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# ARTICLES

## TOWARD FEMINIST PERFECTIONISM: A RADICAL CRITIQUE OF RAWLSIAN LIBERALISM

Kimberly A. Yuracko\*

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#### INTRODUCTION

This paper contends that Rawls's value-neutral liberalism, which seeks to eliminate barriers to public participation, fails to address the most invidious barriers to gender equality — namely, internalized gender-based conceptions of self. Rawls's vision of a just society is one in which all people are guaranteed certain basic rights of public and political participation and are free to endorse whatever religious, philosophical, and moral beliefs they choose. Rawls fails to recognize, however, that a gender-based division of labor in the private sphere results in vastly different levels of participation in the public sphere.

Feminist theorists typically do recognize the interplay between the private and public spheres and realize that inequality in one sphere will have spillover effects into the other. Still, most feminist theorists rest their arguments for equality primarily on eradicating harms such as acts of physical violence against women and institutional barriers to public sphere participation. Like Rawls, feminist theorists typically try to remain neutral regarding individuals' private conceptions of the good. However, feminist arguments which focus on liberal harms<sup>1</sup> and remain neutral toward private conceptions of the good do not address those aspects of gender inequality resulting from women's and men's socially constructed conceptions of self and self-worth.

Because the internalization of sexist values and attitudes inhibits gender equality, Rawls's and liberalism's commitment to

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1. By "liberal harms" I mean those harms that interfere with accepted individual rights to political participation or to bodily integrity. See discussion *infra* part II.B-C.

value-neutral pluralism must be foregone in favor of an affirmative endorsement of the values and behaviors that are necessary for a normative vision of gender equality.<sup>2</sup> That is, substantive gender equality requires abandoning liberal neutrality and adopting a version of feminist perfectionism.<sup>3</sup>

The paper proceeds as follows. In Part I, I set out Rawls's vision of political liberalism as developed in *A Theory of Justice*<sup>4</sup> and *Political Liberalism*.<sup>5</sup> This section focuses on Rawls's contention that a just society is compatible with, and in fact requires, neutrality toward a plurality of comprehensive visions of the good.

In Part II, I argue that Rawls's theory does not adequately ensure women's substantive political and public equality nor does it address the most insidious aspects of gender oppression. First, I contend that the effect of inequalities in the private sphere spills over into the public sphere much more than Rawls acknowledges and limits the extent of women's public participation. Second, I argue that even liberal feminist arguments which take into account the spillover effects of private inequality into the public sphere are neither sufficient nor necessary to eliminate many forms of gender oppression. I suggest that the liberal focus on guaranteeing political participation is a useful starting point but will not remedy many forms of gender oppression. Finally, I argue that liberal harm arguments that focus on eliminating violence against women are also inadequate to fully combat the sources of gender inequality. Throughout this paper, I use the example of pornography to show that liberal harm arguments are unable to address barriers to equality that operate by shaping women's preferences rather than by simply frustrating them.

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2. The normative or substantive vision of gender equality discussed in this paper obviously does not accept equality of choices as an adequate proxy for gender equality but looks instead at comparisons between the sexes as to social power and respect.

3. Perfectionism is, most simply, the belief that some ways of life are more valuable and should be more socially valued than others. A life of scholarship and learning, for example, is more valuable than a life spent counting blades of grass. See generally VINIT HAKSAR, *EQUALITY, LIBERTY, AND PERFECTIONISM* (1979); THOMAS HURKA, *PERFECTIONISM* (1993); Martha Nussbaum, *Non-Relative Virtues: An Aristotelian Approach*, in *THE QUALITY OF LIFE* (Martha Nussbaum & Amartya Sen eds., 1993); JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986).

4. JOHN RAWLS, *A THEORY OF JUSTICE* (1971) [hereinafter *A THEORY OF JUSTICE*].

5. JOHN RAWLS, *POLITICAL LIBERALISM* (1993) [hereinafter *POLITICAL LIBERALISM*].

In Part III, I suggest that a move toward feminist perfectionism and a rejection of value-neutrality will better provide substantive equality for women. First, I show that liberal theorists are not entirely value-neutral. They covertly embrace perfectionist principles. Next, I argue that their limited perfectionism does not go far enough. Finally, I offer a radical feminist critique of value-neutrality and present two feminist perfectionist alternatives.

I conclude that it is time for feminists to discuss openly their substantive visions of gender equality and to recognize that liberal value-neutrality has advanced women as far as it will. Feminists whose vision of gender equality differs from the status quo must admit to and must argue on behalf of their substantive visions of equality and the virtues and preferences that must be encouraged or discouraged in order to achieve their visions.

#### I. RAWLS'S FOCUS ON POLITICAL JUSTICE

In *A Theory of Justice*, Rawls's project is to develop a political theory of justice. He claims that if individuals were behind a "veil of ignorance" and did not know their race, sex, class, natural talents, intelligence, conceptions of the good, or special psychological propensities, they would agree on two fundamental principles.<sup>6</sup> The first principle, which has primacy over the second, guarantees to each person "an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for all."<sup>7</sup> The basic liberties, for Rawls, include "freedom of thought and liberty of conscience; the political liberties and freedom of association, as well as the freedoms specified by the liberty and integrity of the person; and finally, the rights and liberties covered by the rule of law."<sup>8</sup> Rawls emphasizes that the equal political liberties are more than formal; they are to be guaranteed their "fair value."<sup>9</sup> The fair value of political liberties assures that those "similarly endowed and moti-

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6. A THEORY OF JUSTICE, *supra* note 4, at 11-12. In *A Theory of Justice*, Rawls does not include sex in his list of morally irrelevant contingencies that are not to be known in the original position, *i.e.*, behind the veil of ignorance. He explicitly adds sex to this list in *Fairness to Goodness*, and continues to include sex as a factor unknown to people in the original position in *Political Liberalism*. John Rawls, *Fairness to Goodness*, 84 PHIL. REV. 536-54 (1975); POLITICAL LIBERALISM, *supra* note 5.

7. POLITICAL LIBERALISM, *supra* note 5, at 271.

8. *Id.* at 291.

9. *Id.* at 6.

vated should have roughly the same chance of attaining positions of political authority irrespective of their economic and social class."<sup>10</sup>

The second principle permits social and economic inequalities as long as they are to the greatest benefit of the least advantaged members of society and are attached to positions open to all persons under conditions of fair equality of opportunity.<sup>11</sup> The first part of this principle, which requires that inequalities favor the least well-off, is commonly known as the "difference principle."<sup>12</sup> The fair equality of opportunity guaranteed by the second part of the principle, like the fair value of political liberty guaranteed by the first principle, ensures more than purely formal equality of opportunity.<sup>13</sup> Fair equality of opportunity tries to ensure that "those who are at the same level of talent and ability, and have the same willingness to use them, should have the same prospects of success regardless of their initial place in the social system, that is, irrespective of the income class into which they are born."<sup>14</sup>

These two fundamental principles apply only to the "basic structure" that, for Rawls, is composed of the political constitution and the major social and economic arrangements. Specifically, he includes in the basic structure: "the legal protection of freedom of thought and liberty of conscience, competitive markets, private property in the means of production, and the monogamous family."<sup>15</sup>

In response to criticism from communitarians who argue that justice should not be the guiding principle for all types of human relationships,<sup>16</sup> Rawls emphasizes, in *Political Liberalism*, that his is a political theory of justice. His principles are not meant to guide behavior in all spheres of human interaction but

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10. A THEORY OF JUSTICE, *supra* note 4, at 225.

11. POLITICAL LIBERALISM, *supra* note 5, at 271; *see also* A THEORY OF JUSTICE, *supra* note 4, at 83.

12. *See* POLITICAL LIBERALISM, *supra* note 5, at 6.

13. *Id.*

14. A THEORY OF JUSTICE, *supra* note 4, at 73.

15. *Id.* at 7. It is interesting to note that, in *Political Liberalism*, Rawls changes his description of the family included in the basic structure from the monogamous family to "the nature of the family," a seemingly broader concept. *See* POLITICAL LIBERALISM, *supra* note 5, at 258.

16. *See e.g.*, MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 32-34 (1982) (arguing that love and altruism rather than justice should govern intra-family relations).

only to protect people in their public sphere interactions, specifically those involving political, social, and economic institutions.<sup>17</sup>

Rawls's public/private distinction is effectively similar to that meant by most feminists and does not in fact replicate his basic/nonbasic structure distinction. The public sphere includes both the state and the market and the private sphere includes the family.<sup>18</sup> Given his focus on the political, it is not surprising that, despite Rawls's nominal inclusion of the family in the basic structure in *A Theory of Justice*, he does not actually apply his principles of justice within the family.<sup>19</sup> In *Political Liberalism*, Rawls is adamantly value-neutral about how people should structure and live their private lives.<sup>20</sup> Although Rawls sets up the basic structure as his testing ground for the principles of justice, he retreats to a fairly typical public/private distinction and only applies his principles in the public sphere.

Rawls further emphasizes that intense disagreement about issues of morality, philosophy, and religion is to be expected and must be protected in any democratic society.<sup>21</sup> Justice as fairness requires agreement only on the basic political conception.<sup>22</sup> Rawls's just society is characterized not by agreement but by a pluralism of incompatible, yet reasonable, comprehensive doctrines.<sup>23</sup>

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17. See generally POLITICAL LIBERALISM, *supra* note 5, at 10-11.

18. See, e.g., POLITICAL LIBERALISM, *supra* note 5, at 10-11. See also Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1501 (1983) (describing different versions of the public/private distinction in which the public sphere describes either the market and the state or just the state, and the private sphere describes either just the family or the market and the family).

19. Rawls effectively excludes questions of intrafamily justice by assuming that those in the original position who formulate the principles of justice are not "single individuals" but "heads of families." See A THEORY OF JUSTICE, *supra* note 4, at 128-29, 146.

20. See POLITICAL LIBERALISM, *supra* note 5, at 58. Rawls's reluctance to actually apply the principles of justice to the family, despite its formal inclusion in the basic structure, is probably due in large part to his beliefs that the family should be regulated by different moral values and that the family is somehow already just. See, e.g., A THEORY OF JUSTICE, *supra* note 4, at 490.

21. POLITICAL LIBERALISM, *supra* note 5, at 3-4.

22. *Id.* at 11.

23. See *id.* at xvi-xviii.

II. RAWLS'S THEORY DOES NOT ADEQUATELY PROTECT  
WOMEN'S SUBSTANTIVE POLITICAL AND PUBLIC  
EQUALITY AND DOES NOT ADDRESS THE  
MOST INSIDIOUS ASPECTS OF  
GENDER OPPRESSION

Rawls attempts to guarantee both fair equality of opportunity and the fair value of political participation by limiting the extent of economic inequality permissible among individuals. Rawls tries to ensure through his difference principle that economic disparities will not be so great as to overwhelm any individual's ability to partake meaningfully in the public sphere.

While Rawls pays careful attention to and seeks to remedy the effects of economic inequality, he does not pay much attention to and does not attempt to remedy the effects of gender-based socialization on the fair value of women's public sphere participation. Rawls does not recognize how social expectations of women to bear the bulk of domestic and family care responsibilities inhibit their ability to participate on the same level with men in the public sphere. Nor does Rawls recognize how the private sphere socialization of girls and women to think of themselves primarily as helpers of or sex partners for men shapes their self-conceptions and motivations in ways that make women unable to participate in the public sphere on the same level as men.

A. *Rawls Fails to Recognize the Spillover Effects of Private Sphere Inequality*

Feminists have critiqued Rawls's public/private distinction between the political and economic world to which he applies his principles of justice and the family to which he does not.<sup>24</sup> They argue that spillover between the public and private spheres is much more extensive than Rawls acknowledges.<sup>25</sup> Furthermore, feminists assert that not only is the family not governed by its own principles of justice, but private domestic gender inequality spills over into the public sphere, thereby denying women mean-

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24. See generally SUSAN M. OKIN, *JUSTICE, GENDER, AND THE FAMILY* (1989) [hereinafter *JUSTICE, GENDER, AND THE FAMILY*]; Deborah Kearns, *A Theory of Justice — and Love; Rawls on the Family*, 18 *POL. AUSTRALASIAN POL. STUD. ASS'N J.*, Nov. 1983, at 36, 39; Jane English, *Justice Between Generations*, 31 *PHIL. STUD.* 95 (1977); see also *supra* notes 18-20 and accompanying text.

25. See *JUSTICE, GENDER, AND THE FAMILY*, *supra* note 24, at 125; CAROLE PATEMAN, *Feminist Critiques of the Public/Private Dichotomy*, in *THE DISORDER OF WOMEN* 118, 135 (1989); DEBORAH L. RHODE, *JUSTICE AND GENDER* 126 (1989).



ingful participation in the public sphere and undermining Rawls's principles of political and market justice.<sup>26</sup>

Feminist critiques of the public/private dichotomy argue that the perpetuation of private inequality, both through sexist customs and traditions and through supposedly value-neutral laws, prevents women from enjoying full public participation.<sup>27</sup> For example, Carole Pateman argues against the traditional gendered division of labor.<sup>28</sup> As long as women are expected to be the primary caregivers to children and the elderly and still hold primary responsibility for domestic tasks, they cannot participate in the public sphere of politics and economics on the same footing as men.<sup>29</sup>

Susan Okin argues that not only does the traditional gendered division of labor in the domestic sphere limit women's potential participation in the public sphere as compared to men's participation in the public sphere but it also serves to recreate this inequality generation after generation.<sup>30</sup> The family, as the first school of justice, teaches children what to expect from themselves and others.<sup>31</sup> To the extent that families are ordered along traditional gendered divisions of labor, girls and boys grow up with different expectations about their degree and type of participation in both the public and private spheres.<sup>32</sup> Thus, the private gender inequality founded on traditional notions of gender difference perpetuates women's lesser ability to take advantage of the liberal rights guaranteed to them in the public sphere.<sup>33</sup>

Similarly, Deborah Rhode argues that supposedly value-neutral laws governing marriage, the structure of the workplace, welfare, child custody, the availability of contraception and abortion, and child care have a significant impact on private domestic arrangements and, necessarily, also on women's public opportu-

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26. See JUSTICE, GENDER, AND THE FAMILY, *supra* note 24, at 125; PATEMAN, *supra* note 25, at 135; RHODE, *supra* note 25, at 126.

27. See JUSTICE, GENDER, AND THE FAMILY, *supra* note 24, at 125; PATEMAN, *supra* note 25, at 135; RHODE, *supra* note 25, at 126.

28. PATEMAN, *supra* note 25, at 135.

29. *Id.*

30. Susan M. Okin, *Gender, the Family, and the Development of a Sense of Justice*, in VALUES AND KNOWLEDGE (Edward S. Reed ed., forthcoming) [hereinafter *Gender, the Family, and the Development of a Sense of Justice*].

31. *Id.*

32. *Id.*

33. *Id.*

nities.<sup>34</sup> Rhode sums up the feminist critique of liberalism's public/private dichotomy:

[A] dichotomous framework masks other connections between private roles and public opportunities. Individual achievements in the marketplace are highly dependent on family resources and socialization patterns. A society truly committed to liberal ideals of equal opportunity in the public sphere could not tolerate the kind of unequal opportunities in the private sphere that characterize contemporary American life.<sup>35</sup>

Pateman, Okin, and Rhode all argue that the power dynamics in the private sphere must not be ignored because women's heavier burdens and lesser power in the private sphere diminish their ability to participate equally with men in the public sphere.

Despite these feminist critiques, Rawls frequently does not seem to recognize — and when he does recognize, does not find significant — any but the most concrete spillover from private inequality to public inequality. Rawls does recognize the spillover effects of private actions which clearly and directly lead to violations of basic liberties or which clearly prohibit women from political participation.<sup>36</sup> For example, Rawls does recognize the spillover effects on women's political participation when women are not able to control their reproductive functions.<sup>37</sup> He recognizes that women's right to abortion is crucial to their political liberty and equality. Rawls explains that the political need for women's right to abortion results from a weighing of three competing political values: a respect for potential life, society's interest in reproducing itself, and the equality of women as equal citizens.<sup>38</sup> He concludes:

Now I believe any reasonable balance of these three values will give a woman a duly qualified right to decide whether or not to end her pregnancy during the first trimester. The reason for this is that at this early stage of pregnancy the political value of the equality of women is overriding, and this right is required to give it substance and force.<sup>39</sup>

Similarly, if it could be shown that pornography causes direct physical harm to women and thereby denies them one of their basic liberties, then Rawls would probably have no problem

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34. RHODE, *supra* note 25, at 126-31.

35. *Id.*

36. POLITICAL LIBERALISM, *supra* note 5, at 243 n.32.

37. *Id.*

38. *Id.*

39. *Id.*

regulating pornography. Rawls recognizes that liberties may conflict with one another in which case one must be qualified. He notes:

Since the basic liberties may be limited when they clash with one another, none of these liberties is absolute; nor is it a requirement that, in the finally adjusted scheme, all the basic liberties are to be equally provided for. Rather, however these liberties are adjusted to give one coherent scheme, this scheme is secured equally for all citizens.<sup>40</sup>

It is plausible to think that, if Rawls believed that the speech right exercised by pornographers directly clashed with women's right to bodily integrity, he would choose to limit pornographers' speech rights rather than infringe upon women's right to personal safety.

Rawls, however, does not recognize the spillover effects of private inequality onto women's political participation through the inculcation in the private sphere of ideas and expectations which are incompatible with gender equality. In fact, Rawls does not challenge inequalities in the family. As part of his first psychological law of moral development, Rawls assumes "that family institutions are just."<sup>41</sup> With this assumption, he frees himself from pondering whether gender inequality and dichotomous role teachings within the family will lessen women's basic liberties and prevent them from meaningfully participating in the public sphere.

Rawls seems to believe that children's public education regarding their political rights of citizenship cannot be tainted by whatever substantive teachings they receive at home. The public school message that all children are equally valuable future citizens with the right and duty to participate in public institutions will apparently be undiminished by the conflicting messages that girls and boys receive in the home about their respective roles in public.<sup>42</sup>

Rawls believes that both children and adults can maintain two distinct and potentially contradictory belief systems, one

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40. *Id.* at 295.

41. A THEORY OF JUSTICE, *supra* note 4, at 490.

42. Rawls wants children's civic education to focus only on their role as future citizens and not to endorse any particular comprehensive doctrines or to support any particular virtues and values. He does not address, however, the ramifications that different comprehensive doctrines will have on the effectiveness of children's civic education. *See, e.g.*, POLITICAL LIBERALISM, *supra* note 5, at 200.

public and one private.<sup>43</sup> He does not seem troubled about the extent to which certain private ideologies which people hold may make their political equality impossible. Rawls repeatedly says that he wants to protect the diversity of reasonable comprehensive doctrines of the good but is unclear about what doctrines he would consider unreasonable.<sup>44</sup> He explains that some comprehensive doctrines are “off the political agenda” and some conceptions of the good cannot be allowed or permitted since they “involve the violation of basic rights and liberties.”<sup>45</sup> His examples of unreasonable comprehensive doctrines include “doctrines and . . . associated ways of life . . . in direct conflict with the principles of justice . . . [such as those] requiring the repression or degradation of certain persons on, say, racial, or ethnic, or perfectionist grounds.”<sup>46</sup> Yet, Rawls still finds almost all religions reasonable. He says, “[E]xcept for certain kinds of fundamentalism, all the main historical religions . . . may be seen as reasonable comprehensive doctrines.”<sup>47</sup>

Rawls discusses the importance of maintaining this public/private difference of ideology. “Another feature of public reason,” he says, “is that its limits do not apply to our personal deliberations and reflections about political questions, or to the reasoning about them by members of associations such as churches and universities, all of which is a vital part of the background culture.”<sup>48</sup> In protecting people’s private belief systems, Rawls does not consider that these beliefs may not be random or balanced but may be the result of social gender hierarchy.

To the extent that Rawls does recognize spillover effects of private socialization on public participation, he does not think these effects are significant or that they render illegitimate personal value preferences. In fact, in *A Theory of Justice*, Rawls explicitly recognizes the effect of motivation, particularly as determined by one’s family, in determining one’s ability for public and political participation. Rawls claims, however, that as long as the differences among individuals are equally distributed across sectors of society, the principle of fair equality of opportunity is not violated. He states:

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43. *Id.* at 199-200.

44. *Id.* at 59.

45. *Id.* at 151, 187, 193.

46. *Id.* at 195-96.

47. *Id.* at 170.

48. *Id.* at 215.

[A]lthough the internal life and culture of the family influence, perhaps as much as anything else, a child's motivation and his capacity to gain from education, and so in turn his life prospects, these effects are not necessarily inconsistent with fair equality of opportunity . . . . If there are variations among families in the same sector in how they shape the child's aspirations, then while fair equality of opportunity may obtain between sectors, equal chances between individuals will not.<sup>49</sup>

Similarly, just as Rawls does not recognize feminists' claims regarding the spillover effects of family socialization on women's public participation as significant, it is unlikely that Rawls would be persuaded by feminists' arguments regarding the spillover effects of pornography's socialization of women to believe they are second-class citizens. Feminists argue that pornography deters women from having the ambition to hold high political office and it dissuades men from voting for women because they see women exclusively in terms of their sexual accessibility.<sup>50</sup>

Rawls seems to endorse a value-neutral attitude toward individual preferences, even if these preferences are the result of socialized gender differences and perpetuate women's disability to participate equally with men in the public sphere. He claims that preferences are valid regardless of their source and does not challenge the authenticity of people's preferences as long as they are aware of their political rights and of liberal ideology.<sup>51</sup>

Suppose that girls are bombarded with images of ideal women as sex toys so that many want to grow up to be anorexic-looking models while boys are bombarded with images of powerful male politicians so that many want to grow up to be President and to marry an anorexic-looking model. It seems that, as long as girls and boys are taught about their equal political rights, Rawls would not challenge the authenticity or validity of these preference choices even though they dramatically undermine the fair value of political participation for girls and boys who started life with equal natural talents and abilities.

Similarly, suppose the fundamentalist religious right teaches its children that an authority higher than the liberal state deems that women should be the helpers of their husbands and should

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49. A THEORY OF JUSTICE, *supra* note 4, at 301. Rawls admits, "[T]he family may be a barrier to equal chances between individuals." *Id.*

50. See generally CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 172-74 (1987) (discussing the socialization effects of pornography).

51. Rawls does not challenge the legitimacy of preferences resulting from early childhood socialization. See, e.g., POLITICAL LIBERALISM, *supra* note 5, at 199.

bear and raise children as their primary responsibilities, but that men should be the providers and masters of their family. Rawls seems to argue that, as long as these children learn somewhere — public school, scouting, television, or newspapers — that they do in fact have equal political rights, then it is a matter of free choice when these fundamentalist girls become subordinate homemakers and the boys become heads of households and paid workers in the public labor force.

Rawls is in a difficult position. If he recognizes that attitude preferences that are the result of deeply ingrained patterns of gender division and sexism inhibit the fair value of political participation that he wants to guarantee, then he must challenge the sacrosanct nature of personal preferences, a core value of liberal diversity. According to Rawls, the fair value of political liberties requires “that citizens similarly gifted and motivated have roughly an equal chance of influencing the government’s policy and of attaining positions of authority irrespective of their economic and social class.”<sup>52</sup> Yet, if Rawls does not recognize the importance of people’s values and socialization on their ability to take advantage of their political rights, then he merely removes the formal legal and economic boundaries to political participation without assuring that some groups of people are not systematically discouraged from participation.

Rawls attempts to get himself out of this bind by requiring that children are formally aware of their political rights and the liberal ideology of persons as politically free and equal.<sup>53</sup> He is not concerned, however, with how salient these beliefs are to children, or how these beliefs are overshadowed by other values taught either by their families, or by society at large. After ensuring that children are exposed to liberalism’s values, he accepts almost all resulting personal preferences as authentic.<sup>54</sup>

Part of Rawls’s disregard for the spillover effects that feminists find significant comes from differing notions of what equal opportunity to participate in the public sphere means. Clearly, when Okin and Rhode claim that private inequality inhibits women’s equal opportunity in the public sphere, they have a certain

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52. *Id.* at 358.

53. *Id.* at 199-200.

54. *Id.*

view of equality of opportunity that probably differs from what Rawls means by equality.<sup>55</sup>

Understandings of equality of opportunity can be divided initially into two main categories. Most simplistically, equality of opportunity can mean pure formal legal equality of access to any career; every person has the same legal privilege to do what she wants in adult life. All other versions of equality of opportunity involve the state's obligation to individuals to increase their chances of success by providing them with some good or service.

Versions of equality of opportunity involving state obligation to individuals can be divided into five categories.<sup>56</sup> First, equality of opportunity can be taken to require equal resources.<sup>57</sup> Democratic equality requires that, for individuals to compete fairly against each other, they must all start off with the same social and economic resources.<sup>58</sup> Second, moralistic equality of opportunity allows differential distribution of goods as long as the distribution is based on a measurement of individual effort rather than achievement.<sup>59</sup> Third, one form of compensatory equality of opportunity tries to make up for environmental deprivation.<sup>60</sup> This version argues that, because some people are encouraged to hold certain values or attitudes that are incompatible with their equality or achievement, equality of opportunity requires that society compensate these people by giving them special encouragement to adopt and enact the values and behaviors that are socially rewarded.<sup>61</sup> Fourth, a second form of compensa-

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55. In *A Theory of Justice*, Rawls outlines three different versions of equality of opportunity: (1) formal or meritocratic equality of opportunity; (2) the principle of redress requiring that, "to provide genuine equality of opportunity, society must give more attention to those with fewer native assets and to those born into the less favorable social positions"; and (3) fair equality of opportunity. A THEORY OF JUSTICE, *supra* note 4, at 72, 73, 100, 106. Rawls explains that justice as fairness endorses neither meritocracy, which permits too much social inequality, nor the principle of redress, which is not required by and may even violate the difference principle. Rawls endorses instead fair equality of opportunity which requires that, "[in] all sectors of society there should be roughly equal prospects of culture and achievement for everyone similarly motivated and endowed." *Id.* at 73, 101, 106.

56. These categories and labels come from Christopher Jencks, *Whom Must We Treat Equally for Educational Opportunity to be Equal?*, 98 ETHICS 518, 518-33 (1988).

57. *Id.* at 519.

58. *Id.*

59. *Id.*

60. *Id.*

61. Jencks refers to this as "weak humane justice" since society is only obliged to compensate those who have been disadvantaged in their homes or earlier schooling environment. Jencks contrasts this with "strong humane justice" which requires

tory equality of opportunity tries to compensate for biological and genetic, as well as environmental disadvantages. This strong version of humane justice argues that, if certain people are lacking the skills or values that will help them achieve socially, for genetic, social, or other reasons, equality of opportunity requires that those lacking are given extra assistance so that they have an equal, or nearly equal, ability to compete for social rewards.<sup>62</sup> Fifth, a utilitarian version of equality of opportunity endorses differential rewards used as motivation in order to further some social goal and maximize some social welfare function.<sup>63</sup> Rewards may be differentially distributed, giving more to those who achieve the most in some socially valued activity in order to encourage maximum achievement in that area. Alternatively, resources may be differentially distributed on the basis of individual effort in order to motivate all persons to work to their full potential.<sup>64</sup>

While Rawls, Okin, and Rhode all favor equality of opportunity as necessary for a just society, they disagree on what they mean by equality of opportunity. Rawls's equality of opportunity is largely formal with some important redistributive provisos. He requires a certain range of equality of resources as a starting point from which people compete<sup>65</sup> and would perhaps require some compensatory measures provided by a public school system for children who are *socially disadvantaged*.<sup>66</sup> Rawls would also certainly require the most basic compensatory measures for physical or biological differences.<sup>67</sup> He would probably advocate pregnancy leave plans for women<sup>68</sup> and would presumably endorse efforts to make public buildings accessible to

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society to compensate those who are disadvantaged in any way, be it socially or genetically. *Id.* at 519-20.

62. *Id.* at 520.

63. *Id.*

64. *Id.*

65. This of course is the purpose of the difference principle — the guarantee of the fair value of political liberties and the guarantee of fair equality of opportunity.

66. Rawls's equality of opportunity suggests that education should be used to compensate for social disadvantage. See *A THEORY OF JUSTICE*, *supra* note 4, at 101.

67. See Rawls's discussion of natural or biological differences. *POLITICAL LIBERALISM*, *supra* note 5, at 79-80.

68. Rawls's argument in favor of protecting women's right to abortion in order to protect their ability to participate in the public sphere strongly suggests a parallel argument on behalf of pregnancy leave plans. *POLITICAL LIBERALISM*, *supra* note 5, at 243 n.32.



the handicapped.<sup>69</sup> After these initial redistributive requirements, Rawls's equality of opportunity only entails equality of formal access to public participation. Equality of opportunity is realized when those born with the same talents and abilities and who exercise the same levels of motivation and desire achieve the same levels of success.<sup>70</sup> Once economic disparities are no longer a hindrance to free formal competition for rewards, Rawls does not go to any lengths to compensate individuals for environmental disadvantages that are not purely economic.

Rawls does not suggest compensatory social measures for individuals suffering from motivational or self-esteem problems resulting from a dysfunctional family situation or for genetic differences which lead some people to master tasks more quickly and easily than others. For example, Rawls does not suggest or imply the need for any compensatory measures to change the preferences of those born with great natural talents but raised to hold values that are incompatible with social achievement. If a child is raised by her parents to think that education and professional achievement are unimportant, Rawls would accept these preferences as legitimate. He would not argue that equality of opportunity requires special resources be used to expose the child to alternative value structures in order for her to have equal opportunity with her more academically motivated peers.

Both Okin and Rhode advocate versions of equality of opportunity that seem to differ significantly from Rawls's. They advocate more extensive social equality than does Rawls before allowing for achievement-based competition. For Okin and Rhode, in order for all people to compete equally for social rewards, they must all start not only with basically equal social resources, but also with basically equal social expectations placed on them.<sup>71</sup>

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69. I say "presumably" because, although endorsing these efforts seems in line with Rawls's general desire to provide people with substantive rights of public and political participation, he implies that some handicapped people are excluded from his definition of "citizens" entitled to such rights. He assumes "that while citizens do not have equal capacities, they do have, at least to the essential minimum degree, the moral, intellectual, and physical capacities that enable them to be fully cooperating members of society over a complete life." *POLITICAL LIBERALISM*, *supra* note 5, at 183-84.

70. See *A THEORY OF JUSTICE*, *supra* note 4, at 73.

71. See generally *Gender, the Family, and the Development of a Sense of Justice*, *supra* note 30 (discussing the impact of sex-based role expectations on women's and men's participation in the public and private spheres); *RHODE*, *supra* note 25, at

Both also imply that more compensatory measures are necessary for equality of opportunity than Rawls recognizes.<sup>72</sup> Like Rawls, Rhode argues that women's biological needs relating to pregnancy must be treated so as not to disadvantage them when competing with men in the public sphere.<sup>73</sup> Okin goes beyond Rawls when she insists that equality of opportunity requires that women and men be raised with the same attitudes and expectations about the level and importance of their participation in the public and private sphere.<sup>74</sup>

To the extent that private families teach girls and boys different values about the significance of housework versus paid labor, it seems schools would have to compensate for these children, particularly the girls, receiving values incompatible with their social equality. For example, schools would have to emphasize to girls the importance of paid labor and emphasize to boys the importance of domestic work. Only by compensating for the different values traditionally taught to each gender, in order to assure that their attitudes, incentives, and motivations are largely similar, can women and men have equality of opportunity. Thus, while some feminists argue that Rawls does not guarantee equality of opportunity, it is perhaps more accurate to say that he does not guarantee the version of equality of opportunity they deem to be meaningful.

B. *Feminist Arguments Focusing on the Spillover of Inequality from the Private to the Public Sphere are Neither Sufficient nor Necessary to Address Many Forms of Gender Oppression*

Liberal feminist arguments about the spillover effects of private inequality onto political equality are neither sufficient nor necessary to get at many forms of gender oppression. Spillover arguments regarding political harms are not sufficient because the spillover effects of gender inequality are not dramatic enough alone to necessitate many of the social changes feminists deem necessary.<sup>75</sup> Spillover arguments are not necessary because femi-

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165-66 (detailing the significance of gender-based role socialization for women's and men's career expectations).

72. See generally *Gender, the Family, and the Development of a Sense of Justice*, *supra* note 30; RHODE, *supra* note 25, at 165-66.

73. See RHODE, *supra* note 25, at 117-25.

74. See JUSTICE, GENDER AND THE FAMILY, *supra* note 24, at 171.

75. The social changes I have in mind here entail not only a redistribution of domestic labor so that it falls equitably upon both women and men, but also a con-

nist arguments for change need not endorse gender equality solely in terms of its political benefits. Feminists can argue for a just private sphere simply because the private sphere is an equally important realm of human activity that should neither be ignored nor thought of only in relation to the public sphere.

Liberal spillover arguments against pornography, for example, often try to show that pornography infringes upon the value of the liberal right to political participation.<sup>76</sup> The claim is that pornography infringes upon women's ability to participate equally in political activities because it disables many women from having the ambition to run for political offices, and it disables many male voters from voting for women because they see women exclusively in terms of their sexual accessibility. Pornography denies women equal political participation by denying them the internal and external resources necessary for meaningful participation.<sup>77</sup>

Frank Michelman makes a similar argument about the need for basic welfare benefits.<sup>78</sup> He argues that guaranteed welfare benefits are needed in order to protect the transtextual<sup>79</sup> constitutional right to effective political participation.<sup>80</sup> In trying to determine what conditions are necessary to ensure the fair value of political participation, he asks, "[W]hat about life itself, health, and vigor, presentable attire, or shelter not only from the elements but from the physical and psychological onslaughts of social debilitation? Are not these interests the universal, rock-

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scious effort to socialize girls and boys so that they have similar life expectations and experience similar social obligations. See generally JUSTICE, GENDER, AND THE FAMILY, *supra* note 24; PATEMAN, *supra* note 25.

76. See generally MACKINNON, *supra* note 50 (arguing that pornography constructs how women and men experience themselves as gendered beings); CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 257-70 (1993) (arguing that pornography acts as a conditioning factor for women and men in ways incompatible with women's social equality with men).

77. See generally MACKINNON, *supra* note 50; SUNSTEIN, *supra* note 76, at 266.

78. Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659, 674-77 (arguing that certain basic welfare benefits, such as food, shelter, health care, and education, are prerequisites for meaningful political participation).

79. Michelman uses the term "transtextual" to refer to rights that are not enumerated in the Constitution but which should be gleaned from the whole body of the document. *Id.* at 673-76.

80. Michelman argues that meaningful political participation is a transtextual constitutional right. *Id.* at 676-77.

bottom prerequisites of effective participation in democratic representation . . . ?”<sup>81</sup>

Both Michelman’s arguments and those made by feminists who seek changes in the private sphere in order to protect women’s ability to participate in the public sphere implicitly privilege the public sphere over the private sphere. They both argue for substantive social equality solely in terms of the need to ensure the equal worth of political participation instead of arguing that substantive equality is a good in and of itself, regardless of whether and how it enhances political participation.

Feminist spillover arguments are not sufficient to require deep social changes in the private sphere because the extent or obviousness of women’s exclusion from the public sphere is not stark enough. Particularly given women’s surge of political participation in the 1992 elections,<sup>82</sup> it is difficult to call for dramatic social changes based exclusively on women’s inability to participate politically because of women’s and men’s socialization.

Neither are private to public spillover arguments necessary in order to argue for a restructuring of the private sphere. Even if private sphere inequalities do not cause public sphere harms, or do not cause harms that Rawls recognizes, the private sphere should still be subject to principles of justice simply because it is a valuable sphere of human activity. The private sphere has traditionally been where women spend most of their time and where children first learn how they and others should be treated.<sup>83</sup>

Although Rawls technically includes the family in his basic structure to be covered by the principles of justice, he undermines the application of the principles of justice to family dynamics by arguing that those behind the veil of ignorance who agree to the principles of justice are not individuals but are “heads of families.”<sup>84</sup> As Jane English explains, “By making the parties in the original position heads of families rather than individuals, Rawls makes the family opaque to claims of justice.”<sup>85</sup> Rawls effectively ignores the intrafamilial gender hierarchy and the in-

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81. *Id.* at 677.

82. In the 1992 elections, the number of women in the House jumped from 28 to 47, while the number of women in the Senate grew from 2 to 6. Brenda Caggiano et al., *The New Congress*, WASH. POST, Nov. 5, 1992, at A33.

83. See JUSTICE, GENDER, AND THE FAMILY, *supra* note 24, at 16-17.

84. A THEORY OF JUSTICE, *supra* note 4, at 128.

85. English, *supra* note 24, at 95.

trafamilial injustice which frames much of the reality of most women's domestic lives.<sup>86</sup>

Feminists making nonspillover related arguments contend that the family should be subject to principles of justice because of its crucial role in developing individuals' sense of self and of morality.<sup>87</sup> The family is the first school of justice and, as such, it is the formative influence in shaping children's sense of justice.<sup>88</sup> If the family is structured along lines of dominance and subordination, and particularly if such hierarchy is justified within the family on the basis of sex, then children are likely to learn to accept and partake in such structures of injustice.<sup>89</sup>

The family's critical role in forming one's psychology raises questions about the need for gender equality in the family not only as a fairness issue, but also to maintain the inner coherence of Rawls's own theory. As Okin explains,

Rawls's failure to subject the structure of the family to his principles of justice is particularly serious in the light of his belief that a theory of justice must take account of 'how [individuals] get to be what they are' and 'cannot take their final aims and interests, their attitudes to themselves and their life, as given.'<sup>90</sup>

Feminists over the last several decades have argued that the family, and particularly the traditional gendered division of labor, is instrumental in the different psychological development of women and men which creates preferences and attitudes that then reproduce the gendered division of labor.

Nancy Chodorow, in her object relations theory of child development, argues that girls and boys have very different experiences individuating themselves from their primary caregiver because, in a gender-structured society, these primary caregivers

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86. Susan M. Okin, *Justice and Gender*, 16 PHIL. & PUB. AFF. 42, 49 (1987) [hereinafter *Justice and Gender*].

87. See, e.g., Nancy Chodorow, *Family Structure and Feminine Personality*, in WOMAN, CULTURE, AND SOCIETY 43, 57-58 (M.Z. Rosaldo & Louise Lamphere eds., 1974) [hereinafter *Family Structure and Feminine Personality*] (arguing that gendered parenting leads to different paths of moral development in girls and boys); Sara Ruddick, *Maternal Thinking*, 6 FEMINIST STUD. 342, 360 (1980) (arguing that the social rather than biological role of mothering, which is performed overwhelmingly by women, encourages a particular ethic of care not as pronounced in those who do not perform this role).

88. See JUSTICE, GENDER AND THE FAMILY, *supra* note 24, at 18.

89. See *Gender, the Family and the Development of a Sense of Justice*, *supra* note 30 (describing girls' and boys' replication of their parents' unequal and gendered division of household labor).

90. *Justice and Gender*, *supra* note 86, at 52.

are overwhelmingly female.<sup>91</sup> Girls are able to remain connected to and to identify with their caretaker while boys must separate themselves from their primary caretaker and identify themselves with an often absent and rather abstract father figure.<sup>92</sup> As a result, Chodorow argues, girls develop the personality characteristics that make them more psychologically connected to others and more likely to choose traditionally female nurturing roles.<sup>93</sup> Boys, in contrast, develop a greater sense of individuation and drive for the public status and recognition they associate with manhood.<sup>94</sup>

Sara Ruddick argues that it is not simply the fact that children are mothered that leads to girls' and boys' different psychological and moral development, but the fact that women, far more than men, are mothers in the social, not biological, sense.<sup>95</sup> Because women, and not men, are overwhelmingly society's caregivers, she claims that women develop an ethos of personal care and responsibility toward others that men typically do not share.<sup>96</sup> Carol Gilligan, while not making any specific claims as to causation, found that women were more likely than men to voice a morality based on their responsibility for others, but that men were more likely to voice a morality based on abstract rights for themselves and others.<sup>97</sup>

Many radical feminists have argued that it is not women's difference that guarantees or mandates their social inequality, but it is society's treatment of women's and men's differences

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91. See NANCY CHODOROW, *THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER* 174 (1978); *Family Structure and Feminine Personality*, *supra* note 87, at 52-53.

92. *Family Structure and Feminine Personality*, *supra* note 87, at 49-51.

93. *Id.* at 57.

94. *Id.* at 57-58.

95. See Ruddick, *supra* note 87, at 345-47.

96. See *id.* at 360.

97. See CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982). Gilligan's findings of differences in women's and men's moral voices have been contested. See, e.g., CYNTHIA FUCHS EPSTEIN, *DECEPTIVE DISTINCTIONS: SEX, GENDER, AND THE SOCIAL ORDER* 76-94 (1988); John M. Broughton, *Women's Rationality and Men's Virtues: A Critique of Gender Dualism in Gilligan's Theory of Moral Development*, 50 *SOC. RES.* 3 (1983); Catherine G. Greeno & Eleanor E. Maccoby, *How Different is the 'Different Voice'?*, 11 *SIGNS* 310 (1986); Lawrence J. Walker, *Sex Differences in the Development of Moral Reasoning: A Critical Review*, 55 *CHILD DEV.* 677 (1984). Gilligan herself has moved away from essentializing the different voices of women and men but holds that the sexes are still likely to choose different forms of moral reasoning because of their different social experiences. See Carol Gilligan, *Reply*, 11 *SIGNS* 324 (1986).

that creates this inequality.<sup>98</sup> As Catharine MacKinnon argues, the real problem for feminism to address is not gender difference but gender dominance.<sup>99</sup> MacKinnon criticizes Gilligan for portraying women's different moral thinking as somehow innate or biological when MacKinnon views it as a result of the subordinate, supportive role that has been forced upon women.<sup>100</sup> According to radical feminists, it is not sex differences per se that must be eliminated in order for society to treat women and men in substantively equal ways. Rather, it is the artificial, gender-based choices encouraged by patriarchy and the social devaluation of women's choices, whatever they may be, that must be challenged.<sup>101</sup> Only by creating a society in which the human potential of women and men is equally valued and promoted can sex differences be differentiated from gender differences and have no social consequences for either sex.

In order for Rawls's theory to be coherent, women and men must be morally genderless.<sup>102</sup> Rawls claims that the people behind the veil of ignorance unanimously accept the principles of justice; however, if this is to be the case among people who know nothing of their personal characteristics, then they must all at least share a mode of psychological and moral reasoning. In order for this to be the case, the individuals behind the veil of ignorance would have to be the product of families more egalitarian than those that now exist so that their thought processes would not be distinctly gendered.<sup>103</sup>

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98. See, e.g., MACKINNON, *supra* note 50, at 32-34 (explaining that feminists should focus not on women's sameness as or difference from men but on the social power hierarchy of men over women); Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1282-85 (1987) (arguing that the phallogocentric perspective of social institutions creates sexual inequality by disadvantaging women for their differences from men).

99. See MACKINNON, *supra* note 50, at 32-45.

100. *Id.* at 39.

101. *Id.* See also Littleton, *supra* note 98, at 1284-85 (arguing that social equality demands that traditional male and female "differences" be costless relative to each other so that, presumably, both women and men would be able to make more authentic life choices).

102. *Justice and Gender*, *supra* note 86, at 71.

103. *Id.*

C. *Liberal Arguments Regarding the Connection Between Private Sphere Inequality and Physical Harms Against Women Are Neither Necessary nor Sufficient to Address the Harms of Gender Oppression*

Liberal feminist harm arguments are unable to address much of the damage that gender inequality causes women. The liberal causation requirement of proving a direct link between gender inequality and physical violence against women is neither sufficient nor necessary to address the harms of gender inequality.

Liberal feminist arguments against pornography and sexual harassment claim that private gender inequality leads to physical violence against women.<sup>104</sup> The liberal feminist critique of pornography takes on two forms. The first argues that pornography leads to direct sexual violence against identifiable women by identifiable men.<sup>105</sup> The second argues that pornography increases the general level of violence against women perpetrated by men.<sup>106</sup>

Within liberalism, there are two methods for regulating a social practice or behavior that is a clear cause of harm. One involves tort law or civil rights legislation in which an identifiable woman who can show direct harm as a result of particular pornography receives some form of redress against the makers or distributors of the pornography. This is the type of liberal harm-based argument at the heart of MacKinnon's pornography ordinance.<sup>107</sup> Although her critique of pornography itself is substantially more radical, her efforts at regulation, because she is

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104. See SUNSTEIN, *supra* note 76, at 264-66.

105. See Catherine Itzin & Corinne Sweet, *Women's Experience of Pornography: UK Magazine Survey Evidence*, in PORNOGRAPHY: WOMEN, VIOLENCE & CIVIL LIBERTIES 222, 229-30 (Catherine Itzin ed., 1992); Ray Wyre, *Pornography and Sexual Violence: Working with Sex Offenders*, in PORNOGRAPHY: WOMEN, VIOLENCE & CIVIL LIBERTIES, *supra*, at 236, 237-38.

106. See SUNSTEIN, *supra* note 76, at 266.

107. The pornography ordinance written by Catharine MacKinnon and Andrea Dworkin outlined four areas of harm caused by pornography: (1) coercion into pornographic performances; (2) having pornography forced upon an unwilling person; (3) physical violence resulting from pornography; and (4) trafficking in pornography. The ordinance allowed individuals harmed in these ways to seek injunctive relief and monetary damages. *The MacKinnon/Dworkin Pornography Ordinance*, 11 WM. MITCHELL L. REV. 119, 121-24 (1985). The ordinance first passed the City Council in Minneapolis in 1983. However, the ordinance was vetoed by the city's mayor. A similar ordinance was adopted in Indianapolis in 1984 but was struck down in 1985 by Judge Frank Easterbrook of the Court of Appeals. For a history of the ordinance, see Paul Brest & Ann Vandenberg, *Politics, Feminism, and the Con-*



working within a liberal state, focus largely on showing direct harm to women by pornography. Attempting to prove this causal link between pornography and violence to women occupied much of the time at the hearings on the ordinance in Minneapolis and is a common topic of laboratory and cultural studies relating to pornography and the incidence of violence against women.<sup>108</sup>

MacKinnon cited experimental research findings which show that exposure to pornographic materials increases men's discriminatory attitude and behavior toward women. Exposure to some forms of pornography increases men's aggression against women under laboratory conditions.<sup>109</sup> Pornography also increases men's hostility toward women, propensity to rape, acceptance of rape, and prediction that they would rape a woman if they knew they would not get caught.<sup>110</sup> Anecdotal evidence of the causal link was presented at the Minneapolis hearings. For example, a former prostitute claimed that all the women in a group of ex-prostitutes of which she was a member were brought into prostitution as children through pornography and were forced as prostitutes to perform the acts shown to them in pornography. Another woman explained how her husband bound

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*stitution: The Anti-Pornography Movement in Minneapolis*, 39 STAN. L. REV. 611, 611-61 (1987).

108. See, e.g., Dolf Zillmann & Jennings Bryant, *Effects of Massive Exposure to Pornography*, in PORNOGRAPHY AND SEXUAL AGGRESSION 115, 134-35 (Neil M. Malamuth & Edward Donnerstein eds., 1984) (reporting that massive exposure of men to pornography increased sexual callousness toward women and trivialization of sexual violence against women); Larry Baron & Murray A. Straus, *Sexual Stratification, Pornography, and Rape in the United States*, in PORNOGRAPHY AND SEXUAL AGGRESSION, *supra*, at 185, 206 (finding a high correlation between pornographic magazine circulation and rape statistics in the different states).

109. See Catharine MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 53 (1985) [hereinafter *Pornography, Civil Rights, and Speech*]; Edward Donnerstein, *Pornography: Its Effect on Violence Against Women*, in PORNOGRAPHY AND SEXUAL AGGRESSION, *supra* note 108, at 52, 64-65 (finding that exposure to violent pornography increased men's level of aggression against unknown women over the level displayed toward unknown women after viewing non-violent sexual depictions).

110. See *Pornography, Civil Rights and Speech*, *supra* note 109, at 53-54; See also UNITED STATES, ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, FINAL REPORT 34 (Rutledge Hill Press 1986) (finding a causal relationship between some forms of sexually explicit material and sexual violence and sex discrimination against women); EDWARD DONNERSTEIN ET AL., THE QUESTION OF PORNOGRAPHY 93-107 (1987) (discussing experimental research findings that violent pornography has a negative effect on men's attitudes about women and that it increases men's aggressive behavior toward women).

her against her will using the knots he learned to tie from pornography magazines.<sup>111</sup>

The second approach involves regulation on behalf of a harmed group and avoids the burden mentioned above of proving direct causation between pornography and an identifiable victim. This type of regulation seeks to redress the increased likelihood of harm that pornography causes to women as a group. It is likely that many women are raped and molested as a result of pornography. Even though the precise women who are raped as a result of pornography are not identifiable, the extent to which pornography increases the level of violence against all women can be determined.<sup>112</sup> In this case, one need not show direct causation of violence but only a general increase of risk to women's health and safety as a result of pornography that is significant enough to warrant regulation.<sup>113</sup>

Feminists have focused on proving the causal link between pornography and violence against women believing that if they did so, the regulation of pornography would no longer violate the First Amendment's viewpoint-neutrality standard. They argue that what is being regulated is not misogyny per se but violence against women.

Judge Frank Easterbrook's decision in *American Booksellers v. Hudnut*,<sup>114</sup> striking down the pornography ordinance drafted by Catharine MacKinnon and Andrea Dworkin, has been routinely read as denouncing the ordinance for its non-value-neutrality. Easterbrook's decision is typically understood as a

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111. *Pornography, Civil Rights, and Speech*, *supra* note 109, at 56-57.

112. For studies describing the general increase of levels of violence to women caused by men's exposure to pornography, see John H. Court, *Pornography and Sex-Crimes: A Re-Evaluation in Light of Recent Trends Around the World*, 5 INT'L J. CRIMINOLOGY & PENOLOGY 129, 152 (1977) (describing the correlation in numerous western countries between the increase in pornographic material available and reported rates of rape and attempted rape); Baron & Straus, *supra* note 108, at 185-209; Edward Donnerstein & Leonard Berkowitz, *Victim Reactions in Aggressive Erotic Films as a Factor in Violence against Women*, 41 J. PERSONALITY & SOC. PSYCHOL. 710, 712-23 (1981); Neil M. Malamuth & James V. P. Check, *The Effects of Mass Media Exposure on Acceptance of Violence Against Women: A Field Experiment*, 15 J. RES. PERSONALITY 436, 436-46 (1981).

113. Regulation of this nature is similar in intent to laws banning smoking in public places and to restrictions on pollution emission into the air. Both attempt to ensure that the danger level of these substances to public health does not rise above some socially determined critical point.

114. *American Booksellers v. Hudnut*, 771 F.2d 323, 325 (7th Cir. 1985), *aff'd*, 106 S. Ct. 1172 (1986).

condemnation of the ordinance's preference for certain types of speech about sex over others.

Easterbrook states, "The ordinance discriminates on the ground of the content of the speech"<sup>115</sup> and he suggests that the ordinance establishes an approved and a disapproved viewpoint.<sup>116</sup> When offering suggestions on how to salvage some of the drafter's intent, he advises that the proposed ordinance must remain neutral with respect to viewpoint.<sup>117</sup> For example, Easterbrook suggests that instead of restricting the ordinance to coercion pertaining to pornography, the provisions should be rewritten to prohibit all coercion or force of certain types, not simply those associated with the particular viewpoint of pornography.<sup>118</sup>

In response, ordinance supporters argue that Easterbrook did not understand or accept the drafters' intent to regulate harms, not speech. Or, perhaps more accurately, they argue that he cared more about pornographers' speech than about women's harms.<sup>119</sup> In a sense, they are correct. In addition to the value-neutrality arguments, Easterbrook also seems to have been making a "mechanism of harm" argument.<sup>120</sup> The argument is that regulating harms caused by viewpoint is not legitimate regardless of the nature and certainty of the harms. It is this part of the argument that seems largely ignored in feminists' responses to the Easterbrook decision and which poses new problems for advocates of pornography regulation who have been focusing much of their attention on combating First Amendment criticisms by showing pornography's direct link to violence against women.

Easterbrook accepts that pornography causes all the harms to women (and men) that the ordinance claims, both physical

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115. *Id.*

116. *Id.*

117. *Id.* at 332.

118. *Id.* at 332-33.

119. See ANDREA DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* xxx (1989); MACKINNON, *supra* note 50, at 210-11.

120. By "mechanism of harm," I mean that society will punish and restrict certain mechanisms or causal factors of harm but not others. If the mechanism of harm is someone's fists, the state will punish the person whose fists are responsible, but if the mechanism of harm is a viewpoint regarding the sub-human status of another person, the state will not punish this viewpoint. Thus, the truly problematic distinction between the two mechanisms is not in their proximity to the resulting damage but in the nature of what the mechanism is; e.g., fists versus ideas. Understanding this argument requires understanding MacKinnon's claim that pornography does not depict the subordination of women but itself subordinates women. MACKINNON, *supra* note 50, at 176-77.

and psychological.<sup>121</sup> He then claims that this effect simply demonstrates the power of pornography as speech, which must therefore be protected.<sup>122</sup> Easterbrook seems to be arguing that, even if what is being regulated is the causation of direct harms, because this causal mechanism is a viewpoint, regulation is unconstitutional. He elaborates this view somewhat more clearly when he states:

A belief may be pernicious — The belief of the Nazis led to the death of millions, those of the Klan to the repression of millions . . . . One of the things that separates our society from theirs is our absolute right to propagate opinions that the government finds wrong or even hateful.<sup>123</sup>

He continues, "The First Amendment does not prohibit redress of all injuries caused by speech."<sup>124</sup>

Easterbrook's argument is similar to the following. Even if it could be proven that Mormon men rape women at a far lower level than do non-Mormon men, the state cannot require that all individuals be raised with Mormon values in order to reduce the incidence of rape. Endorsement of non-Mormon values, like endorsement of the values promoted by pornography, is protected despite its statistically negative consequences with regards to violence against women.<sup>125</sup> In neither case can individuals be forced to hold the viewpoint that is more socially beneficial. This analogy makes most sense if one views both non-Mormonism and pornography as representing society's value norms so that in both cases the status quo is being restricted in favor of more socially appealing alternatives. While smoking may be a legitimately regulable cause of physical harm, so that legislatures may prohibit smoking in public and private business establishments, Mormonism, or the ideology of pornography, is not a regulable cause.

Cass Sunstein offers two criticisms of this viewpoint mechanism of harm argument. First, he argues that the state does recognize and regulate harms caused by a particular viewpoint.<sup>126</sup> He cites examples of state power to ban employers from speaking negatively about the effects of unionization in the period before a union election and state power to prohibit radio and

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121. *Hudnut*, 771 F.2d at 329.

122. *Id.*

123. *Id.* at 328.

124. *Id.* at 333.

125. I thank Mark Kelman for this example.

126. SUNSTEIN, *supra* note 76, at 268.

television advertisements for casinos and cigarettes presumably because of the moral and health hazards these viewpoints promote.<sup>127</sup> Similarly, new hate crime legislation rejects Easterbrook's reasoning by punishing crimes particularly for the viewpoint of hate that motivates them.<sup>128</sup>

Second, Sunstein suggests that pornography does not represent an attitude or viewpoint in the way that Easterbrook means.<sup>129</sup> Pornography does not act through the promotion of certain conscious or deliberative attitudes and opinions but through one's subconscious and visceral emotions.<sup>130</sup> He explains:

Such materials [some pornography] fall in the same category as commercial speech, libel of private persons, conspiracies, . . . bribes, perjury, threats, and so forth. The reason is that these forms of speech do not amount to part of an appeal to deliberative capacities about public matters, or about matters at all — even if this category is construed quite broadly, as it should be, and even if we insist, as we should, that emotive and cognitive capacities are frequently intertwined in deliberative processes.<sup>131</sup>

Sunstein claims that some pornography is low-grade speech that is not in fact acted upon as a conscious viewpoint or attitude and is not in need of constitutional protection.<sup>132</sup> Sunstein suggests that pornography acts to create in men an eroticized reac-

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127. *Id.*

128. Several states have enacted hate crime legislation which enhances penalties if a crime is motivated by bias. *See, e.g.*, WIS. STAT. ANN. § 939.645(1)(b) (West 1991) (increasing the penalties for underlying crimes which were committed in whole or in part because of the victim's "race, religion, color, disability, sexual orientation, national origin or ancestry"); N.Y. PENAL LAW § 240.30, 240.31 (McKinney 1995) (enhancing the penalty for aggravated harassment when it is committed with intent to harass, annoy, or threaten another person because of that person's race, color, religion, or national origin). *But see* R.A.V. v. City of St. Paul, 112 S.Ct. 2538, 2547 (1992) (striking down a hate speech ordinance on the grounds that it was not content-neutral); Wisconsin v. Mitchell, 113 S. Ct. 2194 (1993) (striking down the Wisconsin penalty enhancement statute on the grounds that it punished "offensive thought").

129. SUNSTEIN, *supra* note 76, at 265 (suggesting that some pornography does not appeal to people's cognitive capacities in the way that traditional conceptions of speech, such as ideas, do but appeals to people's emotional capacities on a somewhat subliminal level).

130. *Id.*

131. *Id.*

132. *Id.* at 264-65.

tion to violence that is pre-rational.<sup>133</sup> Pornography increases the level of violence against all women, though specific victims and even specific perpetrators of violence of this sort are hard to recognize.<sup>134</sup> This theory argues that the increase of violence towards women is caused by the general socialization of all men through their exposure to pornography.<sup>135</sup>

A parallel case might be the regulation of smoking because it increases the risk of cancer in all people, and directly causes cancer in some, though it is difficult to identify smoking as the definite cause in specific cases. The mechanism of harm is not conscious but just a physical reaction that leads to cancer in some people.<sup>136</sup> Similarly, in this view, pornography causes a certain number of men to rape not because of a conscious endorsement of the attitudes of gender oppression, but due to an autonomous nervous system response to their exposure to pornography.

In addition to not being sufficient to maintain pornography regulation, liberal harm arguments are not necessary to argue in favor of regulation. As some radical feminists argue, the harm of pornography is not primarily that it leads to violence against women, although this is certainly important, but that it constructs gender and sexuality for women and men in terms of the messages of pornography.<sup>137</sup> That is, women learn to think of themselves as objects for men's sexual pleasure and to sexualize their subordination, while men think of women as objects to be

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133. *See id.* at 265-66 (arguing both that some pornography affects men on an emotional or pre-rational level and that pornography increases the incidence of sexual violence against women).

134. *See id.* at 266 (asserting that pornography increases the level of sexual violence against women generally though the precise connection between pornography and violence against women is disputed).

135. Sunstein's argument about the way pornography affects men's behavior is interesting, and probably right, in the sense that most strong socialization influences affect people's behavior. However, the seeming fatalism of the argument's expectation of violence and the sharp line drawn between those actions and attitudes that are within people's control and those that are not makes it very difficult to hold individuals responsible for actions that could be attributed to nondeliberative socialization. To the extent that prerational socialization forces are held responsible for leading to certain actions, it is very hard to attribute any actions to a person alone. Hence, it would be very difficult to avoid having to seek out, recognize, and perhaps regulate, the socialization influences contributing to *all* acts of social deviance.

136. I thank Mark Kelman for this insight.

137. *See generally* MACKINNON, *supra* note 50, at 172-73; DWORKIN, *supra* note 119, at 128. *See also* Robin West, *Pornography as a Legal Text*, in FOR ADULT USERS ONLY: THE DILEMMA OF VIOLENT PORNOGRAPHY 110 (Susan Gubar & Joan Hoff eds., 1989) [hereinafter *Pornography as a Legal Text*].

taken and used sexually and sexualize their dominance.<sup>138</sup> Radical feminists claim that pornography corrupts women and men in three ways.<sup>139</sup> First, it creates a vision of women in men's minds that focuses exclusively on their physical beauty and sex appeal.<sup>140</sup> Second, pornography hurts men by depersonalizing sex and linking its enjoyment with violence.<sup>141</sup> Third, pornography causes women to internalize a conception of themselves as dominated sex objects so they come to sexualize and find sexually arousing their sexual domination.<sup>142</sup>

MacKinnon describes the real internalized harm of pornography to women's and men's understanding of themselves. She explains: "Men treat women as who they see women as being. Pornography constructs who that is. Men's power over women means that the way men see women defines who women can be. Pornography is that way."<sup>143</sup> She continues, "Gender has no basis in anything other than the social reality [pornography's] hegemony constructs. Gender is what gender means."<sup>144</sup>

Liberal feminist arguments have not been effective thus far at regulating attitudinal mechanisms of harm to women. These arguments, which shroud liberal feminists' demands for changes in standard rights rhetoric, do not address what some feminists perceive to be the most pernicious aspects of gender oppression. Gender hierarchy not only hurts some women in particular ways, but it constructs all women's and men's conceptions of themselves as gendered beings in accordance with the social messages of male dominance and female subordination.

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138. MACKINNON, *supra* note 50, at 172-73.

139. For versions of all three of these claims see generally, MACKINNON, *id.*; DWORKIN, *supra* note 119, at 128. See also *Pornography as a Legal Text*, *supra* note 137, at 118.

140. See DWORKIN, *supra* note 119, at 128 (describing pornography's sexual objectification of women).

141. *Id.* at 68-69 (explaining how men use and internalize the messages of pornography to dehumanize women and to link their dominance over women with their own sexual gratification).

142. See MACKINNON, *supra* note 50, at 172-73.

143. *Id.* at 172-73.

144. *Id.* at 173.

III. LIBERALISM'S VALUE-NEUTRALITY TOWARD INDIVIDUALS' PRIVATE CONCEPTIONS OF THE GOOD MUST BE REPLACED WITH A VERSION OF FEMINIST PERFECTIONISM IN ORDER TO ACHIEVE SUBSTANTIVE GENDER EQUALITY

Liberalism's desire to remain value-neutral toward individual conceptions of the good life and the good society is incompatible with virtually any version of substantive gender equality. At root, some viewpoints are compatible with gender equality and others are not. Widespread endorsement of women's and men's "naturally" different social roles, such as exists at present, prevents women and men from enjoying similar levels of public and private sphere participation and power. Feminists must recognize that gender equality requires abolishing not only formal barriers to women's social participation but internal barriers as well. Liberalism's neutral acceptance of all personal viewpoints as acceptable and worthy of social protection must be abandoned in favor of a feminist perfectionist critique that recognizes that certain private conceptions must be considered unacceptable in a society in which women and men truly have the same life chances.

A. *Liberals' Supposedly Value-Neutral Rejection of Perfectionism Is Ostensible, Not Real*

Even liberals' rejection of perfectionism and endorsement of value-neutrality is more ostensible than real. Both Rawls and Okin covertly embrace a vision of the good life that is required by their versions of the just society.

Rawls strives to avoid comprehensive liberalism on the order of Kant or Mill. He does not want to impose on individuals any private thought requirements. He explains: "The liberalism of Kant and Mill may lead to requirements designed to foster the values of autonomy and individuality as ideals to govern much if not all of life. But political liberalism has a different aim and requires far less."<sup>145</sup> Here, Rawls claims to be value-neutral. He sets up a political structure of equal rights entitlements but does not mandate how much or how little different people or different types of people use their political rights.

Even so, Rawls is not completely value-neutral. Rawls does assert that some comprehensive doctrines are "off the political agenda" because they do not respect the principles of justice and

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145. POLITICAL LIBERALISM, *supra* note 5, at 199.



involve the violation of basic rights and liberties.<sup>146</sup> Furthermore, Rawls's political rights are not simply formal. Rawls's fair value of the political liberties are more substantive than the simple guarantee to all adults of the right to vote and hold public office.

Rawls develops the difference principle in part to assure that the fair value of political participation will be substantive and will not diminish as the economic gap between the rich and the poor grows.<sup>147</sup> The difference principle is also meant to assure that all people have the material resources needed to pursue their conceptions of the good. Rawls criticizes the Supreme Court for not protecting the right to political participation in a substantive enough form. He argues:

The Court fails to recognize the essential point that the fair value of the political liberties is required for a just political procedure, and that to insure their fair value it is necessary to prevent those with greater property and wealth and the greater skills of organizing which accompany them, from controlling the electoral process to their advantage.<sup>148</sup>

Rawls recognizes the tug between his two internally conflicting desires: his desire to promote a multiplicity of ideologies and viewpoints in a value-neutral way and his desire to promote values commensurate with his more substantive notion of the fair value of political rights. For example, although Rawls adamantly supports the right of parents to teach their children whatever religious or social values they want,<sup>149</sup> he recognizes that, in order to assure more than just the formal guarantee of political rights for these children, the children must also be taught the virtues of political liberalism. He states the need to teach children some basic yet substantive lessons about their political rights so that they can take advantage of these rights.<sup>150</sup> Rawls recognizes that he cannot be completely value-neutral about what children learn and believe and still guarantee more than formal rights. Rawls explains that children's education should include such things as:

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146. *Id.* at 151.

147. *See supra* text accompanying note 10.

148. A THEORY OF JUSTICE, *supra* note 4, at 360 (criticizing the Supreme Court's decisions in *Buckley v. Valeo*, 424 U.S. 1 (1976), and *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978)).

149. *See id.* at 301 (supporting the right of parents to socialize their children as they wish even if this socialization effectively undermines the child's future political participation); POLITICAL LIBERALISM, *supra* note 5, at 199-200.

150. POLITICAL LIBERALISM, *supra* note 5, at 199-200.

[K]nowledge of their constitutional and civic rights so that, for example, they know that liberty of conscience exists in their society and that apostasy is not a legal crime. All this is to insure that their continued membership when they come of age is not based simply on ignorance of their basic rights or fear of punishment for offenses that do not exist.<sup>151</sup>

Rawls moves from value-neutrality in his prescriptions for children's education to further assure the fair value of political participation regardless of the private teachings children receive at home. He states: "Moreover, their education should also prepare them to be fully cooperating members of society and enable them to be self-supporting; it should also encourage the political virtues so that they want to honor the fair terms of social cooperation in their relations with the rest of society."<sup>152</sup>

Rawls's seeming internal tug-of-war over the extent of his value-neutrality falls well within the confines of standard liberal thought. Liberal society commonly treats the socialization of children differently from that of adults. The state can prescribe and advocate certain values and preferences for children because children are essentially malleable and will be influenced by whatever surrounds them. Thus, the state is legitimate in advocating and teaching children certain values and preferences over others.

Liberalism generally and Rawls in particular, tend to draw a thick line between the legitimacy of children's preferences and the legitimacy of adults' preferences. Children's personal preferences can be challenged and determined to be inauthentic when they result from masochistic socialization.<sup>153</sup> Adults' preferences, however, are held to be legitimate regardless of their source. It is far easier for the state to be non-value-neutral to the personal preferences of children than it is for the state to be non-value-neutral to the preferences of adults regarding how to live their lives within the general confinements of the law. For example, liberals have a much easier time challenging the authenticity of a fourteen-year-old girl's choice to have sex with David Koresh<sup>154</sup> than they do challenging the decisions of the

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151. *Id.* at 199.

152. *Id.*

153. I use the term masochistic socialization to refer to preference formation resulting from the internalization of the message of one's own lack of self-worth.

154. See Sue Anne Pressley, *Teenager Tells Waco Panel of Koresh's Lust: Divergent Views on Sect Featured as Hearings Open*, WASH. POST, July 20, 1995, at A1.

girl's mother to do the same. Age makes a significant difference between what liberals see as voluntary and involuntary behavior.

Though Rawls does recognize the need for some substantive education of children with regard to their political rights, he does not require that children or adults endorse politically liberal values and rights. He is only willing to require that children know these values and rights exist. Rawls clarifies how far he will go to make his liberties more than formal:

[J]ustice as fairness does not seek to cultivate the distinctive virtues and values of the liberalism of autonomy and individuality, or indeed of any other comprehensive doctrine. For in that case it ceases to be a form of political liberalism. Justice as fairness honors, as far as it can, the claims of those who wish to withdraw from the modern world in accordance with the injunctions of their religion, provided only that they acknowledge the principles of the political conception of justice and appreciate its political ideals of person and society.<sup>155</sup>

Rawls recognizes the challenge to his tenuous hold on value-neutrality and is saved from completely abandoning it only by a dubious factual assumption. Rawls's dubious factual assumption is that simply educating children about their political rights will lead most of them as adults to endorse and act upon the liberal political doctrines. It would be very interesting to know what Rawls would do if he did recognize how sexism teaches girls attitude preferences that undermine their political participation as women to such a degree as to undermine the justice of the political state.

If it could be shown that certain views were so widespread that they suppressed the basic liberties to such a degree, perhaps by politically incapacitating one-half of the population, so as to make the fair value of political participation impossible, Rawls would have to abandon his neutrality toward such comprehensive doctrines. He states, "Views that would suppress altogether the basic rights and liberties affirmed in the political conception, or suppress them in part, say its liberty of conscience, may indeed exist, as there will always be such views. But they may not be strong enough to undermine the substantive justice of the regime."<sup>156</sup>

Rawls's factual assumption is certainly wrong. Rawls is far too optimistic in believing that people will accept and act in ac-

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155. POLITICAL LIBERALISM, *supra* note 5, at 200.

156. *Id.* at 65.

cordance with politically liberal values of people as politically equal even if they receive contrary messages in the home or in the rest of society. That is, if children are taught that girls are inferior to boys by their parents as the word of God, and are treated in ways that manifest this belief, it is extremely unlikely that they will grow up to believe in gender equality. In adulthood, neither women nor men will treat both sexes equally simply because they received the message from public education that the sexes are considered equal before the state.

Okin applies Rawls's value-neutral principles of justice in the political sphere to the family.<sup>157</sup> She proposes principles designed to protect women from economic vulnerability while remaining value-neutral as to people's personal preferences regarding their private division of labor.<sup>158</sup> She imagines people behind the veil of ignorance not knowing their gender, personal characteristics, or beliefs as to proper gender roles.<sup>159</sup> Those behind the veil would have to arrive at principles of justice which could satisfy and accommodate the range of different legitimate viewpoints on proper family organization, while insuring that these different choices, such as preferences regarding the private division of labor, do not result in the economic and physical vulnerability of women and children.<sup>160</sup>

As Rawls does in the political sphere, Okin places a limitation on views considered acceptable in the private sphere by those behind the veil. Certain views, for example religious fundamentalist notions of women's natural inferiority to men, violate Rawls's equal basic liberty principle<sup>161</sup> and should not be considered viable comprehensive doctrines to be protected by principles of justice.<sup>162</sup> After guaranteeing that all people are inherently free and equal, Okin applies neutral principles of justice to the private sphere and recognizes a pluralism of beliefs. This is simply a logical translation of Rawls's own initial restriction on the comprehensive doctrines that are incompatible with notions of people as formally free and equal.<sup>163</sup>

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157. JUSTICE, GENDER AND THE FAMILY, *supra* note 24, at 174-75.

158. *Id.* at 175-77.

159. *Id.* at 174.

160. *Id.* at 172-74.

161. Equal basic liberty is required by Rawls's first principle. See *supra* text accompanying note 7.

162. JUSTICE, GENDER, AND THE FAMILY, *supra* note 24, at 173-74.

163. See POLITICAL LIBERALISM, *supra* note 5, at 151 n.16 (explaining when certain doctrines are considered "off the political agenda"); see also A THEORY OF

According to Okin, applying principles of justice to the private sphere should mean that public policies and laws assume no social differentiation in domestic and public responsibilities between women and men.<sup>164</sup> Okin offers suggestions as to the changes needed in the structure of the public work world in light of these private sphere assumptions of gender equality. For example, pregnancy leave should be treated like any other form of temporary disability and employers should be required to provide leave for all disabling conditions.<sup>165</sup> Parental leave should be offered to both women and men on the same terms.<sup>166</sup> Part-time and flexible work hours should be available to parents of young children.<sup>167</sup> Professions whose greatest demands on workers come during their prime child-rearing years should restructure their demands or provide greater flexibility to those workers who are parents.<sup>168</sup> Large-scale employers should be required to provide on-site day care and the government should provide direct means-tested government subsidies to parents for child care.<sup>169</sup>

Okin argues that principles of justice, as applied to the private sphere, would require that children be taught about gender inequality, workplace discrimination, and the potential dangers of following a traditional gendered division of labor.<sup>170</sup> According to Okin, children should be encouraged to think about their futures as full of possibilities unaffected by their sex.<sup>171</sup> This seems to be the private sphere parallel of Rawls's requirement that children be encouraged to think of themselves as politically free and equal regardless of their sex, race, or class.

Okin, however, recognizes that not all families will decide to divide their labor in a nongendered way. Okin, wishing to allow for as diverse a set of comprehensive doctrines as possible, requires only that those who decide to divide their labor in a traditionally gendered way are not made particularly vulnerable in either the private or the public sphere. If those behind the veil

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JUSTICE, *supra* note 4, at 504-05 (describing the bases for treating all people as free and equal).

164. JUSTICE, GENDER, AND THE FAMILY, *supra* note 24, at 175.

165. *Id.* at 176.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* at 176-77.

170. *Id.* at 177.

171. *Id.*

consider a traditionally gendered division of labor to be acceptable, then society must be structured according to principles of justice which assure that those with these viewpoints are not socially disadvantaged.<sup>172</sup> In order to assure this, Okin proposes that, for families choosing more traditional gender-dichotomous marriages, society should work to minimize the economic vulnerability of women and children by having employers pay equal checks to the wage earner and the partner providing the family's unpaid domestic services.<sup>173</sup>

In spite of Okin's endorsement of pluralism, her vision of a just society is distinctly perfectionist. Okin recognizes that widespread endorsement of the values of a genderless society is necessary for achieving substantive gender equality. She argues, "[N]ot only is the disappearance of gender necessary if social justice is to be enjoyed in practice by members of both sexes, but . . . the disappearance of gender is a prerequisite for the *complete* development of a nonsexist, fully human *theory* of justice."<sup>174</sup> Okin implicitly endorses a vision of the good life that involves both women and men sharing equally in public and private sphere activities. Okin argues:

Only when men participate equally in what has been principally women's realm of meeting the daily material and psychological needs of those close to them, and when women participate equally in what have been principally men's realms of larger scale production, government, and intellectual and

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172. *Id.* at 181-82.

173. *Id.* at 180-81. Okin is of course right that in a society of substantive gender equality, women must not be punished for their life choices if these life choices are deemed legitimate and socially acceptable. Yet, in a society structured according to principles of justice, there seems to be no reason to require that women not be disadvantaged by their choice not to participate in the market without requiring the same be true for men who forgo market labor in favor of domestic duties. Either the private choices of both genders must be privileged or neither should be. This is not at all incompatible with Okin's proposal when framed in genderless terms. In addition, if a woman who stays home and cares for the house and children is deemed worthy of economic remuneration for her labor, is there any reason why women who marry rich men and stay at home should be less socially disadvantaged than women who marry poorer men and stay home? The intrafamilial financial division does alleviate the crucial problem of women's economic vulnerability within the family; however, it raises questions about whether the person at home is really being paid for her labor or being paid in order to maintain her social equality with her spouse. This raises questions not just of intrafamilial fairness, but also of social fairness, the value of work, and the worth of some personal preferences to be free from negative repercussions while others are not.

174. *Justice and Gender*, *supra* note 86, at 68.

creative life, will members of both sexes develop a more complete *human* personality than has hitherto been possible.<sup>175</sup>

As was Rawls's, Okin's perfectionism is hidden by her prescriptions regarding how children should be raised and by her assumption about the kind of people that this early socialization will create. Okin assumes that changing the formal structure of the family to be based on expectations of gender equality, instead of dichotomy, will lead to a change in women's and men's preferences and attitudes.

While Okin's factual assumption is more realistic than Rawls's, it too is probably overly optimistic. Certainly a change in family form will affect children's socialization, role expectations, and values. However, creating egalitarian families is not sufficient to socialize children to think of themselves as genderless beings. Children probably learn as much about who they are, what they are for, and how much they matter socially from toy stores, movies, and television. Changing family structure would help to eliminate gender-based socialization, but it is probably not enough to bring women and men to think of themselves as socially equal beings. Furthermore, until gender equality is achieved, children will be raised by women and men who, despite their efforts at equality, have been socialized to varying degrees in accordance with traditional female and male roles. Thus, even creating a just family in which children of both sexes are given equal treatment and consideration and in which they do not learn gender roles from observing their parents, requires the prior existence of genderless people and of a non-gender-based society.

B. *Liberalism's Limited Perfectionism Is Not Enough to Achieve Sex Equality*

Sunstein critiques liberalism's lack of value-neutrality and argues that it should be replaced with a more open perfectionism.<sup>176</sup> Sunstein questions the supposed value-neutrality of public laws and institutions which shape people's attitudes, desires, and preferences while claiming only to reflect people's natural preferences.<sup>177</sup> He further argues that it is time to recognize that the status quo is the result of a long history of legal and social

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175. *Id.* at 71.

176. SUNSTEIN, *supra* note 76, at 257-61.

177. *Id.* at 43-44.

subordination of certain groups.<sup>178</sup> The status quo is not neutral in any sense; it is neither natural nor is it fair.<sup>179</sup> Therefore, status quo neutrality<sup>180</sup> should be replaced by laws designed to foster the personal preferences needed to promote a substantive picture of social equality.

Sunstein describes the way the formal public structure helps create private preferences. These preferences are then used to mask gender domination behind claims of natural gender difference. He explains:

Consider laws ensuring that women will not be rewarded as well as men in the workplace, and that thus encourage women but not men to engage in the care of children. Even when the differences are biological, and not a product of law, it is legal practices that turn biological differences into a source of social disadvantage.<sup>181</sup>

According to Sunstein, taking the status quo as neutral only makes sense if the status quo is substantively just. If the status quo is the result of historical oppression of certain groups, then to accept it as neutral is only to accept that certain groups have second-class citizenship. Sunstein explains, "Status quo neutrality is unobjectionable if the status quo can be defended in substantive terms or if it does not itself embody injustice, whether social, biological, or otherwise." If existing practice is not just, it often "serves as a mask for substantive theories that conceal injustice and cannot be defended if brought into the open."<sup>182</sup>

To the extent that formal rules and regulations shape private preferences, those rules and regulations should be structured with a substantive vision of social equality in mind.<sup>183</sup> Sunstein offers both desegregation and pornography as cases in which the supposed value-neutrality of the status quo is better replaced by endorsement of values necessary for substantive equality.<sup>184</sup>

Sunstein follows the progress of the Supreme Court from a status quo-value-neutral position to a non-value-neutral position

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178. *Id.* at 269.

179. *Id.*

180. Sunstein uses this term throughout *The Partial Constitution*. Sunstein explains that the "understanding" of neutrality he challenges "defines neutrality by taking, as a given and as the baseline for decision, the status quo, or what various people and groups now have: existing distributions of property, income, legal entitlements, wealth, so-called natural assets, and preferences." *Id.* at 3.

181. *Id.* at 261.

182. *Id.* at 353.

183. *Id.* at 353-54.

184. *Id.* at 75-77, 267-70.



on the issue of racial desegregation. First, he examines the Court's claim in *Plessy v. Ferguson*<sup>185</sup> that it could not mandate social as opposed to political equality. According to the Court, the Fourteenth Amendment "could not have been intended to abolish distinctions based upon color, or to enforce social as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either."<sup>186</sup> The Court argued that segregation was constitutional because it represented only the state's enactment of the established customs and traditions of the people.<sup>187</sup> The Court took people's racial attitudes and preferences as both neutral in value and natural in derivation. It refused to acknowledge that attitudes and preferences were both reinforced and created by the legal system of racial segregation.

Next, Sunstein turns to *Brown v. Board of Education*.<sup>188</sup> In *Brown*, the Court finally recognized the ability of social structures to affect individuals' attitudes and preferences and the obligation of the state to establish a social framework that would promote the private values necessary for substantive social equality.<sup>189</sup> The Court in *Brown*, recognizing the effect of segregation on shaping black children's personal attitudes of inferiority,<sup>190</sup> mandated a social policy that would instead foster private attitudes commensurate with racial equality.<sup>191</sup> The Court held: "To separate [black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to ever be undone."<sup>192</sup>

While I think few people would argue today that the state should be neutral between fostering racist and egalitarian values, this same logic has been used by courts desiring to be neutral

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185. 163 U.S. 537 (1896).

186. *Id.* at 544.

187. *Id.* at 551.

188. 347 U.S. 483 (1954).

189. *See id.* at 494-95.

190. *Id.* at 494.

191. *Id.* at 495.

192. *Id.* at 494. For a criticism of the *Brown* decision as non-neutral, see Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). Wechsler argues that the Court was deciding between two equal associational preferences: the desire of blacks to attend school with whites and the desire of whites to attend schools without blacks. According to Wechsler, the Court was being non-value-neutral in preferring the associational preferences of blacks to those of whites. *Id.* at 33-35.

between the values of sexual oppression and sexual equality. In *American Booksellers*,<sup>193</sup> Judge Frank Easterbrook acknowledged the causal link between pornography and women's social subordination both through acts of direct violence and through teaching both women and men that women are inferior to men.<sup>194</sup> Apparently, though, for Easterbrook, women's social inferiority is simply an opinion equal in value to the one professing gender equality. He says, "The ordinance discriminates on the ground of the content of the speech . . . The state may not ordain preferred viewpoints in this way."<sup>195</sup> Moreover, because gender oppression is the current status quo, it appears neutral; any regulation of the status quo is taken as partisan position-taking.

Sunstein explains this argument:

Under the anti-pornography approach, depictions of sexuality that involve rape and violence against women may be subject to regulation, whereas depictions that do not are uncontrolled. It is the non-neutrality of anti-pornography legislation — its focus on violence against women — that is its central defect. People with the approved view can speak; people with the disapproved view cannot.<sup>196</sup>

As Sunstein suggests, arguing that the state cannot regulate an institution that promotes gender inequality because it must be neutral between the values of gender equality and gender oppression is equivalent to arguing that the state cannot regulate racial segregation because to do so is to be impermissibly partisan between the values of racial equality and racial supremacy. True equality requires the state to promote through its formal structures the development of personal preferences that are in accordance with substantive equality for all persons.

If substantive gender equality does, in fact, require widespread acceptance of certain values regarding women's and men's behavior, then liberalism's commitment to hyperpluralism and Rawls's commitment to a diversity of comprehensive doctrines must be reevaluated and replaced by an affirmative and open endorsement of particular values over others.

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193. 771 F.2d at 323.

194. See *supra* note 114 and accompanying text.

195. 771 F.2d at 325.

196. SUNSTEIN, *supra* note 76, at 268. This is a very close paraphrase of Easterbrook's own words. 771 F.2d at 325.

C. *Feminist Perfectionism Should Replace Liberal Value-Neutrality*

Both liberal and radical feminists agree that certain personal values and preferences are more commensurate with gender equality than are others and that values and preferences are shaped largely by one's social world. Both would also presumably agree that Rawls does not go nearly far enough to assure that women and men hold those values and self-conceptions that are necessary for their private and public equality. The difference is in how much liberals, as opposed to radicals, are willing to deviate from value-neutrality. Rawls and liberals generally, acknowledge the need for certain values to be universally shared. However, these values have been restricted to formal endorsements of public equality. In order to address the oppression of women in society, largely through the forces of socialization and internalized inferiority, gender equality requires a more open and full feminist perfectionist vision of society.

I focus largely on the version of perfectionism presented by Robin West because she has been the most forthright among feminist scholars in her perfectionist leanings. I also present, in far less detail, an alternative version of feminist perfectionism based on notions of human essentialism.

Like Sunstein, West critiques liberalism's value-neutral acceptance of women's facially "consensual" choices.<sup>197</sup> She argues for a perfectionist society structured to maximize each individual woman's authentic pleasure and minimize her authentic pain.<sup>198</sup> She argues that the dominant experience of women's, and not men's, lives is fear, particularly fear of sexual violence.<sup>199</sup> As a result, women redefine themselves as gift-givers or gift-objects for men so as not to experience the expectation of sex as a threat of violence.<sup>200</sup> Sex is what women already expect and want to give so it cannot be taken from them.<sup>201</sup> Because many women undergo this internal reconceptualization, they and their choices frequently deviate from the liberal ideal.<sup>202</sup>

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197. Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81, 139-43 (1987) (critiquing liberalism's use of choice as a proxy for well-being) [hereinafter *The Difference in Women's Hedonic Lives*].

198. *Id.* at 142-44.

199. *Id.* at 94.

200. *Id.*

201. *Id.* at 102-03.

202. *Id.* at 92-94.

Liberalism assumes that all people make choices based on their own self-interest.<sup>203</sup> If, however, women, or at least a substantial number of women, because of the ever present threat of sexual violation, reconceive of themselves as gifts in order to avoid the internal experience of being violated, then their decisions are not made with regard to their own self-interest in any real way.<sup>204</sup> The woman who conceives of herself as a gift for another is existing and making choices to make the other, not herself, happy and to promote the other's, not her own, well-being.<sup>205</sup> Liberalism's endorsement of the inherent goodness of people's freely-made choices will not promote women's equality, much less their happiness, if women are not acting as self-interested liberal persons. West explains:

For if women consent to changes so as to increase the happiness of others rather than to increase our own happiness, then the ethic of consent, applied even-handedly, may indeed increase the amount of happiness in the world, but women will not be the beneficiaries. . . .

The rather inescapable fact is that much of the misery women endure is fully 'consensual.'<sup>206</sup>

West looks at several instances, among them wife-beating, promiscuous teenage sex, and non quid pro quo sexual harassment, in which women commonly act not to promote their own subjective or objective well-being, but to promote that of a man, thereby undermining the foundational assumptions of liberalism's commitment to the sanctity of personal choice.

According to West, women who are the victims of domestic violence respond to the prolonged, pervasive, and daily fear of abuse by defining themselves as being for that other person's violence.<sup>207</sup> The woman's entire focus becomes the other's violence — taking it, mitigating it, and hiding it.<sup>208</sup> The constant threat of violence causes the woman to change her focus from her own well-being to the well-being of the other who seemingly controls her life and world.<sup>209</sup> West explains this transformation as such: "[T]he near-universal response to the pervasive fear with which a battered woman lives is to redefine herself as a giving rather than

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203. *Id.* at 91.

204. *Id.* at 92-94.

205. *Id.*

206. *Id.* at 92.

207. *Id.* at 99.

208. *Id.* at 98-99.

209. *Id.*

a liberal self."<sup>210</sup> Thus, battered women's consent to the nature of their relationships, signaled by their not leaving, is given at the cost of their subjective selves.<sup>211</sup>

Similarly, West looks at the experience of promiscuous teenage heterosexuality for girls. She describes these teenagers' sexual encounters as often tinged with an implicit, if not explicit, threat of force and violence.<sup>212</sup> In order to deal with the threat of physical violence and to avoid the sensation of subjective violation, girls define themselves and, more particularly, their sexuality, as something that is to be given to the boys with whom they are involved.<sup>213</sup> If their sexuality is already understood as something they are giving, then it cannot be taken from them by the boys they date. West explains:

There is a fine line between the feeling of being threatened by an implied threat of force and the feeling of the sheer inevitability of sex. Nevertheless, they are, for the self-regarding woman, distinctively different experiences: the first is frightening and the second is deadening. By contrast, for a woman or girl who has defined herself as 'giving' and her sexuality as 'that which is to be given,' there is no line. She will never experience the anxious, ambiguous fear of rape by a 'date.' But nor will she experience consensual sex as pleasurable, or if she does, it will be only incidentally so.<sup>214</sup>

As in the example of the battered wife, the promiscuous girl who is other-regarding will consent to sex that is fearful and painful for her because her subjective focus is not on her own well-being.

A slightly different, and perhaps the most difficult, example West gives of how liberalism's value-neutral endorsement of personal choices legitimates women's subjective misery and objective inequality is the case of non quid pro quo sexual harassment in a hierarchical setting, particularly that between a student and a professor.<sup>215</sup> Almost all students at some point in their careers find professors whom they admire. However, according to West, while male students aspire to be like a male professor they admire, female students, because of their internal tug-of-war between their intellectual selves and their giving selves, aspire to give themselves sexually to male professors they admire.<sup>216</sup>

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210. *Id.* at 99.

211. *Id.* at 98-99.

212. *Id.* at 101.

213. *Id.* at 102.

214. *Id.* at 103.

215. *Id.* at 108-11.

216. *Id.* at 109.

West argues that the female student seeks praise and recognition from the male professor she admires by offering her sexuality.<sup>217</sup> If the professor accepts the student's offer of sexuality, he reinforces her belief that her greatest contribution to the intellectual world will be through her giving herself sexually to one whose intellectual contribution she views as far more worthy of being fostered than her own.<sup>218</sup> West argues the harm of such "consensual" relations is more severe than that suffered in the quid pro quo variety of sexual harassment because, in this case, the woman loses her subjective identity and self-pride instead of losing an "A."<sup>219</sup> She becomes totally other-regarding and, as she loses all self-esteem for her intellectual self, she becomes smothered in a "blanket of self-contempt."<sup>220</sup> Although liberals do not recognize the harm of such consensual relationships, particularly if the student is above a certain age, the harm, according to West, is substantial.<sup>221</sup>

West also argues that radical feminists are misguided in choosing and striving for the objective goal of equality and in implicitly assuming that it will equate with women's subjective well-being.<sup>222</sup> She claims that, while liberal feminism uses choice as a proxy for human happiness and radical feminism uses equality as a proxy for happiness, neither focuses solely on ensuring and maximizing women's subjective well-being.<sup>223</sup> Instead, she argues the focus of feminist theory and activity should be on identifying and promoting women's authentic happiness.<sup>224</sup>

Here is the snag for West's theory and for feminists generally. Given her critique of liberalism's neutral acceptance of women's choices, made because they conceive of themselves as giving selves, West clearly does not accept all of women's choices or actions as inherently maximizing their self-interest and subjective pleasure. The problem is distinguishing subjectively authentic choices from inauthentic ones.

West's characterization of radical feminists is slightly off. They do not, as she argues, claim that women will experience

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217. *Id.* at 108-09.

218. *Id.* at 110.

219. *Id.* at 109.

220. *Id.* at 110.

221. *Id.* at 111.

222. *Id.* at 114.

223. *Id.* at 143.

224. *Id.* at 142.

equality as happiness.<sup>225</sup> Rather, they argue that, unless women are within a society of equality, they cannot make authentic choices about what they find pleasurable and painful.<sup>226</sup> MacKinnon is unambiguous in this point.<sup>227</sup> She argues that no one can know now what women would want or would find enjoyable in a situation of equality.<sup>228</sup> Only when women are socially equal will their preferences be authentic and not the result of their social subordination.<sup>229</sup>

Nevertheless, West's mission is clear. She wants to critique both liberalism's value-neutrality and radicalism's non-value-neutral endorsement of equality. In their stead, she argues for a critical but neutral endorsement of women's authentic subjective preferences. In order to do this, West must somehow hold that it is possible to discover women's authentic subjective desires and distinguish them from the inauthentic ones she describes in her examples. To this end, West privileges collective speech formed as a result of group consciousness-raising as authentic while devaluing private unquestioned speech.<sup>230</sup>

Furthermore, because it is ambiguous whether West's criticism of the legitimacy of certain decisions women make ultimately rests on their own regret of these decisions or not, West's theory collapses her vision of authentic pleasure onto decisions promoting substantive equality (with the very limited exception for women's enjoyment of controlled ritualistic masochistic fantasy).<sup>231</sup>

Although West claims to be distinguishing herself from other radical feminists with her value-neutrality toward the virtue of equality for women's happiness, it is clear that she also

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225. *Id.* at 114.

226. MACKINNON, *supra* note 50, at 39.

227. *Id.* at 45.

228. *Id.* at 39.

229. *Id.* at 39-45.

230. *The Difference in Women's Hedonic Lives*, *supra* note 197, at 123.

231. For example, West seems to be arguing for the authenticity of women's enjoyment of two hours of controlled masochistic sex while condemning as inauthentic the pleasure of a woman married to her former male professor for twenty years. West claims that she wants to promote acceptance of women's authentically pleasurable masochistic actions and fantasies. *Id.* at 136. Yet, the masochistic fantasies and enactments she sees as authentically pleasurable are ritualistic and highly controlled. *Id.* She explains, "the relinquishment of authority and responsibility expressed in masochistic sexual fantasy and controlled masochistic practice at least sometimes constitutes a willed sexual submission which is motivated by *trust*, not fear. When motivated by trust, that submission can be pleasurable, erotic, and therefore valuable." *Id.*

equates women's true happiness with their equality in all but an extremely narrow set of cases. Despite her exception for masochistic sexual fantasies and their controlled enactment, West seems to believe that only preferences that support women's substantive equality can be authentically pleasurable.

A second, more openly essentialist,<sup>232</sup> perfectionism would judge a good life not in terms of authentic happiness but in terms of the ideals of self-love and autonomy. A fully human life requires that an individual is able to satisfy her basic needs for food, shelter, and physical and psychological safety. In addition, this form of perfectionism argues that each person, in order to be fully human, must value herself as much as she values others, must never treat herself solely as a means for others, and must have an autonomous conception of her own life and goals not formed under threat or coercion.<sup>233</sup>

In this version of perfectionism, an argument about the harm to students of consensual female student/male professor relationships would not rest, as it seemingly did for West, on a claim about the high probability of regret on the students' part sometime after the inception of the relationship. Regardless of whether the woman comes to regret her romantic relationship with her male professor, the relationship denies the woman what is necessary for a good life — fulfilling her own goals and aspirations — and therefore is harmful. The relationship undermines the woman's autonomy to determine her own life course. She sacrifices her own life goals and aspirations in favor of his and redefines her own life plans to reflect her adjunct status to him. The woman's autonomy is also undermined by the social pressure on her to conceive of herself as a sexual gift-object for men's enjoyment in order to avoid the subjective experience of the constant threat of sexual violence. By treating the woman as a sexual rather than intellectual being, the professor further restricts the student's autonomy in determining her life course by rein-

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232. Essentialism refers to the idea that there are some core needs that must be satisfied, as well as core capabilities that must be fostered, in order for one to live a fully human life. An essentialist perfectionism judges life choices to be good or bad based on the extent to which these choices accord with and promote these values. For a theory on the essential capacities of a good human life, see Martha C. Nussbaum, *Human Functioning and Social Justice: In Defense of Aristotelian Essentialism*, 20 *POL. THEORY* 202, 216-22 (1992).

233. The version of perfectionism I offer here is strongly influenced by Martha Nussbaum's list of goods and capacities required for human flourishing. See generally *id.*; Nussbaum, *supra* note 3, at 242.



forcing society's message that her autonomy is severely constricted.

The versions of perfectionism put forth here try to provide a framework to address and critique those seemingly consensual choices women make that seem both harmful to their own subjective well-being and to the well-being of women as a group. Feminists must adopt some version of perfectionism in order to critique choices that liberals respect as voluntary, yet which feminists know are incompatible with any substantive version of gender equality. The liberal focus on consent and the desire to remain neutral with respect to adult choices render liberalism unable to challenge women's and men's life choices that perpetuate social and gender inequality.

#### CONCLUSION

Feminists whose vision of gender equality differs from the status quo must not abandon the rhetoric of values to the religious right or the Moral Majority. For too long, feminists have tried to stay under the safe cover of liberalism's value-neutral pluralism while recognizing at the same time, covertly or overtly, that certain life choices and private values are incompatible with most visions of social and gender equality. Feminists must, therefore, be more open about the grounds of their perfectionism so that the debate on how to achieve gender equality can be focused where it should — on what values society should endorse and why. We should strive for a perfectionist moral pluralism that does not prescribe one set of values and activities as necessary for the good life, but recognizes that certain conceptions of the good are demeaning and harmful and should be socially discouraged or curtailed.<sup>234</sup>

I have presented two possible groundings for a feminist critique of private choices, one based on West's desire to maximize women's authentic happiness and the other based on my own essentialist vision of human nature. My perfectionist model is only preliminary, but I hope my arguments on behalf of perfectionism generally will point the direction of the feminist debate toward a discussion about the vision of gender equality that feminists hold and about the substantive values that society must endorse, both as a group and as individuals, in order to achieve it.

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234. RAZ, *supra* note 3, at 133.