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Journal

UCLA Women's Law Journal, 2(0)

Author

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Publication Date

1992

DOI

10.5070/L321017558

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ARTICLES

FEMINIST LEGAL METHOD: NOT SO SCARY

Ann Scales*

Professor Anita Hill brought the processes of United States government to a temporary standstill just as I was finishing this Article. Hill's contribution to the possibility of equal governance was profound, and though this Article is not primarily about the Thomas confirmation hearings, I have to say this. I admit that I wanted the vote in the Senate to turn out the other way, and was distressed by the "logic" of a slim majority of Senators. But the entire process frankly thrilled me, for one reason: *I had never before had a truly unmediated experience of politics*. I've been involved in politics all my life. But this time, it was direct, it finally had a connection to reality, and the issue of gender domination, in all its gory complexity, was out on the table. In short, those events indicated to me that patriarchy¹ is running scared. In spite of a conspiracy to keep sexual harassment off the national agenda, in

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1. By "patriarchy," I mean the arrangement and perpetuation (conscious or not) of institutions, including all institutions of violence, that reflect the needs (emotional, economic, and otherwise) of the creators of those institutions to the detriment of women, people of color, and other "others."

spite of what will be massive efforts to put it to rest,² women have had a taste of real participatory politics on a national level, and we cannot now be satisfied with anything less.³

Hearing certain paranoid comments during and after the Hill/Thomas hearings enhanced my sense of feminist momentum.⁴ Those comments typically referred to "breakdown in the process" and "charges easy to allege" and even "open season on men," non-sequiturs in light of the Thomas result and the high risks to women who speak out against sexual abuse of all kinds. Beneath the rhetoric, however, I smell fear. A fear of losing protections that those under patriarchy's umbrella had not needed to think about before, but realize now it will be hard to live without. The sense of vertigo is palpable.

Finally, and quite tragically, I think we must be getting somewhere because the backlash is so strong. Women have never been less safe, on the streets or at home.⁵ The escalating violence can only be understood as a preemptive strike to nip feminist transformations in the bud.⁶ The treatment of Anita Hill was part of this

2. At least one of those efforts is positive. After years of wrangling and nit-picking, the President finally signed the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991), in part, no doubt, to mitigate Anita Hill's impact.

3. By use of the pronoun "we" in this Article, I usually refer to feminist activists and feminist lawyers, both women and men. I do not mean to suggest that all members of that group share essential characteristics or agree with everything I say. Rather, I am speaking of and to the community that is variously engaged in the struggle for equality.

4. Very quickly, Thomas characterized the hearings about his fitness to sit on the Supreme Court as an "inquisition." *Congressional Hearing of Clarence Thomas of Georgia to be an Associate Justice of the Supreme Court of the United States, Before the Senate Judiciary Committee*, 102d Cong., 1st Sess. (Oct. 12, 1991) (testimony of Judge Clarence Thomas). This was amazing given how strenuously the inquisitors had attempted to suppress Anita Hill's sexual harassment allegations. Among paranoid commentaries on the Thomas hearings, see Michael Weiss, *The Caring, Connected Lynching of Clarence Thomas*, 23 REASON 28 (1992). Mr. Weiss internally re-titled this piece, *Crimes of the Head: the New, Nurturing, Caring Thought Police*, *id.* at 3, and *Feminist Legal Theory is Creating A Government Not of Laws, But of Women*, *id.* at 29. These inflammatory titles constitute Mr. Weiss's entire argument. In his text, Mr. Weiss simply quotes my work, as well as the work of Professor Catharine MacKinnon and Professor Leslie Bender, as "proof" that we are wrong.

5. The rate of total (reported) violent crime, excluding murder, dropped 20% for male victims between 1973 and 1987, while the rate for women victims stayed the same. U.S. DEP'T OF JUSTICE, FEMALE VICTIMS OF VIOLENT CRIME 2 (1991). Recently, violent crime rates have risen, including a 4% rise in rape. *F.B.I. Says Reports of Crime Rose This Year*, N.Y. TIMES, Oct. 28, 1991, at A15. The overall rate of reported "forcible" rape for women 12 years and older rose over 90% between 1970 and 1988. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 173 (1990).

6. SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN xx (1991).

backlash. Although the strategies used against her were both absurd⁷ and scarily familiar in their efficacy,⁸ they were not undertaken coolly, but undertaken in a context of high pressure damage-control. The treatment of Anita Hill involved a bizarre manipulation of reality, reeking of a desperate need to conform the facts with the Senators' comfort levels.⁹ Arlen Specter and company were patriarchal *heroes*, rushing in to patch the cracks in the edifice,¹⁰ rather than conspiratorial masterminds.

7. The testimony of Thomas's female co-workers reminded me of a story told by Judge Woody Smith, now sitting in the Second Judicial District, Bernalillo County, New Mexico. When Judge Smith was in Albuquerque's Metropolitan Court, he was asked to enforce a local ordinance about barking dogs. The defendant attempted to introduce an audio tape containing complete silence to disprove the allegations. Judge Smith disallowed the tape, on the grounds, "that could be anybody's dog not barking." Judge Woody Smith, *Class Commentary, Introduction to Law*, University of New Mexico Law School (Nov. 1984).

8. For example, Andrea Dworkin explains how the apparent (temporary) safety of some women constitutes a *de facto* defense in rape and battery cases.

[T]he so-called victim is distinguished from other females by her provocativeness, which accounts for her individual victimization, which is not victimization because she provoked it. There are always those billions of other women who were not raped or beaten at that particular time by that particular man. *They* were passed by, which is the evidence that convicts her. Something in her caused the assault — her sexuality, in fact — and now she must convince strangers not only that it was against her will but also that she did not like it: an indignity beyond imagining and in the male system nearly always impossible.

ANDREA DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* 179 (1981).

9. Insinuations were repeated often enough that they became sufficient reasons to vote for Thomas's confirmation. A "delusional" state on Professor Hill's part was created to explain a lot, including her passing of a polygraph examination. Similarly, marginally relevant information, such as the testimony of women who were not sexually harassed by Thomas, was transformed into reliable corroboration.

10. The courts' acceptance of the illegality of sexual harassment in the workplace said to many men that the behavior they have learned, enjoyed, and considered completely normal was wrong. That must be a blow to people accustomed to seeing their needs and desires largely reflected and supported by institutional interpretations. It is therefore no surprise that the sexual harassment cause of action is under major attack, even from alleged friends of women's rights. The ACLU of Florida has filed an *amicus* brief on the appeal of *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991), on the side of the defendant. At trial, Lois Robinson won her claim that the shipyard was an unlawful "hostile environment" because it had consistently allowed male employees to use sexually abusive epithets and graffiti, and to hang pictures of nude or nearly nude women in sexually demeaning poses. *Id.* The ACLU of Florida takes the position that the remedies ordered in that case were too broad: for the injunction to include prohibitions on employees' "expressive" conduct violates the First Amendment. The National ACLU will apparently file a brief on the opposite side of this question. See Dennis Cauchon, *National and State Offices Square Off*, USA TODAY, Nov. 20, 1991, at 9A. Some of my lawyer friends call this "embarrassing." I call it a predictable struggle over replacing the slightly moved mountain.

Backlash can be incredibly destructive.¹¹ Although I saw the Thomas hearings as a thrilling example of “the clarifying drama of public confrontation,”¹² they were also part of a crazed and violent movement to freeze institutions against the ferment of new ways of seeing. Fear and violence, though the very stuff of history, are still high prices to pay for progress. I therefore submit this Article in the spirit of conciliation. Perhaps by offering this explanation of feminist jurisprudence, I can show that at least that part of the feminist project isn't very scary.

Feminist legal theory is connected historically, politically, and in substance, with Critical Race Theory. They combine to form “outsider jurisprudence.”¹³ Outsider jurisprudence is also connected with Critical Legal Studies. Beginning in the mid-70s, CLS demonstrated relentlessly that all of law is absolutely indeterminate and absolutely political, and gleefully so, from the Critics' point of view. The Critics' deconstructive strategies indicated that law is co-extensive with the interests and the comprehension of those in power. Outsider jurisprudence shares much of the Critics' appraisal of existing law, but adds to the Critics' analysis a *purposive re-construction*:¹⁴ that is, given this mess and its deep pathology, how do we change the law to protect disenfranchised peoples, and even perhaps to advance their causes?

If it is true that law is politics, is a discourse about power, the next challenge is to *inform* the politics of decision-making. The debate is no longer *whether* interpretation — the debate is now *what*

11. Historically, women and their achievements are both the causes of backlash and the targets for fury caused by other social changes. For a comparison of the witch persecutions of the 15th through 17th centuries with today's backlash, see JANE CAPUTI, *THE AGE OF SEX CRIME* 102–08 (1987).

12. ANDREA DWORKIN, *RIGHT-WING WOMEN* 35 (1983).

13. Mari Matsuda describes outsider jurisprudence as follows:

This methodology, which rejects presentist, androcentric, Eurocentric, and false-universal descriptions of social phenomena, offers a unique description of law. The description is realist, but not necessarily nihilist. It accepts the standard teaching of street wisdom: law is essentially political. It accepts as well the pragmatic use of law as a tool of social change, and the aspirational core of law as the human dream of peaceable existence. If these views seem contradictory, that is consistent with another component of jurisprudence of color: it is jurisprudence recognizing, struggling within, and utilizing contradiction, dualism, and ambiguity.

Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2324 (1989).

14. On the distinctions between feminist jurisprudence and CLS, see David Cole, *Getting There: Reflections on Trashing From Feminist Jurisprudence and Critical Theory*, 8 HARV. WOMEN'S L.J. 59 (1985); Robin West, *Feminism, Critical Social Theory and Law*, 1989 U. CHI. LEGAL F. 59.

interpretation.¹⁵ Outsider jurisprudence can inform such decisions in a way not undermined by paranoid charges of short-sighted subjective self-interest, anarchism, fluffy-headedness, fascism, or any of the other epithets often hurled at our most courageous participants. Outsider jurisprudence proposes a substantive reconstruction of law. This project asserts that right answers, or more precisely, provisionally right answers, can be found to legal questions. It asserts that the discourse informing this project can be rational and progressive.

With respect to the feminist part of this project, I would like to suggest eight ideas, or eight steps, that inform a feminist legal analysis. I don't mean to speak for Critical Race Theorists,¹⁶ nor for all feminist theorists. Indeed, these steps are not the last word on even my own system, for I don't have one. This list is what I have gleaned as of today from reading and doing feminist jurisprudence. It is an after-the-fact account of some of the concerns that a feminist analysis of a legal problem probably will bring to bear.

1. DON'T GET BOGGED DOWN IN CONVENTIONAL POLITICAL DIVISIONS.

"Strange bedfellows" arguments are used against feminists often, usually to portray us as Victorian, anti-sexuality pawns of ultra-conservative forces. Hearing about "strange bedfellows" reminds me of being in Chicago in 1980 for the great march in an unsuccessful attempt to get the Illinois legislature to ratify the Equal Rights Amendment. These hundreds of thousands of people had divided themselves into marching groups, and one could

15. Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 644 (1990).

16. The dangers of defining the experience of any group and of assuming a static, essential self, have been amply demonstrated. See, e.g., Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990). I have elsewhere criticized essentialism and the tendency to indulge in the "oppression sweepstakes." Ann C. Scales, *Surviving Legal De-Education: An Outsider's Guide*, 15 VT. L. REV. 139, 160 (1990). The key, as Professor Harris notes, is to enlarge the options between essentialism on one hand and radical nominalism on the other. Harris, *supra*, at 581-84 (contrasting a universal voice with the specter of "infinite unique experiences"). The steps I propose in the text are intended to expose some of the essentialisms imbedded in conventional legal analysis, in order to make room for the "multiple consciousness" described by Professor Harris and others. *Id.* at 584 (citing Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7, 8, 9 (1989); Teresa de Lauretis, *Feminist Studies/Critical Studies: Issues, Terms, and Contexts*, in FEMINIST STUDIES/CRITICAL STUDIES 8 (Teresa de Lauretis ed., 1986); CYNTHIA OZICK, *Innovation and Redemption: What Literature Means*, in ART AND ARDOR 247 (1983)).

wander through the crowd reading their banners. There were the predictable, such as "Working Women for the ERA," and the random but charming, such as "Opera Singers for the ERA" (I marched with them). But the best were the anomalous marching groups, those who, according to the theretofore reliable stereotypes, weren't supposed to be in favor of equal rights for women. So there were "Male Athletes for the ERA," "Nuns for the ERA," and my personal favorite, "Mormon Wives of Law Enforcement Officers for the ERA." At the time, these anomalies were delightful and fed a naive hope of irresistible ground swell for equality. Now I see those anomalies as the beginning of a more profound geological shift in political arrangements.

In my view, conventional political divisions, such as left versus right, are at best an artifact and more probably a smokescreen that keeps progressive people from taking even modest steps in coalition toward liberation. At the very least, strange bedfellows arguments obscure the coherence and justice in our position. As usual, who women are in bed with is more important than what we have to say.¹⁷

Consider the allegation that anti-pornography feminists are in bed with right-wing women and former attorney general Ed Meese.¹⁸ This alleged alignment is thought to be the kiss of death because of conflicting interests in similar legislation: the feminist interest in pornography regulation is to provide civil remedies for pervasive practices that harm women;¹⁹ the right-wing women's in-

17. As Catharine MacKinnon said, "There is this urgent need to define women by who they have sex with — without that, people don't seem to know how to read." Fred Strebeigh, *Defining Law on the Feminist Frontier*, N.Y. TIMES, Oct. 6, 1991, § 6 (Magazine), at 28, 53 (quoting Catharine MacKinnon).

18. See, e.g., Lisa Duggan, *Censorship in the Name of Feminism*, VILLAGE VOICE, Oct. 16, 1984, at 11. See also sources cited in Robin West, *The Feminist-Conservative Anti-Pornography Alliance and the 1986 Attorney General's Commission on Pornography Report*, 1987 AM. B. FOUND. RES. J. 681.

19. The pornography regulation at issue is that proposed by Professor Catharine MacKinnon and Andrea Dworkin. Although they have proposed their ordinance in slightly different versions, the basic structure characterizes injuries caused by pornography as sex discrimination, and allows persons injured by pornography to bring civil rights actions for damages and injunctive relief against pornographers. The MacKinnon/Dworkin definition of pornography is central to the effort.

Pornography is the graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following: (i) women are presented dehumanized as sexual objects, things, or commodities; or (ii) women are presented as sexual objects who enjoy pain or humiliation; or (iii) women are presented as sexual objects who experience sexual pleasure in being raped; or (iv) women are presented as sexual objects tied up or cut up or mutilated or bruised or

terest is supposedly in the perpetration of their own ideas of virtue, both feminine and masculine. Pornography regulation to them is a vehicle for imposing their narrow morality on everyone else.²⁰ The strange bedfellows argument usually arrives at the conclusion that such regulations, when effective, will be used against the speech of the very people they were intended to protect.²¹

My question is, why give up because there is interpretive competition? There is *always* interpretive competition. The "strange bedfellows" charge is a way of making us believe before the fact that we can't handle it. I think we need to acknowledge the likelihood of interpretive competition and be prepared for it. Goddess knows, we

physically hurt; or (v) women are presented in postures of sexual submission, servility or display; or (vi) women's body parts — including but not limited to vaginas, breasts, and buttocks — are exhibited, such that women are reduced to those parts; or (vii) women are presented as whores by nature; or (viii) women are presented being penetrated by objects or animals or (ix) women are presented in scenarios of degradation, injury, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual.

CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 262 n.1 (1987). The ordinance also provides that pornography includes "[t]he use of men, children, or transsexuals in the place of women . . ." *Id.* For a complete text of the most recently litigated version of the ordinance, see Margaret A. Baldwin, *Pornography and the Traffic in Women: Brief on Behalf of Trudee Able-Peterson, et al., Amici Curiae in Support of Defendant and Intervenor-Defendants, Village Books v. City of Bellingham*, 1 YALE J.L. & FEMINISM 111, 152-55 (1980).

20. West, *supra* note 18, at 683-85.

21. See, e.g., Mary Dunlap, *Sexual Speech and the State: Putting Pornography in its Place*, 17 GOLDEN GATE U. L. REV. 359 (1987).

The argument that pornography regulation will backfire is highly speculative. None of the MacKinnon/Dworkin ordinances passed in three cities ever went into effect. Amendment to the Minneapolis, Minn., Code of Ordinances, tit. 7, ch. 139 (Dec. 30, 1983) (vetoed by the mayor Jan. 5, 1984; reenacted in amended form on July 13, 1984; vetoed by the mayor on the same day); Indianapolis, Ind., City-County General Ordinance No. 24, Ch. 16 (May 1, 1984) (held violative of the First Amendment in action for declaratory judgment, *American Booksellers Ass'n v. Hudnut*, 598 F. Supp. 1316 (S.D. Ind. 1984), *aff'd per curiam*, 771 F. 2d 323 (7th Cir. 1985), *aff'd mem.* 475 U.S. 1001 (1986), *reh'g denied*, 475 U.S. 1132 (1986)); Bellingham, Wash., Initiative 1C (Nov. 8, 1988) (passed by 62% of the voters) (held violative of the First Amendment in action for declaratory judgment in *Village Books v. City of Bellingham*, No. 88-1470 (W.D. Wash. Feb. 9, 1989)).

Even a mainstream liberal commentator has been critical of this rush to judgment: "It would have been more appropriate - and surely more consonant with a restrained view of federal judicial intervention - to abstain from deciding *Hudnut* until a specific civil enforcement challenge had emerged." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 924 (2nd ed. 1988).

We may now have the opportunity to observe pornography regulation in effect, as the Canadian Supreme Court has redefined "obscenity" in terms of harms done to women. *R. v. Butler*, reported in N.Y. TIMES, Feb. 28, 1992, at A1 (— S.C.R. — (Can. 1992)).

ought to be *used* to it. It is no accident that a majority of equal protection sex discrimination cases decided by the Supreme Court have been brought by men.²² It is no accident that the hot racial issue in equal protection doctrine is "reverse discrimination" challenges to affirmative action plans, that is, claims by white people that they are victims of racism.²³ Similarly, Charles Lawrence notes how opponents attack proposed hate speech regulations pre-promulgation as overbroad. Once regulations are enacted, those same critics bring claims clearly outside the intended coverage of the regulation in order to invalidate it.²⁴ And that — knowing the intention and intentionally perverting it — passes for civil libertarianism.

If we know how to bear up in that sort of interpretive competition, why should competing with traditional conservative interpretations be any scarier? In a rush to distance ourselves from the subjective morality that informs right-wing politics, we lose an opportunity. If Andrea Dworkin is correct that right-wing women engage in moral sloganeering because they perceive that it is the best protection from male violence,²⁵ maybe we should listen. Right-wing women may be stuck, but they are not stupid. In working together we might not only get a political result we want. We may

22. For an analysis of this phenomenon, see David Cole, *Strategies of Difference: Litigating for Women's Rights in a Man's World*, 2 LAW & INEQ. J. 33, 37-38 (1984) (preponderance of male plaintiffs distorted doctrine).

23. See, e.g., *Metro Broadcasting, Inc. v. F.C.C.*, 110 S. Ct. 2997 (1990); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). See also *infra* note 104 and accompanying text.

24. Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 476-1 (1990). See also the comment of attorney Randall Tigue, quoted in Paul Brest & Ann Vandenberg, *Politics, Feminism and the Constitution: The Anti-Pornography Movement in Minneapolis*, 39 STAN. L. REV. 607, 632 (1987). Before the Minneapolis City Council considered the MacKinnon/Dworkin pornography ordinance, Mr. Tigue had successfully challenged a Minneapolis obscenity zoning law, for a fee of \$24,000. He chose not to participate in the pornography debate because he "didn't want to do anything that would jeopardize my getting at least as much money on this ordinance." *Id.*

25. DWORKIN, *supra* note 12, at 13-35.

also learn powerful new communicative strategies,²⁶ change some minds,²⁷ and forge effective coalitions for the future.²⁸

We hear strange bedfellows charges too often, even in arguments with ourselves. Over the years a number of students, both men and women, have said things like, "you know, I'm not a feminist, I'm actually quite conservative, but this Right-to-Life thing really ticks me off." Often, such statements are accompanied by a sense of insecurity or inauthenticity, as if one has no right to express seemingly contradictory opinions. You are a strange bedfellow when you sleep alone.

These students' opinions are contradictory only in terms of learned limits of discourse. Their discomfort signifies some possibly illuminating point that can't shine through the shame of contradiction. They are strangled by conventional *systems* of thought, systems so complete that a refutation of any part can instantly be transformed into further proof of the system. The air is too thick these days with charges of inconsistency, moral imperialism, false consciousness, denial, repression, and nihilism. Though each of

26. A friend who keeps up with the music business tells me that when Aretha Franklin and Annie Lennox collaborated on their hit duet, "Sisters Are Doin' It For Themselves," Aretha balked at singing some of the more radical feminist lyrics penned by Lennox and her partner, Dave Stewart. Those lyrics were deleted. Conversation with Joann A. Chase (Jan. 1990). The result, however, was a great rocking feminist anthem, surely a candidate for the *Art Saves Lives Hall of Fame*. ARETHA FRANKLIN (with the Eurythmics), *Sisters are Doin' It for Themselves*, on WHO'S ZOOMIN' WHO? (Arista Records 1985). This is not to say that producing songs is much like organizing around legal issues, and surely not to say that Aretha is a right-wing woman. It is just to note how *that* collaboration was a synergistic masterpiece, in spite of political disagreement.

27. The hope is that these women, upset by internal conflicts that cannot be stilled by manipulation, challenged by the clarifying drama of public confrontation and dialogue, will be forced to articulate the realities of their own experiences as women subject to the will of men. In doing so, the anger that necessarily arises from a true perception of how they have been debased may move them beyond the fear that transfixes them to a meaningful rebellion against the men who in fact diminish, despise, and terrorize them . . . [T]his struggle alone has the power to transform women who are enemies against one another into allies fighting for individual and collective survival that is not based on self-loathing, fear, and humiliation, but instead on self-determination, dignity, and authentic integrity.

DWORKIN, *supra* note 12, at 35.

28. After the Thomas confirmation, women's groups nationwide enjoyed a dramatic increase in new members and monetary support. Much of this came from self-proclaimed non-feminists. Patricia Ireland of NOW reported that many people who phoned said things like, "Gee, I never thought I'd be talking to you." Elizabeth Neuffer, *Women Seek Political Clout After Thomas*, BOSTON GLOBE, Oct. 20, 1991, at A1.

these charges has a legitimate place, more often their invocation keeps the discussion from digging deeper.

We should be wary of some allegiances, and careful about their consequences.²⁹ But we live in an era of strange bedfellows. We've long lived among self-proclaimed advocates of women's equality who defend women-loathing propaganda. Now — from Strom Thurmond and Clarence Thomas, to the weird configurations in the Middle East after the Gulf War fiasco, to the U.S. embrace of the nations formerly in the Warsaw Pact — both definitions of the issues and formerly predictable political alignments are giving way to different ways of understanding the present and imagining the future.

2. ESCHEW NEUTRALITY.

The idea of neutrality, on which U.S. jurisprudence is built, is noble in principle. It is thought that fairness is achieved only when the laws are neutral and apply neutrality to everybody. I fear, however, that there is no logical sense in this idea. A truly neutral position draws no lines, nor authorizes any action according to differences among situations. The law, however, is all about drawing lines, contrasting behaviors and making classifications — to an incredibly detailed degree.

Neutrality as a goal makes sense only when we ask, "neutral in what respect, and as compared to what? Which aspects of this situation should be consequential, and which not?" Having voiced those questions, we are plunged neck deep into the grime of politics. Better to relinquish neutrality as a surrogate for justice, because the ideal of neutrality obscures more than enhances the debate.³⁰ As the late Lon Fuller said, "There is indeed no frustration greater than to be confronted by a theory which purports merely to describe, when it not only plainly prescribes, but owes its special prescriptive powers precisely to the fact that it disclaims prescriptive intentions."³¹

The pretense of neutrality presents a special obstacle to women due to the historic equation of neutrality with maleness. This is

29. See West, *supra* note 18, at 699-711.

30. The obscuring effect of the neutral ideal is particularly powerful in equality doctrine. The Aristotelian ideal of "treating like cases alike" is an "empty vessel" without a means for determining likeness and identifying underlying substantive rights. See Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

31. Lon Fuller, *Positivism and Fidelity to Law - A Reply to Professor Hart*, 71 HARV. L. REV. 630, 632 (1958).

apparent in contrasting what feminist legal theory is now from what it was. Feminist jurisprudence began in a liberal mode. It involved challenging the exclusion of women from equal opportunities of all sorts. The thrust of the approach was to argue for neutrality in legal standards, that is, for a legal rule regarding women that “did not take sex into account.” That led a group of feminist scholars — it surely led me³² — to waste about a decade bickering about rules and standards, *in the abstract*. I thought that if feminist lawyers could just explain ourselves *precisely enough*, if we offered a new, improved equality standard just *one more time*, then there would be justice in the world.

The equality standard did change,³³ but the world didn’t, except for the privileged few. It was a time of stuckness for me, until Catharine MacKinnon demonstrated that the engine of the liberal machine is the “differences approach.”³⁴ If women ask to be treated the same as men on the grounds that we *are* the same, then we concede that we have no claim to equality in contexts where we are *not* the same.³⁵ Indeed, the law of this country technically still is that discrimination on the basis of pregnancy is not unconstitutional sex discrimination.³⁶ Last fall, the U.S. Supreme Court heard argument on whether blocking access to abortion clinics might dis-

32. Ann C. Scales, *Towards a Feminist Jurisprudence*, 56 IND. L.J. 375 (1981) (criticizing *Geduldig v. Aiello*, 417 U.S. 484 (1974)); see also Sylvia Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 984 (1984) (noting that criticizing *Geduldig* had become “a cottage industry” and citing numerous articles to that effect).

33. In 1976, the U.S. Supreme Court elevated the standard for measuring sex discrimination to “intermediate scrutiny.” *Craig v. Boren*, 429 U.S. 190 (1976). The male plaintiffs claimed to be victims of the sexist injury that females aged 18 in Oklahoma could buy 3.2% beer, but males had to wait until they were age 21.

34. MacKinnon’s first powerful deconstruction of the “differences approach” and explanation of her alternative “inequality approach” was in CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 101–41 (1979).

35. MacKinnon explained that “sex” is — by definition — a term of differentiation: “[s]ex equality thus becomes a contradiction in terms, something of an oxymoron, which may suggest why we are having such a difficult time getting it.” MACKINNON, *supra* note 19, at 33.

36. *Geduldig v. Aiello*, 417 U.S. 484 (1974). In subsequent cases, the Court has indicated its readiness to abandon the *Geduldig* doctrine, see, e.g., *Newport News Shipbuilding & Drydock Co. v. EEOC*, 462 U.S. 669 (1983) (applying the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k)), though the question has not been specifically raised in a constitutional case. To repudiate *Geduldig* would be an implicit repudiation of the “similar situation” requirement in equal protection doctrine. See Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1322–28 (1991). The “similar situation” requirement is a matter of false neutrality, as its effect in reproduction cases demonstrates. U.S. law can take a lesson here from Canada, which abandoned the “similar situation” requirement in constitutional equality cases in 1989. *Andrews and Law Society of British Columbia*, 1 S.C.R. 143 (1989).

criminate against women, or whether, one supposes, men in need of abortions might be discriminated against as well.³⁷

The ideal of neutrality represents the essential conjure in this thinking. Neutrality converts someone's personal preference into an allegedly objective fact; it converts a subjectively felt injustice into an official legal claim. Neutrality is dangerous: if one group can take a decidedly non-neutral point of view and get people to buy it on the grounds that it is neutral, the game is over.³⁸

Consider the concept of "individual choice," which is the allegedly neutral unit of moral measurement in liberal legal thought. The individualist norm seems to flow naturally from the moral relativism at the heart of liberalism. All we can count on is that people do have their individual preferences, portrayed in a sort of willful, petulant way, so that the best society can do is to satisfy those preferences, within limits, or allow them to be satisfied.

There are two serious flaws in the allegedly neutral premise of individual choice. First, it is administered in a disingenuous way: the U.S. Supreme Court has said that states can fail to provide the funding required for a poor woman to *have* an abortion, so long as she can still *choose* to have an abortion.³⁹ "Choice" is that essential conjure. It has the same meaning as if I chose to be Aretha Franklin or the Princess of Wales.

Second, choice is not equally distributed and has different contours for different people. As Robin West says, "the conditions which create [women's] misery — unwanted pregnancies, violent

37. *Bray v. Alexandria Women's Clinic*, 60 U.S.L.W. 3331 (1991). The relevant question is whether Operation Rescue's blockades were motivated by "discriminatory animus" against women, within the meaning of the Ku Klux Klan Act, 42 U.S.C. § 1985(3) (1981). Operation Rescue took the position that it is motivated by a desire to stop abortion in general, not specifically to stop women from entering clinics. The government as *amicus* cited *Geduldig* to support that proposition. *Bray*, 60 U.S.L.W. at 3332. See *supra* note 36.

38. Feminists noticed that the underlying subjectivity was consistently male. As MacKinnon put it, the system of male dominance

is metaphysically nearly perfect. Its point of view is the standard for point-of-viewlessness, its particularity the meaning of universality. Its force is exercised as consent, its authority as participation, its supremacy as the paradigm of order, its control as the definition of legitimacy.

Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 638-39 (1983) (footnotes omitted) [hereinafter MacKinnon, *Toward Feminist Jurisprudence*]. See also Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515 (1982) [hereinafter MacKinnon, *An Agenda for Theory*].

39. *Harris v. McRae*, 448 U.S. 297, 314 (1980); *Maher v. Roe*, 432 U.S. 464, 475-76 (1977).

and abusive marriages, sexual harassment on the job — are often traceable to acts of consent. Women — somewhat uniquely — consent to their misery.”⁴⁰ The differential in access to, as well as in meanings of choice, was epidemic in the Clarence Thomas hearings. Some of the Senators found Anita Hill’s choice to continue working for Clarence Thomas as long as she did incomprehensible. I believe their lack of comprehension was largely in good faith, in spite of their laborious dramatic delivery. To them, Anita Hill had a quotient of choice in the abstract equivalent to what the Senators have in fact. They would have left the job, called a press conference, hired many law firms to sue, and demanded an FBI investigation. The remedies for sexual harassment would have long since been enlarged. In order to be believed, Anita Hill *had to have acted as they would have acted*.⁴¹

Anita Hill tried to explain her decisions. To understand, the Senators needed to know something about patterns of choicelessness for victims of harassment and sexual abuse. Of course, few had an inkling. “Choice” is a neutral standard of measurement exactly to the degree that the rest of us have the power, self-satisfaction and insularity of Alan Simpson, Orrin Hatch, and Arlen Specter.

The ideal of neutrality is a lazy shorthand for “justice.” It really means that in a given disagreement there are probably some aspects which justly should be evaluated the same for all the participants. The ideal of neutrality alone, however, doesn’t tell us which aspects those are. Choice is usually not one of them.

3. CHALLENGE FALSE NECESSITIES.

The law is organized around a set of bottom lines, presented as unquestionable. These false necessities are the conversation-stopping arguments, as in “when you say Bud, you’ve said it all.” When a conversation-stopping argument is lobbed out, that should be the beginning rather than the end of discussion.

40. Robin West, *The Difference in Women’s Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN’S L.J. 81, 93 (1987).

41. This was also apparent in questions to the four witnesses called to corroborate Professor Hill’s testimony. Senator Alan Simpson, particularly, just could not believe that they had not advised her to leave her job and/or to sue. If she had called him with this problem, he in his infinite paternalistic wisdom would have told her exactly what to do. In order for them to be believed, they *had to have told her what he would have told her*. *Congressional Hearing of Clarence Thomas of Georgia to be an Associate Justice of the Supreme Court of the United States, Before the Senate Judiciary Committee*, 102d Cong., 1st Sess. (Oct. 13, 1991) (testimony of Judge Susan Hoerchner, Ellen Mary Wells, John Carr & Joel Paul).

Previously, I've attacked the principle of neutrality. When presented with a result that is said to be compelled by neutrality, one must ask whether that neutral approach is not really counter-productive or unjust. I would like to mention just two other of these false bottom lines: the slippery slope argument, and the postulation of dispositive false dichotomies.

The Slippery Slope

Though the slippery slope gets trotted out in many contexts, it is ubiquitous in First Amendment discourse. You know how it goes: if we allow judges to award civil damages for injuries proven to be inflicted by pornography, tomorrow they'll be censoring Oprah and packing her off to the pokey. Slippery slope arguments should flag your skepticism for three reasons. First, doctrinal line-holding notwithstanding, we are already at the bottom of some slippery slopes. A handful of corporations have a hammerlock on media worldwide,⁴² and we hear only what they want us to hear. Further, not a month goes by that some school district doesn't waste a lot of time and money trying to ban books or magazines for small-minded reasons.⁴³ It is gross legal solipsism to assert that protecting the makers of *School Girl Zombies With Deep Throats* from a *civil rights action* is necessary to protect either the alleged

42. See, e.g., Ben H. Bagdikian, *Cornering Hearts and Minds: The Lords of the Global Village*, THE NATION, June 12, 1989, at 805. Media of all sorts are dominated by five oligopolists: Time Warner Inc. (U.S.), Bertelsmann AG (Germany), News Corporation Limited (Australia — Rupert Murdoch's organization), Hachette SA (France), and Capital Cities/ABC, Inc. (U.S.). Their reach and economic power is staggering. "Time Warner . . . has a total value of \$18 billion, more than the combined gross domestic products of Jordan, Bolivia, Nicaragua, Albania, Laos, Liberia and Mali." *Id.* at 807. There is no constitutional right in this country to access to the media. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (invalidating Florida's "right of reply" statute).

43. School boards have broad discretion to remove literature from libraries, so long as not done to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *Board of Educ. v. Pico*, 457 U.S. 853, 870 (1982) (plurality opinion) (quoting *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1942)). That limitation notwithstanding, challenges to books and magazines in secondary school libraries have succeeded 52% of the time in the last three years, according to a University of Wisconsin survey by Diane McAfee Hopkins. The most frequently challenged books were JUDY BLUME, *FOREVER* (1982) (about a teenage girl who loses her virginity), JEAN M. AUDEL, *CLAN OF THE CAVE BEAR* (1980) (describing the adventures of a pre-historic woman), GO ASK ALICE (1976) (an anonymous book about teenage drug use), and ROBERT CORMIER, *THE CHOCOLATE WAR* (1974) (about teenage boys who rebel when their school asks them to sell chocolate). *Efforts to Ban Books Succeed Half the Time*, ALBUQUERQUE JOURNAL, Jan. 19, 1992, at A6.

independence of the fourth estate or the comprehensiveness of our children's education.

Second, the slippery slope is often disingenuously invoked. In structure, the slippery slope argument concedes the innocuousness of regulating the instant case but posits impossibly harder cases down the road.⁴⁴ For example, it would be acceptable to regulate *School Girl Zombies With Deep Throats* because it is disgusting (or so most people say in public), but *The Little Mermaid* may be next.⁴⁵ I doubt that the person making this argument gives a hoot about *The Little Mermaid*. He is far from conceding the innocuousness of regulating pornography. He inappropriately invokes the slippery slope argument as a way of protecting access to *School Girl Zombies*.⁴⁶

Third, the engine of the slippery slope argument is a paranoid fear that decision-makers in later cases either will not understand or will ignore the distinctions that drafters of regulations have tried to

44. Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361, 368–69, 373–76 (1985). Many of my textual assertions apply to overbreadth challenges, even though the slippery slope argument is technically distinguishable from the doctrinal concept of overbreadth. Under the slippery slope scenario, a narrowly drawn rule may be susceptible to illegitimate expansion later. In contrast, overbreadth presupposes the linguistic possibility of narrowing the rule in order to eliminate any “danger cases.” *Id.* at 366–67. Practically, both slippery slopes and overbreadth are on a strategic continuum: the former often describes the inventive mindset of those who bring overbreadth challenges, or those who apply existing rules in overbroad ways. Compare the enforcement pattern of the university hate speech regulation invalidated in *Doe v. University of Mich.*, 721 F. Supp. 852, 864–66 (E.D. Mich. 1989) (regulation unconstitutional on overbreadth and vagueness grounds; enforcement so inconsistent that “the University . . . was essentially making up the rules as it went along,” *id.* at 868) with the pattern of enforcement of the regulation invalidated in *UWM Post v. Board of Regents*, 774 F. Supp. 1163 (E.D. Wis. 1991) (regulation unconstitutionally overbroad, in spite of coherent pattern of enforcement in system comprising 26 campuses).

45. *The Little Mermaid* is not beyond criticism. I bought the video for a nine year old friend one Christmas and watched it with her several times. It brought back all the self-denying lessons I had learned in childhood, including lessons learned from Disney movies: looking good is everything; give up your talent, your heritage and your political authority to spend your life with a handsome man, though he may be vapid and unperceiving of your own accomplishments. A national paper gave the Little Mermaid character a “role model grade” of D+. It gave an A+ to the character Belle in the recent film, *Beauty and the Beast*, for her intelligence and sense of self-determination. Karen Peterson, *Disney's New 'Beauty' Isn't Just A Pretty Face*, USA TODAY, Nov. 20, 1991, at 6D.

46. In this scenario, the real argument is neither the slippery slope nor overbreadth, but an “argument against the instant case,” see Schauer, *Slippery Slopes*, *supra* note 44, at 365, that is, an argument against regulating pornography. Slippery slope and overbreadth arguments simply provide socially acceptable ways to protect one's devotion to pornography.

explain.⁴⁷ Of course, there is some slippage in every articulation of thought,⁴⁸ and in every legal dispute there lurks the possibility that an evil decision-maker will purposely skew the necessarily flexible language of rules to wreak havoc on the republic. This is familiar argumentative terrain, but there is no *necessity* for this grim view of our articulative power and of human nature. In reality, later decision-makers have been cautious, even in First Amendment disputes where slippery slope arguments are most often asserted. Although the First Amendment neither gives access to media nor protects children's libraries,⁴⁹ we have not hit the bottom of the canyon in the areas that judges most often worry about.⁵⁰

The fear implicit in the slippery slope argument has something to do, I think, with the *mythology* of the First Amendment. That mythology presupposes some Armageddon-like struggle in the past, a singular achievement that must be safeguarded, hard won victories that cannot be replicated and the terms of which cannot be re-valued. Without underestimating those constitutional struggles, even they are just the beginning of the story. I have heard various new age commentators say that the United States is very young, karmically speaking. Indeed, this national entity exhibits some characteristics of daft youth: a taste for dramatic but often pointless adventurism in military affairs, a tendency to self-absorption (even solipsism, when it comes to seizing opportunities to learn something from other countries' social systems), and a conviction that our often intense but *very short* experience settles things.⁵¹

47. *Id.*

48. *Id.* at 375.

49. *See supra* notes 42 & 43.

50. *See, e.g.*, Justice Douglas's concurrence in *Brandenburg v. Ohio*, 395 U.S. 444, 454-55 (1969) (arguing that the "clear and present danger" exception could be used to indict people for tearing up a copy of the Constitution or the Bible).

51. *See, e.g.*, Thomas I. Emerson, *Pornography and The First Amendment: A Reply to Professor MacKinnon*, 3 YALE L. & POL'Y REV. 130, 136 (1984) (suggesting that *Beauharnais v. Illinois*, 343 U.S. 250 (1952), sustaining a "group libel" statute, cannot be an analogy for pornography regulation because in 1952, "First Amendment doctrine was in its infancy."). The implication is that later cases which are understood to overrule *Beauharnais* are somehow *grown-up* cases. I was an infant in 1952. I hate to think that in my middle-age I have learned all there is to learn, or that growing up requires rejecting all early instincts. More importantly, we should not confound the time of justice with individual time. Better to think of *Beauharnais* and subsequent cases as competing ethics in a national adolescent dialectic.

The Supreme Court applied the First Amendment free speech guarantee to the states only in 1925.⁵² The crime of blasphemy did not pose a constitutional issue for decades, until brought within the ambit of the First Amendment religion clauses.⁵³ The restriction of obscenity was not considered a constitutional problem until the 1930s, not addressed by the Supreme Court until 1948,⁵⁴ and is still very much unsettled.⁵⁵

The paradigmatic free speech struggle involved criticism of the government. The contemporary debate⁵⁶ developed around wartime statutes criminalizing advocacy of anarchy or sedition, such as the federal Espionage Act of 1918. Early cases tended to uphold convictions for such advocacy.⁵⁷ Since 1957,⁵⁸ however, there has been a trend toward civil libertarianism in political advocacy prosecutions, culminating in a decisive narrowing of the "clear and present danger" exception in *Brandenburg v. Ohio* in 1969.⁵⁹

52. The first case understood to indicate application of the First Amendment to the states was *Gitlow v. New York*, 268 U.S. 652 (1925) (criminal anarchism conviction sustained against First Amendment challenge).

53. See Robert C. Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 CAL. L. REV. 297, 314-18 (1988). Courts sustained blasphemy convictions late into this century, one of the first cases to the contrary being *State v. West*, 9 Md. App. 270, 263 A.2d 602 (1970) (Maryland's 1723 blasphemy statute unconstitutional under religion clauses). According to Professor Post, prosecution for blasphemy was consistent with an "assimilationist" interpretation of the First Amendment religion clauses, which gave way to a "pluralistic" interpretation only in mid-century. Post, *supra*, at 314-18. See, e.g., *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (breach of the peace conviction of Jehovah's Witness who criticized Catholics reversed on free exercise grounds).

54. *TRIBE*, *supra* note 21, at 907 (identifying *United States v. One Book Called "Ulysses"*, 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2d Cir. 1934), and *Doubleday & Co. v. New York*, 335 U.S. 848 (1948) (affirming by a divided court the obscenity conviction of Edmund Wilson), as the beginnings of the constitutionalization of obscenity).

55. See *Pope v. Illinois*, 481 U.S. 497, 504-05 (1987) (Scalia, J., concurring) (calling for a reexamination of the obscenity standard announced in *Miller v. California*, 413 U.S. 15 (1973)).

56. Although it foreshadowed later constitutional developments, the controversy over the Sedition Act of 1798 largely involved ideological differences between Federalists and Republicans. See ALFRED KELLY ET AL., *THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT* 135-41 (6th ed. 1983).

57. See, e.g., *Schenck v. United States*, 249 U.S. 47 (1919) (upholding conviction under Espionage Act of 1918; included Holmes' first articulation of the "clear and present danger" test); *Debs v. United States*, 249 U.S. 211 (1919) (upholding conviction under Espionage Act of 1918); *Whitney v. California*, 274 U.S. 357 (1927) (upholding conviction under state criminal anarchy and syndicalism statute).

58. *Yates v. United States*, 354 U.S. 298 (1957) (reinterpreting "clear and present danger" test to reverse convictions of Communists prosecuted under Smith Act).

59. 395 U.S. 444 (1969) (per curiam) (invalidating Ohio criminal syndicalism statute; overruling *Whitney v. California*, 274 U.S. 357 (1927)). See also *NAACP v. Clai-*

These struggles are not dispositively over, but their terms are changing. I perceive that we are in the midst of a paradigm shift⁶⁰ in free speech doctrine. The issue *was* about allowing individual criticism of and deviation from assimilationist values imposed by dominant spiritual, sexual, and political groups.⁶¹ Free speech doctrine has grown beyond the infant craving to be protected from all criticism, particularly "blasphemous" criticism of mainstream religion, "obscene" criticism of mainstream sexual morality, and "seditious" criticism of mainstream politics. The hardest cases in First Amendment discourse, however, are no longer blasphemy, sedition, and obscenity.⁶² The paradigmatic concern is no longer insult to mainstream values *in the abstract*.

The burning issue of today is how free speech doctrine can respond to demonstrable harm to real people from racist and sexist speech. The focus is on harm, not offense,⁶³ and the injury is not to

borne Hardware Co., 458 U.S. 886 (1982) (reversing civil judgment imposed for boycott); *Hess v. Indiana*, 414 U.S. 105 (1973) (reversing state breach of the peace conviction).

60. The term "paradigm shift" is borrowed, of course, from THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970) (1962). Among the parallels between scientific revolutions and this paradigm shift is the differential identification of *problems* to be addressed. "To the extent . . . that two scientific schools disagree about what is a problem and what a solution, they will inevitably talk through each other when debating the relative merits of their respective paradigms. . . . [P]aradigm debates always involve the question: Which problems is it more significant to have solved?" *Id.* at 109-10. That is the bottom line in this First Amendment controversy: is group-based oppression significant enough to have to change the law?

61. See Post, *supra* note 53.

62. Having said that obscenity doctrine is up in the air, I still believe it is no longer paradigmatic of First Amendment discourse. U.S. obscenity law concerns the reconciliation of law and morality *in the abstract*, so that there will never be agreement about the appropriate legal standard. The case in which Justice Scalia, in his concurrence, called for reexamination of the reasonable person obscenity standard involved exactly this abstraction trap. *Pope v. Illinois*, 481 U.S. 497, 500-01 (1987) ("The proper inquiry is not whether an ordinary member of any given community would find serious literary, artistic, political, or scientific value, in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole.") (majority opinion) (footnote omitted). Obscenity doctrine will ride a morality merry-go-round until it focuses on the harm to women from sexualized violent depictions. See MACKINNON, *supra* note 19, at 146-62. Canada has taken this critical step of redefining obscenity, in part, as harm to women. See *R. v. Butler*, — S.C.R. — (Can. 1992).

63. See Lawrence, *supra* note 24, at 461:

There is a great difference between the offensiveness of words that you would rather not hear - because they are labeled dirty, impolite, or personally demeaning - and the *injury* inflicted by words that remind the world that you are fair game for physical attack, evoke in you all of the millions of cultural lessons regarding your inferiority that you have so painstakingly repressed, and imprint upon you a badge of servitude and subservience for all the world to see.

the government, nor to others possessing political, moral, or religious power. The injury is to people subject to racist and sexist group-based harm, those living in a “stigma-picture” of their group to which speech has mightily contributed and which more speech does little to repair.⁶⁴

Opponents of pornography and hate-speech fear state power just as much as civil libertarian slippery slope adherents do, but do not have the latter’s luxury of definitional paralysis.⁶⁵ We must re-vision our relationship to the state, and can begin by careful drafting and by running for political office ourselves. Proponents of hate speech and pornography regulation are proposing legislation against the state’s own racist and sexist interests. In every case, we will be there to undertake the interpretive competition in good faith. This is a whole different ball game from the blasphemy, obscenity and sedition prosecutions of times past. Let’s give it a go. I truly believe Oprah will be safe.

There are real slippery slopes; there are massive grey areas; but not every case is a hard case. We should not let cowardice deter us from trying to use the power of law in a truly transformative way.

Dichotomization in Legal Thinking

Legal thinking is organized around bottom line dichotomies: law versus policy, public versus private realms, expert versus lay opinion, civilian governance versus military necessity, consent versus coercion — there are scores more.⁶⁶ These dichotomies consti-

64. See Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 Nw. U. L. REV. 343, 383–6 (1991) (arguing that the speech by which society constructs a stigma-picture of racial minorities can be regulated consistent with the First Amendment, and should be regulated to effectuate the guarantee of equality).

65. In my experience, this is what civil libertarians, both male and female, *just don’t get*. They consider the state to be the enemy, and so it often is. But only the very privileged or ignorant can ignore the state; everyone else needs state power to protect them from private power, which in the U.S. is much more ruthless. Liberal lawyers are paralyzed by not knowing exactly what an empowered state might do. This confusion is exactly the male standpoint. You can’t tell the difference between what you think and the way the world is — or which came first — if your standpoint for thinking and being is one of social power. . . . Their Cartesian doubt is entirely justified: their power to force the world to be their way means that they’re forever wondering what’s really going on out there.

MACKINNON, *supra* note 19, at 58.

66. There has been much discussion in critical legal studies, feminist legal theory, and critical race theory about the misleading use of dichotomies in law. I have already mentioned one misleading dichotomy in political discourse: the left/right political polarization, in the context of the strange bedfellows argument. For an explanation of the danger for women in the nature/culture distinction, see Anne E. Simon, *Whose Move?*

tute law's binary logic: when a situation falls on one side of the line, it is actionable, or otherwise of consequence; when a situation falls on the other side of the line, it is unactionable, someone else's business, or inconsequential. Underlying these dichotomies is a more fundamental distinction, that between objective and subjective judgments, which can also be understood as a dichotomy between knowing subject and known object.⁶⁷ Examining the contingency in this most basic distinction reveals the contingency in other allegedly necessary distinctions.

I consider it significant that the demise of legal formalism — the idea that neutral legal rules could be mechanically applied to objectively known facts to determine a result — was historically concurrent with the rise of modern physics. For example, *Palsgraf v. Long Island Railway*,⁶⁸ the case that firmly displaced legal causation from the arena of objective fact into the arena of "policy" judgment, appeared at the same time that Werner Heisenberg formulated his uncertainty principle.⁶⁹

Physics, the same field that for centuries exemplified the dichotomy between individual mind and external world,⁷⁰ now said that the two were inevitably interrelated. According to Heisenberg, the more precisely an observer tries to take one measurement of electron status, the more the accuracy in another measurement is skewed. Put more broadly, the observer inevitably transforms the observed system.⁷¹ After Heisenberg, there was no longer any clear division between the knowing subject and the known object. The demise of the subject/object split on the quantum level suggests that

Breaking the Stalemate in Feminist and Environmental Activism, 2 UCLA WOMEN'S L.J. 145 (1992).

67. For the best account of subject/object split by a feminist legal scholar, see MacKinnon, *An Agenda for Theory*, *supra* note 38, at 539–43 and MacKinnon, *Toward Feminist Jurisprudence*, *supra* note 38, at 636–39, 644–45, 654–55.

68. 248 N.Y. 339, 162 N.E. 99 (1928).

69. Heisenberg formulated the uncertainty principle in 1926, *see* STEPHEN W. HAWKING, *A BRIEF HISTORY OF TIME* 54–55 (1988), and later included it as part of his quantum theory. WERNER HEISENBERG, *THE PHYSICAL PRINCIPLES OF THE QUANTUM THEORY* 4, 20, 62–65 (1930).

70. The separation between individual mind and external world was also lodged as a habit of grammar, for example, in Descartes' *Cogito*. In Western grammars it makes sense to say, "I think therefore I am." In other languages the structure is completely different. In Tibetan, the structure is "raining is going on now," or "thinking is going on now." Descartes mistook his grammar for necessity. Thanks to Charlene McDermott for this example.

71. *See* HAWKING, *supra* note 69, at 54–55.

we should at least acknowledge its contingency on the legal level,⁷² which acknowledgement might loosen the lock on our progressive imaginations.

Consider the interrelation between observer and observed in the context of the speech/conduct dichotomy in First Amendment law, now salient in pornography and hate speech debates. The courts and commentators concede that there is no clear line between speech and conduct — all speech involves physical action of some kind (even if just moving one's mouth to talk), and much conduct has protected expressive content. The line-drawing problem is predictable, in that the speech/conduct distinction itself is a matter of *habit* rather than necessity. Significantly, the U.S. Supreme Court has never articulated a basis for the speech/conduct distinction, and the commentators urge other contingent epistemological habits to justify this one.⁷³

The speech/conduct distinction, I think, is based on the pre-quantum physical idea of the separation of mind and world. Conduct interferes with another's integrity without the opportunity speech provides for the other's mental processes to reject the intrusion.⁷⁴ Moreover, when threatened with conduct, "more speech" usually will not improve the situation. In addition, conduct observably hurts people. Harms arising from speech are hard to observe and verify: recognizing harm from speech indulges both the oversensitive, whose protective mental processes have failed them, and the fraudulent, whose mental processes are falsely claimed to be ineffective.

72. See, e.g., Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn From Modern Physics*, 103 HARV. L. REV. 1, 2 (1989) (suggesting that, at the very least, the metaphors of physics have "heuristic ramifications" for constitutional law).

73. Nadine Strossen suggests, for example, that the speech/conduct distinction signifies the causal closeness, measured by "directness" and immediacy, of harm to speech. Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 532, 542 (1990). But causation as well is a habit of apprehension, changing all the time. See Ann C. Scales, *Feminists in the Field of Time*, 42 FLA. L. REV. 95, 112-121 (1990).

74. See C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 997-1009 (1978). Professor Baker suggests that "we hold a person responsible for actions that are based on the opinions or perceptions the person accepts." Therefore, exceptions to free speech doctrine — including fraud and blackmail — simply recognize that *coercive* speech tricks or overpowers the injured party's discernment or choices. *Id.* at 998-99. Baker's explanation of coercion helps to explain existing doctrine, but is only one step toward appreciation of how racist and sexist speech actually work.

The process of identifying the harm, however, is itself a function of the habits of observation and the power of social discourse. The harm is serious only if the law is accustomed to seeing its seriousness.⁷⁵ Within the set of harms the law sees are doctrinal exceptions to the First Amendment, such as defamation. The defamation exception⁷⁶ is like an affirmative action program for wealthy or important people. Defamation law officially recognizes *their* subjective experience of the worthlessness of mental intermediation or the use of "more speech" to prevent injuries to their reputations.⁷⁷ As Mari Matsuda says, the law can imagine "what it feels like to have lies spread about one's professional competency To see this, and yet fail to see that [similar psychic harms] happen to the victims of racist speech, is selective vision."⁷⁸

75. When lawyers get into the habit of seeing the connection between speech and harm, that can be enough to transform the speech into conduct, making it actionable. See, e.g., Lawrence, *supra* note 24, at 438-44 (arguing that racial segregation is the means of conveying a message of white supremacy, so that *Brown v. Board of Educ.*, 347 U.S. 483 (1954), can be understood as a group defamation case).

76. Defamation is only a partial exception, requiring more stringent proof when allegedly defamatory speech involves public figures and matters of public concern. *New York Times v. Sullivan*, 376 U.S. 255 (1964) (requiring proof of "actual malice" in libel suit by public official).

77. Thus, defamation is not a "neutral" exception. Like other allegedly neutral rules, it accommodates the subjectivity of the few. See *supra* notes 30-41 and accompanying text. According to Catharine Mackinnon:

[V]irtually every quality that distinguishes men from women is already affirmatively compensated in this society. Men's physiology defines most sports, their needs define auto and health insurance coverage, their socially designed biographies define workplace expectations and successful career patterns, their perspectives and concerns define quality in scholarship, their experiences and obsessions define merit, their objectification of life defines art, their military service defines citizenship, their presence defines family, their inability to get along with each other . . . defines history, their image defines god, and their genitals define sex. For each of these differences from women, *what amounts to an affirmative action plan is in effect*, otherwise known as the structure and values of American society.

MACKINNON, *supra* note 19, at 36 (footnote omitted) (emphasis added).

78. Matsuda, *supra* note 13, at 2375-76.

Although I focus on defamation in the text, other First Amendment exceptions also reflect subjective experiences of dominant groups. The "fighting words" exception "presupposes an encounter between two persons of relatively equal power who have been acculturated to respond to face-to-face insults with violence." Lawrence, *supra* note 24, at 453-54. The exception expresses and glorifies the 'macho-read-my-lips' self-image of white males to the exclusion of women who have not been acculturated in violence and of men of color who have learned the harsh consequences of responding to racial insult with violence. *Id.* at 454 n.93.

Just as important as existing doctrinal content-based exceptions are the vast areas of discourse not thought of as *exceptions* because of pre-existing cultural priorities (such as the entirety of contract law) or cultural inacceptability (such as fraud, blackmail,

Contemporary philosophy and jurisprudence, consistent with the history of physics, agree that the split between mind and world tells a false story. Not only does speech affect us, speech *creates* us. We are formed by the habits learned in discourse.⁷⁹ Therefore, the less obvious the harm arising from speech, the more likely it is a function of the embeddedness of oppression in the social organization, itself a product of language.⁸⁰ In a post-quantum physical world, the rule should be that the less obvious the harm from speech to members of an historically oppressed group, the more subject to serious scrutiny it should be.

These are not questions of the reliability of observation, but questions of overcoming tunnel vision. Essentialist conventions like the “speech/conduct” distinction only blur the problem. Addressing the false dichotomy between speech and conduct means showing how we are all products of social discourse, how pornography and hate speech normalize oppression, and how formerly useful but simplistic distinctions must give way to proven real injuries.

4. DECONSTRUCT THE STATUS QUO FROM THE LEVEL OF KNOWLEDGE.

Sometimes, the philosophical terms and concepts used in feminist legal literature frustrate students. Chief among these frustrators is the term “epistemology,” which is that branch of philosophy which investigates the origin, structure, methods, and validity of knowledge.⁸¹ I cannot overemphasize the importance of epistemological analysis to feminist legal method. Legal results are generated, though sometimes very loosely, by determinations of facts. The analysis of “what the facts are” is too often taken for granted. How do we know the facts? What does it mean “to

intentional infliction of emotional distress, and — only quite recently — “hostile environment” claims in sexual harassment cases). See Frederick Schauer, *Exceptions*, 59 U. CHI. L. REV. 871 (1991). Emerging cultural norms may place some viewpoints beyond the ambit of First Amendment protection, such as the viewpoint that women are appropriate objects for sexual violence expressed in pornography. *Id.* at 88–90. Cf. Matsuda, *supra* note 13, at 2358–61 (arguing that the near universal condemnation of racism dissolves many First Amendment objections to the regulation of racist speech).

79. There is a rich literary and philosophical tradition exploring this insight, which in the world of legal theory is closely associated with contemporary Critical Legal Studies. For a collection of sources and summary, see Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1160–81 (1985) (“Knowledge does not flow from a free subject perceiving independently existing objects; it is constructed in the relationships between things, in the metaphors we create.”). *Id.* at 1170.

80. See Delgado, *supra* note 64, at 383–87.

81. THE DICTIONARY OF PHILOSOPHY 109 (Dogbert D. Runes ed., 1960).

know"? Feminism discerns that existing social arrangements are expressed, recapitulated, and reinforced by claims to knowledge.

Last year, the Public Broadcasting System aired a special two hour segment of William F. Buckley, Jr.'s, *Firing Line*. This program concerned "political correctness" on campus, and involved a debate between notable academics and commentators on both sides.⁸² The conversation was characterized by high-faluting academic talk, and liberally spiced with snide phrases, particularly from the anti-political correctness (or pro-incorrectness) contingent. Multiculturalism and related movements were referred to as a "cult of sensitivity"⁸³ constituting a "culture of forbidden questions."⁸⁴ Multiculturalism, and the language in which it is communicated, were diagnosed, at best, as an "affectation of the current age"⁸⁵ in which sensible defenders of the academic canon are "interrogated by exhibitionists"⁸⁶ and, at worst, as "a competition gimmick,"⁸⁷ an underhanded sort of affirmative action program that benefits people of color and women by silencing the good old boys.

Buckley's argument was largely comprised by an inability to accept simple linguistic changes, such as the replacement of the word "chairman" with "chairperson" or "chair."⁸⁸ He did make one comment worthy of reply, which was that multiculturalism plunges us into a kind of "epistemological pessimism."⁸⁹ I think Buckley meant that multiculturalism, in its insistence on teaching multiple points of view, seems to posit that one system of thought is as good as another, one cultural metaphysics is as good as another, one truth is as good as another. And this, to Buckley, is unacceptable, because particularly in the university, we have to have reliable means of differentiation — for example, among texts, curricular choices, and faculty candidates. There must be therefore a kind of

82. *Firing Line* (PBS television broadcast, Sept. 12, 1991) (video on file with author). The participants on the "pro-canon" side were author William F. Buckley, President John Silber of Boston University, Professor Glenn Lowry of Boston University, and Dinesh D'Souza, author of *ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS* (1991). On the other, "pro-political-correctness" side were Dean Catherine Stimpson of Rutgers University, Professor Stanley Fish of Duke University, President Leon Botstein of Bard College, and Professor Ronald Walters of Howard University.

83. *Id.* (remarks of Glenn Lowry).

84. *Id.* (remarks of Dinesh D'Souza).

85. *Id.* (remarks of William F. Buckley).

86. *Id.* (relying on Socratic dialogues).

87. *Id.* (remarks of John Silber).

88. *Id.* (remarks of William F. Buckley); *see also id.* (remarks of John Silber) (referring to the changes noted in the text as "brutalizations of language").

89. *Id.* (remarks of William F. Buckley).

epistemological optimism, a sense of security in our ability to know the facts fueling these competitions.

Too feverishly sought, that security gives us universities peopled and controlled by a small segment of society. It must be great to have one's self reflected in the great curriculum in the sky as the brightest achievements of all civilization. The "objective reality" implicit in that curriculum affirms its reliability by insisting on its point-of-viewlessness. The central insight of feminist theory is that this same objective reality is a projection of the self-image and psychic needs of the powerful. In a dazzling self-referential way, claims to objective fact are verified by exactly the subjectivity that created objectivity as a means to justify itself and its lock on interpretation.⁹⁰ It cannot be that education consists in replicating this process, in teaching students to narrow their perceptions and to feel good about it by inculcating habits of self-aggrandizement. Real education — the broadening of perceptions and critical eagerness in the project of progressive discourse — is in many ways an inherently feminist enterprise.

Feminist method unlocks objective reality and posits alternative claims to truth through consciousness-raising, "the collective critical reconstruction of the meaning of women's social experience, as women live through it."⁹¹ This method does not criticize objective reality because it is insufficiently objective, or even because that reality has failed to incorporate women's voices.⁹² Rather, it is objectivity itself — entailing objectification, unacknowledged self-reference, and protection of the status quo — that is criticized.⁹³

Consciousness-raising exposes the points of view implicit in the objective norm, liberates participants in the process of consciousness raising in many ways (such as by demonstrating that they're not crazy), and ultimately transforms what is meant by "reality" by presenting sufficient examples, often enough repeated,⁹⁴ that are alternative to reality as we have learned it. This epistemological method underlies all the recent emphasis in legal scholarship on

90. See MacKinnon, *Toward Feminist Jurisprudence*, *supra* note 38, at 638.

91. MacKinnon, *An Agenda for Theory*, *supra* note 38, at 543.

92. On the danger of "incorporationism," see Ann C. Scales, *The Emergence of Feminist Jurisprudence*, 95 YALE L.J. 1373 (1986).

93. MacKinnon, *Toward Feminist Jurisprudence*, *supra* note 38, at 638 n.6.

94. Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 65 (1988) ("We need to flood the market with our own stories until we get one simple point across: men's narrative story and phenomenological description of law is not women's story and phenomenology of law.").

storytelling, on narrative rather than abstraction as the source of authority.⁹⁵

When in legal discourse we deconstruct from the level of knowledge, we find that the facts are almost always open to multiple interpretation. Often, when varying factual accounts are alleged, no one has to be lying. Divergent factual accounts may make perfect sense within their own sets of cultural, gender, and other determinants.⁹⁶ MacKinnon illustrated this by pointing out that, in a typical rape prosecution, the facts are that "a woman is raped but not by a rapist."⁹⁷ To the woman, the action was a violation and an injury. To the man, it was sex. His belief may even be reasonable in this society where sex is largely what women are for and, therefore, can almost never be an injury, where many women have a powerful internal censor when it comes to expressing or even knowing our own desires, and where men are systematically taught not to have to know and often to be unable to know what women want.⁹⁸

We need a more dynamic conception of reality and a more sophisticated epistemology⁹⁹ than that allowed by the assumption that there is one objective truth of the matter. To allow that there are multiple realities is not to embrace radical nominalism, such that we can never have meaningful concepts or rules. Outsider jurisprudence looks for rules and organizations that *work* to enhance value in being alive. The ethical principle of outsider jurisprudence is that understanding comes to rest with difference, "remains content with multiplicity as an end in itself."¹⁰⁰ Liberal legalism may give lip service to the ideals of individual self-determination and fulfillment, but outsider jurisprudence takes those goals seriously. It recognizes that *dignity* is a prerequisite to fulfillment, that individual dignity requires a coherent experience of group membership, and that massive institutional barriers standing in the way of dignity require massive changes.

95. The most wonderful example of this method to emerge thus far is PATRICIA J. WILLIAMS, *On Being the Object of Property*, in *THE ALCHEMY OF RACE AND RIGHTS* 216 (1991). See also Symposium, *Legal Storytelling*, 87 MICH. L. REV. 2073 (1989) (a symposium on narrative as jurisprudential method).

96. I don't mean to suggest that multiple good faith scenarios inform every case. For example, in the Anita Hill/Clarence Thomas confrontation, I believe that only one of their accounts could be accurate, that neither was delusional, and that, credibility and all the evidence considered, she was the truth-teller.

97. MacKinnon, *Toward Feminist Jurisprudence*, *supra* note 38, at 654.

98. *Id.* at 648-55.

99. See EVELYN F. KELLER, *REFLECTIONS ON GENDER AND SCIENCE* 84 (1985).

100. *Id.* at 163.

In the present system, one unstated ideology proclaims its reality as paramount, with no care to investigate the determinants of that reality, nor any consideration of the injustice of imposing that reality on others. Thus, when the facts are that a woman was raped but not by a rapist, "the law tends to conclude that a rape *did not happen*."¹⁰¹ Difference is dealt with by making it disappear. This is not good enough. The question of knowledge cannot ultimately be answered by allocation of burden of proof (much less by chucking in allegations of delusional psychosis); rather, the question of knowledge requires an investigation of relative epistemological privilege. This leads to the next step in my list. When two or more good faith realities inform a dispute, whose reality shall prevail?

5. LOOK TO THE BOTTOM.

Professor Mari Matsuda suggested the phrase, "looking to the bottom," as part of a new, improved jurisprudential method.¹⁰² Looking to the bottom requires a painstaking historical, contextual analysis of whose subjectivity has been relatively unfettered, and whose has been tragically constrained.¹⁰³ When the law must choose among realities, the principle of equality requires that we look to see whose dignity is most at stake, whose point of view has historically been silenced and is in danger of being silenced again, and that, in the ordinary case, we choose that point of view as our interpretation.¹⁰⁴

101. MacKinnon, *Toward Feminist Jurisprudence*, *supra* note 38, at 654.

102. Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324 (1987).

103. Surely it is daunting and dangerous to list actionable instances of oppression, particularly in this "nation of minorities," *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 292 (1987), where group status changes often, if incrementally. I do not propose a static list, but I believe that "[t]o conceptualize a condition called subordination is a legitimate alternative to denying that such a condition exists." Matsuda, *supra* note 13, at 2362. Of course, there are hard cases — from assimilated, affluent members of ethnic minorities to scapegoated white males — which will especially require the painstaking consideration described in the text. But there are also millions of paradigmatic cases in which *we all know exactly who we're talking about*. This is simply a call for taking history and its group-based harms seriously; this is a call for an end to the "unknowing." *Id.* at 2362-74.

104. This is not to say that the historically disadvantaged group member always wins. Rather, when one or more elements of a legal claim require factual interpretation, that group's interpretation should prevail over a divergent "reasonable person" approach. Thus, in interpreting a campus code (such as the University of Wisconsin's) that includes "degradation" in its definition of hate speech, "community members tend to have a clear sense of what is racially degrading and what is not." Matsuda, *supra* note 13, at 2364. Having determined that the utterance in question is hate speech, the other elements of the offense may or may not be met.

Looking to the bottom includes at least three historical, political, and moral judgments. First, it recognizes that some groups and group members have had epistemological privilege, including the power to define, appropriate, and control the realities of others. Second, looking to the bottom incorporates the moral principle that at some point, it is *just* that members of that group relinquish their epistemological privilege in favor of the point of view of the theretofore epistemologically un-privileged. Third is the proposition that it is appropriate for the law to undertake this epistemological redistribution.

Looking to the bottom is anathema to mainstream liberal jurisprudence because it has this big dose of *purposive* interpretation of rules. Much of the jurisprudential debate has been about how to constrain judges, how to close the door on purposive interpretation on the ground that one man's good purpose is another man's evil. The more thoughtful liberals saw the problem in this. Law is not an end in itself. Trusting in rules *qua* rules, even if that could ever be done,¹⁰⁵ gives no guide to conscience, ethics, or justice. There must be *some* purpose in interpretation, if law is to contribute to a good society.

The jurisprudential question was, what purposes can legitimately inform interpretation, given the moral relativism at the bedrock of liberal ethics? Lon Fuller put it this way: "One is tempted to say, 'Why, just use ordinary common sense.' But this would be an evasion, and would amount to saying that although we know the answer, we cannot say what it is."¹⁰⁶ Fuller went on to say, as most liberals do, "the answer lies in structure."¹⁰⁷ To mainstream jurisprudence, the moral authority of the law is in *process*. The process allows for checks and balances among morally relativistic actors, and that should work, because after all, the process is *neutral*. Uh oh, that word again!!

Outsider jurisprudence asserts that the real moral authority of the law inheres in its responsiveness to injustice. Looking to the bottom means committing to the proposition that oppression on the

105. See, e.g., JUDITH SHKLAR, LEGALISM 1, 10 (1964). Professor Shklar is relentlessly critical of "legalism," which she defines as "the ethical attitude that holds moral conduct to be a matter of rule following." It is not the rules themselves that produce ethical bankruptcy, but the failure to see the rules as historically and socially situated. Of course, it is usual jurisprudential practice that the literal language of a rule should yield in most cases to interpretations consistent with the rule's purposes. See Schauer, *supra* note 78, at 894.

106. Fuller, *supra* note 31, at 670.

107. *Id.*

bases of race, gender, sexual orientation, disability, and class is unjust if anything is unjust. Contrary to Professor Fuller's viewpoint, we can say what the answer is in a given case. The historical and personal experience of the oppressed, revealed through consciousness-raising, is amply persuasive. In the meantime, lawyers must give up on monolithic reality and believe that there is something to be learned and a better society to be achieved by listening to formerly silenced people.

6. FIND THE BEST ANSWER FOR NOW.

Finding the best answer for now means to generate as many options as possible about how to deal with a situation. Then, based on information learned from the prior steps, choose the best option. The crucial idea of this step is that any option chosen can be *provisional*. Solutions once embraced can cease to be useful or can be co-opted by others for bad ends. Therefore, this step requires constant vigilance about when the best answer for then becomes a bad answer for the future.

Sometimes, empirical and political conditions mandate "the best answer for now." Abortion is the best example. Anti-choice forces have appropriated the phrase, "abortion on demand," as if women, left to our own murderous devices, would become pregnant just for the fun of increasing the abortion rate. Contrary to this implication, *no one* desires to have an abortion as a worthy end in itself. Rather, abortion is a necessary interim option pending the changes that would dramatically decrease the need for abortions: women's control of sexual access to their bodies, equal participation in child care, economic parity between the sexes, racial equality, and meaningful access to health care.¹⁰⁸ Abortion is only the "best answer for now," and we should portray it that way. With honesty as our best strategic policy, we might shift the debate from abstract morality to the real needs of women and children.

Often, the "best answer for now" strategy entails the careful use of stereotypes. Legal liberalism tends to say that stereotypes are always bad, without acknowledging its extensive use of them.¹⁰⁹

108. MacKinnon, *supra* note 36, at 1323. The social context of abortion requires that doctrinal lines be provisionally but firmly drawn: "[T]he existence of sex inequality in society requires that completed live birth mark the personhood line. If sex equality existed socially . . . the fetus still might not be considered a person but the question of its political status would be a very different one." *Id.* at 1316 (footnote omitted).

109. See my discussion of the ideal of neutrality, *supra* notes 30–41 and accompanying text. "Neutral" laws do the most pernicious stereotyping. They normalize stere-

Stereotypes, though often used as weapons against those stereotyped, can be useful. Some stereotypes are true, if only temporarily; some stereotypes describe group characteristics that tend to be true, if only statistically.

Thus, a pornography ordinance which depicts women as not sexually self-possessed imposes a stereotype. Although this stereotype is not true for all women and does not depict the Essential Nature of Woman,¹¹⁰ I believe it is true, for now, for many women. Strategic use of the stereotype exposes how it is the patriarchal ideal of *how women are supposed to be*, which ideal has made itself true, in part through pornography. The anguished refrain that decision-makers cannot distinguish between useful and harmful stereotypes has helped to protect the \$8 billion/year pornography industry for so long. When pornography ordinances force pornographers to account for the harm they cause to women, when women are not defined by pornography, it is time to get rid of the stereotype.

Similarly, a university hate speech prohibition may stereotype protected groups as unable to respond effectively in verbal exchange, as submissive in the face of insult, and as disproportionately susceptible to psychic injury.¹¹¹ Again, insofar as these stereotypes are true, they are true only for some within the protected classes, and true only, one hopes, temporarily. When things get better for historically disadvantaged groups on campus, or certain groups cease to be reasonably describable as historically disadvantaged, or the regulation fails to work — due to stereotypes or for any other reason — the regulation should be repealed.¹¹²

The obstacle to the proper use of stereotypes is the stunning circularity of legal reasoning. In legal discourse, the alleged evil of stereotypes typically comes up when regulations are proposed to

otypical white maleness, and dispense privilege to others according to their stereotypical distance from that norm. Consider the “fighting words” doctrine, *supra* note 78. It is “neutral” on its face, but black women are unlikely to be the beneficiaries of that doctrine as they are two steps removed — by their race and their gender — from being the stereotypical person who would fight back. This objection does not sound like conventional legal argument, for good reason. “Neutral” laws by definition cannot acknowledge their stereotyping effect and have no self-critical mechanism for adjusting or eliminating the stereotypes.

110. Because of the imperfect fit between stereotype and reality, I endorse the civil rights structure of the MacKinnon/Dworkin pornography ordinances, described at *supra* note 19. Under such an approach, as opposed to imposing criminal prohibitions, women can elect to invoke the stereotype rather than being swept up by it.

111. See Lawrence, *supra* note 24, at 452–62 (discussing the factors that tend to make these stereotypes true).

112. See Matsuda, *supra* note 13, at 2361–62 (suggesting that victims of nationalist hate speech would lose the protection of regulation as historical conditions change).

curtail the activity which produced the stereotypes in the first place.¹¹³ Even if convinced that pornography dispossesses women of their sexuality and that hate speech makes its victims meek and vulnerable, lawyers somehow cannot help worrying that it hurts people worse to describe their injury with specificity. Because we have learned to disapprove of all stereotypes, it becomes more important to avoid the possibility of additional hurt than to provide a remedy for the original one.

The “best answer for now” strategy requires the same historical thoroughness and self-trust that I mentioned in the discussion of looking to the bottom. In all cases we should discern the origins of stereotypes, and use extra care when dealing with new, very sweeping, or truly self-replicating ones. We can trust ourselves with those discussions, and trust ourselves to take interim measures toward rectifying social inequality.

7. PRACTICE SOLIDARITY.

Solidarity means other-directedness on at least three levels. At a minimum, solidarity means thinking through how our decisions, as professionals and as activists, affect other people. It is too easy in the practice of law, even while engaged in the representation of worthy clients, to make bad law that will do harm down the road.¹¹⁴

Avoiding such harm is a big challenge, because it requires understanding the connections between your life and the lives of other people. It requires seeing how you have benefitted from the “subtle magic” of privilege.¹¹⁵ It requires noticing that racism and sexism are interlocking parts of systems of oppression — however unconsciously perpetrated¹¹⁶ — rather than falling into the habit of seeing

113. See also Christine A. Littleton, *Feminist Jurisprudence: The Difference Method Makes*, 41 STAN. L. REV. 751, 760 (1989) (book review) (“[S]eparating the individual from her or his social context in litigation leaves out of a case the very elements that make the case necessary in the first place — unequal social power.”).

114. This can happen with respect to issues that we may not think to be *our* issues, whoever we are. Anne Simon, writing in this volume of how environmental impact studies don't include impacts on the safety of women, suggests a specific area where otherwise progressive organizing can harm groups of outsiders. Simon, *supra* note 66, at 150-51.

115. Matsuda, *supra* note 102, at 379-80.

116. The unconsciousness of racism and sexism fundamentally assure their continued power, Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317 (1987), and provide their legal cover, particularly in the “intentional discrimination” requirement of equal protection doctrine. Alan Freeman, *Legitimizing Racial Discrimination Through Anti-Discrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).

injustices as "isolated incidents."¹¹⁷ It requires uncompromising recognition that our lives and well-being are tied together, and requires resisting any reform that implicitly re-incorporates the race/gender/class system.¹¹⁸ Doing this is a lifetime's work; not doing it is moral idiocy.

On the second level, solidarity means trying unfamiliar strategies informed by unfamiliar voices. Anybody can think up a million reasons, for example, why the foundations of the republic would crumble if a pornography ordinance were put into effect.¹¹⁹ But really, how do we know that? How do we know that everyone's quality of life, and the free marketplace of ideas itself, wouldn't be enriched? It is possible that pornography regulation would cut into the vicious cycle of gender hierarchy. The social construction of gender could change, and that would be to everyone's benefit. Both women and men are significantly eaten up by genderization.¹²⁰ The gender hierarchy deprives men of their humanity; it deprives women of their lives.¹²¹

Third, and most difficult for us verbal types, I believe that at some point, solidarity requires privileged voices to shut up. I plan on doing that, at least for a while. I am accustomed to talking and being listened to. I don't learn much that way, and my opinions and strategies displace fresher and potentially more effective ones.

8. KEEP THE LAW IN PROPER PERSPECTIVE.

Living a legal life, especially engaging in jurisprudential discourse, often leaves one feeling that the only choices are nihilism¹²²

117. Typically, the racial outrages that gave rise to the University of Michigan hate speech regulation were referred to as "isolated and purposeless acts." *Doe v. University of Mich.*, 721 F. Supp. 852, 854 (E.D. Mich. 1989). Similarly, after the massacre of fourteen women at the Ecole Polytechnique in Montreal on December 6, 1989, the mainstream press consistently portrayed it as a meaningless act, in spite of the facts that the killer asked men to leave the room before shooting and left a letter expressing his rage at feminists, listing the names of eighteen specific targets. See *THE MONTREAL MASSACRE* (Louise Malette & Marie Calouh eds. & Marlene Wildeman trans., 1991).

118. For a powerful exposition of this idea, see DWORKIN, *supra* note 12, at 216-21.

119. Describing her experience in the anti-pornography effort, Professor MacKinnon has said, "[y]ou have never heard more reasons for doing nothing in your life . . . It does make one think one is on to something." Catharine A. MacKinnon, *To Quash a Lie*, *SMITH ALUMNAE QUARTERLY* 11, 11-12 (Summer 1991).

120. "Man would have nothing to lose, quite the contrary, if he gave up disguising woman as a symbol." SIMONE DE BEAUVOIR, *THE SECOND SEX* 261 (H.M. Parshley ed. & trans., 1972) (1952).

121. Thanks to my friend Rheba Rutkowski for this concise expression.

122. See Paul Carrington, *Of Law and the River*, 34 *J. LEGAL EDUC.* 222 (1984); Owen Fiss, *The Death of the Law?*, 72 *CORNELL L. REV.* 1 (1986).

or conformity to the dreary, overcautious status quo. In my experience, that stuckness is critical to the maintenance of law's self-importance, and is fueled by a weird legal pathology.¹²³ As a partial remedy for this syndrome, keep in mind that a legal decision neither begins nor ends any important controversy. Legal decisions are distorted snapshots of ongoing social processes.

Lawyers have learned to view the legal dispute as the beginning of a controversy, or as the first place that we can be consequential actors. A number of people are justly concerned, for example, about prosecutions of women for substance abuse during pregnancy.¹²⁴ We will have to deal with the constitutionality of such prosecutions, but it is a mistake to imagine the problem as some abstract conflict between due process rights of mother and fetus, or even between the ideals of liberty and equality. Rather, the constitutional controversy is incidental to the real problems in this country: disgraceful pre-natal care, lack of access to substance abuse treatment, and all the other cracks that women, especially poor women, always fall between. We must learn to focus timely on the hideous conditions that give rise to misleading legal pictures of them.

Likewise, legal decisions are not the end of the matter. Feminist lawyers are justifiably freaked out about the pending official demise of the constitutional right to abortion. The good news, however, is that we are learning to participate (and win) in political processes other than litigation.¹²⁵ Moreover, the work done by lawyers even in losing litigation is critical work. Those snapshots we took, and the preparation that went into them, are invaluable educational and organizational items. Although abortion may soon no longer be a federally constitutionalized right, that will not signal

123. For my analysis of how this syndrome demoralizes lawyers to keep them out of the arena of progressive politics, see Ann Scales, *Midnight Train to Us*, 75 CORNELL L. REV. 710 (1990).

124. For articles addressing the legal implications of substance abuse during pregnancy, and going helpfully beyond the legal context, see Jacqueline Berrien, *Pregnancy and Drug Use: The Dangerous and Unequal Use of Punitive Measures*, 2 YALE J.L. & FEMINISM 239 (1990); Kary Moss, *Substance Abuse During Pregnancy*, 13 HARV. WOMEN'S L.J. 278 (1990); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991); Note, *Maternal Rights and Fetal Wrongs: The Case Against the Criminalization of "Fetal Abuse"*, 101 HARV. L. REV. 994 (1988); Note, *Rethinking (M)otherhood: Feminist Theory and State Regulation of Pregnancy*, 103 HARV. L. REV. 1325 (1990).

125. West, *supra* note 15, at 700-07, 713-21 (turning constitutionalism exclusively over to courts has sapped the moral and political force of our work, and marginalized progressive victories).

any end of our efforts. We are in the process of implementing change in consciousness rather than merely in rules. That is what real progress is.

As I finished this Article, early in the morning of October 16, 1991, the tube reported that it was "National Bosses Day." Too bad, I thought, with the sensation of having missed a delicious irony, that the Senate vote on Judge Thomas's confirmation couldn't have been today instead of yesterday. I know what outsiders have had to do to get by in the world, the ways that women in the workplace, for example, have been asked to show that they are "team players." But today, perhaps, both workers and bosses have a slightly different point of view about that. We had a vital national seminar on what it means to show a little R-E-S-P-E-C-T. It happened in only one week. And I'm glad that I was there.