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"FEMINIST JURISPRUDENCE"— THE 1990 MYRA BRADWELL DAY PANEL

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Myra Bradwell Day is an annual event held by the Columbia Law Women's Association at Columbia Law School to celebrate women in the law. In 1990, a panel of feminist scholars discussed the connection between theory and practice in the real-lived lives of women and the law.

Elizabeth M. Schneider¹

I'm delighted to have the opportunity to talk with you today about some important aspects of feminist legal theory. My comments will focus on the implications of feminist legal theory for legal education. Feminist legal theory has important ramifications for legal education. Feminist legal theory is theory that is connected to doing and to being. Thus, an important dimension of feminist legal theory is its interconnection with legal practice and with legal education.

Here at Columbia, as well as at many other law schools, there has been much discussion concerning problems of gender bias in legal education. It is now widely acknowledged that law school courses do not adequately incorporate issues relating to women and women's perspectives into the curriculum.² As a result, many law professors and law students have begun to rethink every facet of the law school curriculum, particularly first-year courses, from the standpoint of gender. Today I want to suggest some contributions that feminist legal theory can make to the teaching of one of the most important courses in the first-year curriculum—Civil Procedure.

I'd like to make a few introductory points concerning feminist theory. Generally, feminism can be understood as "a self-consciously critical stance toward the existing order with respect to the ways it affects different 'women as women.'"³ However, there are many different feminist perspectives. Feminist theory is not unitary; there is no one feminist theory,

¹ I am grateful to Martha Minow for the many years of conversation about feminism and civil procedure that led to the ideas discussed here; this talk is part of an ongoing joint effort.

This talk is dedicated to the memory of Mary Joe Frug whose life and work inspired and continues to inspire me.

² See generally Symposium on Gender Bias in Legal Education, 38 J. Legal Educ. 1-193 (1988); Erickson, Sex Bias in Law School Courses: Some Common Issues, *id.* at 101-16; Menkel-Meadow, Feminist Legal Theory, Critical Legal Studies, and Legal Education or "The Fem Crits Go To Law School," *id.* at 61-85; Shalleck, Report of the Women and the Law Project: Gender Bias and the Law School Curriculum, *id.* at 97-99; Schneider, Task Force Reports on Women in the Courts: The Challenge for Legal Education, *id.* at 87-95.

³ Bartlett, Feminist Legal Methods, 103 Harv. L. Rev. 829, 833 (1990).

one politically correct feminist theory.⁴ One of the most exciting developments in feminist theory has been the recent effort to expose feminism's tendency toward "essentialism," feminism's tendency to imply that there is one "essential" womanness. Feminist theory, or to put it more accurately, feminist theories, must take account of the varied experiences of all women.

Feminist theory has two dimensions—one which breaks down old notions and another which reconstructs new visions. The first dimension exposes the ways in which the law presently fails to reflect the range of women's experiences or the values that many women have. This dimension provides a critique of existing legal standards and the notion that law is objective and neutral. It exposes the extent to which law masks the perspectives and experiences of women. The second dimension of feminist theory, its reconstructive aspect, is very much a part of what the women's movement has been about: namely, our efforts to reconstitute law and legal institutions to incorporate within them the viewpoints of all women. This reconstructive dimension attempts to use the multiplicity of women's experiences to create new visions of law on both a theoretical and a practical level.

One of the central aspects of feminist theory is what I have elsewhere called the dialectical relationship between theory and practice.⁵ A unique

⁴ See Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *Stan. L. Rev.* 581 (1990); E. Spelman, *Inessential Woman: Problems of Exclusion in Feminist Thought* (1988).

⁵ Schneider, *The Dialectic of Rights and Politics: Perspectives From the Women's Movement*, 61 *N.Y.U. L. Rev.* 589 (1986).

The dialectical approach . . . explores the process which connects ideas that appear to be in opposition to one another. One "moment" in the process gives rise to its own negation, and "out of this negativity, emerges a 'moment' which at once negates, affirms, and transcends the 'moment' involved in the struggle." Thus, an idea may be both what it appears to be and something else at the same time; the idea may contain the seeds of its own contradiction, and ideas that appear to be in opposition may really be the same or connected. At any given "moment," ideas may appear to be connected or in opposition because this connection or opposition exists in only one stage of a larger process. The dialectical process is not a mechanical confrontation of an opposite from outside, but an organic emergence and development of opposition and change from within the "moment" or idea itself. [Cites omitted].

Id. at 599.

The notion of dialectical process is a critical aspect of feminist theory. The term dialectical and the concept of dialectic are frequently used by feminist theorists in a wide range of contexts. See *id.* at 601 n.58.

contribution of feminist theory is this special dynamic interrelationship between theory and practice based on women's experiences. Feminist theory emphasizes direct and personal experience as the place that theory should begin. Theory is not something which is "out there"; theory is "in here." It is in our lived experiences, it is in the sharing of these experiences together, and it is summed up in the traditional phrase which I'm sure is familiar to many of you: "the personal is political." This phrase has important political and theoretical dimensions. Politically, it reflects the view that the realm of personal experience, the "private" world, which has traditionally been devalued for women, is an appropriate subject of "public" inquiry. Theoretically, it suggests that, for feminist theory, "private" and "public" worlds are inextricably linked.

Consciousness raising, as a feminist method, is an example of this dialectical process. Consciousness raising begins with personal experience, experience which is usually conceived of as "private." Through the sharing of personal experience, individuals realize that their own experience is really widely shared, and this insight moves the understanding of individual experience to the recognition that the commonality of women's experience reflects larger social structures. These insights then move back to the personal.

Consciousness raising begins with the lived experiences of women, uses personal experience to understand, create, and inform theory, and then reshapes theory based on the insights gained from exploring personal experience. The richness of this process, the moving back and forth between the personal and the political, the private and the public, exposes the complex, dialectical interrelationship between the social dimension of individual experience and the individual dimension of social experience. Consciousness raising reveals the profound link between individual and group interest—between individual change and social change.

The legal work of each of us on this panel reflects this dynamic interrelationship between theory and practice. We have all engaged in both the articulation of theory and the practice of law. I worked as a civil rights lawyer at the Center for Constitutional Rights in New York for many years before becoming a full-time law teacher. Lucinda Finley has been involved in practice as well as legal scholarship. Carin Clauss has moved back and forth between governmental, policy-making, and academic work for many years. Joan Bertin has long been shaping work on equality and reproductive hazards in the workplace at the Women's Rights Project of the American Civil Liberties Union (ACLU). In all of our work, we have begun with the concrete and lived experiences of women and then articulated these

experiences in legal theory and legal argument. Our legal arguments in court and legislatures grew out of women's experiences, and the impact of these arguments then further developed our theory.

Feminist legal theory also looks at the diversity of human experience and examines varied factual situations and kinds of moral/political choices that are implicit in the decisions faced by women. Some have called this "emphasizing context."⁶ Although all law involves an understanding of context in some sense, the emphasis on context, on particularity, on challenging the general and looking closely at particular experience, is an important contribution that feminist theory makes to law.

These aspects of feminist theory underscore the central role of process in feminist theory. Of course, feminist theory also has a substantive and political importance. But the perspective on feminist theory that I have just suggested implies a concept of, and an experience with, process that has shaped my thinking and teaching in civil procedure. However, my work in civil procedure also needs to be situated in the larger context of the impact of feminist theory generally on legal education.

I'm sure many of you are aware of the burgeoning scholarship on gender bias in legal education.⁷ This work is very important. Feminist theory tells us to develop theory based on our experiences in the places where we live, and of course all of you here as students and faculty, and several of us on the panel, live a good part of our lives in law schools. It is important that we apply both dimensions of feminist theory—particularly its reconstructive aspect—to these institutions and try to change them.

In the 1970s when I was in law school at New York University (NYU), I was active in NYU Law Women and concerned with issues of gender

⁶ Minow & Spelman, *In Context*, 63 S. Cal. L. Rev. 1597 (1990). Martha Minow and Elizabeth Spelman urge a renewed attention to context as a means of highlighting the "particular particularities associated with legacies of power and oppression." *Id.* at 1601.

⁷ See Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 Notre Dame L. Rev. 886 (1989); Worden, *Overshooting the Target: A Feminist Deconstruction of Legal Education*, 34 Am. U.L. Rev. 1141 (1985); Menkel-Meadow, *supra* note 2; Elkins, *On the Significance of Women in Legal Education*, J. Am. L. Stud. A.F. 290 (1988); Project, *Gender, Legal Education and the Legal Profession: An Empirical Study of Stanford Law Students and Graduates*, *id.* at 1209; Homer & Schwartz, *Admitted But Not Accepted: Outsiders Take an Inside Look at Law School*, 5 Berkeley Women's L.J. 1 (1989-90); Melling & Weiss, *The Legal Education of 20 Women*, 40 Stan. L. Rev. 1299 (1988); Symposium on Gender Bias in Legal Education, *supra* note 2; *infra* notes 12-16.

bias in legal education. In 1971, in my first year of law school, a colleague and I addressed the NYU Law School faculty about problems of gender bias in the classroom, and in 1972, in my second year of law school, the Association of American Law Schools (AALS) had a symposium at NYU to explore problems of gender bias in the law school curriculum. Many years later, after the release of the *Report of the New York Task Force on Women in the Courts*,⁸ I was asked to give a speech to the New York City Bar Association about the implications of the *Report* for legal education.⁹ In the course of preparing for that speech, I went back to the notes of my talk to the NYU Law faculty and found a disturbing similarity between the concerns that had animated my work then as a law student and those that occupy my attention now as a law teacher. We are talking about 1990! Some of the language of the description for the 1972 conference sounded like it was written today! So, even in 1972, while only a few law schools offered courses on women and the law, it was recognized that serious problems of gender bias pervaded the law school curriculum, and that inclusion of women's concerns in the law school community meant more than a few token courses on women and the law.

Now I don't want to criticize these courses. I've been teaching *Women and the Law* since 1974. I love it. It's a critically important course. But it can't do the work needed to correct problems of gender bias in the rest of the law school curriculum. It simply can't do it. More importantly, it shouldn't be doing it. What we study in courses such as *Women and the Law* or *Feminist Legal Theory* needs to be affirmatively integrated into every aspect of the law school curriculum.

Today there is, I'm happy to say, a growing interest in the exploration of these issues of gender bias in the law school curriculum. I know that you've had quite a bit of interest in this area here at Columbia. I know that a colloquium on gender bias was held so that the faculty could discuss student concerns.¹⁰ Similar events have been taking place at other law schools as well.¹¹ It is very exciting. Moreover, there has been a lot of very important work going on and a growing body of literature developing in the areas of criminal law,¹²

⁸ Report of the New York Task Force on Women in the Courts, 15 Fordham Urb. L.J. 11 (1986).

⁹ Schneider, *supra* note 2.

¹⁰ Columbia Gender Bias Task Force Faculty Colloquium (March 29, 1989).

¹¹ See *supra* note 7.

¹² See generally Erickson & Taub, Final Report: Sex Bias in the Teaching of Criminal Law, 42 Rutgers L. Rev. 309 (1990); Coombs, Crime in the Stacks, or A Tale of a Text: A Feminist Response to a Criminal Law Textbook, 38 J. Legal Educ. 117 (1988).

torts,¹³ property,¹⁴ and contracts.¹⁵ It is important for us to explore issues of gender bias throughout the entire curriculum, to identify courses in which women's experiences, concerns, and perspectives have been excluded, and to include the contributions of feminist theory in reconstructing legal education.

I want to give you some examples of how this thinking has influenced my own work and teaching in civil procedure. I think it fair to say that feminist work is just developing in this area.¹⁶ A colleague, Martha Minow, and I have started thinking about how, as feminists, our concern with process has led us to love teaching procedure and to think differently about problems of procedure. As we have discussed it over several years, we, as feminists, have realized that process is something that we value in and of itself. Feminist theory and feminist praxis have long valued "process." Process—the methods by which we talk, decide, organize a meeting, organize organizing—has been viewed as important independent of result. At

¹³ See generally Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. Legal Educ. 3 (1988); Bender, *Feminist (Re)torts: Thoughts on the Liability Crisis, Mass Torts, Power and Responsibilities*, 1990 Duke L.J. 849 (1990); Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 Yale J.L. & Feminism 41 (1989); Joint Program of AALS Sections on Torts and Compensation Systems and Women in Legal Education, *Teaching Torts: A New Perspective* (AALS Annual Meeting January 1987); Tobias, *Gender Issues and the Prosser, Wade and Schwartz Torts Casebook*, 18 Golden Gate U.L. Rev. 495 (1988).

¹⁴ See generally Joint Program of AALS Sections on Real Property and Women in Legal Education, *Losing and Gaining Ground: Feminism and Property* (AALS Annual Meeting January 1990); Radin, *Market-Inalienability*, 100 Harv. L. Rev. 1849 (1987).

¹⁵ See generally Program of AALS Section on Women in Legal Education in Cooperation with the Society of American Law Teachers, *The Influence of Feminist Theory and Gender Bias in Contracts* (AALS Annual Meeting January 1989); Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 Am. U.L. Rev. 1065 (1985).

¹⁶ See generally Schneider, *Rethinking the Teaching of Civil Procedure*, 37 J. Legal Educ. 41 (1987); Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. Cal. L. Rev. 1878 (1988); Resnik, *Housekeeping: The Nature and Allocation of Work in Federal Trial Courts*, 24 Ga. L. Rev. 909 (1990); Farina, *Conceiving Due Process*, 3 Yale J.L. & Feminism 189 (1991); White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 Buffalo L. Rev. 1 (1990). There is growing interest in this topic. In January 1992, a program on Feminism and Civil Procedure will be held at the AALS Annual Meeting, jointly sponsored by the AALS Sections on Women in Legal Education and Civil Procedure.

the same time, we believe that process counts precisely because it profoundly affects result and the way in which people experience both process and result. The very definition of process and what we bring to this definition is shaped by a feminist perspective. We're starting to explore the contributions that feminist theory can make to thinking about process; the ways in which feminist theory both heightens our understanding of the significance of process and at the same time provides a critical perspective on process. Here, I will give some examples of how feminist theory can contribute in fundamental ways to our thinking about procedure.

A central tenet of feminist theory has been an understanding of the dynamic nature of process. The way in which consciousness raising actively involves moving back and forth between personal experience and practice, private and public, is an example of this dynamic process.¹⁷ Feminist theory emphasizes the active dimensions of process, that process is never constant or fixed but always changing. Attention to the dynamic nature of process, and the nature of change in the relationship between process and substance, highlights valuable elements of the civil procedural system.

This view of process has important implications for our thinking about civil procedure. On a macro level, the dynamic nature of our civil procedural system is evident historically. For example, with the development of the Federal Rules of Civil Procedure, civil procedure in the United States has changed dramatically over the last 100 years.¹⁸ These changes continue with ongoing modification of the Federal Rules and statutory revisions.¹⁹ On a micro level, within the context of individual litigation, the fluid and dynamic nature of the procedural system is also apparent. A complaint is filed, it brings on a response, which brings on another response, and so on. In the very process of litigation, issues, strategies, and problems emerge, unfold, and change. The very notion of procedure as a fixed set of rules, a static framework, or even a linear unravelling denies the complexity, richness, and *ad hoc* nature of the procedural system in action. Learning the "rules" or "doctrines" of civil procedure without attention to the textured, chaotic, and dynamic aspects of the process violates the fundamental nature of procedure itself.

¹⁷ See *supra* text accompanying notes 5 & 6.

¹⁸ See generally Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. Pa. L. Rev. 909 (1987).

¹⁹ See, e.g., 1983 amendments to the Federal Rules of Civil Procedure; 1991 amendments to the Federal Rules of Civil Procedure; Judicial Improvements Act of 1990, Pub. L. 101-650, 104 Stat. 5089 (1990).

Feminist theory also values process because it has a transformative potential beyond the results in a given case or moment. In the process of sharing insight, participating in group discussion or in political activity, consciousness and identity can be transformed. This understanding of process as potentially transformative has implications for our thinking about procedure. The process of litigation, of asserting claims in legal form, can be transformative for individuals and for groups. Asserting a claim in court can impart to a group the power to effect change through legitimization, strength in numbers, and a sense of solidarity.²⁰ In the process of litigation, individual claims can be transformed into group claims, both through formal procedural mechanisms such as class action²¹ and party joinder,²² and through more subtle processes of legitimization. Of course, process can also be transformative in a negative sense. The procedural system can also limit efforts for more radical vision or thwart and frustrate activist energy.²³ But feminist theory helps us to understand the potentially transformative dimension of process, and the difference that the type and availability of process have on individual lives and political mobilization.

Feminist theory recognizes that process and result are closely interconnected. There is a deep feminist sense that process and result are linked in important ways; that methods of institutional practice and decision making affect who is silenced and who can speak; that the context in which rules are applied affects their meaning; and that the value of an experience includes the way in which it unfolds and is understood. When we think about what process is due, or consider the various values of process, we must consider who can speak and the way in which procedural rules allow or deny access to courts. Different forms of process take on different meanings, both in fact and symbolically, to individuals and to the society at large. The way in which process is experienced and understood becomes part of the individual and social meaning of that process.

Feminist theory focuses on the process of unearthing hidden voices and identifying rules and practices that have had the effect of silencing the views of those with less power. Procedural rules provide vehicles to bring those voices to the surface and remedy those practices. For example, the constitutional commitment to a right to be heard rests on the fundamental

²⁰ See, e.g., my discussion of this process in the women's rights movement in Schneider, *supra* note 5.

²¹ Fed. R. Civ. P. 23.

²² Fed. R. Civ. P. 19, 20, and 22.

²³ See Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 Wis. L. Rev. 29.

notion of providing access for those voices that are not likely to be heard. Feminist theory underscores the importance of access and the need for a critique of procedural rules that impose obstacles to participation, for example, bonds and costs, denial of access to counsel, or those that chill vigorous advocacy or deter unfamiliar arguments, such as Rule 11.²⁴ The valuing of process in feminist theory also provides a critique of rules that measure due process by some kind of economic calculus of the values at stake.²⁵

Another contribution of feminist theory to our thinking about civil procedure is the interrelationship between individual and group interests. The very process of consciousness raising discussed earlier involves a dynamic process of individual discovery and sharing of collective experience, and collective discovery and sharing of individual experiences, in ways that then allow individuals to experience commonality and to imagine their own strengths and identity in a different way. In the formal civil procedural system, we see these concerns reflected in rules on party joinder and class action that address the question of the interrelationship between individual and group interests and define the parameters of when individual claims or group claims are appropriate. A common insight from feminist discussions is the realization that what each of us thought was our own insight really is widely shared and reflects larger social structures, and that there is a close interrelationship between private and public. Similarly, the formal procedural system frequently transforms individual disputes into group claims and gives private disputes a more public, shared experience and meaning.

Another example of feminist focus on process is the experience of self-reflection and self-criticism implicit in the dynamic nature of the consciousness-raising process. In the dialectic of consciousness turning in on itself, we see a capacity for reflection, for reconsideration. Feminist "process" has also developed a practice whereby feminist groups discuss the methods by which to conduct a meeting, then review the experiences people have with the meeting or a particular discussion in order to validate those experiences and foster self-criticism and reform. Similarly, in the

²⁴ Fed. R. Civ. P. 11 provides for sanctions for attorneys and parties who submit pleadings, motions or other papers in court that are not "well grounded in fact," "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law" or are interposed for an "improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."

²⁵ For provocative reinterpretations of procedural due process from feminist perspectives, see generally Farina, *supra* note 16; White, *supra* note 16.

civil procedural system, we see the theme of reconsideration in judgments *n.o.v.*, motions for new trial, and appellate review. The need for opportunities to construct more particularized forms of process is also addressed in procedures such as pre-trial conferences and summary jury trial.

There is, however, an obvious tension between the desire to maximize opportunities for reconsideration and the need for finality and closure. One of the criticisms of feminist methodology and activist practice in the 1960s and 1970s was that there was too great an emphasis on process, and a failure to acknowledge the importance of both final decision making and different tiers of decision-making authority. This tension is also present in our procedural system. For instance, the concept of appellate review is based on fundamental notions of the importance of adjudication by different tiers of decision makers, but there is a limit to the amount of review available. Similarly, preclusion cuts off the possibility of reconsideration of issues or claims that have been previously decided. The doctrines of finality and preclusion balance the value of continued process, of reconsideration and reflection, with the need for closure. Feminist theory emphasizes the value of openness but also recognizes the appropriateness of legal boundaries, the notion that at some point there must be an end. Feminist theory illuminates the way in which these concerns can be reasonably balanced.

In the past few minutes, I have focused mainly on the ways in which a feminist approach to process can help us to understand our civil procedural system. But I do not want to simply celebrate the "process" connection between feminist theory and civil procedure. There are important differences between feminist conceptions of process and those dominant in the civil justice system. If, as mentioned earlier, feminist theory provides the basis for a self-consciously critical stance toward law, then it is important not to lose the critical focus of feminist work. The "process" enabled by the civil procedural system is lacking in many important ways. Feminist interest in process provides some analytic tools for identifying those shortcomings.

Feminist theory exposes the norms and values of different models of procedural systems. For example, the traditional image of litigation and of the adversary system as "battle" is inappropriate in feminist theory. Feminist theory doesn't talk about battle. Some feminist theories have emphasized the alternative of dialogue and connection, and posited these values as traditionally female.²⁶ But the dichotomies of warfare versus

²⁶ See, e.g., C. Gilligan, *In a Different Voice* (1982). Carol Gilligan's work has been interpreted, possibly misinterpreted, to support this view.

connection are oversimplified.²⁷ Although the adversarial model of procedure is somewhat alien to the conception of feminist process which I've been discussing, recent feminist work has emphasized the danger of suppressing difference and disputes within feminism and has called for attention to conflicting points of view, competition, and other aspects of potential contention.²⁸

There are considerable dangers in positing the formal procedural system as male, as some scholars do, in contrast with, for example, alternative dispute resolution as "female."²⁹ Indeed, sensitivity to issues of power and the problematic dichotomy of public versus private within feminist theory underscores the dangers of this approach. Although in theory alternative dispute resolution can be viewed as a form of more unstructured and potentially dialogic process, this kind of informal process can disadvantage women. Since women are in unequal power relations to begin with, the problems that women face in using alternative dispute resolution mechanisms in battering, divorce, or custody situations are considerable.³⁰ However, feminist theory can sensitize us to the need for attention to power relations and some combination of dialogue and vigorous advocacy, if not exactly battle, in the litigation context.

A further difference may arise concerning the balance struck between efficiency and fairness, and between the need for closure and the need for reevaluation and revision. Preclusion rules, summary judgment, and dismissal, and, for that matter, *ex parte* orders, reflect lines drawn by the procedural system on these matters. Feminists may at times prefer more process and reevaluation than the civil rules typically provide—but sometimes feminists may prefer closure or may evaluate the costs and benefits of process differently.

²⁷ For example, some feminist theorists have expressed concern that Gilligan's articulation of connection as woman's mode of expression (see Gilligan, *supra* note 26) is too dichotomized. See, e.g., Schneider, *supra* note 5, at 616–17 n.140; Williams, *Deconstructing Gender*, 87 Mich. L. Rev. 797 (1989).

²⁸ See generally M. Hirsch & E. Fox Keller, *Conflicts in Feminism* (1990); Taub, *Thoughts on Living and Moving with the Recurring Divide*, 24 Ga. L. Rev. 965 (1990).

²⁹ See generally Note, *Alternative Dispute Resolution in a Feminist Voice*, 5 Ohio J. on Dispute Resolution 337 (1990); Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 Berkeley Women's L.J. 39, 52–53 (1985).

³⁰ Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 Yale L.J. 1545 (1991); Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 Harv. Women's L.J. 57 (1984); Holmes-Norton, *Bargaining and the Ethic of Process*, 64 N.Y.U. L. Rev. 493, 568–74 (1989).

In sum, a feminist embrace of process does not mean acceptance of existing procedural rules and their pattern of application. Feminist legal theory can help us question process by providing a different vision of civil procedure. Feminist concerns can help us to identify important areas of reform and challenge to prevailing procedural rules.

These are some preliminary thoughts on the way that feminist theory can inform our thinking of civil procedure. I will be very interested in hearing your reactions.

Lucinda Finley

It is crucially important for dealing with gender issues in legal education to look at what I call "curricular integration." This involves bringing issues of relevance to women's lives and the perspective of gender analysis into the entire legal curriculum, rather than keeping it in the marginalized territory of women and the law or gender and the law courses. The reason that curricular integration is so important is that so long as gender issues are confined to courses like Gender and the Law or Women and the Law, the message being conveyed is that these issues are not core concerns of the law and are not present throughout every area of the law. Neither of these assumptions is true.

One of the privileges of being part of the dominant group in society is that the members of that group are able to think that a characteristic, such as race or gender, only describes or pertains to others, not to them. For example, how many white people really think that they, too, have a race, or think that race issues are about whiteness just as much as they are about blackness? How many people whose sexual orientation follows the so-called "straight" path really think that issues of "sexuality" have anything to do with them? They probably think that those issues just have meaning to people who are not "straight."

Well, the same problem of the dominant group's blindness to its own characteristics occurs with gender. This can be illustrated by examining the enrollment in gender and the law courses. Every once in a while, when I'm teaching women and the law or gender and the law courses, I wonder about why the class is predominantly women. Indeed, I am perplexed why this audience today is predominantly women. So occasionally I ask male students, "Why are there only one or two men in the Gender and the Law course?" And frequently the response goes something like this: "Well, gee, that course is about gender. It's got nothing to do with me." I respond

But see Rifkin, *Mediation from a Feminist Perspective: Promise and Problems*, 2 *Law & Inequality* 21 (1984).

by saying, "Oh, then you don't have a gender?" The male students look startled and say, "Oh, well I never really had to think about it." That, precisely, is the point—if the male gender is considered the "genderless norm," few men ever think about how their gender affects their lives.

Sometimes a man's response goes like this: "Oh, well that course is about women's issues. Women's issues have nothing to do with me and they don't have anything to do with any of the areas of law I'm interested in." I usually just scratch my head to this response and get depressed by the fact that some people aren't interested in the areas of law that most closely touch our own lives. But I wish I had thought on the spot to say: "Oh, women's issues have nothing to do with you. Then what is it that you think that women's issues are?" To which the man would probably say, "Oh, well, you know, stuff like pregnancy and rape and domestic violence and all, you know, that kind of stuff." I would then say, "If you can show me that pregnancy or rape or domestic violence doesn't almost always involve men too, then you will have finally convinced me that women's issues have nothing to do with men and are indeed only women's problems." These issues certainly affect men and women differently, but the pervasive assumption that they are only matters of concern to women is one of the barriers to making progress in addressing them.

Until we start integrating a gender perspective into legal education, and into legal thinking, argumentation, practice, and, ideally, into legal decision making, the powered members of society will continue to have the luxury of thinking that gender issues have nothing to do with them. They will continue to think that they are not participants in or architects of society's gendered structures. They will also continue to believe that a course like Tort Law does not or should not include women's torts or gendered torts.

One way to begin disrupting these beliefs and integrating a gender perspective into legal analysis is to "ask the woman question."³¹ To "ask the woman question" means to look at an area of the law and ask, "If we consider the experiences, needs, and perspectives of women, what supposedly neutral or objective aspects of that area of the law are actually nonneutral and nonobjective because they wholly fail to consider, or render invisible, the experiences and perspectives of women?" I will give some practical examples of what happens when I "ask the woman question" of tort law. Once I started looking at tort law from that perspective, tort law started looking very different to me.³²

³¹ Bartlett, *supra* note 3, at 837 n.23.

³² I have written an article about this subject, which has served as a springboard for my later work. Some of the ideas presented in this talk are elaborated on

One of the obvious areas of tort law to examine is the venerable reasonable person rule.³³ At one time, it was called the reasonable *man* rule. Then, when sensitivity to gendered pronouns crept into law, the reasonable man got linguistically transformed into the reasonable person. We thought that the gender problem was gone, right? Wrong. The linguistic transformation did not cure the underlying image. What is it that judges see when they close their eyes and imagine the reasonable person? What does he look like to them? He looks like a he. His life experiences look a lot like his, the judge's, experiences and his reactions. And what, therefore, is reasonable to do under the circumstances looks a lot like paradigmatic male experiences and reactions.

Rabidue v. Osceola Refining Co.,³⁴ a sexual harassment case in the Sixth Circuit involving the standard for finding an offensive work environment, is one of the more egregious and obvious examples. Although brought under Title VII,³⁵ the court used a tort standard: would the reasonable person find this work environment offensive.³⁶ In this case, one of the first woman supervisors at this company was subjected to a workplace where her male co-workers addressed her with four-letter terms, such as the "c" word. Whenever she complained about this, the male supervisor told her what she really needed was a good "f _ _ _." This was the sort of daily conversation to which she was subjected. The male workers littered the walls, particularly the area around her desk, with sexually graphic—often violently so—posters. After a while, the woman began to go quite crazy in this environment. She brought an offensive environment sexual harassment case.

in the article. See Finley, A Break in the Silence: Including Women's Issues in a Torts Course, 1 Yale J.L. & Feminism 41 (1989).

³³ D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on Torts 173 (5th ed. 1984).

³⁴ 805 F.2d 611 (6th Cir. 1986) (Keith, J. concurring in part, dissenting in part), cert. denied, 481 U.S. 1041 (1987). See also Carin Clauss' discussion of *Rabidue*, *infra* note 72 and accompanying text.

³⁵ Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2000e-17 (as amended in 1972).

³⁶ *Rabidue*, 805 F.2d at 620. The court adopted the district court's analysis for determining standards for sexual harassment under Title VII. The district court noted the lack of statutory language concerning sexual harassment and looked to the Equal Employment Opportunity Commission (EEOC) guidelines on sexual harassment. These guidelines define sexual harassment as conduct which "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." EEOC Guidelines, 29 C.F.R. § 1604.11(a)(3). The district court viewed the term "unreasonably" as inviting judicial analysis. It therefore adopted the objective, reasonable person standard to direct its determination of a hostile work environment

Rabidue was one of the first cases after the Supreme Court decision in *Meritor Savings Bank v. Vinson*³⁷ to go to a court of appeals. The Sixth Circuit majority, both white and male, said, in effect, that since pornography is widely available and widely consumed in society, and you can buy it at any newsstand or go into all sorts of corner theaters, and everybody uses bad words, how can we possibly say a person would reasonably find violent or pornographic posters of women offensive? Therefore, Sharon Rabidue, in finding them offensive, is not a reasonable person.³⁸

The only dissenter was a black man, Judge Damon Keith. I believe his race is significant, because he was much better positioned to be sensitive to different realities than the two white male judges of the majority. He said, basically, that we have to ask ourselves just who are these "reasonable people" who go out and eagerly consume pornography? There aren't too many women among these reasonable people. This suggests that the reasonable person standard used by the majority is a biased standard.³⁹

That case illustrates the obvious problem with a supposedly neutral rule like the reasonable person. Actually, the content of the rule is being drawn from the life experience of one rather small segment of society. Then, if women react differently due to different life experiences, they are excluded from the bounds of reasonable people by the supposedly objective legal standard. This example shows how using feminist jurisprudence, which tries to be inclusive of the full diversity of human life, enables us to take a new look at the content and impact of our legal standards. Once you start asking "the woman question" you start moving beyond merely what I call the integrative approach, and start examining to what extent the entire structure and values of our legal system are themselves

under Title VII. *Rabidue v. Osceola Refining Co.*, 584 F. Supp. 419, 430 (E.D. Mich. 1984).

³⁷ 477 U.S. 57 (1986) (holding that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment). In this case, the Court rejected the view that the language of Title VII in sexual harassment cases is limited to "economic" or "tangible" discrimination. See also Carin Clauss' discussion of workplace harassment, *infra* notes 58 & 59 and accompanying text.

³⁸ *Rabidue*, 805 F.2d at 622.

³⁹ *Id.* at 626-27. See also *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991) (adopting a "reasonable woman" standard for evaluating whether a work environment is abusive, because a "sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women").

gendered.⁴⁰ As an example of this level of inquiry, in my current research I am concentrating primarily on the concept of injury in tort law. I am asking questions about the kinds of things that get recognized and do not get recognized as injuries in tort law and the ways in which we evaluate injuries.

Several years ago someone posed to me the challenge: "You're a feminist and you also teach torts, so how do you teach torts differently?" In response to this challenge, I decided to examine gender issues in tort law. I decided that the area of reproductive harm would be a logical and ripe area for such an investigation. Initially, I tried to start doing it at the usual analytical, doctrinal, and legal research level. But I got stuck, and I then realized that what I was really looking for was not what was in the legal opinions, but rather the thing that never was in the opinions—the real-lived experiences of the people who suffered the harm and how they experienced the way they were injured. What I was interested in exploring just did not fit with the traditional legal categories, and therefore dropped out of the doctrinal picture.

So I decided that rather than research out of books, I was going to have to do legal research with people. Consider this an example of feminist methodology in operation. I embarked on what is now a book project on the experiences of women who have suffered reproductive harm from the drug DES and also from the Dalkon Shield.⁴¹ I have primarily concentrated on DES, although I know there are some of you in the audience who are more affected by the Dalkon Shield.

⁴⁰ I have developed these ideas in Finley, *supra* note 7.

⁴¹ DES litigation arose from the use by pregnant women of the synthetic estrogen drug diethylstilbestrol (DES) from the late 1940s through the early 1970s. Doctors prescribed the drug to prevent miscarriages, although it proved ineffective. It has been established that DES causes a rare form of cervical and vaginal cancer, as well as reproductive organ malformations and fertility problems, among the daughters of the women who ingested the drug while pregnant. There is also growing concern about similar problems among the sons born to these women. See *Sindell v. Abbott Laboratories*, 26 Cal.3d 588, 607 P.2d 924, 163 Cal.Rptr. 132, cert. denied, 449 U.S. 912 (1980); D. Dutton, *Worse Than the Disease: Pitfalls of Medical Progress* 31-90 (1988).

The Dalkon Shield litigation arose from the use by women of the intrauterine contraceptive device (IUD) known by that name. The shape of the Dalkon Shield and the composition of its tail string made it highly conducive to bacteria, and it also posed a high risk of uterine perforations. Hysterectomies and infertility often resulted. See R. Bacigal, *The Limits of Litigation: The Dalkon Shield Controversy* (1990).

I have been going around the country for the last year or so interviewing DES victims. I speak with them about their experiences and about the ways in which they feel injured. For those who have sued, I ask about their motivations for suing, what they expected, what their expectations were from the legal system, and how they feel the legal system has been able to deal with their needs. I think about what I have been hearing from these women, and I then apply feminist theory to my findings. This process has enabled me to come up with some insights about the concept of injury in tort law and the way the tort system evaluates damages.

The concept of injury and the way of evaluating injury in tort law are what I call "market-referenced." The primary focus of tort law is on things that keep people out of market activity, ways of earning income, and income-producing activities. That perceived split between the public world which encompasses market-related activities and the private world which includes domestic activities structures a lot of our life and thinking. Women's reproductive capacity is not a market-oriented activity. It is not highly valued in a market-referenced system. Infertility does not keep you out of work. So you are not going to have a big lost income item of damages in a tort suit. It also means your case is not going to be worth much for a lawyer to bring. If a lawyer does bring it, it is not going to be worth much in a jury's evaluation of damages.

An example of the devaluation of women's reproductive capacity is that, so far in the DES area, very few cases where the injury is infertility, as distinguished from cancer, have even gone successfully to a jury verdict.⁴² One "bellwether"⁴³ case was brought by a woman who had three ectopic pregnancies caused by her DES exposure. In the process, she lost both of her fallopian tubes, and she went through years of expensive infertility treatment. Finally, she and her husband adopted a child. After six or seven years of litigation, a jury awarded her \$50,000. Then, of course, the defendants won a retrial on appeal, and her lawyer would not retry the case, because it was not worth enough to retry it. She settled for \$45,000. As she put it, she did not even have enough to buy a new car afterwards.

She spoke eloquently to me about her experience with the tort system. She said that the message that she got from society was that the most important thing about being a woman was her reproductive capacity, and

⁴² My information is based on interviews I conducted with DES plaintiffs and attorneys. Several infertility cases have been settled, but the amounts of settlements cannot usually be divulged.

⁴³ Lawyers use jury verdicts such as the one in the case described in the text as "bellwether" for gauging the likely value of other cases.

that what women are really valued for is their reproductive, nurturing role. And then, as she put it, when she had the opportunity to make the legal system "put society's money where its mouth was," they told her that all of that was really worth only \$50,000. Why? Because she did not have any lost income. She had a little bit of time out of work when she had to have surgery, but she did not have the major kinds of damage items that tort law considers really important. She did not lose marketplace time, even though her entire reproductive capacity had been taken from her.

This woman's experience is an example of how women's experiences have not been factored into the basic structure of the tort system. The seemingly neutral choice to categorize types of injury and types of harm, when referenced toward male experiences, is going to leave out or barely acknowledge very significant kinds of women's injuries. Another example can be seen in the emotional distress area. Tort law is hesitant to compensate emotional distress,⁴⁴ unless it is accompanied by physical injury. Somehow physical harm is seen as more real. This works in combination with the medical profession's tendency to diagnose women's complaints of physical harms as psychological in origin. So, rather than getting treated for a back injury, a woman may get valium and the advice to consult a psychiatrist.⁴⁵ In other words, even when women do suffer physical harm, it may be seen as only emotional. Infertility, for example, is a physical problem, but its impact is often dismissed as emotional. The injury of infertility is likely to be comprehended by tort damages categories as "pain and suffering" or as "emotional distress." Thus, through the congruence of the medical system, the tort system, and gender bias, another aspect of women's injuries often goes unaddressed in tort law. Moreover, tort reform statutes, which often put a cap on the amount of noneconomic damages like pain and suffering that a plaintiff can recover, and thus tend to further privilege economic damages, can subsequently intensify these

⁴⁴ D. Dobbs, R. Keeton & D. Owen, *supra* note 33, at 54-55. See, e.g., *Payton v. Abbott Labs*, 386 Mass. 540, 437 N.E.2d 171 (1982) (claims of DES-exposed plaintiffs dismissed because the injuries were classified as trivial emotional harm and therefore not compensable unless causally related to physical harm).

⁴⁵ For discussions of how the medical profession responds to women patients, see B. Ehrenreich & D. English, *Complaints and Disorders: The Sexual Politics of Sickness* (1973); B. Ehrenreich & D. English, *For Her Own Good: 150 Years of the Experts' Advice to Women* (1978); S. Fisher, *In the Patients' Best Interest: Women and the Politics of Medical Decisions* (1986). For discussion of the social and medical construction of pain, see M. Pernick, *A Calculus of Suffering: Pain, Professionalism, and Anesthesia in Nineteenth Century America* (1985).

market-referenced gender bias effects in the tort system.⁴⁶ Those who earn the least, or are "worth" the least, in the marketplace—women and children—most need the damages for nonpecuniary harm to redress adequately their injuries.

In this short synopsis of the kinds of work I am now doing to examine gender and tort law, I hope that it is evident how the theory informed the practice, and the practice then informed the theory, and the theory drew from the insights of the real people affected by the tort system. The lived experience can also be used to make different kinds of arguments in cases. In legal education, consideration of gender is necessary to educate future lawyers better about the need to be aware of the potential gender-biased effects of seemingly neutral rules. With such an awareness, lawyers can more effectively represent the whole diversity of their clientele—women as well as men. It also allows them to argue more effectively before legislatures that, for example, tort damage reform statutes exacerbate the devaluation of women's injuries. Asking "the woman question" often means asking—and seeing—what no one has dared to mention before.

Carln Clauss

My area of practice, teaching, and research has been employment law, with an emphasis in recent years on sex discrimination. One of the challenges and frustrations of work in this area has been the failure of our legal system to fashion a definition of nondiscrimination that effectively addresses workplace inequities and burdens affecting women. When Title VII of the Civil Rights Act was enacted in 1964, neither the courts nor the

⁴⁶ In 1989, the Coalition for Consumer Justice, in Washington, D.C., evaluated the effect of limitations on noneconomic damages and concluded that such limitations have a particularly harmful impact on women and children because their losses may not be easily validated by their economic worth. Caps on noneconomic damages prevent such victims from receiving full compensation for injury. See also N. Armatas, *An Empirical Study of Gender Bias in the Awarding of Civil Damages* (Harv. Law School 1989) (unpublished manuscript on file with the author) (concluding that male jurors value a case differently depending on the plaintiff's gender, i.e., male jurors gave statistically significant higher awards for diminished earning capacity to male plaintiffs in a controlled experiment in which juries evaluated cases factually identical except for the gender of the plaintiff); Nagel & Weitzman, *Women as Litigants*, 23 *Hastings L.J.* 171, 183 (1971) (finding that adult female plaintiffs receive medical expenses and lost wages awards 2% below national average for similar injuries, while adult male plaintiffs receive awards 6% above national average).

Equal Employment Opportunity Commission (EEOC), the federal agency having the primary responsibility for administering Title VII, were prepared for the large volume of sex discrimination complaints.⁴⁷ These complaints were initially met with ridicule⁴⁸ and disinterest, if not outright hostility.⁴⁹ They were also met with little understanding of what constituted sex discrimination. In part, this was because none of the legislative hearings on the various civil rights bills had addressed the issue, since sex discrimination was not included in the proposed legislation.⁵⁰ It was added to the Civil Rights Bill only during the last few days of debate in the House⁵¹—in what

⁴⁷ In the first year of the EEOC's operation, 37% of all individual complaints contained a charge of sex discrimination. EEOC, First Annual Report 6 (1966). Since then such complaints have consistently averaged 25% of the total. See H. Graham, *The Civil Rights Era* 228 & n.90 (1990).

⁴⁸ In his book, *The Civil Rights Era*, which examines federal civil rights enforcement from 1960 to 1972, Hugh Davis Graham cites a number of examples illustrating the tone of ridicule used in discussing the Act's prohibition of sex-based employment discrimination. For example, when the first chair of the EEOC, Franklin Roosevelt, was asked about sex at a news conference marking Title VII's effective date, on July 2, 1965, he replied, "I'm all for it." H. Graham, *supra* note 47, at 211. Shortly thereafter, the EEOC's executive director, Herman Edelsberg, informed the press that, "There are people [at the EEOC] who think that no man should be required to have a male secretary—and I am one of them." *Id.* at 217. Mr. Edelsberg outraged the women's community again when in 1966 he commented at New York University's Annual Conference on Labor that the sex provision in Title VII was a "fluke" that was "conceived out of wedlock." *Id.* at 223. For a response to this remark, see Margolin, *Equal Pay and Equal Employment Opportunities for Women*, in *Proceedings of New York University Nineteenth Annual Conference on Labor* 297, 306 (T. Christensen ed. 1967). The newspapers had a heyday with a wide variety of sex jokes. H. Graham, *supra* note 47, at 211.

⁴⁹ The program budget officer at the Bureau of the Budget, in reviewing the EEOC's request for fiscal 1968, recommended that the EEOC reduce its complaint backlog by devoting "less time . . . to sex cases since . . . they deserve a lower priority than discrimination because of race or other factors." H. Graham, *supra* note 47, at 203–04. The Department of Justice did not even consider sex discrimination charges in selecting targets for enforcement action until after 1972, and it included sex discrimination counts in only two of the 76 suits filed between 1966 and 1972. U.S. Comm'n on Civil Rights, *The Federal Civil Rights Enforcement Effort—1977*, at 267–74 (1977).

⁵⁰ H. Graham, *supra* note 47, at 39–40, 97, 134–39. Only three states—Hawaii, New York, and Wisconsin—had amended their Fair Employment Practice Acts by 1964 to include a prohibition against sex-based employment discrimination. Bureau of Nat'l Affairs, *The Civil Rights Act of 1964*, at 59 (1964).

⁵¹ A summary of the legislative history relating to the addition of the word "sex" to Title VII is set forth in the Supreme Court's decision in *County of Washington v. Gunther*, 452 U.S. 161, 171–76 (1981).

some say was an unsuccessful attempt to defeat the bill.⁵² The lack of understanding about sex discrimination was further compounded by the fact that few federal judges had any experience with sex discrimination. At the time of the bill's enactment, only three women had ever served on the federal judiciary.⁵³ Moreover, there was very little existing scholarly work addressing the issues of sex discrimination in the workplace.⁵⁴

As a result of all this, both the courts and the agencies struggled with the concept of sex discrimination. The courts, for example, found no discrimination in policies that excluded married women but not married men from flight attendant positions,⁵⁵ or that excluded from employment women with preschool age children, but not men with preschool age children,⁵⁶ or that distinguished between non-pregnant workers and pregnant workers.⁵⁷ Typically, sexual harassment complaints were dismissed on the ground that they were insufficiently related to the workplace, involving only individual "personal urge[s]"⁵⁸ and "inharmonious... relationship[s]."⁵⁹

⁵² See, e.g., Miller, *Sex Discrimination and Title VII of the Civil Rights Act of 1964*, 51 Minn. L. Rev. 877, 880-82 (1967). But see Berger, *Equal Pay, Equal Employment Opportunity and Equal Enforcement of the Law for Women*, 5 Val. U.L. Rev. 326, 333-37 (1971); H. Graham, *supra* note 47, at 97, 134-39.

⁵³ They were Judge Florence Allen, U.S. Court of Appeals for the Sixth Circuit; Judge Burnita Matthews, U.S. District Court for the District of Columbia; and Judge Sarah Hughes, U.S. District Court for the Northern District of Texas.

⁵⁴ One of the few early law review articles on sex discrimination in employment was Murray & Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 Geo. Wash. L. Rev. 232 (1965).

⁵⁵ This view, expressed in a dissenting opinion by Judge (now Justice) Stevens, was rejected by the court's majority in *Sprogis v. United Air Lines*, 444 F.2d 1194 (7th Cir. 1971), cert. denied, 404 U.S. 991 (1971).

⁵⁶ The Fifth Circuit's holding to this effect was rejected by the Supreme Court. *Phillips v. Martin Marietta Corp.*, 411 F.2d 1, 3-4 (1969), reh'g denied, 416 F.2d 1257 (5th Cir. 1969), vacated and remanded, 400 U.S. 542 (1971).

⁵⁷ *General Electric v. Gilbert*, 429 U.S. 125 (1976), reh'g denied, 429 U.S. 1079 (1977). Congress overturned the Court's premise in *Gilbert* when it enacted the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k), making it clear that discriminatory classifications based on gender-related biological characteristics such as pregnancy constitute sex discrimination for all Title VII purposes. See also *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983).

⁵⁸ *Corne v. Bausch & Lomb*, 390 F. Supp. 161, 163 (D. Ariz. 1975), vacated and remanded, 562 F.2d 55 (9th Cir. 1977).

⁵⁹ *Barnes v. Train*, 13 Fair Empl. Prac. Cas. (BNA) 123, 124 (D.D.C. 1974), rev'd sub nom. *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977). The first case to hold that sexual harassment was treatment prohibited by Title VII was *Williams v. Saxbe*,

In the same spirit, the EEOC refused to prohibit classified advertisements segregated by sex, as it had those by race, noting that culture and mores, personal inclinations, and physical limitations operate to make many job categories primarily of interest to one sex or the other.⁶⁰ Neither the EEOC nor the Department of Labor were prepared to rule that the so-called state protective laws, barring women from specific occupations as well as from any job requiring night work, heavy lifting, or constant standing, had been preempted by Title VII or that such standards could not qualify as a bona fide occupational qualification.⁶¹ The EEOC also would not accept any sex-based wage discrimination claims unless they met the standards of "equal pay for equal work" set forth in the Equal Pay Act.⁶² The Department of Labor could not decide whether it was sex discrimination to pay lower monthly pension benefits to women than to men despite the fact that women had made equal contributions to the pension plan.⁶³ Meanwhile, several agencies complained about the already burdensome volume of sex discrimination charges. The Department of Justice which,

413 F. Supp. 654 (D.D.C. 1976), rev'd in part on other grounds, vacated in part, sub nom. *Williams v. Bell*, 587 F.2d 1240 (D.C. Cir. 1978). The Supreme Court has since confirmed that workplace harassment is prohibited by Title VII. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986); Lucinda Finley's discussion of workplace harassment, *supra* notes 34-39 and accompanying text.

⁶⁰ EEOC Guidelines on Discrimination Because of Sex, 30 Fed. Reg. 14926 (1965). The problem of sex-segregated classified ads is discussed in H. Graham, *supra* note 47, at 214-21. A change in the EEOC's position, banning sex-segregated advertising except where there was a bona fide occupational qualification, 33 Fed. Reg. 11539, was announced on August 14, 1968, but did not become effective until January 24, 1969, because of an intervening court suit. *Fuentes, Federal Remedial Sanctions: Focus on Title VII*, 5 Val. U.L. Rev. 374, 386-88 & n.70 (1971).

⁶¹ H. Graham, *supra* note 47, at 213-14. The EEOC changed its policy in August 1969, "finding that state laws that restrict the employment of women are superseded by Title VII." *Fuentes, supra* note 60, at 384-85. The courts agreed. See, e.g., *General Elec. v. Hughes*, 454 F.2d 730 (6th Cir. 1972); *Rosenfeld v. S. Pac. Co.*, 444 F.2d 1219 (9th Cir. 1971); *LeBlanc v. S. Bell Tel. & Tel.*, 333 F. Supp. 602 (E.D. La. 1971), *aff'd*, 460 F.2d 1228 (5th Cir. 1972), *cert. denied*, 409 U.S. 990 (1972).

⁶² 29 U.S.C. § 206(d). This restriction was subsequently deleted from the Guidelines in 1972. EEOC Guidelines on Discrimination Because of Sex, 37 Fed. Reg. 6835, 6837 (1972) (currently codified at 29 C.F.R. § 1604).

⁶³ U.S. Comm'n on Civil Rights, *supra* note 49, at 158-60, 318-19. The Supreme Court ruled that such practices were discriminatory in *Los Angeles Dep't of Water and Power v. Manhart*, 435 U.S. 702 (1978). See also *Arizona Governing Comm. v. Norris*, 463 U.S. 1073 (1983) (applying the *Manhart* principle to invalidate an Arizona pension system that called for equal contributions, but paid lower pensions to women).

until March 1972, was the only federal agency authorized to bring enforcement suits under Title VII, virtually ignored sex discrimination for the first seven years following the law's enactment.⁶⁴

While these early administrative actions were subsequently reversed,⁶⁵ and while the more egregious misconstructions of the Act were corrected by the Supreme Court in *Phillips v. Martin Marietta Corp.*,⁶⁶ and *Los Angeles Department of Water & Power v. Manhart*,⁶⁷ and by Congress in the Pregnancy Discrimination Act of 1978,⁶⁸ the search for a comprehensive concept of sex discrimination that will meaningfully address the barriers to employment confronting women in the workplace continues to this day. Moreover, the search raises questions about policies that exclude fertile women from the workplace because of potential harm to a future fetus,⁶⁹ that close off nontraditional employment opportunities,⁷⁰ that deny reasonable leave for women who bear and care for their children,⁷¹ and that measure the legality of workplace pornography by the effect it would have on a "reasonable person"—as opposed to a "reasonable woman"—"when considered in the context of a society that condones and publicly features and commercially exploits open displays of written and pictorial erotica"⁷²

⁶⁴ See U.S. Comm'n on Civil Rights, *supra* note 49, at 274.

⁶⁵ See generally Fuentes, *supra* note 60; EEOC Guidelines on Discrimination Because of Sex, *supra* note 62.

⁶⁶ 400 U.S. 542 (1971).

⁶⁷ 435 U.S. 702 (1978).

⁶⁸ 42 U.S.C. § 2000e(k).

⁶⁹ Several circuit courts refused to invalidate such policies. *International Union, UAW v. Johnson Controls, Inc.*, 886 F.2d 871 (7th Cir. 1989) (en banc); *Wright v. Olin Corp.*, 697 F.2d 1172 (4th Cir. 1982); *Hayes v. Shelby Memorial Hospital*, 726 F.2d 1543 (11th Cir. 1984). However, these decisions all have been mooted by the Supreme Court's recent decision in *International Union, UAW v. Johnson Controls*, 111 S.Ct. 1196 (1991) (holding that fetal protection policies can never be legal under Title VII of the Civil Rights Act).

⁷⁰ *EEOC v. Sears, Roebuck & Co.*, 628 F. Supp. 1264 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988).

⁷¹ But state laws mandating such protection were upheld in *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987) (upholding a California law extending rights to employees disabled by pregnancy, even if those rights are not given to employees disabled by other medical conditions, because it furthers Title VII's purpose of achieving employment opportunities for women who are pregnant).

⁷² *Rabidue*, 805 F.2d at 627. See Lucinda Finley's discussion of the "reasonable person" standard and *Rabidue*, *supra* notes 34-40 and accompanying text. See also *Highlander v. K.F.C. Nat'l Management Co.*, 805 F.2d 644 (6th Cir. 1986). But some courts have now rejected the Sixth Circuit's "reasonable person" standard and

It is in this context that we need to view and understand the contribution of feminist scholarship since the late 1960s. The earlier absence of women's voices—and of women's experiences in the workplace—was reflected in the initial and continuing failure of the courts and the enforcement agencies to address the more fundamental barriers to equal employment opportunities for women. Thus, an important function of women in academia is not merely to provide role models for students, but to perform research, to write, and to think critically about women's issues. And when I say research, I do not only mean doctrinal work that provides the theoretical basis and, sometimes, breakthrough, for analyzing workplace barriers and inequities, but also empirical research that describes the reality of women in the workplace.

It seems so simple to start with the reality of sex discrimination, like the reality of race discrimination, and from there to develop legal theories for remedying that discrimination. But just defining the reality of sex discrimination—e.g., are female-dominated jobs really paid less because performed by women? or will women actually accept traditional male jobs if offered the opportunity?—is something that seems to have escaped many male scholars. One academic expert told the U.S. Commission on Civil Rights in 1984 that he had “not yet seen a persuasive demonstration that wage rates based on private bargaining and free competition are, in fact ‘unfair’ to women.”⁷³ And in a *Wall Street Journal* report, published a few days before Title VII went into effect, a telephone company official dismissed as “fantasy” the notion that women would want to become linemen.⁷⁴

The reality for these two men—who doubted the existence of pay discrimination or the interest of women in better paying jobs—was not my reality. My reality was that when I was about to graduate from Columbia Law School, I and the other female students were advised by the placement office to ask for \$400 less than the then going rate for male graduates in the Wall Street firms. My reality was that when I graduated from Vassar College, the only major recruiting for women was for librarians and teachers. Vassar graduates in 1960 were never offered the chance to con-

have adopted a “reasonable woman” standard. See, e.g., *State v. Wanrow*, 88 Wash. 2d 221, 239–41, 559 P.2d 548, 558–59 (1977) (en banc) (superseded by statute as stated in *State v. Bonilla*, 23 Wash. App. 869 (1979)); *Ellison v. Brady*, 924 F.2d 872 (1991).

⁷³ Rabkin, *Comparable Worth as Civil Rights Policy: Potentials for Disaster*, in U.S. Comm'n on Civil Rights, *Comparable Worth: Issue for the 80's*, 187, 195 (1984) [hereinafter U.S. Comm'n on Civil Rights, *Comparable Worth*].

⁷⁴ H. Graham, *supra* note 47, at 211.

sider a junior executive position with Texaco or Xerox. In other words, as Jane Larson and Clyde Spillenger commented in defending the historians' brief that they helped write in *Webster v. Reproductive Health Services*:⁷⁵

[S]ubjective perspective shapes the way in which a scholar empirically perceives and interprets reality. An observer is shaped by social location and by all the particularities of experience that create individual perspective. Thus, for example, a historian who has first-hand experience of racism, ethnocentrism, or sexism in an institutional setting is more likely to detect evidence of these phenomena in historical materials. Another historian, less concerned with such experiences in either the present or the past, may see something less pernicious or systemic when examining the same historical evidence.⁷⁶

Women scholars—writing from the perspective and with the insight provided by their own experiences—have in the last decade produced a large body of writing that has helped redefine the concept of sex-based employment discrimination.⁷⁷ Women academics have also participated

⁷⁵ 492 U.S. 490 (1989) (upholding a Missouri statute restricting the use of public employees and facilities for performing abortions not necessary to save the life of the mother and requiring all physicians to determine a fetus' viability before performing an abortion).

⁷⁶ Larson & Spillenger, "That's Not History": The Boundaries of Advocacy and Scholarship, 12 *The Public Historian* 33, 37-38 (Summer 1990).

⁷⁷ See, e.g., C. MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (1979); Blumrosen, *Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964*, 12 *U. Mich. J.L. Ref.* 397 (1979); Taub, *Keeping Women in Their Place: Stereotyping Per Se as a Form of Employment Discrimination*, 21 *B.C.L. Rev.* 345 (1980); Law, *Rethinking Sex and the Constitution*, 132 *U. Pa. L. Rev.* 955 (1984); 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.* 1750 (1990) (debunking the "lack of interest" defense in hiring and promotion cases); Becker, *From Muller v. Oregon to Fetal Vulnerability Policies*, 53 *U. Chi. L. Rev.* 1219 (1986) (demonstrating the per se illegality of employment policies that exclude fertile and pregnant women from numerous jobs because of their exposure to toxic substances that could be harmful to a future fetus). See also the equal treatment/special treatment debate that surrounded *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987), and other efforts to address the effects of pregnancy and maternity on workplace participation. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 *N.Y.U. Rev. L. & Soc. Change* 325 (1984-85); Taub, *From Parental Leaves to Nurturing Leaves*, 13 *N.Y.U. Rev. L. & Soc.*

more directly in the litigation of most of the important sex discrimination issues to come before the courts, either by authoring briefs for the principals or for *amici curiae*, by presenting oral argument, or by testifying as experts.⁷⁸ While the courts have not always credited the more important feminist scholarship,⁷⁹ there have been a number of other cases, for example, in the area of sexual harassment and sexual stereotyping, where the

Change 381 (1984-85); Krieger & Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Act and the Meaning of Women's Equality*, 13 *Golden Gate U. L. Rev.* 513 (1983).

In addition to this legal scholarship, the past decade has produced a large body of important work by feminist scholars in all fields, including economics, sociology, history, and psychology. See, e.g., A. Kessler-Harris, *Out of Work: A History of Wage-Earning Women in the U.S.* (1982); B. Wertheimer, *We Were There: The Story of Working Women in America* (1977); R. Kanter, *Men and Women of the Corporation* (1977); R. Steinberg Ratner, *Equal Employment Policy for Women* (1980); J. Baer, *The Chains of Protection: The Judicial Response to Women's Labor Legislation* (1978); *Women in the Workplace* (P. Wallace ed. 1982); England, *The Failure of Human Capital Theory to Explain Occupational Sex Segregation*, 17 *J. of Hum. Resources* 358 (1982); B. Bergmann, *The Economic Emergence of Women* (1986); *Women's Work, Men's Work: Sex Segregation on the Job* (B. Reskin & H. Hartmann eds. 1986); *Sex Segregation in the Workplace: Trends, Explanations, Remedies* (B. Reskin ed. 1984); *The Economics of Women, Men and Work* (F. Blau & M. Ferber eds. 1986).

⁷⁸ Catharine MacKinnon wrote the brief for the plaintiff in *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986); Ruth Bader Ginsburg argued as *amicus curiae* for the plaintiffs in *Frontiero v. Richardson*, 411 U.S. 677 (1973); Wendy Williams was counsel to the plaintiffs in *Geduldig v. Aiello*, 417 U.S. 484 (1974) and filed an *amicus* brief in *Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737 (1976); Herma Hill Kay, Susan Ross, and Wendy Williams all filed briefs in *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987); and Nadine Taub, Lucinda Finley, and I filed briefs in *International Union, UAW v. Johnson Controls, Inc.*, 111 S.Ct. 1196 (1991). I also served as counsel in *International Union, UAW v. Michigan*, 886 F.2d 766 (6th Cir. 1989) and *Grant v. General Motors Corp.*, 908 F.2d 1303 (6th Cir. 1990). Sarah Burns represented the plaintiffs in *Robinson v. Jacksonville Shipyards, Inc.*, 55 *Emp. Prac. Dec. (CCH)* P40, 535 (1991) (LEXIS, Genfed library, Dist. file). Our other two co-panelists have also served as advocates. Joan Bertin, in addition to writing extensively and teaching, has participated, at the Women's Rights Project of the ACLU, in virtually every major case involving sex-based employment discrimination. And Elizabeth Schneider represented the female defendant in *State v. Wanrow*, 88 *Wash.2d* 221, 559 *P.2d* 548 (1977). See in this connection Schneider, *supra* note 5, at 604-10.

⁷⁹ See, e.g., Milkman, *Woman's History and the Sears Case*, 12 *Feminist Studies* 375 (Summer 1986).

work of women scholars has clearly influenced the successful outcome of those cases.⁸⁰

Just recently, in a widely reported sexual harassment case,⁸¹ the trial judge, after setting out in some detail the qualifications and expert testimony of a social psychologist, concluded as follows:

Dr. Fiske's testimony provided a sound, credible theoretical framework from which to conclude that the presence of pictures of nude and partially nude women, sexual comments, sexual joking, and other behaviour previously described creates and contributes to a sexually hostile work environment. Moreover, this framework provides an evidentiary basis for concluding that a sexualized working environment is abusive to a woman because of her sex.⁸²

While some scholars are uncomfortable with legal advocacy—fearing that their work will be perceived as ideological or lacking in objectivity⁸³—it is my belief that scholars can (and I would argue should) seek to use their scholarship to change the lives of working women. Their participation as advocates has the same objective that Sylvia Law had when she filed the historians' brief in the *Webster*⁸⁴ case: "to preclude the court from relying on history [economics, sociology] in a stupid way, to tell the truth, and to support a political mobilization of [specific] voices."⁸⁵ We have a motto at the University of Wisconsin, that "the boundaries of the University are the boundaries of the state." This motto embodies the "Wisconsin

⁸⁰ See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (holding that the use of sexual stereotypes can be evidence of gender discrimination); *Robinson v. Jacksonville Shipyards, Inc.*, 55 Emp. Prac. Dec. (CCH) P40, 535 (1991) (LEXIS, Genfed library, Dist. file) (finding a hostile work environment in violation of Title VII based on visual displays and sexual comments). In finding discrimination, the courts in both these cases relied heavily on the testimony of Dr. Susan Fiske, a social psychologist. For an interesting discussion of the role played by Dr. Fiske in *Price Waterhouse*, see Chamallas, *Listening to Dr. Fiske: The Easy Case of Price Waterhouse v. Hopkins*, 15 Vt. L. Rev. 89 (1990).

⁸¹ *Robinson v. Jacksonville Shipyards, Inc.*, 55 Emp. Prac. Dec. (CCH) P40, 535 (1991) (LEXIS, Genfed library, Dist. file).

⁸² *Id.* at para. 62 (Finding of Fact).

⁸³ See Mohr, *Historically Based Legal Briefs: Observations of a Participant in the Webster Process*, 12 *The Public Historian* 19 (Summer 1990).

⁸⁴ *Webster*, 492 U.S. 490.

⁸⁵ Law, *Conversations Between Historians and the Constitution*, 12 *The Public Historian* 11, 12 (Summer 1990).

idea" to use the University's resources and scholarly work to promote legislative and social reform. The most prominent of such Wisconsin scholars was John R. Commons, who revolutionized the condition of the American worker by initiating unemployment insurance, workers compensation, and collective bargaining. He never apologized for his advocacy, and I do not believe that any of us should either.⁸⁶

I would like to use my remaining time to discuss two areas of sex-based employment discrimination—pay equity and occupational barriers. I leave my third area of interest (fetal protection policies) to be discussed by Joan Bertin.

When wage discrimination first became a rallying point for a growing women's movement in the 1960s, advocates for the issue took an overly simplistic approach and distributed to women everywhere little green and white buttons which had written on their front "59¢." The 59¢ referred to the then-ratio of women's to men's annual earnings.⁸⁷ In other words, the reference was to macroeconomic data and not to the earnings of any particular woman in any specific occupation or workplace.

This may have been a good strategy for mobilizing women into a political movement. It may have been an effective device for highlighting the depressed economic condition of working women⁸⁸ with its harsh consequences for large numbers of children and the elderly. It did little, however, to document the fact of sex-based wage discrimination. This was so

⁸⁶ J. Commons, *Myself: The Autobiography of John R. Commons* (1964).

⁸⁷ Historically, the so-called wage gap between men's and women's earnings has been reported in terms of annual earnings. Those figures do not adjust for differences in total hours worked; hourly earnings by sex are generally not published. In 1970, the annual earnings of women who worked full-time was 59.4% of the annual earnings of men who worked full-time. Nat'l Comm. on Pay Equity, Briefing Paper #1: *The Wage Gap* 3 (1989). This percentage of women's to men's earnings increased to 60% in 1979, to 64.8% in 1987, and to 68.3% in 1989. Women's weekly earnings as a percentage of men's is somewhat higher, increasing from 62.5% in 1979 to 71.8% in 1989. Using hourly rates (which, however, do not include the earnings for women who work on a wage or salary basis), the ratio of women's to men's earnings has increased from 64.1% in 1979 to 76.8% in 1989. Women's Bureau, U.S. Dep't. of Labor, *90-3 Facts on Working Women, Earnings Differences Between Women and Men* 2 (Oct. 1990).

⁸⁸ In 1987, families maintained by women represented 52% of all families living below the poverty level. And while a married couple family with two children had a median income of \$36,807, a female headed family with two children had a median income of \$11,257. Women's Bureau, U.S. Dep't. of Labor, *89-3 Facts on Working Women, Working Mothers and Their Children* 2 (Aug. 1989).

because the earnings ratio—that 59¢ slogan—had too many explanations other than wage discrimination.⁸⁹ One explanation for some of the gap was the fact that women worked in different occupations. True, we now know that this occupational segregation contributes significantly to the undervaluation of women's work.⁹⁰ But that was not intuitively so in 1965. What was so was that women were secretaries and men were lawyers. And no one was going to interpret the Act's prohibition against sex-based wage discrimination as requiring employers to pay secretaries the same as lawyers.

A second explanation for some part of the earnings gap was that women worked fewer hours. Of course, this may not have been by choice. Women are disproportionately concentrated in more marginal firms. There may have been less opportunity for longer and more regular hours. Or the women may have been unable to work the longer hours because of inadequate child care facilities, or because they more often had the primary responsibility for the care of home and hearth. But these indirect effects of the traditional family, and of more limited employment opportunities, do not constitute *wage* discrimination.

Finally, some part of the earnings gap can be explained by differences in the human-capital characteristics of men and women workers—differences in education, training, prior job experience, years in the workforce, uninterrupted work history, etc.⁹¹ Obviously, many of these differences may have been the result of discriminatory educational and training policies or of discriminatory employment policies. And such policies, along with the now invalidated state protective laws, may have indirectly caused women not to seek certain education and training. For example, you would not expect women to invest in a mining engineering degree if most state laws prohibited women from working underground, or if mining companies never hired women. But again, while some of these differences in human capital may have been the direct and indirect results of discriminatory

⁸⁹ See Clauss, *Comparable Worth—The Theory, Its Legal Foundation, and the Feasibility of Implementation*, 20 U. Mich. J.L. Ref. 7, 20–21 (1986).

⁹⁰ Newman & Vonnhoff, "Separate but Equal"—Job Segregation and Pay Equity in the Wake of *Gunther*, 1981 U. Ill. L. Rev. 269. See also Blumrosen, *supra* note 77; Nat'l Comm. on Pay Equity, *supra* note 87, at 5–6.

⁹¹ For a discussion of the various factors that may explain some of the earnings gap between full-time male and female workers, see 1 U.S. Comm'n on Civil Rights, *Comparable Worth: Issue of the 80's* (1984); Weiler, *The Wages of Sex: The Uses and Limits of Comparable Worth*, 99 Harv. L. Rev. 1728, 1779–93 (1986).

policies, and of social role conditioning, they are not evidence of wage discrimination.

In other words, the very rhetoric adopted by the women's movement to focus attention on women's disproportionately low earnings obscured the fact that a significant factor affecting women's earnings was intentional wage discrimination. By looking at macroeconomic data, with its many explanatory factors, the 59¢ slogan permitted the opponents of pay equity to argue that the only problem for working women was job access, not pay discrimination, and that Title VII's guarantee of equal employment opportunity would, over time, correct that part of the earnings gap that was the indirect result of discriminatory employment opportunities.⁹²

But any notion that the only employment-related factors adversely affecting women's earnings are job access and training simply discounts the actual wage experience of women working with men in the exact same establishment. Prior to the Equal Pay Act of 1963, when women did the exact same work as men for the same company in the same establishment, they were typically paid less than their male counterparts. And this was so without regard to any differences in productivity, seniority, or merit. Even after 1963, many companies continued to pay women less than men for equal work. Moreover, the same wage setting practices that once routinely led employers to pay women less than men for equal work now lead employers to pay less for various levels and types of skill, effort, and responsibility in a female-dominated job than for equivalent levels of skill, effort, and responsibility in a male-dominated job.

I have written elsewhere documenting disparate wage treatment based on sex, both historically and in current pay systems, and explaining its origins.⁹³ But perhaps the best empirical documentation that discrimination has adversely affected the wage rates for predominantly female jobs are the numerous pay equity studies conducted by various state and local governments in the 1980s. These studies, using a variety of techniques, determined how men were paid in each of the systems examined, and then applied that same criteria to the wage rates established by that same

⁹² See Abram, *Affirmative Action: Fair Shakers and Social Engineers*, 99 Harv. L. Rev. 1312, 1326 & n.53 (1986) (equating comparable worth with affirmative action and criticizing both as the pursuit of redistributive goals in the name of civil rights). See also Bunzel, *To Each According to Her Worth?*, 67 The Public Interest 77, 84 (Spring 1982). For the application of this idea to racial discrimination see Reynolds, *Individualism vs. Group Rights: The Legacy of Brown*, 93 Yale L.J. 995, 1003 (1984).

⁹³ See Clauss, *supra* note 89, at 7, 10-15, 27-34.

system for female-dominated jobs. Every single study found that women's jobs were paid from ten to twenty percent less than men's jobs with equivalent characteristics.⁹⁴ It is these studies of individual pay systems and not some macroeconomic analysis that demonstrate the continuing effect of sex on wage rates.

The focus on macroeconomic data has also allowed the opponents of pay equity to claim significant progress for equal employment opportunity based on earnings data without ever examining the effects of the last two decades on wage rates for individual male- and female-dominated jobs. Thus, the most recent data on earnings show that the ratio of women's to men's earnings has increased from 59.4%, where it was in 1970, to 68.3% in 1989. And if you use hourly rates, it is 76.8%.⁹⁵ So really, there is no problem!

But this data tells us very little about the relative wage rates of male- and female-dominated jobs in individual companies, or even about long-term gains for women's earnings. For example, the data on men's earnings include data from high-wage industries like auto, steel, and tire, whereas the data on women's earnings include data from notoriously low-wage industries like textiles. Following a major wave of economic dislocations in the late 1970s, many of the jobs in these high-wage industries disappeared while the lowest paid female jobs often were exported to other countries.⁹⁶ It is unclear how much of the improvement in women's to men's earnings ratio is due to a relative increase in women's wages, and how much to the exportation of American jobs—both the best and the worst.

Moreover, can we say that this decreasing gap between women's and men's earnings reflects a long-term, and not just short-term, gain? For example, one of the concerns addressed by a wage discrimination theory is that career ladders for predominantly female jobs are substantially shorter than the career ladders for predominantly male jobs, even when those jobs require equivalent skills and responsibilities. In this connection, the data

⁹⁴ See, e.g., Report of Wisconsin's Task Force on Comparable Worth 53-59 (1985). For a discussion of the findings of this report as well as of the Comm'n on the Economic Status of Women, *Pay Equity: The Minnesota Experience* (1983) and New Jersey Comm'n on Sex Discrimination in the Statutes, *An Analysis of Wage Discrimination in New Jersey State Service* (1983), see generally Clauss, *supra* note 89. See also Blumrosen, *Remedies for Wage Discrimination*, 20 U. Mich. J.L. Ref. 99 (1986); Rothchild, *Pay Equity—The Minnesota Experience*, 20 U. Mich. J.L. Ref. 209 (1986).

⁹⁵ Women's Bureau, U.S. Dep't. of Labor, *supra* note 87, at 2.

⁹⁶ See The Bureau of Nat'l Affairs, Inc., *Daily Labor Report* (Aug. 12, 1983).

show that younger women have a better female/male earning ratio than older women. Thus, in the twenty-one- to twenty-nine-year-old age group, women's hourly earnings are 83.2% of the hourly earnings of men in that same age group. If the men and women have completed four or more years of college the earnings ratio increases to 86.2%.⁹⁷ But in the thirty- to forty-four-year-old age group the women's to men's earnings ratio drops to 72.4% (and drops proportionately for each level of educational attainment below four years of college).⁹⁸ And, when we get to the forty-five- to sixty-four-year-olds, who typically are the women that Joan Bertin and I represent, the earnings ratio is 60.1%.⁹⁹ And for those of you who are graduating from law school and are thinking, "At least, by choosing a professional career, I will escape the wage disparity," let me just tell you that in 1986, women attorneys earned 63% as much as men attorneys.¹⁰⁰

And can we really say that a wage gap set at 68.3%—and not the old 59.4%—has wrung out any remaining sex taint in the establishment of wage rates for female-dominated jobs? All the data that I have seen on wage practices of individual employers—either in court transcripts or in state studies—suggest that the sex-based wage disparities for jobs of comparable worth have remained unchanged.¹⁰¹

The last point I want to make on the topic of wage discrimination concerns the rhetoric used by the opponents of pay equity. This rhetoric borrows heavily from the language surrounding the debate on affirmative action.¹⁰² It uses words like "equal results" and "quotas" and creates the

⁹⁷ Women's Bureau, U.S. Dep't. of Labor, *supra* note 87, at 5.

⁹⁸ *Id.* at 5.

⁹⁹ *Id.* at 5.

¹⁰⁰ Nat'l Comm. on Pay Equity, *supra* note 87, at 7.

¹⁰¹ *Id.* at 5.

¹⁰² It is not surprising that the critics of comparable worth would attempt to use the rhetoric surrounding the more controversial concept of affirmative action. In contrast to the unfortunate lack of support for affirmative action (which is commonly misunderstood by the public), comparable worth and pay equity have enjoyed consistent popular support, even if that support has not been reflected in the case law or in the Administration's civil rights agenda. A 1985 national survey conducted by Marttila and Kiley, a Boston polling firm, found that 69% of U.S. workers think that women are not paid as fairly as men. The reason most frequently cited for this disparity is sex discrimination, and 80% of those surveyed supported the principle of pay equity. This survey was commissioned by the National Committee on Pay Equity, and its results were released on February 12, 1985. Nat'l Comm. on Pay Equity, *A National Opinion Survey: Working Women*

imagery of victims. Clarence Pendleton, the former chair of the U.S. Civil Rights Commission during the 1980s, called comparable worth "reparations for middle-class white women" and a "financial quota system."¹⁰³

This rhetoric was perfectly captured in a radio commercial sponsored by the Wisconsin Manufacturer's Association and aired during the public debate preceding Wisconsin's adoption in 1985 of legislation requiring pay equity for state classified employees.¹⁰⁴ The commercial featured the voice of a woman identified as Pearl. She was a plumber, and over the sound of water gushing from a broken pipe which she was in the process of repairing as she talked, she explained how she had become a plumber and how rewarding the work was. She then stated that what really bothered her were the women who demanded equal wages but who were not willing to take jobs like hers.¹⁰⁵

and Pay Discrimination (Feb. 1985). Similar results were reported in a subsequently released Harris Poll (Aug. 19, 1985), which found that 70% of those polled believed that women were not paid the same as men for comparable work. The Harris Survey, *Women's Movement on Verge of Major Comeback* (Aug. 1985).

¹⁰³ U.S. Comm'n on Civil Rights, *Comparable Worth*, supra note 73, at 127.

¹⁰⁴ Act of July 17, 1985, No. 29, § 3019(2), 1985 Wis. Legis. Serv. 20, 474 (West) (No. 3).

¹⁰⁵ Cahill-Sweeney & Associates, *Anti-Comparable Worth Radio Spots*, Spot #1. The 55 second spot ran thus:

Background: (continuous tapping sound, like pounding on a pipe)

(woman's voice is strong, tough-sounding)

Woman: Hi! I'm Pearl, the Plumber. You know, it used to be we had men's work and women's work. But now, women like me are doing all kinds of jobs and doing them well, too.

Man: Pearl, could you show me how to fix this?

Woman: Sure, just a minute! But you know what gets my goat, a bunch of these high-falutin' Madison bureaucrats want to take us back to the idea of "women's work" again. They call their plan comparable worth, but old Pearl here says it's a joke. They claim they want women's work to pay as well as men's work. If they had passed a law saying things like, "dental hygienists have to [be] paid exactly the same as electrical engineers" and stuff like that, well I don't buy the idea that there are "women's jobs." And there's no fair way to compare one job with another. (sound of water rushing out—pipe burst) Comparable worth, it's a slap in the face to women like me who've worked hard to break down the old barriers. Help me fight it. Write your state legislator or better, call the Legislative Hotline—1-800-362-9696 and register your concern about comparable worth. Call today—1-800-362-9696. (tapping begins again)

Voiceover: Sponsored by Comparable Worth Project, Madison, Wisconsin.

Look how this commercial mirrors the intellectual argument against comparable worth. First, it reframes the issue as one of job access and, after the corrective effect of Title VII, as one of job choice. Women can become plumbers and, if they do, they will be paid the same as male plumbers. But women do not really want equal treatment. They want equal results. They do not want to become plumbers; they want plumbers' wages for the easier work they do now. In other words, women want men's wages but are not willing to take men's jobs. Once again, the rhetoric conceals the reality. Comparable worth does not ask that women be paid the same as plumbers or any other specific occupation. Rather, it asks that female-dominated jobs be compensated using the same criteria as are used by the employer in setting wage rates for male-dominated jobs. If male jobs are compensated at x amount for a specific level and type of skill, the female jobs should be compensated by the same amount for that same level and type of skill. This may or may not result in secretaries being paid the same as plumbers.

Secondly, the language and *dramatis personae* of the Wisconsin commercial mirror the rhetoric against comparable worth in another way. The commercial is subtly—and perhaps not so subtly—divisive, appealing to both racism and classism. Its message, like Clarence Pendleton's when he referred to "reparations for middle-class white women,"¹⁰⁶ is that comparable worth will benefit white women, who are already economically secure and have the better paying female-dominated jobs, and not minority and other less advantaged women. It also suggests that the money to pay for these "reparations" will come from male craft jobs, which typically have been held by middle-class whites, but which increasingly are attracting minorities who have taken advantage of the opportunities offered by Title VII to move into better paying jobs.

Once again, the reality is quite different. Under the Wisconsin study, it was the lower skilled, and the lowest paid, female-dominated jobs (such as worker compensation assistant, seamstress, data entry operator, and licensed practical nurse) that received the largest percent wage increases, ranging from 16.4% to 18.2%. The higher paid and more skilled female-dominated jobs were less affected by sex discrimination, and received generally smaller percent wage increases, ranging from 10.7% to 11%.¹⁰⁷

Finally, the very word "reparations" is misleading in that it suggests that men's wage rates can be reduced to help pay for comparable worth.

¹⁰⁶ U.S. Comm'n on Civil Rights, *Comparable Worth*, supra note 73, at 127.

¹⁰⁷ Report of Wisconsin's Task Force on Comparable Worth, supra note 94, at 57–58.

Any such action would be illegal, and it, in fact, has not been done in any other state adopting pay equity legislation.¹⁰⁸

Joan Bertin

When I filed my first sex discrimination case, there was no "feminist jurisprudence." Then and now, we had to find arguments within the law as it exists to deal with the problems that women experience. That remains the driving force in my professional career as an advocate for women. What I'm charged with doing every day is finding solutions to address concrete injuries. For me, these experiences both define the proper goals of "feminist jurisprudence"—to address the real problems of real women—and shape my philosophy about how the law should relate and respond to the problems of women.

The central recurring issue that I have encountered, since I embarked on a career in women's rights, relates to pregnancy. Because pregnancy is often viewed as *sui generis*, the ability of the law to respond to the rights and needs of pregnant and potentially pregnant women has been inconsistent at best. I can hardly believe, as the fourth person on a panel on Myra Bradwell Day, that I'm actually going to be the first person to quote from Justice Bradley's concurring opinion in *Bradwell v. Illinois*: "The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator."¹⁰⁹ It is this perception of women primarily as childbearers and nurturers that, in my opinion, has accounted for the inability of courts and legislatures to recognize and accord women full legal rights and privileges. It seems that as long as women are viewed primarily as "fetal vessels," they will not be viewed as persons in their own right.

Let me give you a few examples. If Carin had another five minutes, she would have talked about an area that we have worked on together for a long time, having to do with reproductive health hazards in the workplace and the exclusion of women from jobs that allegedly pose a hazard only to the fetus. About a decade ago, when I filed my first such case representing women at the American Cyanamid Company who had submitted to surgical sterilization to keep their jobs, I filed it as a Title VII case, a sex discrimination case.¹¹⁰ Some people asked why women workers would want equal access to hazardous workplaces. That, of course, is not what

¹⁰⁸ For a discussion of this issue, see Clauss, *supra* note 89, at 94 & n.344.

¹⁰⁹ 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J. concurring).

¹¹⁰ *Christman v. American Cyanamid Co.*, 92 F.R.D. 441 (N.D.W. Va. 1981).

women workers (or men, for that matter) want. They want access to jobs *and* safe working conditions. Enforcement of the occupational safety and health laws, however, was not an option. For starters, there is no private right of action by which workers could enforce the provisions of the federal statute.

From a strictly pragmatic perspective, therefore, advocates for women workers in these situations have had to rely largely on Title VII's nondiscrimination entitlement to obtain any relief. We have attempted to construe that statute and to construct arguments in ways that will force employers to upgrade workplace conditions for all workers, rather than exposing women to the risks to which men have been subjected. An amendment to the Occupational Safety and Health Act (OSHA), strengthening its enforcement provisions, would be a more direct way to achieve these goals. In the absence of that remedy, we use whatever tools are available.

It is no coincidence that women have been excluded *en masse* from high-paying jobs that make the difference between being on welfare and being self-sufficient. These cases demonstrate how the emergence of women from their "separate sphere" in the home, attending to the bearing and rearing of children and other domestic activities, a role that women have traditionally played, is met by the same question—echoed by society at large, by the law, by their bosses, by their husbands: can women still fulfill their duties as wife and mother? The more women venture away from traditional activities, the more intense the pressure to address this question becomes. For women who would enter certain male bastions, the only way to qualify was to get sterilized. The message, not even a terribly covert message, is that if you want to live in a man's world, you've got to be like a man.

By 1984, when several cases had been litigated involving the validity of corporate "fetal protection" policies, partial victories for plaintiffs challenging the policies¹¹¹ seemed to have dampened corporate enthusiasm to exclude fertile women workers. Recently, however, that progress was halted by the Seventh Circuit's opinion in the *Johnson Controls* case, in which that court sitting *en banc* upheld Johnson Controls' policy of excluding *all* fertile women from certain jobs.¹¹² The policy applied to women up to the age of

¹¹¹ See, e.g., *Zuniga v. Kleberg County Hosp.*, 692 F.2d 986 (5th Cir. 1982); *Wright v. Olin Corp.*, 697 F.2d 1172 (4th Cir. 1982); *Hayes v. Shelby Memorial Hosp.*, 726 F.2d 1543 (11th Cir. 1984), reh'g denied, 732 F.2d 944 (11th Cir. 1984).

¹¹² The Seventh Circuit Court's decision has since been overturned by International Union, UAW v. Johnson Controls, Inc., 111 S.Ct. 1196 (1991), rev'g 886 F.2d

seventy. The chemical from which women were being "protected" was lead, and the level of protection was the same level that OSHA said ten years ago endangered the reproductive capabilities of both men and women. Johnson Controls apparently disbelieved the part about men.

The exclusion of women from hazardous jobs is by now a familiar problem. Of more recent vintage are related issues raising questions about other limitations on pregnant women's conduct. These include a host of legislative proposals and other government activities in response to women's use of drugs and alcohol during pregnancy. First, there's the criminalization of certain prenatal conduct, and second, there are abuse and neglect proceedings also based on undesirable prenatal conduct.

In Florida, Jennifer Johnson was convicted for delivering illicit drugs to a minor.¹¹³ The prosecutor identified the moments after birth before the umbilical cord was cut as the basis for the prosecution. She is appealing the decision. In California, Pamela Rae Stewart was charged with prenatal child abuse, in part because she failed to go to the hospital as she had been instructed by her doctor when she started bleeding vaginally.¹¹⁴ She had placenta previa, which is a condition of pregnancy requiring medical attention. Because she delayed in going to the hospital, her child was born prematurely and died shortly thereafter. The charges against her were ultimately dismissed. Then there was a case in Wyoming involving a woman who, in the fourth month of pregnancy, went to the police to complain that she had been physically abused by her husband.¹¹⁵ She was sent over to a clinic, and while she was there the police obtained a warrant for her arrest for prenatal child abuse because she had been drinking. In Indiana, a charge of possession of illicit drugs against a mother was based upon a drug toxicology done on the newborn child.¹¹⁶

871 (7th Cir. 1989) (en banc). See also Carin Clauss' discussion of workplace fetal protection policies *supra* note 69 and accompanying text.

¹¹³ *Johnson v. Florida*, No. 89-1765 (Fla. App., 5th Dist. 1991) (WESTLAW 1991 WL 56359) (appeal pending, No. 77831 (Fla. Sup. Ct. 1991)). I came into contact with this and the other unpublished cases at *infra* notes 114-18 and 120-23 through my work with the ACLU. Materials relating to some of the cases are available at the ACLU National Office.

¹¹⁴ *People v. Stewart*, No. M 508197 (San Diego Mun. Ct. 1987). See *supra* note 113.

¹¹⁵ *State v. Pfannenstiel*, No. 1-90-8CR (Laramie County Ct. 1990). See *supra* note 113.

¹¹⁶ *State v. Yurchak*, No. 64D01-8901-CF-181B (Porter County Super. Ct. 1989) (pending). See *supra* note 113.

In Massachusetts, a woman was charged with criminally negligent homicide for driving while intoxicated and pregnant.¹¹⁷ She had an accident and suffered injuries which resulted in premature labor and stillbirth. This case raises some particularly interesting issues, because the indictment was justified on the basis of an earlier decision in Massachusetts, holding an outside agent liable for prenatally inflicted injuries. The idea is that if another person can be liable for such harms, why not the mother?

In Washington, D.C., a couple of years ago, Brenda Vaughn was jailed for a routine, minor shoplifting charge.¹¹⁸ She never would have been given a jail sentence except for the fact that she was pregnant and had a drug problem. The judge said that he was going to put her in jail to keep her from getting drugs. This is ludicrous. Even prosecutors concede the ready availability of drugs in many jails. In jail it is much harder to get a nutritious diet and access to prenatal care. Many of these criminal prosecutions get dismissed—a lot of grand juries refuse to indict—but that does not stop the flow of cases.

On the legislative front similar things are happening. For example, former Senator (now Governor) Pete Wilson from California introduced a bill that would make access to drug treatment funds contingent on the state's making it a crime for a woman to give birth to a child adversely affected by a woman's prenatal use of any drug, apparently including legal and therapeutic drugs.¹¹⁹ Interesting constitutional issues are raised by the state making it a crime to give birth under any circumstances.

Criminalization of prenatal conduct attracts a good deal of press attention. An equally serious but less well recognized issue is the use of neglect and abuse proceedings against women who engage in undesirable, "bad mother" kinds of behavior. Many social services officials believe that any evidence of drug use during pregnancy is *per se* evidence of the mother's unfitness to care for the child. Other relevant questions are not even addressed: whether such women are capable of taking care of their children, whether they have taken care of other children successfully, or whether the children have a father who has taken care of them or is capable of taking care of them. Evidence of maternal drug use has reportedly even been obtained by squeezing out a newborn's diapers to get a urine sample for toxicology testing. In some places, health care providers

¹¹⁷ *Commonwealth v. Levey*, No. 89-2725-2729 (Mass. Super. Ct. 1989). See *supra* note 113.

¹¹⁸ *U.S. v. Vaughn*, No. F-2172-88B (D.C. Super. Ct. 1988). See *supra* note 113.

¹¹⁹ S. 1444, 101st Cong., 1st Sess., § 509H, 135 Cong. Rec. S9,134 (1989).

are required to do drug testing and to report positive test results to state authorities, making health care providers the agents for separating newborns from their mothers.

In Nassau County, New York, a woman lost custody of her child for smoking marijuana while she was in labor.¹²⁰ Recently, we assisted on a case in Nevada involving a woman who went into labor on Super Bowl Sunday.¹²¹ She had had a few drinks, and someone at the hospital smelled the alcohol on her breath. Her child was placed in foster care shortly after birth, on the basis of a state statute defining a child born with Fetal Alcohol Syndrome (FAS) as needing protection. There was no evidence that this child had FAS or any other problem; the sole evidence of maternal "unfitness" was the mother's elevated blood alcohol reading.

In a California case, a heroin addict had to travel to a distant county every day in order to get methadone maintenance while she was pregnant.¹²² She had another child and was ultimately unable to continue treatment because of the travel. Because her county provided no free drug services, she relapsed into her drug habit and ultimately lost custody of her child. In the Florida case mentioned earlier, Jennifer Johnson had been unable to get drug treatment services until she was convicted and the court ordered that it be provided.

These cases demonstrate the "Catch-22" situation in which many pregnant drug users find themselves. There is little or no treatment for low-income substance abusers generally and even less for pregnant women. Such women cannot obtain treatment, but are then punished for their drug habits by being declared unfit mothers. To begin to address this dilemma, my office recently sued four alcohol and drug treatment centers for their discriminatory refusal to provide treatment services to pregnant women, in an effort to break this destructive cycle.¹²³

A survey conducted recently in New York found that of the children who were put in foster care or some other kind of substitute care, more than fifty percent were ultimately returned to their parents when further

¹²⁰ Nassau County Dep't of Social Services v. Teresa L., No. 365-88 (Nassau County Fam. Ct.), appeal dismissed; *In Re Ryan L.*, Motion No. 3527 (App. Div., 2d Dep't, May 17, 1989). See *supra* note 113.

¹²¹ *In Re Autumn Bean*, Case No. J-960 (Humboldt County Juv. Dep't, 6th J. Dist., 1990). See *supra* note 113.

¹²² *In Re W.*, No. J-17240 (Butte County Super. Ct., Juv. Div., 1988). See *supra* note 113.

¹²³ *Elaine W. v. North General Hosp.*, No. 6230-90 (N.Y. County Super. Ct. 1990) (pending). See *supra* note 113.

investigation revealed that the parents were not in fact unfit or neglectful. Other studies document the harms done to children in the foster care system.¹²⁴ But these problems are rarely acknowledged in the rush to remove children from women who fail to provide a socially acceptable fetal environment.

There is an element of vindictiveness toward women who engage in these socially undesirable activities. It is obvious in the incarceration of drug-using women and in the removal of their children. It also appears prominently in the workplace reproductive hazards area, as evidenced by overbroad policies that impose sterilization requirements on all women. In both sets of cases, the response is contingent on a selective view of the science of reproduction that assigns disproportionate responsibility for fetal and childhood well-being to maternal factors.

Many commentators have noted that research on reproduction tends to focus on the maternal/fetal unit and to ignore the male half of the equation. Since sperm are rapidly dividing cells, they may be particularly vulnerable to chemical insult. And since half of the fetus' genetic complement is provided by the male parent, there is every reason to study men who are exposed to toxic substances and their children, to identify adverse pregnancy outcomes and transgenerational effects of chemicals that interfere with genes and chromosomes.

Some scientists assert that only strong, healthy sperm participate in fertilization. This is what one scientist calls the "macho sperm theory" of conception. But this ignores the fact that male exposures to chemicals, drugs, alcohol, and other substances influence the course of pregnancy and potentially the health of a future child. The potential for toxic agents to alter genetic material or damage sperm in other ways does not necessarily impair the sperm's ability to participate in fertilization. Paternal preconception exposures have been associated with childhood cancers, reduced birth weights, miscarriages, stillbirths, and other adverse pregnancy outcomes. The risk of adverse pregnancy outcome may be increased when both parents are exposed to certain chemicals. Employers, judges, and others have been reluctant to acknowledge this data, much less to recognize their implications with regard to the "right" of men to work in hazardous jobs or the "duty" of fathers to protect the health of the next generation by not drinking, smoking, or using drugs. So far, they have been content to pretend that women alone are responsible, and that all would be well if women would just behave.

¹²⁴ See DeParle, *Ideas & Trends; The Fight to Save Children Shifts to the Statehouse*, N.Y. Times, June 23, 1991, at D4, col. 1.

As these examples demonstrate, advocacy on behalf of women leads us to explore some unexpected territory in order to resolve the dilemmas of women's lives. The cases also reveal the power of the cultural investment in sex role stereotypes, as if social equilibrium were dependent on these arrangements remaining fixed. This is most apparent in the struggles over the rights of pregnant women, where social expectations are entrenched and unyielding, and where women's claims to basic and fundamental rights taken for granted by men—the right to personal self-determination and to legal equality—are most seriously and persistently challenged. Because pregnancy, or pregnancy potential, is central to the *perception* of women, even women who never have children can be the victims of pregnancy-based discrimination. The pervasiveness of this problem, which extends far beyond the two nine-month periods in the average woman's life during which she will be pregnant, will undoubtedly challenge women's rights advocates for some years to come to develop both a jurisprudence and a practice that deals with the reality of what happens to women because they are or might be pregnant.