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De Tocqueville once remarked on the unusual tendency of Americans to give political and social controversies a legal cast.[1] This observation, made more than a century and a half ago, remains true today, perhaps more so than ever, and is confirmed by the peculiar American engagement with feminism.

Feminism is the set of beliefs and ideas that belong to the broad social and political movement to achieve greater equality for women. As its governing ideology, feminism gives shape and direction to the women's movement and, of course, is shaped by it. Women seek equality in all spheres of life and use a broad array of strategies to achieve that goal. Feminism does not belong to the law alone. Still, the law has figured prominently in the fight for women's equality, both as a domain to be reformed and as an instrument of reform. As a result, feminism has become of special concern to the legal community.

Some lawyers, for example, Catharine MacKinnon, have played an almost architectural role in feminist thought. Others have contributed through more traditional professional activities. Lawsuits to achieve greater equality for women fill the courts, and statutes seeking the same end are now commonplace. Feminism also has been of great importance in recent struggles for power on the Supreme Court.

Ruth Bader Ginsburg, President Clinton's first appointment to the Supreme Court, indeed the first by a Democratic president in the last twenty-five years, made her career fighting for women's rights. Similarly, the confirmation battles of two recent Republican nominees — Clarence Thomas and Robert Bork — largely centered on feminist issues. In the fall of 1991, the nation was gripped by the allegations of sexual harassment lodged against Clarence Thomas by Anita Hill in

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1. ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 280 (Phillips Bradley ed., 1945).

his confirmation hearing. The defeat of Robert Bork in the Senate in 1987 — one of the most important events in contemporary constitutional history — was in significant part due to his position on two cases that are foundational to feminism: *Griswold v. Connecticut*[2] and *Roe v. Wade*.[3] *Griswold* established a constitutional right to privacy and protected access to birth control, and *Roe* built on *Griswold* to set aside laws criminalizing abortion.

Feminism has also come to play an important role in the legal academy. Almost every American law school has a course on the subject. These courses are exceedingly popular and provoke discussions and arguments that spill into the corridors. About a dozen legal periodicals devoted exclusively to feminism have been launched within the last decade. Even non-specialized legal periodicals like the *Yale Law Journal* or *Harvard Law Review* regularly carry articles on the subject. These courses and journals present feminism not simply as a political ideology but as a legal theory, and I venture to say that feminism may be *the* legal theory of the 1990s. It is the source and locus of the most gripping and demanding theoretical discussions that today take place in the legal academy.

In this Article I have set for myself the task of describing and analyzing feminism as a legal theory. This effort will be marred by the usual difficulties experienced by anyone foolish enough to try to distill a single theory from a literature as rich and varied as that of feminism. Like the two legal theories most prominent in the last two decades, law and economics and critical legal studies, analyzed in an earlier article of mine,[4] feminism means different things to different people. Distinctions are often made among "radical feminists," "cultural or relational feminists," "liberal feminists," and "socialist feminists."[5] These distinctions are as significant as the differences between the radical and moderate branches of critical legal studies or the Chicago and New Haven schools of law and economics.[6]

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2. 381 U.S. 479 (1965).

3. 410 U.S. 113 (1973).

4. Owen M. Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1 (1986) [hereinafter Fiss, *The Death of the Law?*].

5. For a helpful overview of the many strands of contemporary feminism, see generally ALISON JAGGAR, FEMINIST POLITICS AND HUMAN NATURE (1983); Isabel Marcus et al., *Feminist Discourse, Moral Values, and the Law — A Conversation*, 34 BUFF. L. REV. 11 (1985). *See also infra* note 28.

6. For a comparison of the Chicago and New Haven schools of law and economics, see Fiss, *The Death of the Law?*, *supra* note 4, at 7. For a discussion contrasting the work of radical critical legal studies scholars from that of its more moderate adherents, like Frank Michelman and Peter Gabel, see Owen M. Fiss, *The Law Regained*, 74 CORNELL L. REV. 245, 250-51 (1989) [hereinafter Fiss, *The Law Regained*].

Feminism is as varied as any body of thought. It presents a special difficulty, however, because it encompasses not one theory, but two. On one level feminism is a theory about equality. Yet on another, more abstract or general level, it is a theory about the objectivity of law. Each of these strands of feminism represents a profound challenge to established political and legal traditions. At the same time they are in conflict with each other. Feminism's egalitarianism is at war with its radical epistemology, and we should acknowledge that in the end one will have to give way to the other.

I

The modern period of American constitutional law began in 1954, when the Supreme Court handed down its decision in *Brown v. Board of Education*.[7] In that case, the Court declared unconstitutional a system of education that segregated blacks and whites according to race. Even more importantly, the Court relocated equality within the constitutional order. For most of our history, liberty was seen as the paramount value, dominating and almost excluding all others. But *Brown* underscored the importance of equality, even to the point of justifying the sacrifice of certain individual liberties, like freedom of association.[8]

Brown marked the beginning of a new era in politics as well as in constitutional law and set into motion a number of radical changes in American society. For a twenty-year period, roughly from 1954 to 1974 — and with special force in the 1960s — the Supreme Court and the civil rights movement were locked in an intense and powerful dialogue. Time and again, the Court was called upon to elaborate the constitutional ideal of equality and to fashion remedies that would give it practical content.[9]

By the mid-1970s the civil rights movement had lost most of its momentum, in the courts and elsewhere.[10] The tide had shifted. Many continued to fight for greater equality for blacks, but their efforts were both desperate and defensive, trying to hold onto the gains of the past. At that very moment, however, the women's movement began to take

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7. 347 U.S. 483 (1954).

8. *See generally* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

9. *See, e.g.*, Keyes v. School Dist. No. 1, 413 U.S. 189 (1973); Swann v. Charlotte-Mecklenburg, 402 U.S. 1 (1971); Griggs v. Duke Power, 401 U.S. 424 (1971); Gaston County v. United States, 395 U.S. 285 (1969); Green v. New Kent County, 391 U.S. 430 (1968); Katzenbach v. Morgan, 384 U.S. 641 (1966); South Carolina v. Katzenbach, 383 U.S. 301 (1966).

10. *See generally* Washington v. Davis, 426 U.S. 229 (1976); Milliken v. Bradley, 418 U.S. 717 (1974).

root in legal circles, and in 1973 that movement established a decisive constitutional beachhead in *Roe v. Wade*. The road ahead was not straight nor unbroken, but during the late 1970s and 1980s the women's movement grew in power and support, as the civil rights movement receded, and today the women's movement is at the forefront of the struggle for equality.

There are some libertarian elements in feminism. Some see *Roe v. Wade* itself as a victory of liberty, giving each individual woman the right to choose whether to have an abortion and thus the right of control over her body. This interpretation of *Roe v. Wade* finds ample support in the Court's rhetoric and has great sway in political circles. Yet it does not make great sense as a matter of constitutional theory. The Constitution does not confer upon any individual an absolute liberty in any domain; it requires only that the state justify each infringement of liberty. If there were no other concerns involved, such as equality, the state's desire to protect the life of the fetus might well be sufficient to constrain the decision to abort a pregnancy. The Court's decision in *Roe v. Wade* makes constitutional sense only if we bring to the fore an understanding of the significance of the right to choose abortion for the social position of women: as a means of furthering their equality.[11]

In their understanding of equality, feminists traveled a theoretical journey parallel to that of the civil rights movement.[12] Feminism began with an attack upon discrimination; it condemned those policies or practices whereby a woman is denied a scarce opportunity simply because of her gender. Feminists proclaimed a unisex rule and demanded that people not be judged or discriminated against on the basis of their sex.[13] This strand of feminism — known as "liberal feminism" — was the dominant position of feminism during the seventies, but as the movement matured, it took on a more ambitious goal — ending the subordination of women as a group.[14] Feminists are now primarily concerned with hierarchy, not discrimination, and they understand equality in terms of what I will call the antisubordination principle —

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11. *See, e.g.*, Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 382-83 (1985).

12. *See generally* Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976) [hereinafter Fiss, *Groups and the Equal Protection Clause*].

13. *See generally* Barbara Brown et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871 (1971).

14. The transition and the use by feminists of law developed in the civil rights context can be seen most clearly in CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979).

a principle condemning those practices that have the inevitable effect of creating or perpetuating a subordinate position in American society for certain disadvantaged groups.

Within this new framework, feminists condemn discrimination, but for very special reasons. They do not condemn discrimination solely because it entails unfair treatment to some identifiable individuals, but rather because of its role in subordinating women as a group and thus creating and perpetuating a gender hierarchy. Moreover, they see discrimination — choosing among competing applicants on the basis of gender — as only one among many social processes responsible for the hierarchical ordering of the sexes. Admittedly, many feminists, including the most radical, still cast their arguments in terms of discrimination, but I view that simply as a rhetorical strategy intended to make their position more palatable to those steeped in the antidiscrimination tradition. Antisubordination, not antidiscrimination, is the defining goal of the movement, as can be seen by examining its more ambitious and controversial demands — those that place feminism at the center of academic concern and establish its identity as a distinctive body of thought.

Consider, for instance, the demand that women be given preferential treatment in employment. Initially, it should be emphasized that feminists have put forth a number of strategies to improve the share of jobs or positions obtained by women and that some of these strategies can comfortably rest on the antidiscrimination principle. For example, feminists have attacked certain employment criteria that disfavor women, such as height requirements or rules that treat pregnancy as a disability, on the ground that these criteria are unrelated to job performance and thus are the functional equivalent of gender. Feminists have also attacked some selection criteria that look backward (e.g., company seniority) on the ground that such criteria unnecessarily perpetuate past discrimination based on gender.[15] Here, too, we can see the antidiscrimination principle at work.

The antidiscrimination principle seems less apposite, however, when feminists escalate their demands and attack so-called meritocratic selection criteria, arguing that such criteria be modified or set aside and that a preference among the competing applicants be given to women simply as a way of increasing their share of the jobs awarded. In the *Santa Clara* case, the Supreme Court upheld such an argument, allowing

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15. Owen M. Fiss, *An Uncertain Inheritance*, *in* THE OUTER CIRCLE: WOMEN IN THE SCIENTIFIC COMMUNITY 259 (Harriet Zuckerman et al. eds., 1991).

a local government agency to modify their standard selection criteria (four years as a road maintenance worker) and to consider the gender of the applicants for a road dispatcher's job.[16] Meritocratic selection criteria such as those used by the local authority in *Santa Clara* are presumably related to performance and do not perpetuate past discrimination, and thus their use cannot be deemed a forbidden form of discrimination. But these criteria effectively put women at a competitive disadvantage and reduce the share of jobs women might otherwise obtain.

Not only is the antidiscrimination principle incapable of supplying the theoretical basis for such a challenge and for the insistence that scarce opportunities be awarded to women because they are women, but even more, it may in fact prohibit such a system of preferences. The antidiscrimination principle concentrates on the fairness of treatment to individuals, and any male rejected by a selection process that favors women on the basis of gender could claim that he was treated unfairly. Of course, the antidiscrimination principle could be modified to excuse discrimination when the purpose is to improve the overall position of women as a group, but doing so virtually eliminates any difference between the antidiscrimination and antisubordination principles.

The debate over the role of women in childrearing offers another illustration of the centrality of the antisubordination principle in modern feminist thought. The dominant contemporary social understanding continues to assign to women the primary responsibility for the care of children, thereby fusing both the biological and social functions in the process of reproducing the species.[17] Feminists acknowledge that taking care of children can have its own intrinsic rewards and is of enormous social importance, but they object to the social understanding that automatically assumes that the responsibility for the care of children belongs to their mothers. The functional basis of this understanding is far from clear, especially in modern society, and in any event is seen by feminists — decrying the "institution of motherhood"[18] — as an important source of disadvantage. The responsibilities of motherhood tend to keep women at home, unable to obtain the experience and qualifications needed for the offices that have the greatest prestige and rewards in society. Motherhood also makes it difficult for women to hold those positions when they are qualified. An increasing number of

16. Johnson v. Transportation Agency, 480 U.S. 616, 640-42 (1987).

17. *See generally* DOROTHY DINNERSTEIN, THE MERMAID AND THE MINOTAUR: SEXUAL ARRANGEMENTS AND HUMAN MALAISE (1976).

18. *See* ADRIENNE RICH, OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION 13 (1976).

women leave the home to take paid jobs, but even they are still expected — by their families and the culture in general, though perhaps not by their bosses — to give their children first priority when work and family conflict.

Because of its focus on the fair allocation of scarce opportunities among a pool of competing applicants, the antidiscrimination principle does not readily reach a practice so subtle and pervasive as the cultural imposition of child caretaking duties on women. In one sense, the gendered division of labor — men go to work while women stay at home with the kids — can be understood as reflecting an allocative decision within the family, but that allocation is more the result of a diffuse social understanding than the mechanism presupposed by the discrimination paradigm: a deliberate choice by some identifiable authority, like an employer or university admissions officer. The antisubordination principle, in contrast, is not confined to the regulation of the type of allocative process that is the special focus of the antidiscrimination principle. It reaches any practice or institution that disadvantages women, and accordingly has been used to support increases in the availability of birth control and child care facilities, as well as requiring employers to provide parental leave.

Antisubordination is also the rationale for a crucial portion of the feminist program — referred to as "comparable worth" or "pay equity" — that seeks to obtain equal wages for women in the context of a job market that remains largely segregated by sex.[19] Comparable worth does not attack all pay differentials, some of which may be attributable to higher skill requirements (which large numbers of women may be unable to satisfy because of domestic responsibilities or outright exclusion from training programs). The concern, rather, is with those differentials where the jobs are functionally equivalent or comparable. Paradigmatic is the practice of paying secretaries — mostly women — half the salary of truck drivers, though the value of the work of each job is, as measured by some abstract standard, the same.

What accounts for such differentials? In some cases, employers exclude women outright from the higher paying jobs, for example, truck driving, simply because they are women — an economically unwise practice that can also be eradicated as a gross form of discrimination.

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19. *See* Paul Weiler, *The Wages of Sex: The Uses and Limits of Comparable Worth*, 99 HARV. L. REV. 1728, 1729 (1986); *see also* DEBORAH H. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW (1989); Mary E. Becker, *Barriers Facing Women in the Wage-Labor Market and the Need for Additional Remedies: A Reply to Fischel and Lazear*, 53 U. CHI. L. REV. 934, 937 (1986); Deborah L. Rhode, *Occupational Inequality*, 1988 DUKE L.J. 1207, 1207-08.

The law does not allow employers to satisfy their own, or their employees', taste for discrimination.[20] An employer might also be held responsible under the antidiscrimination principle for the vestiges of past exclusionary practices, reflected in the hostility and harassment that women might encounter when they seek to enter a job category previously reserved for men. In such cases, courts may agree that these jobs remain effectively closed to women and that responsibility for this situation rests with employers because of their role in excluding women from the job category in the first place.[21]

Imagine, however, a situation where the employer formally and effectively holds open to all the higher paying jobs, but, due to social pressures, women are taught in subtle and various ways to avoid those jobs and to apply only for the lower paying ones. Women are channelled into roles as secretaries, not truck drivers. Of course, the higher pay of the so-called male job is likely to counteract these pernicious social pressures, for it supplies a reason for everyone to apply for that job. But we should not underestimate the force of social pressures perpetuating entrenched gender roles. As everyone recognizes, money is only one among many factors that lead people to apply for one job as opposed to another.

Feminists have attacked the socialization processes that lead to such channelling and have pushed for educational programs to liberate women from the confines of the stereotypes that account for such channeling and are reinforced by it. But such changes take time and cannot provide a remedy for an earlier generation of women who find themselves locked into lower paying jobs. As a result, feminists have also insisted on pay increases for these lower paying jobs and in so doing have voiced a demand for comparable worth, a demand which can only be justified in terms of antisubordination, not antidiscrimination.

Employers confronting such a demand are not discriminating on the basis of sex; they are neither choosing employees nor determining their rate of pay on the basis of sex. They are simply acquiescing in or taking advantage of a labor market that is structured by larger social pressures and that allows them to maintain a differential in pay among functionally equivalent jobs. The employer is acting as most busines-

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20. *See* Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 249-53 (1971).

21. *See* Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1831-32 (1990).

speople do, but is held accountable because the resulting pay differential disadvantages women — certainly those presently holding the lower paying jobs, and maybe women in general.

Finally, we can see the antisubordination principle at work in those aspects of the feminist program concerned with rooting out certain social practices, such as sexual harassment, prostitution, and pornography, that reduce women to sexual objects.[22] The claim here is not that the transformation of women into sexual objects is discrimination, although, once again, that locution is sometimes used. Rather, feminists challenge this kind of objectification because it lessens the value or place of women in society ("Women exist for the sexual pleasure of men") or is responsible for the subordination of women in other spheres of social life ("Women are kept in lower paying jobs to serve the sexual interests or desires of men"). Pornography is said to eroticize the subordination of women and, even worse, to provoke or incite violence against women.

In using the antisubordination principle in these various ways, feminism continues, and builds upon, the work of the civil rights movement. At its core, the antisubordination principle constitutes an attack on those social structures — so evident in slavery and the segregation decreed by Jim Crow — that order people and the groups to which they belong according to ascriptive criteria. It condemns these hierarchical structures because they both impede individual self-actualization and do violence to those conceptions of community based on that ideal. The struggle on behalf of black people in the United States gave the antisubordination principle much of its appeal, and feminists have drawn on this experience in their own fight. Yet it is also true that many of the difficulties that the antisubordination principle created for the civil rights movement now beleaguer the feminist movement.

One difficulty arises from the antisubordination principle's group-oriented nature. The antisubordination principle requires that the social significance and legality of a practice be measured in terms of the impact of the practice on the group as a whole. Inevitably, however, some women take a radically discordant position on the significance of even some of the most troublesome of these practices. Some women, for example, find nothing objectionable in being treated as sex objects,

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22. *See* CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 50-52 (1987) [hereinafter MACKINNON, FEMINISM UNMODIFIED]; CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 127 (1989) [hereinafter MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE].

viewing or making pornography, or even engaging in prostitution. How should their views be reconciled with the feminist program?

On one level, feminists make every effort to respect the choices and interests of individual women and to allow room for them within the larger effort to secure equality for women. But at the same time, feminists are wary of individual preferences or desires that may reinforce practices or institutions deemed to hurt women as a group. Consequently, some feminists discount or explain away these preferences or desires on the theory that they are atypical or contrivances of existing power relationships — that they are the product of "false consciousness," to use a once-fashionable term. Others argue that these individual concerns are an insufficient basis for justifying the challenged practices — that what is paramount is the welfare of the group. There is great force to all these rejoinders, but there is no denying that many aspects of the feminist program divide even women. In addition, the group orientation of the antisubordination principle cuts against the individualist ideology undergirding so much of American constitutional law and politics.

Another difficulty is that the antisubordination principle envisions a robust role for the state. Admittedly, the feminist attack on abortion laws or laws restricting access to birth control is anti-statist, but this should not mislead. Feminists are as interested in subsidized abortions as they are in decriminalizing abortion. They may denounce the state for having become an agent of oppression, but at the same time embrace it as a potential ally in the fight for equality. Feminists realize that affirmative exercises of state power are required to eradicate so entrenched and stubborn a social phenomenon as gender hierarchy and contemplate a broad program of state activism that includes, in addition to subsidized abortion, increased availability of birth control, child care facilities, prenatal and parental leaves, job equalization schemes, protection against domestic violence and sexual harassment, and regulation of pornography.

Some elements of this program involve considerable costs and thus are of special concern in a budget-conscious era. Some forms of state activism, like the regulation of pornography, come into conflict with specific constitutional norms, such as freedom of speech. On a more general and more theoretical level, however, the feminist program causes concern because it involves a departure from the role of the state contemplated by the liberal philosophy upon which this country is often thought to be founded.

Liberalism presupposes a sharp dichotomy between the state and society, and absolves the state of any responsibility for most of what

transpires in the social sphere. Indeed, liberal thought, in its most pristine form, treats every state intrusion in the social sphere and any regulation of citizen-citizen interaction with great suspicion, and strictly limits the state to curbing individual conduct that violates some moral principle which is almost universally held. Such a view cannot be easily reconciled with the kind of state activism that feminists envision. The intervention they call for is structural in nature, trying to alter basic social institutions like the family and the market, and is not predicated upon finding that the individual against whom state power is brought to bear has committed a discrete wrong. Thus, we find a number of feminists, such as Zillah Eisenstein or Catharine MacKinnon, challenging the fundamental tenets of liberalism and trying to construct a new theory for the state: a charter for a state actively committed to the pursuit of equality.[23]

II

America experienced many changes in the 1970s. One involved the transfer of judicial power to a more conservative group of Supreme Court justices. The Court that handed down *Brown v. Board of Education* and attended its implementation disintegrated as some of its leaders, such as Earl Warren, Hugo Black, and William O. Douglas, retired. In their place, Presidents Nixon and Ford appointed persons considerably less sympathetic to egalitarian claims, and this pattern was only reinforced in the eighties by the Reagan and Bush appointments.

This shift in alignment at the highest level of the federal judiciary had many consequences. For one, it crippled the civil rights movement, which, because of sheer numbers (blacks constitute only twelve percent of the population), depended heavily on leadership by an institution far removed from popular control. The changes in the Supreme Court also forced the women's movement to broaden its appeal and to turn to the legislatures in addition to the courts to advance its egalitarian agenda. Speaking more generally, the personnel changes in the Court and the resulting shift in doctrine led to a certain disenchantment with the law among many in the legal profession, especially in the law schools. In the 1960s, students looked to the Supreme Court as a source

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23. *See generally* ZILLAH R. EISENSTEIN, FEMINISM AND SEXUAL EQUALITY: CRISIS IN LIBERAL AMERICA (1984); MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 22. *See also* Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

of inspiration, as an indication of how law might be used to serve the highest ideals of the nation. During the 1970s, the spell was broken. Cynicism and distrust — what Paul Ricoeur has called "the hermeneutic of suspicion"[24] — became the order of the day.

Possibly the most significant manifestation of this cynicism in the legal academy was the critical legal studies movement. It emerged in the late 1970s and caused quite a stir because it debunked as pure pretense the law's claim to justice objectively understood. Critical legal studies scholars claimed that "law is politics," and by that they meant not merely that politics has an important influence on law, say, through judicial appointments, but rather that the development of the law is continuous with, if not reducible to, the exercises of political will and power. They argued that all normative structures, especially those of the law, are riddled with a "fundamental contradiction," a conflict between the longing for intimacy and the distrust of others.[25] As a result of this conflict, all normative structures point in two directions and are thus radically indeterminate with respect to the duties or conclusions they impose. There are no right answers in law, nor could there ever be.[26] Rather, law is simply politics in formal garb.

During the late 1970s, and for a good part of the 1980s, critical legal studies played a leading role in the theoretical debates in American law schools. Hundreds attended annual conferences. Faculty appointments were made in some of the leading law schools, such as Harvard and Stanford. Student interest was insatiable. Today, the situation is strikingly different. Students have been diverted. There are no new faculty recruits. The work of critical legal studies scholars is of virtually no interest in American philosophical circles. Many of its central tenets, including the fundamental contradiction and the indeterminacy thesis, have been renounced, even by those who first propounded them.[27] Critical legal studies is dead, and all eyes have turned to feminism.

Feminism is part of the same skeptical tradition as critical legal studies, but it has developed its own critique of the law. One form of the feminist critique — sometimes referred to as "cultural or relational feminism" and largely stemming from the work of Carol Gilligan[28] —

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24. PAUL RICOEUR, FREUD AND PHILOSOPHY: AN ESSAY IN INTERPRETATION 26-36 (1970).

25. Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205, 211-14 (1979).

26. *See* Fiss, *The Death of the Law?*, *supra* note 4, at 7.

27. *See* Fiss, *The Law Regained*, *supra* note 6, at 247; Duncan Kennedy & Peter Gabel, *Roll Over Beethoven*, 36 STAN. L. REV. 1, 15-17 (1984).

28. *See generally* CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982). Some who build on the work of Professor Gilligan take exception

is relatively tepid. It does not attack the objectivity of law, as did critical legal studies, but rather claims that the law's exclusive concern with justice and the theory of rights must be supplemented with another perspective altogether — the ethic of care. As a purely sociological matter, the emphasis upon the ethic of care enhances the value of women because, although this ethic does not belong to women alone, it is thought to be more common among women or more closely identified with stereotypical feminine qualities. The ethic of care also has been seen as having jurisprudential implications. Specifically, it has been used as a basis for reexamining many of the notions that have long dominated the law, such as the ideal of adversarial procedure or, especially, the commitment to protect individual rights. These notions were a favorite target of critical legal studies scholars and often dismissed as liberal contrivances;[29] they are now criticized in similar terms by feminists such as Carrie Menkel-Meadow or Robin West, who denounce them as excessively individualistic or insufficiently relational.[30]

A more thoroughgoing critique of the law can be traced to the work of Catharine MacKinnon. She mocks the objectivity of the law and has tried to show, for example, that seemingly neutral or evenhanded rules of the law, such as the consent doctrine in rape law or the rules protecting pornography, are not neutral or evenhanded at all.[31] The law's claim to justice is a sham — all is interest and power. In this effort to demystify the law, MacKinnon's critique overlaps more fully with critical legal studies than does Gilligan's or that of her followers. However, it differs from critical legal studies in two important respects: Whereas critical legal scholars largely argued that the rule of law reflects the dominant economic interests, MacKinnon argues that law reflects a male point of view. And while for critical legal studies scholars

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to the term "cultural feminism" and much prefer to see themselves as belonging to a school of "relational feminism." *See* Jennifer Nedelsky, Relational Feminism Confronts the Problem of Evil (1994) (unpublished manuscript, on file with the author). Like the cultural feminists, the relationalists emphasize the ethic of care proclaimed by Gilligan and see women as having a special (though not exclusive) connection to this ethic, but differ on their understanding of the etiology of the tendency of women to value care more highly than men do. This tendency, they insist, stems not from biology — that women have the capacity to bear children — but rather is socially constructed.

29. *See, e.g.*, William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29; Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984).

30. *See* Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39, 60-62 (1985); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 1-4 (1988).

31. *See* MACKINNON, FEMINISM UNMODIFIED, *supra* note 22; MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 22.

critique was its own end, for radical feminists such as MacKinnon there is another and more substantive point to critique, namely, the promotion of equality.

Critical legal studies was leftist in its inspiration. Politically, its adherents aspired to greater equality, hoping for, so they said, the destruction of all hierarchies.[32] In terms of the doctrine or theory propounded, however, critical legal studies was entirely negativist, and had to be given the tenacity of its critique — every normative structure, even those that critical legal studies might itself propose, could be deconstructed by the fundamental contradiction.[33] Feminism, however, seeks to go beyond the negativism of critical legal studies and as a result assigns egalitarianism a much more substantive role within its theoretical framework. For MacKinnon, equality is not simply a motivation, but part of the theory.

While its egalitarianism distinguishes feminism from critical legal studies, the presence of a critique distinguishes feminism from other egalitarian movements, such as the civil rights movement of the sixties and early seventies. The critique has led many to speak of a "feminist jurisprudence," a term that has no counterpart in the civil rights context. Taken in either its radical or cultural form, feminism is unique because it seeks to combine a theory of equality with a critique of the law. For many, this is a special source of feminism's appeal, but not for me. In my view, feminism's critique lacks adequate theoretical foundations and, in some respects, is at odds with its egalitarianism.

The critique of the law derived from the work of Carol Gilligan founders on the simple fact that there is nothing intrinsically individualistic about justice or rights or even adversarial procedure. We can make justice as relational or as caring as we wish it to be.[34] Groups can and have used the adversarial process and the language of rights to advance their interests.[35] MacKinnon's critique is more powerful and has greater sway in the academy today, in part because it responds more directly to the sense of disenchantment that is so prevalent. But it, too, is vulnerable. For one thing, MacKinnon offers no theoretical argument for her denial of the objectivity of the law, and it is difficult

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32. DUNCAN KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM (Cambridge: Afar, 1983).

33. *See* MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 17 (1987).

34. *See* Linda C. McClain, *"Atomistic Man" Revisited: Liberalism, Connection, and Feminist Jurisprudence*, 65 S. CAL. L. REV. 1171, 1174 (1992). One relational feminist has cast her argument in terms of "rights," though she has insisted that "rights" be understood in a new way: not as boundaries, but as relationships. *See* Nedelsky, *supra* note 28; Jennifer Nedelsky, *Reconceiving Rights as Relationship*, REVIEW OF CONSTITUTIONAL STUDIES/REVUE D'ETUDES CONSTITUTIONELLES 1 (1993).

35. *See generally* Fiss, *Groups and the Equal Protection Clause*, *supra* note 12.

to see how she could make such an argument. Any argument that she might offer would itself necessarily claim to be objective and thus would be in tension with a position that denies objectivity. Why, it is fair to ask, would it be possible to achieve objectivity in one domain (knowing that objective law is not possible) but not in any other (advancing objective law)?

A question can also be raised as to whether the denial of objectivity is consistent with the affirmation of equality. Critical legal studies avoided any affirmative program because such a program would be inconsistent with its critique. MacKinnon and other radical feminists try to avoid the impasse of critical legal studies and offer an affirmative program, one based on equality, but in so doing undermine their denial of objectivity. They condemn gender hierarchy on the ground that it offends equality, and since they are appealing to justice rather than interest, they must be treating equality as an objective value. To some extent, Professor MacKinnon acknowledges this point, but only to finesse it in a parenthetical when she admits that "sex equality is taken, at least nominally, as an agreed-upon social ideal."[36] The inescapable truth — grasped by critical legal studies scholars, but not by certain feminists — is that the denial of objectivity lends itself to an ethical relativism that is inconsistent with an affirmative program that makes claim to justice or that rests upon a social ideal such as equality.

Although the radical feminists' denial of objectivity is deeply troubling as a theoretical matter, a more limited, historically grounded doubt about the impartiality of the law is not. Such a critique could be based on the simple but disturbing fact that for most of our history, women have been excluded from the process of creating and interpreting the law, an exclusion that is likely to render the claimed neutrality of the law a pretense or sham, masking the interests of those who made it, namely, men. This historically grounded doubt about the law is no small matter; it casts a broad skeptical shadow over received doctrine[37]

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36. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 22, at xii. The whole of the passage reads:

> This book is also not a moral tract. It is not about right and wrong or what I think is good and bad to think or do. It is about what *is*, the meaning of what is, and the way what is, is enforced. It is a theoretical argument in critical form which moves in a new direction; it does not advance an ideal (sex equality is taken, at least nominally, as an agreed-upon social ideal) or a blueprint for the future.

My view on the objectivity of law is set forth in Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982).

37. *See, e.g.*, Lea S. Vandervelde, *The Gendered Origins of the Lumley Doctrine: Binding Men's Consciences and Women's Fidelity*, 101 YALE L.J. 775 (1992).

and may be sufficient to sustain the widespread support garnered by more radical branches of feminism. But the historically grounded critique is qualitatively different from its theoretically grounded counterpart, for it at least admits the *possibility* of an objective law and thus renders feminism philosophically coherent — as a claim to justice, not interest. Of course, to some, objective law may remain just that, a theoretical possibility, an aspiration and nothing more, but occasionally one can find in cases like *Roe v. Wade*, or perhaps in the more recent affirmation of that decision in the *Casey* case,[38] a theoretical possibility turned into concrete reality. The historical critique allows feminists to embrace *Roe v. Wade*, not just as good politics, but also as good law — reflecting a true and proper understanding of equality.

Recast in these terms, feminism, even in its more radical versions, can be seen as giving expression to the same hermeneutic of suspicion that gave critical legal studies so much of its appeal during the seventies and eighties, but nonetheless allows a more affirmative vision of the law. The historical critique admits that one must be wary as to whether justice has been achieved, but nonetheless acknowledges that justice is possible and worth the struggle. Indeed, the historically grounded critique may well further, rather than impede, the movement's egalitarianism, in much the same way that an understanding of the history of racism in America and the specific origins of Jim Crow laws forced us to reexamine critically the separate-but-equal doctrine. Admittedly, presenting the feminist critique as more historically than theoretically grounded somewhat weakens its claim to being a "jurisprudence," at least as that term is traditionally understood. Feminism will be seen less as a theory about law, or about the integrity of the law, than as a theory about equality. But perhaps this is not a loss to be regretted. While some of the glamour often associated with the most abstract theorizing will be gone, a feminism grounded in a historical critique seems more authentic and still fully worthy of admiration and attention. Like the civil rights movement that preceded it and from which it draws much of its inspiration, feminism will be seen as a systematic body of thought about one of the law's highest ideals and as a determined effort to turn that ideal into concrete reality. Sometimes less is more.

38. Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992).