some contexts; but the common ground merits attention and statement in ways the wider public can understand. Each strand that will engage discussion and debate at this symposium probes and challenges facets of the traditional subordination of women. There is in this flourishing output, however, one discordant, jarring note—the tendency to regard one's feminism as the only true feminism, to denigrate rather than to appreciate the contributions of others. If that fatal tendency can be controlled, feminist legal theory, already an intellectual enterprise of the first dimension, will indeed be something to celebrate.

