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ARTICLES

DOES IT STILL MAKE SENSE TO TALK ABOUT “WOMEN”?

Christine A. Littleton*

INTRODUCTION

In this Article I make a claim that I have only recently begun to understand as controversial: feminism is about women.¹ To ex-

* Professor, UCLA School of Law; J.D., Harvard Law School, 1982; B.S., Pennsylvania State University, 1974. There must be some better way than the obligatory footnote to express my appreciation for the inspiration and hope the editorial staff of the *Journal* has provided, but I haven't yet thought of one. In the meantime, I thank them and wish them well. My able and efficient research assistant Matthew Swafford deserves, and has, my gratitude. I was also fortunate enough to receive sound and caring advice (*some* of which I have taken) from several fine colleagues: Alison Anderson, Grace Ganz Blumberg, Jon Davidson, Herma Hill Kay, Kenneth Karst, Sheila Kuehl, Carrie Menkel-Meadow, Martha Minow, Stephen Munzer, Judith Resnik, Catherine Wells, and Stephanie Wildman. My thanks also to research librarian Linda Maisner for fine assistance and support and to Pamela Besser for helping me tell her story.

1. I have made this claim before. See, e.g., Littleton, *Feminist Jurisprudence: The Difference Method Makes*, 41 STAN. L. REV. 751, 763 n.55 (1989) [hereinafter *Feminist Jurisprudence*] (reviewing C. MACKINNON, *FEMINISM UNMODIFIED* (1987)) (“Feminism is the theory of, and the practice of resistance to, the oppression and subordination of women.”). So have others. See, e.g., Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education or “The Fem-Crits’ Go to Law School”*, 38 J. LEGAL ED. 61, 82 (1988) (contrasting feminist and critical approaches to oppression); Fineman, *Implementing Equality: Ideology, Contradiction and Social Change*, 1983 WIS. L. REV. 789, 826–42 (insistence on gender-neutrality in divorce law has led courts to ignore harmful effects of marriage on women's careers).

While no one may be making the *opposite* claim — i.e., that feminism is *not* (or should not be) about women — many feminist legal theorists have expressed a desire for non-sex-based approaches to feminism. See, e.g., Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1985) (arguing that gender-neutral, “functional” categories better serve women); Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989) (rejecting both

plore and defend this claim adequately would require a book.² In these pages all I can do is offer a few examples of how thinking explicitly about women as women — rather than subsuming women into some other category such as workers or parents — can make a real difference in our analysis of concrete legal issues. To this extent then, the answer to the question I have posed in the title is clear: Yes, it still makes sense to talk about “women.”

Of course, talking about “women” raises significant questions of both definition and interpretation.³ Notions of womanhood are remarkably different across cultures, and have changed significantly over time even within our own culture.⁴ Many of these notions have been restrictive, rather than emancipatory.⁵ Nonetheless I am convinced that we feminists are doomed to and blessed with the necessity of using, and struggling with, all of the possible ways in which we are, or might be, “women.”⁶ For the purposes of this Article, I will use the term “women” to refer to people who are regarded by those in power (for example, judges and legislators) as women, and who are sometimes rewarded, but more often stigmatized and punished,⁷ as a result of that designation.⁸

gender neutral and women-centered descriptions in favor of “deinstitutionalizing gender”).

2. Fortunately one is in progress. C. LITTLETON, *IN WHOSE NAME? FEMINIST LEGAL THEORY AND THE EXPERIENCE OF WOMEN* (forthcoming in 1992). The book will provide a more extended theoretical argument for the wisdom and practicality of treating women's experience as the foundation of feminist legal theory.

3. See Littleton, *Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women*, 1989 U. CHI. LEGAL F. 23, 25–27 (discussing alternative approaches to interpreting “women's experience”).

4. See generally D. RILEY, *AM I THAT NAME? FEMINISM AND THE CATEGORY OF “WOMEN” IN HISTORY* (1988) (exploring shifting historical constructions of the category “women”).

5. A classic example is the concurring opinion by Justice Bradley in *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873), in which he justified the exclusion of women from legal practice because “[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.” *Id.* at 141 (Bradley, J., concurring).

6. See D. RILEY, *supra* note 4, at 98.

[N]o originary, neutral and inert “woman” lies there like a base behind the superstructural vacillations. Some characterization or other is eternally in play. The question then for a feminist history is to discover whose, and with what effects. This constant characterizing also generates the political dilemma for feminism, which — necessarily landed with “women” — has no choice but to work with or against different versions of the same wavering collectivity.

7. This stigmatization and devaluation is so powerful that it affects everything associated with women. “The social construction of ‘woman’ has not just been a matter of men taking the best for themselves and assigning the rest to women. It has also been a matter of perceiving the ‘worst’ as being whatever women were perceived to be.”

To demonstrate how asking "the woman question"⁹ can have continuing salience and coherence in law, I have chosen two exam-

Littleton, *Reconstructing Sexual Equality*, 75 CALIF. L. REV. 1279, 1333 (1987) [hereinafter *Reconstructing Sexual Equality*]. "[I]dentification with socially female attributes is more 'expensive' than identification with socially male ones . . ." *Id.*

8. I am also striving for a definition of women that includes *all* women, not merely those whose primary or sole locus of oppression is sexual. See *infra* notes 79–84, and accompanying text. The question has been raised whether it is in fact possible to focus on women without ignoring, obscuring, or distorting the deep divisions of race, class, and sexual orientation in this society and in its law. My belief in its possibility should not be read as minimizing the effort involved. For some indication of the magnitude of what it will take to make feminism's sense of "women" nonexclusive, see, e.g., Crenshaw, *Demarginalizing the Intersection Between Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (race); Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990) (race); McCloud, *Feminism's Idealist Error*, 14 N.Y.U. REV. L. & SOC. CHANGE 277 (1986) (class); Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L.J. 191 (1989–90) (sexual orientation).

9. I understand the "woman question" to be a necessary aspect of feminist method in general, as well as feminist jurisprudence in particular. See Wishik, *To Question Everything: The Inquiries of Feminist Jurisprudence*, 1 BERKELEY WOMEN'S L.J. 64 (1986). Wishik describes the necessary inquiries as: (1) What experiences of women are addressed by an area of law? (2) What assumptions or descriptions of that experience does the law make? (3) What is the area of distortion or denial so created? (4) What patriarchal interests are served by the mismatch? (5) What reforms have been proposed, and how will they affect women both practically and ideologically? (6) In an ideal world, how would women's situation look? (7) How do we get there from here? *Id.* at 72–75.

By this time feminists are familiar with asking "the woman question" about every field of human endeavor. At some point the question must relocate itself. For example, Sandra Harding states:

Since the mid-1970s, feminist criticisms of science have evolved from a reformist to a revolutionary position, from analyses that offered the possibility of improving the science we have, to calls for a transformation in the very foundations both of science and of the cultures that accord it value. We began by asking, "What is to be done about the situation of women in science?" — the "woman question" in science. Now feminists often pose a different question: "Is it possible to use for emancipatory ends sciences that are apparently so intimately involved in Western, bourgeois, and masculine projects?" — the "science question" in feminism.

S. HARDING, *THE SCIENCE QUESTION IN FEMINISM* 9 (1986).

This Article is grounded in the first stage of inquiry, i.e., "What is the situation of women with respect to law, and what can be done about it?" I leave for other times and places the more revolutionary issues of the "law question" in feminism, i.e., what is to be done about law, given how it affects women? For a running start at the latter question, see C. SMART, *FEMINISM AND THE POWER OF LAW* (1989). I classify this question as "more revolutionary" because it implies a challenge to an entire discipline, rather than challenging particular doctrines and outcomes within that discipline. As this Article will make clear, however, I have not yet given up on the possibility that basic principles of law can, and someday will, respond to women's situations on women's terms.

ples from my own work:¹⁰ the effort to enact family and medical leave legislation for employees,¹¹ and a recently litigated case regarding a divorced mother's right to choose her own community.¹² In both cases the story will have a very personal and perhaps idiosyncratic perspective. It is the perspective of a feminist legal theorist who engages in litigation and political organizing as necessary (and often enjoyable) prerequisites for theory.¹³ Because I became involved in both stories mid-way through their progress from experience through theory to action,¹⁴ neither one purports to be a complete or definitive account of what "really" happened, or why. Nevertheless, both examples serve to illustrate the basic premise of this Article — the importance of continuing to focus our attention on women.

The stories demonstrate two traps that await the unwary proponent of sexual equality. The first pitfall is the tendency to think that including some men automatically makes our program more inclusive.¹⁵ The trap is sprung if we forget that focusing on all women includes over half the world, while focusing on white, professional, heterosexual women and men includes only a small fraction of the world's population. The second pitfall is the tendency to

10. I might have said "from my own experience," but I have been reminded that such a phrase sets up expectations that the loss of a job or child occurred in my own life. In all of what follows, I acted as a lawyer/theorist, not as a party. However, this role neither diminished my passionate interest in the issues discussed, nor increased the "objectivity" of my stance.

11. See *infra* Part I.

12. See *infra* Part II.

13. To a large extent, I share Kathleen Barry's recently expressed frustration that, in the academy, when "theory became divorced from politics . . . [t]he defeminism of women's studies was under way." Barry, *Deconstructing Deconstructionism (or, Whatever Happened to Feminist Studies?)*, Ms. 83 (Jan./Feb. 1991). While she identifies the root of the problem as abandonment of a particular theory of sex/gender, what she describes seems to me to be an abandonment of women as an appropriate subject of inquiry, history, and theory. Unlike Barry, I do not see dissent from the dominance theory of sex/gender held by many radical feminists as dangerous fragmentation, but rather as potentially necessary and desirable attempts to find truths through the testing of subtly varied hypotheses against women's actual experience. To the extent that such dissent, or even acquiescence, rejects women, women's situation and women's experience, however, I wholeheartedly share her assessment that it has ceased to be feminist.

14. This is the order I, and others, advocate. See, e.g., Blumberg, *Reworking the Past, Imagining the Future: On Jacob's Silent Revolution*, forthcoming in *LAW & SOC. INQUIRY* (Winter 1991). "[T]he methodology of feminism . . . insists that women's experience, rather than theory, be the starting point [for analysis or reform]." *Id.* at 28-29.

15. I use the term "inclusive" throughout this Article in the relatively unsophisticated sense of affecting or benefiting a larger number of people. Of course a program that benefited only a few women and a few men could be thought of as inclusive of more

frame issues in gender-neutral terms — to speak, for example, of the needs of parents rather than the needs of mothers.¹⁶ There are often good pragmatic reasons to make this choice. But again, the trap is sprung if and when we forget women's particular experience, for then we are blind to the ways in which gender neutrality assumes both a commonality of interest not now demonstrated and an equality of situation not yet achieved.¹⁷

I. LEAVING WOMEN OUT BY BRINGING MEN IN: THE FAMILY AND MEDICAL LEAVE ACT¹⁸

The contours of the first trap — missing the exclusion of many women by focusing on the inclusion of some men — can be seen

genders than a program that benefited large numbers of women and no men, but it would include fewer *people*.

More sophisticated analyses of inclusion and exclusion could certainly be desired, and are in fact available. See, e.g., M. MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* (1990).

16. Interestingly, both examples discussed in this article speak to the situation of women as mothers (as well as other things we are). Motherhood is a contested concept for women, because it is highly valued, but poorly paid, and coercively imposed. See, e.g., M. MARGOLIS, *MOTHERS AND SUCH* (1984). In addition, the law's disregard for women's experience is most apparent in its treatment of issues relating to reproduction and maternity. See, e.g., *Reconstructing Sexual Equality*, *supra* note 7, at 1304 ("The phallogocentricity of equality is most apparent in the extraordinary difficulty the legal system has had dealing with the fact that women (and *not* men) conceive and bear children."). We need not embrace traditional *definitions* of motherhood in order to challenge the absence of meaningful attention to the *experience* of motherhood in law. For an exploration of how avoiding an analysis of motherhood can distort feminist theory, see Wildman, *The Power of Women*, 2 *YALE J.L. & FEMINISM* 435 (1990) (reviewing C. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989)).

17. Richard Posner has argued that most women share interests with men, because they benefit from the incomes of their current or former husbands. Posner, *Conservative Feminism*, 1989 *U. CHI. LEGAL F.* 191, 197–98. Interestingly enough, the analysis that flows from this claim supports the denial to women of such basic employment benefits as job-protected pregnancy leave. *Id.* at 198. In the same volume, Posner's colleague Professor Mary Becker explores the ways in which women's economic dependence on men (especially through marriage) has negative effects on women's ability to gain economic and political power. Becker, *Politics, Differences and Economic Rights*, 1989 *U. CHI. LEGAL F.* 169, 183–88. "In a number of ways, and on a number of different levels, relationships between women and men in our society hinder women's effective political participation." *Id.* at 183. My own colleague Grace Blumberg's analysis of the situation of the heterosexual cohabiting couples indicates substantial divergence of interests. Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 *UCLA L. REV.* 1125, 1168 (1981). "The tendency of courts and commentators to speak of the 'intent of the parties' in cohabitation cases, assuming convergence of interest, is thus simply wrong." *Id.* at 1168.

18. A version of the Family and Medical Leave Act was first introduced by Rep. Patricia Schroeder in 1985. See Schroeder, *Is There a Role for the Federal Government in Work and the Family?* 26 *HARV. J. ON LEGIS.* 298, 305 (1989). My focus in this Article is on the most recent version of the bill, referred to as the Family and Medical

through an analysis of the recently defeated struggle to gain passage of the Family and Medical Leave Act of 1990 ("FMLA"). The bill resulted from a national effort to achieve job-protected leave for employees of medium to large-sized companies¹⁹ who needed time to attend to family responsibilities such as care of their sick children or other dependent family members, the worker's own illness, disability, pregnancy, or the birth or adoption of a child. Following successful passage in both chambers of Congress, the bill was vetoed by President Bush, who refused to countenance such inroads on employers' discretion to choose whether or not to provide employee benefits.²⁰ Although Congress was unable to muster sufficient votes to override the Presidential veto,²¹ several members immediately vowed to re-introduce similar legislation in each chamber of Congress until its provisions are finally enacted into law.²² A study of its lessons from the perspective of feminist organizing and coalition-building is, therefore, not merely a matter of historical or general

Leave Act of 1990, H.R. 770, 101st Cong., 2d Sess., 136 CONG. REC. H2198 (1990) [hereinafter FMLA]. The FMLA was passed by the House on May 10, 1990.

The FMLA's name itself is self-consciously gender neutral, even though the legislative findings in Section 2 specifically mention that "due to the nature of women's and men's roles in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects their working lives more than it affects the working lives of men." Schroeder, *supra*, at 305. See also Remarks of Sen. Alan Cranston in support of an earlier version of the bill:

There is hardly a single community in this country which has not experienced a crisis in the area of child care over the past few years. The facts are simple. More than one-half of the mothers of children under the age of 6 are in the work force. Most mothers work for the same reason that most fathers work: economic necessity. Two-thirds of the women in the work force are either sole providers for their families or married to men who earn less than \$15,000 per year. The current supply of child care services simply does not meet the needs of these families.

133 CONG. REC. S2423, (daily ed. Feb. 26, 1987) (statement of Sen. Cranston).

19. The FMLA applies only to employers with fifty or more employees. H.R. 770, 101st Cong., 2nd Sess., 136 CONG. REC. D577, 101st Cong., 2nd Sess. (1990).

20. Holmes, *Bush Vetoes Bill on Family Leave*, N.Y. Times, June 30, 1990, at A9, col. 5. In keeping with his administration's theme of a "kinder, gentler" nation, however, President Bush did suggest that employers should voluntarily provide some type of leave for employees with family responsibilities. See *Kind and Gentle, Eh?*, L.A. Times, July 27, 1990, at B6, col. 6.

21. The House vote was 232 yeas to 195 nays, insufficient for the required two-thirds majority to override a presidential veto. 136 CONG. REC. H5477 (daily ed. July 25, 1990).

22. On January 3, 1991, Rep. William Clay (D-Mo.) reintroduced the Act in the House. 137 CONG. REC. E64-02, 102d Cong., 1st Sess. (1991).

interest, but may also lead to specific strategic choices in the future.²³

Understanding those lessons requires review of the path by which the FMLA became thought of as an answer, at least in the area of employment, to the raging debate about "difference" that has occupied, and continues to occupy, feminists in the 1980s and 1990s.²⁴ The review includes passage of the Pregnancy Discrimination Act of 1978 ("PDA")²⁵ and its interpretation by the Supreme Court in *California Federal Savings & Loan Association v. Guerra* ("Cal. Fed.")²⁶. This history made the FMLA appear, even to me,²⁷ to fulfill the criterion of "inclusiveness" so central to feminists on both "sides" of the debate, i.e., those who argued that equality required the same treatment for women and men and those who argued that equality required different treatment when women and men were differently situated.²⁸

23. Although this Article will argue for a bill that includes more women in its circle of beneficiaries, I do not mean to suggest that these changes will make enactment more likely. Progressive labor legislation has not fared well under the last two administrations. For example, the Civil Rights Act of 1990 also failed to achieve sufficient votes to override a veto. Lewis, *President's Veto of Rights Measure Survives by 1 Vote*, N.Y. Times, Oct. 25, 1990, at A1, col. 3. The Americans with Disabilities Act of 1990 is a notable and significant exception. See *A Law for Every American*, N.Y. Times, July 27, 1990, at A26, col. 1.

24. The concept of "difference," especially questions of what differences exist between women and men, and what consequences those differences should have, occupies a large place in historical and contemporary feminist theory and practice. See generally, *THE FUTURE OF DIFFERENCE* (H. Eisenstein & A. Jardine eds. 1980). In this Article, I will only be dealing with a small part of the debate: Should feminist legal strategies be built around categories that accept or deny significant differences between women and men? See *supra* note 1 and *infra* notes 55-72 and accompanying text.

25. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076, 42 U.S.C. § 2000e(k), amending Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17.

26. 479 U.S. 272 (1987).

27. For the reasons why even a strident asymmetrical feminist legal theorist might subscribe to the FMLA, see *infra* notes 73-77 and accompanying text. I am grateful to Heather Wishik and Nancy Polikoff, whose comments at a Feminist Legal Strategies Project several years ago made me rethink my original analysis of this (and other) issues.

28. Many feminists arguing that differences must be accommodated or accepted, see, e.g., *Reconstructing Sexual Equality*, *supra* note 7, at 1295-1301, have been strongly influenced by Carol Gilligan's work, which indicates that a moral vision incorporating women's perspective would value inclusion more and hierarchy less. See C. GILLIGAN, *IN A DIFFERENT VOICE* (1982).

While Jeffrey sets up a hierarchical ordering to resolve a conflict between desire and duty, Karen describes a network of relationships that includes all of her friends. Both children deal with the issues of exclusion and priority created by choice, but while Jeffrey thinks about what goes first, Karen focuses on who is left out.

After detailing this history, however, this Part will explore how, ironically, the provisions of the FMLA are in fact only marginally more inclusive than the far more modest legislation that exists in a few states, and far less inclusive than the FMLA might have been had it ignored men altogether and focused exclusively on the lives of women.²⁹

The need for federal legislation guaranteeing working parents that they will not have to choose between permanent loss of their jobs and their children's existence, health, or security was apparent even in 1978 when Congress amended Title VII of the Civil Rights Act of 1964 to include pregnancy discrimination as a form of sex discrimination.³⁰ However, the impetus to address pregnancy by equalizing the status of its effects to those of disabling conditions such as illness or accident was primarily responsive to the Supreme Court's justly ridiculed interpretation of Title VII as permitting the exclusion of pregnancy, and pregnancy alone, from public and private employment benefit plans.

In *Geduldig v. Aiello*³¹ and *General Electric Co. v. Gilbert*,³² the Court held that neither the fourteenth amendment's guarantee of equal protection nor Title VII's guarantee of nondiscrimination in employment prohibited the exclusion of pregnancy-related disa-

Id. at 33.

Feminists arguing for symmetrical treatment also appeal to inclusion, although on the ground of the similarity between women and men. From Harriet Taylor Mill to Wendy Williams, the liberal feminist project has been focused on reversing women's exclusion from important political and social spheres, as well as on minimizing differences between women and men as a strategy for achieving this end. *Compare* Mill, *Enfranchisement of Women*, in *ESSAYS ON SEX EQUALITY* (A. Rossi ed. 1970) (originally printed in *WESTMINSTER REV.*, July 1851) with Williams, *supra* note 1, at 368-69 (arguing for incorporating pregnancy "into the general scheme of worker protections").

Indeed, the desire for inclusiveness is expressed by many liberal legal theorists, whether or not they are talking about women. *See, e.g.*, Karst, *Why Equality Matters*, 17 *GA. L. REV.* 245 (1983).

29. Despite this conclusion, this Article should not be read as applauding the defeat of the FMLA. It is appalling that the United States, practically alone among developed nations, continues to ignore the simple fact that workers have families. Capitalism may demand that certain people be classed as workers; it surely does not demand that everything else that they are be ignored.

Additionally, it is not necessarily the case that we must always choose between mutually exclusive options. Including all women does not exclude the possibility of including men as well. The trap is only sprung if the latter move acts to preempt the former.

30. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076, 42 U.S.C. § 2000e(k), amending Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e — et seq.

31. 417 U.S. 484 (1974).

32. 426 U.S. 125 (1976).

bility from employment benefit plans. Although both the constitutional and the statutory schemes prohibit sex discrimination, either explicitly or implicitly, the Court refused to treat pregnancy as sex-based, and therefore refused to treat pregnancy discrimination as sex discrimination.³³ Congress could do nothing about the Court's awkward interpretation of the Constitution, but it could at least correct the interpretation of its own statute. Prompted by feminist lawyers and law professors,³⁴ Congress quickly passed a clarifying amendment. The first prong of the PDA stated that "discrimination on the basis of pregnancy, childbirth and related medical conditions" was indeed discrimination "on the basis of sex."³⁵ The second prong specified that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work"³⁶

The 1978 Amendment was a remarkable achievement, and an almost textbook example of how to use the legislative and judicial processes in tandem for the advancement of the women's rights agenda.³⁷ It is also a classic example of solving the immediate problem while losing sight of the rest of the puzzle. The immediate and obvious problem appeared to be that women who missed a few days or weeks of work because they were pregnant were being fired, while lots of men and a few women who missed the same amount of time because they were recovering from heart attacks, illness, or even skiing accidents were being given disability benefits, employee health insurance benefits, and job security. The solution, therefore,

33. Criticism of this approach appears throughout feminist legal scholarship. See, e.g., Williams, *supra* note 1, at 335-47; *Reconstructing Sexual Equality*, *supra* note 7, at 1305-06.

34. Notable among these activists were Professor Wendy Williams of the Georgetown University School of Law, Susan Deller Ross of the ACLU Women's Rights Project, and Marsha Berzon and Judith Lichtman of the Women's Legal Defense Fund in Washington, D.C.

35. 42 U.S.C. § 2000e(k).

36. *Id.*

37. I do not mean to imply by the use of the phrase "the women's rights agenda" that all feminists agree on either the priorities for attacking or strategies for ending sexual inequality. In the 1970s and early 1980s, however, there appeared to be a remarkable consensus within the feminist *legal* community on how to litigate Supreme Court cases from a women's rights perspective. Much of this appearance may have derived from the prominence of the ACLU Women's Rights Project and its Legal Director Ruth Bader Ginsberg, now a D.C. Circuit Court of Appeal judge. For an account of how this perspective played out and its implications for current feminist legal theory and strategy, see Cole, *Strategies of Difference: Litigating for Women's Rights in a Man's World*, 2 J.L. & INEQUALITY 33 (1984).

seemed equally obvious: treat women temporarily disabled by pregnancy the same as workers temporarily disabled by other things. Of course women tend to be segregated into lower-level positions³⁸ and tend to lack union representation.³⁹ Both of these facts translate into lack of female employee bargaining power to achieve *any* benefits for any employees. However, such facts could easily be missed in a legislative process that relies on surveys of large companies, testimony of labor leaders, and pressure to respond within the paradigms set by those who already have political representation.

Within a few years feminist legal consensus on the salutary nature of the PDA began to break down. The legislation assumed a world of medium and large corporations with pre-existing and relatively generous disability and benefit provisions.⁴⁰ And, although the legislative history demonstrates that Congress knew and approved of some state efforts to prohibit pregnancy discrimination,⁴¹ relatively little attention was paid to the specifics of state approaches.⁴² Indeed, as of 1985, only eight states required employers to provide job-protected leave for pregnant workers.⁴³ Such legislation took one of two forms: (1) requiring maternity leave (e.g.,

38. See, e.g., C. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 9-24 (1979).

39. In 1987, 20.9% of men over sixteen years of age were union members, as compared with 12.6% of women. In 1988 the figures were 20.4% for men and 12.6% for women. U.S. BUREAU OF LABOR STATISTICS, *EMPLOYMENT AND EARNINGS* 225 (1990).

40. For example, in 1980, 72% of firms with one hundred or more employees offered fully-paid employee health insurance. BUREAU OF LABOR STATISTICS, *BULLETIN* 2107: *EMPLOYEE BENEFITS IN INDUSTRY: 1980*, at 9, Table 1 (1981). The bad news is that by 1989 that figure had dropped to 48%. BUREAU OF LABOR STATISTICS, *BULLETIN* 2363: *EMPLOYEE BENEFITS IN MEDIUM AND LARGE FIRMS* 4, Table 1 (1989).

41. See, e.g., *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 287 (1987) ("In the debates and Reports on the bill, Congress repeatedly acknowledged the existence of state antidiscrimination laws that prohibit sex discrimination on the basis of pregnancy.") (footnote omitted); S. REP. NO. 95-331, 95th Cong., 1st sess. 3, n.1 (1977) (state laws prohibiting discrimination on the basis of pregnancy would not be preempted by the amended Title VII).

42. As the Court noted in *Cal. Fed.*, "Two of the states mentioned [in the legislative acknowledgement] then required employers to provide reasonable leave to pregnant workers," 272 U.S. at 287. However, the Court had to "assume that [Congress] was aware of the substantive provisions," *id.* at 288 n.22, of the statutes it cited, because no discussion of those provisions appears in the record.

43. These states were California, Connecticut, Hawaii, Illinois, Massachusetts, Montana, New Hampshire, Ohio, and Washington. *Current Developments (BNA)* No. 196, at A-9 (Oct. 9, 1986). See also Krieger & Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 *GOLDEN GATE U.L. REV.* 513, 514 (1983). By 1989, the count had apparently swelled to fifteen. See Shiu, *Work and Family: Policies for the Working Poor*, 26 *HARV. J. ON LEGIS.* 349, 351 n.11 (1989).

Montana)⁴⁴; or (2) requiring pregnancy disability leave (e.g., Connecticut⁴⁵ and California⁴⁶).

Maternity leave provisions tend to blur the line between childbearing and childrearing, and thus raise immediate questions of whether new fathers might not stand in need of similar accommodations. In contrast, pregnancy disability leave provisions cover only the time period during which a woman is unable to work due to pregnancy, childbirth and recovery, and thus raise a different comparison: other sources of temporary disability suffered by women and men. Although the Montana maternity leave legislation reached the courts first, it was the California pregnancy disability leave approach that eventually resulted in a Supreme Court ruling.⁴⁷

Some feminists were unwilling to sacrifice the benefits of state-mandated accommodation of maternity to the PDA's vision of equal treatment. When the Montana legislation was challenged as preempted by the PDA's requirement that pregnant women be treated "the same" as temporarily disabled workers,⁴⁸ the litigation inspired an intense debate, carried on in law review articles,⁴⁹ national conferences,⁵⁰ law school classrooms, and study groups.

44. MONT. CODE ANN. § 41-2-310 (1983).

45. CONN. GEN. STAT. ANN. § 46a-60 (West 1989).

46. CAL. GOV'T CODE § 19991.6 (West 1982).

47. The debate over symmetrical or asymmetrical treatment narrowed significantly when the litigation focus shifted from maternity to pregnancy disability. As the Ninth Circuit stated in its decision in *Cal. Fed.*, "because [the California law] deals with a condition that is unique to women — pregnancy disability rather than, say, parenting — our decision has no bearing on the lawfulness of state statutes or employment practices that classify on the basis of purportedly sex-linked factors that are actually less biological than stereotypical." 758 F.2d 390, 395 (9th Cir. 1985). The change in focus was significant for those feminists whose support for different but equalizing treatment was limited to areas of *physical* difference. See, e.g., Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J. 1, 28-37 (1985); Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1007-13 (1984).

48. *Miller-Wohl Co. v. Commissioner of Labor & Indus.*, 515 F. Supp. 1264 (D. Mont. 1981).

49. See, e.g., Krieger & Cooney, *supra* note 43 (supporting the Montana legislation as positive action toward women's equality); Scales, *Toward a Feminist Jurisprudence*, 56 IND. L.J. 375 (1981) (supporting "incorporation" of women's experience into prevailing legal norms); Williams, *supra* note 1 (opposing pregnancy-specific benefits as unjustifiable "special treatment"); and Williams, *The Equality Crisis: Some Reflections on Culture, Courts and Feminism*, 7 WOMEN'S RTS. L. REP. 175 (1982).

50. For example, the Fourteenth National Conference on Women and the Law, held in Washington, D.C. in April, 1983, featured a workshop entitled *Pregnancy: Equal Treatment Versus Special Treatment*, led by Wendy Williams and Linda Krieger. 14TH NATIONAL CONFERENCE ON WOMEN & THE LAW SOURCEBOOK 176-77 (1983).

By the time I became embroiled in this debate, the California statute guaranteeing job-protected leave during any period of disability due to pregnancy had likewise come under attack by employers in court (the *Cal. Fed.* case)⁵¹ and equal treatment feminists outside of court. My role in *Cal. Fed.* was first as an activist,⁵² and then as an attorney for a coalition of women's rights and civil rights organizations who supported the California legislation.⁵³ In both roles I found myself arguing against many of the feminists I had chosen as role models. While this situation did not result in a change in my position, it did make me more sensitive to, and appreciative of, the feminist (as opposed to management) arguments⁵⁴ against the statute. Those feminist arguments relied primarily on either (1) the dangers of stating that women might have different or "special" needs with respect to employment,⁵⁵ or (2) the under-in-

51. *California Fed. Sav. & Loan Ass'n v. Guerra*, 33 EPD P34,227, 34 FEP Cases 562 (C.D. Cal. 1984), *rev'd* 758 F.2d 390 (9th Cir. 1985), *aff'd* 479 U.S. 272 (1987).

52. As a member of the Board of Directors of the Southern California affiliate of the ACLU, and co-chair of its Women's Rights Committee, I helped garner local support for the California law and tried unsuccessfully to change the national ACLU's position opposing it.

53. See Brief Amicus Curiae for the Coalition for Reproductive Equality in the Workplace (CREW), *Cal. Fed.*, 479 U.S. 272. The brief argued that the California legislation was not preempted because it shared the same goal as Title VII: equal access to employment opportunity for women and men. By preventing women's reproductive biology from resulting in their permanent exclusion from a workplace, the California statute placed working women who wished to become mothers and working men who wished to become fathers on the *same* footing with respect to their job security.

Of course I was simultaneously working as a theorist. For an account of the relationship between the *Cal. Fed.* litigation and the theory that constitutional and statutory guarantees of "equality" should provide "equal acceptance" rather than merely equal treatment, see *Reconstructing Sexual Equality*, *supra* note 7, at 1297-99.

54. Although the California employers tried hard to wrap themselves in the feminist flag in order to buttress their position, their argument differed sharply from the feminist-inspired briefs filed against the statute, all of which argued for *extension* of job protection to all temporarily disabled workers, as opposed to equality in treatment of whatever (often minimal) benefits the employer was willing to confer. Compare Brief for the Petitioners California Federal Savings and Loan Association, Merchants and Manufacturers Association and the California Chamber of Commerce, *Cal. Fed.*, 479 U.S. 272 (arguing that the PDA prohibited employers from providing any greater security to pregnant workers than they voluntarily provided for temporarily disabled workers) with Brief Amici Curiae of the ACLU, *Cal. Fed.*, 479 U.S. 272 [hereinafter Brief of ACLU] (agreeing with employers' pre-emption argument, but suggesting that the remedy should be extension of job-protected leave to all temporarily disabled workers) and Brief Amici Curiae of the National Organization for Women, *Cal. Fed.*, 479 U.S. 272 (arguing that the PDA and the California statute should be read together to create a uniform right to job-protected leave for all temporarily disabled workers).

55. See, e.g., Brief of ACLU, *supra* note 54, at 10-23 (detailing history of exclusionary legislation purporting to "protect" women).

clusiveness of legislation addressing only disability arising from pregnancy.⁵⁶

The first of these arguments draws on the history of so-called "protective legislation" common in the early twentieth century. Employers were prohibited by statutes in many states from employing women in certain professions,⁵⁷ at certain hours,⁵⁸ or for particular numbers of hours.⁵⁹ Although such statutes were usually couched in terms of, and upheld by courts on the basis of, protecting women and their potential offspring from the dangers of bartending or night travel, or the deleterious effects of long hours, most modern feminists assert that their primary effect was to "protect women out of their jobs" and out of competition with men.⁶⁰

The fact that pregnancy disability leave provisions assured the opposite result — job security rather than exclusion — was not considered to be significant when balanced against the presumed importance of asserting women's identity with men in the service of claiming our equality with them.

The feminist consensus on the concrete effects of protective legislation may or may not be historically justified.⁶¹ Even if it is not,

56. In fact, NOW argued in its brief to the Ninth Circuit that *men* were in greater need of job-protected disability leave than women, since men tended to miss more days of work due to accidents and illness. See Brief for the National Organization of Women, *supra* note 54.

57. See, e.g., *Goesaert v. Cleary*, 335 U.S. 464 (1948) (upholding restrictions on women tending bar).

58. See, e.g., Act No. 466 Pa. Laws (1913); N.Y. Laws, c. 453 (1927); 11930 N.Y. Laws, c. 868 (1930) (restrictions on night work for women). See also *Corning Glass Works v. Brennan*, 417 U.S. 188, 191 n.2 (1974).

59. See, e.g., *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding state law prohibiting employment of women for more than ten hours a day).

60. See, e.g., Brief of ACLU, *supra* note 54, at 15–16. "While some women undoubtedly benefited, overall protective legislation operated to exclude women from 'male' occupations and from promotion opportunities, to depress wages in female-intensive jobs, and to limit women's earning capacity." This view was accepted by the Supreme Court in *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973), in which the plurality found that the "romantic paternalism" underlying protective legislation created "gross, stereotyped distinctions" between women and men, placing women in a position "comparable to that of blacks under the pre-Civil War slave codes."

61. There is certainly strong evidence that *exclusionary* protective legislation reduced the employment of women, particularly those who were recent immigrants. See Landes, *The Effect of State Maximum Hours Laws on the Employment of Women in 1920*, 88 J. POL. ECON. 476 (1980). In addition, benefits promised to women but not to men often were not delivered. See A. KESSLER-HARRIS, *OUT TO WORK* 193–97 (1982). Nevertheless, the record is far from closed. Kathryn Kish Sklar has explored the extent to which some "protective legislation" was strongly supported by feminist activists in the early 19th Century. See, e.g., Sklar, *Why Were Most Politically Active Women Opposed to the ERA in the 1920s?*, in 2 *WOMEN AND POWER IN AMERICAN HISTORY* 175–82 (K. Sklar & T. Dublin eds. 1991).

there is certainly reason to worry about how a phallogocentric legal system⁶² can fashion a plethora of restrictions on women's freedom and denials of women's equality from even the smallest concession that women might not in fact be just like men.⁶³ Thus this argument, while not necessarily persuasive, appears to be grounded in concern about real women. Feminist debate with respect to it revolves around simple risk assessment: Is it safer to forgo women-centered gains to decrease the risk of women-centered disadvantages, or safer to solidify those gains and fight against the imposition of losses?⁶⁴

It is the second argument — that pregnancy disability leave is under-inclusive — that bears further analysis. The assertion that pregnancy disability leave is “[h]alf the proverbial loaf”⁶⁵ could be

62. The term “phallogocentric” refers to an institution or structure that sets its goals, aspirations, and practices according to culturally male attributes, values, and viewpoints. These may or may not accord with what biological males want or need. For a more extended discussion of this terminology, see *Reconstructing Sexual Equality*, *supra* note 7, at 1279–80 n.2, 1280–81. For support of the claim that the legal system is phallogocentric, at least in its interpretation of equality, see *id.* at 1304–11. For support of the claim in other contexts, see, e.g., MacKinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635 (1983) (rape law); McDonald, *Battered Wives, Religion and Law: An Interdisciplinary Approach*, 2 YALE J.L. & FEMINISM 251 (1990) (domestic violence); Reece, *Women's Defenses to Criminal Homicide and the Right to Effective Assistance of Counsel: The Need for Relocation of Difference*, 1 UCLA WOMEN'S L.J. 53 (1991).

63. *Sears, Roebuck & Co. v. EEOC*, 581 F.2d 941 (D.C. Cir. 1978), provides a particularly poignant example. In that case, the EEOC charged the giant retailer with having discriminated against women in two main categories of employment: commission sales (which offered better pay than ordinary wages) and wage differences in managerial and administrative positions. Despite compelling evidence of significant differences in employment between women and men, Sears successfully defended itself by claiming that its work force simply mirrored historical differences in employment choices between the two sexes. It buttressed its case with the expert opinion testimony of women's historian Rosalind Rosenberg. Although Alice Kessler-Harris testified for the EEOC, Rosenberg's explanation of women's difference was used by Sears, and by the federal courts, to justify continuing denial of money, status and potential for advancement to large numbers of working women. For a detailed analysis of the case, see Milkman, *Women's History and the Sears Case*, 12 FEMINIST STUD., 375–400 (1986). Both Rosenberg's and Kessler-Harris' written testimony is reproduced in Hall, *Women's History Goes to Trial: EEOC v. Sears, Roebuck & Co.*, 2 SIGNS 751–79 (1986).

Regardless of whether Sears encouraged, or merely allowed, women to “choose” lower-level jobs, it is not at all clear to me why either explanation should justify the wage and promotion practices that made such jobs lower-level in the first place. See Littleton, *Equality Across Difference: Is There Room for Rights Discourse?*, 3 WIS. WOMEN'S L.J. 189 (1987).

64. Wendy Williams refers to this as a difference in “tactics rather than ultimate goals.” Williams, *supra* note 1, at 378. I prefer to think of it as a difference in methodology. See *Feminist Jurisprudence*, *supra* note 1.

65. Williams, *supra* note 1, at 380.

interpreted in two very different ways. For example, one could believe that women need much more from their employers and many more alternations in "business as usual" than they are now getting in order to achieve equal status. A feminist taking this perspective could argue that the Montana Maternity Leave Act, which protects a woman's job during both pregnancy and childbirth and at least short-term child rearing, is in fact preferable to the California statute, which only protects the period of actual disability. She could similarly prefer the laws of many European countries, such as West Germany, France and Italy,⁶⁶ which require paid maternity leave.⁶⁷ She might even include better grievance and remedial provisions for sexual harassment policies, affirmative action in hiring and promotions, equal pay for work of comparable worth, and many other changes in her description of what a "whole loaf" for working women might look like. She would not, however, be required or even encouraged to think about what men might need.

A very different interpretation of the "half a loaf" argument was deployed in the *Cal. Fed.* debates. According to this interpretation, maternity leave provisions should be replaced by parental leave provisions; pregnancy-related medical leaves by general temporary disability leaves. Wendy Williams, for example, argued that the latter move would normalize pregnancy, treating it as one of a number of medical events that happen in a (gender neutral) worker's life.⁶⁸ Women could keep the job security already offered by pregnancy disability leave (and indeed gain a little more through coverage of women's disabilities) by inserting themselves into a different category — workers or temporarily disabled employees or parents. History was again pressed into service, this time to show that the progressive labor demand for shorter hours had stalled for a generation once shorter hours were gained for women. How much better it would have been had women held out for the "whole loaf" of the progressive labor agenda.

This argument does appeal to many, if not most, feminists. But the appeal arises from our feminism only indirectly. Many of us are (or once were) also liberals or progressives, and it is those agendas that seek to use women worker's demands (perhaps more appealing to those in power) in order to press the "larger" agenda of

66. See Shiu, *supra* note 43, at 355–56 (Appendix).

67. Even Iraq provides job-protected, one hundred percent paid leave for pregnancy and childbirth, and partial pay for longer maternity leaves. *Id.* at 356.

68. Williams, *supra* note 49, at 190–200.

worker's rights.⁶⁹ Many women might well gain substantially from replacement of maternity leave with parental leave, but only indirectly, through their association with men potentially more able to share in parenting tasks.⁷⁰ Those women who do not share intimate living arrangements with men are no better off materially.⁷¹ And women qua women, women as a class, are no closer to having our own bodies, desires and lives accepted as a legitimate basis from which to criticize and change existing work rules.⁷²

While degendering the demands of female employees through appealing to "family" needs in the FMLA fails to match women-centered feminist theory, it does satisfy other closely aligned political agendas. It also may be required in most cases by allegiance to our current constitutional order, which offers equal protection in sex-neutral terms,⁷³ with very few exceptions.⁷⁴

In addition, "coming together" may have appealed to many of us psychologically. Women have traditionally tended to have more

69. See *id.* at 196. ("Creating special privileges of the Montana type has, as one consequence, the effect of shifting attention away from the employer's inadequate sick leave policy or the state's failure to provide important protections to all workers.").

70. Even in Sweden, where "the father or the mother is entitled to a leave with an allowance of 90% of income for 180 days after the birth of a child," Williams, *supra* note 1, at 377 (citing BOETHIUS, *THE WORKING FAMILY* 4 (1984)), the potential has not become reality. "Almost a decade after institution of the program, women still use the leaves more often and for longer periods than do men." *Id.* at 378 n.213. Although Williams finds that fathers in Sweden are almost as likely as mothers to use a few days of leave when their children are ill, healthy children still seem to be the responsibility of their mothers. Only 25% of fathers used an average of only one month of the offered leave following birth of a child. *Id.*

71. Part of the argument may be that women are *always* better off, at least symbolically, when they cease being thought of as women. To the extent that this claim is about how the legal system is likely to use women's status against women, it is really part of the "dangers" argument discussed earlier. See *supra* notes 57-64 and accompanying text. To the extent that the claim is not historically contingent, but rather assumes that devaluation is a logically necessary consequence of being seen as a woman, it is both unverifiable and deeply inconsistent with feminism.

72. In addition, the potential gains of replacing maternity leave with parental leave or pregnancy disability leave with general temporary disability leave must be weighed against the significant risk of simple abolition rather than replacement. After all, according to the courts' traditional approach to equal treatment, it is just as "equal" to give no leave at all as to give leave to parents of both sexes, or to all disabled workers.

73. See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976), in which the Supreme Court announced the prevailing standard of "intermediate scrutiny" for sex-based classifications. The case involved the right of young men to buy 3.2% beer at the same age as young women. See also *Orr v. Orr*, 440 U.S. 268 (1979) (right of men to receive alimony after divorce).

74. As Professor Williams states, "Sex specific affirmative action is an exception to the rule against classification by sex, providing temporary and focused measures to overcome the effects of past discrimination." Williams, *supra* note 1, at 329 n.15.

success avoiding conflicts than winning them.⁷⁵ Also our socialization encourages us to hide or deny negative feelings, as much if not more about other women as about men.⁷⁶ For these and other reasons, we may find disagreeing with friends extremely uncomfortable. I know I did. In any event, several of us involved in the *Cal. Fed.* litigation felt the need to reach "beyond" our differences toward shared ground.

Immediately following oral argument in the *Cal. Fed.* case on October 8, 1986, Betty Friedan (a member of the CREW coalition) and I joined ACLU Women's Rights Project attorneys Joan Bertin and Isabelle Katz Pinzler to speak to Professor Wendy Williams' sex discrimination class at the Georgetown University Law School. The students thus had the opportunity to talk directly with several intensely committed feminists who had opposed each other through almost four years of litigation and debate. At the end of the class we all agreed to sign a joint statement of support for the Family and Medical Leave Act then pending before Congress (for the fourth year). It seemed like something all of us could support. In fact, to me, signing the statement felt like a healing gesture, a chance to reconnect with those on the "other side" without having to give up my commitment to job protection for pregnant women.

In addition to these political, legal and psychological reasons for supporting the FMLA, there was also one that might be classified as moral. The FMLA appeared to be "inclusive." There are strong reasons why feminists prize inclusiveness. First, there is our shared history as women of being excluded, concretely and symbolically, from important public and private enterprises and activities. We seek to avoid doing to others what we have found painful when inflicted on us. Second, there is our shared history as feminists, having participated in a grass-roots, mass movement that depended on huge numbers of women. The extraordinary successes of the feminist movement in the 1970s and early 1980s were a result of successful mobilization from the ground up, rather than reliance on any "top down" breakthroughs in theory or practice. And finally, Carol Gilligan's delineation of women's moral reasoning in *In a*

75. See Littleton, *supra* note 3, at 41-42 (discussing women's strategies for coping with violent husbands).

76. Even the popular press has responded to women's uneasiness about negative feelings (competition, envy, anger, etc.) in relationships with other women. See L. EICHENBAUM & S. ORBACH, *BETWEEN WOMEN: LOVE, ENVY AND COMPETITION IN WOMEN'S FRIENDSHIPS* (1989).

Different Voice resonates strongly with the intuitions of vast numbers of women.⁷⁷

For all of these reasons, inclusion is considered in most feminist circles to be an unalloyed good, exclusion to be either politically incorrect or at best a necessary evil to be practiced sparingly and temporarily. Rather than challenge this general premise, the next several paragraphs question the content of inclusion and exclusion contained in the FMLA. This analysis indicates that by self-consciously shifting the focus from debates over female employees' needs for, among other things, pregnancy disability leave, to a focus on female and male needs for family and medical leave, feminist supporters ironically ended up supporting the same kind of "half a loaf" measure that they had criticized in the litigation arena — only it was a different "half." My assertion is that, had the bill focused on all women, it would have included many more people among its beneficiaries.⁷⁸ Thus what looked like more inclusion ("let's add men") could, from a women-centered perspective, be seen as exclusion ("what about the women we've left out?").

If feminism is faithful to the goal of representing the perspective of women, i.e., *all* women,⁷⁹ then it must necessarily address issues of race, class, sexual orientation, age, disability and every

77. See C. GILLIGAN, *supra* note 28. See also Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 U. MIAMI L. REV. 29 (1987).

78. This is not to say that the bill's fate would have been any different. See *supra* note 23. The women who have been "left out" of the FMLA are those with less power — economic and political. Therefore their inclusion would not be likely to yield greater chances of passage. However, there is always the possibility that a different coalition of forces could, at least over time, alter the result. See *infra* note 100 and accompanying text. And even if a differently designed FMLA would likewise have been defeated, it is still important for us to focus on the women who would have been excluded from the FMLA had the President signed it as it stood on May 10, 1990. Not only does such a focus help us avoid the trap of thinking the game is over when it is only half won (and therefore packing up and going home), but it also may encourage strategies that do not lead to trading off the rights of some women for the rights of other women and some men. See Littleton, *In Search of a Feminist Jurisprudence*, 10 HARV. WOMEN'S L.J. 1, 5 (1987) (arguing that partial reforms should be embraced *if* they are not likely to undermine later, more inclusive reforms).

79. I accept this aspiration as both necessary and desirable for feminist theory and practice. See *Feminist Jurisprudence*, *supra* note 1, at 753 n.11. See also C. MacKinnon, *Feminism, Marxism, Method and the State: An Agenda for Theory*, 7 SIGNS 515, 520 n.7 (1982) ("I aspire to include all women in the term 'women' in some way, without violating the particularity of any woman's experience. Whenever this fails, the statement is simply wrong and will have to be qualified or the aspiration (or the theory) abandoned.").

other social division. As theorists such as Audre Lorde,⁸⁰ Elizabeth Spelman,⁸¹ Kimberlé Crenshaw,⁸² and bell hooks⁸³ have amply demonstrated, women do not come in divisible packages — to be addressed here as classless, raceless “women,” elsewhere as genderless, sexual orientationless “Blacks,” etc. A bill that protected the economic security of Black and Latina women, marginally employed women, lesbians, disabled women, and so on, would have looked quite different, and would have avoided the race and class bias of the bill that reached for inclusiveness by addressing the needs of a few relatively privileged men.⁸⁴

The FMLA excludes women in two ways: eligibility and impact. Under the bill, an eligible employee would be entitled to twelve work weeks of leave during any twelve-month period. The right to take a leave can be exercised in the event of the birth of an employee’s child or because of the placement with the employee of a child for adoption or foster care. Additionally, an employee is entitled to take a leave in order to care for her or his son, daughter, spouse, or parent who has a serious health condition. Finally, an employee can take a leave during her or his own illness, injury or other disabling condition.⁸⁵

The most obvious exclusion in this legislative scheme is, of course, lesbians — whose partners cannot be “spouses” under any

80. See, e.g., A. LORDE, *Age, Race, Class and Sex: Women Redefining Difference*, in *SISTER OUTSIDER* 114 (1984).

81. See generally E. SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* (1988).

82. See Crenshaw, *supra* note 8.

83. See, e.g., B. HOOKS, *TALKING BACK: THINKING FEMINIST, THINKING BLACK* (1989).

84. I am not making a claim that it is “wrong” to try to help *anyone* (although, if we are going to spend our energy helping men, it might make sense to help nonprivileged men before privileged ones). The claim is merely that, even though many feminists do sincerely care about men, caring about men is *not* what feminism is about.

85. The coverage provisions state:

Sec. 102. Family Leave Requirement

(a) In General. — (1) An eligible employee shall be entitled, subject to section 105, to 12 workweeks of leave during any 12-month period —

(A) because of the birth of a son or daughter of the employee;

(B) because of the placement of a son or daughter with the employee for adoption or foster care;

(C) in order to care for the employee’s son, daughter, spouse, or parent who has a serious health condition; or

(d) because of a serious health condition which makes the employee unable to perform the functions of such employee’s position.

FMLA, *supra* note 18, § 103.

existing state law.⁸⁶ In addition, only one of two lesbian co-parents can be genetically related to the child at birth. Existing law does not allow adoption by the nongenetic mother,⁸⁷ and is only beginning to allow joint adoption of unrelated children.⁸⁸ Thus many lesbians would also be prevented from using the leave to care for their children, who are not *legally* their sons and daughters.⁸⁹

Women living in extended or nontraditional families are not eligible for leave to care for the relatives (such as aunts, uncles or grandparents) or legally unrelated family members with whom they actually live. Since women of color and recent immigrant women are more likely to be in such a family setting,⁹⁰ this exclusion also has racial, ethnic, and class dimensions. Indeed, even though we

86. See Sella, *When a Mother Is a Legal Stranger to Her Child: The Law's Challenge to the Lesbian Nonbiological Mother*, 1 UCLA WOMEN'S L.J. 135, 136 n.4 (1991).

87. See *id.*

88. By custom, joint adoption by an unmarried couple seems to be unavailable as an option, even in places where openly gay or lesbian people are allowed to adopt as individuals. The only known exceptions have taken place in California, where at least three joint adoptions have been granted to lesbian and gay couples.

NATIONAL LAWYERS GUILD, ANTI-SEXISM COMMITTEE OF THE SAN FRANCISCO BAY AREA CHAPTER, *SEXUAL ORIENTATION AND THE LAW* § 1.04(2), at 1-77 (R. Achtenberg & M. Newcombe eds. 1990). Indeed, two states still "have laws that absolutely prohibit open gays and lesbians from adopting" at all. *Id.* § 1.04(2), at 1-76. See Kolata, *Lesbian Partners Find the Means to Be Parents*, N.Y. Times, Jan. 30, 1989, at A13, col. 1.

89. For a thoughtful and thorough exploration of what would be required to place lesbian-mother families in parity with traditional families, see Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459 (1990); for a darker perspective on how likely such changes are in the foreseeable future, see Cox, *Choosing One's Family: Can the Legal System Address the Breadth of Women's Choices of Intimate Relationships?*, forthcoming in ST. LOUIS U. PUB. L. REV. (1991). See also Sella, *supra* note 86.

90. In 1980, only 47% of Latino households in Los Angeles were "traditional" families (couples with children); only 22% of Black households consisted of "traditional" families. CITY OF LOS ANGELES, TASK FORCE ON FAMILY DIVERSITY: STRENGTHENING FAMILIES: A MODEL FOR COMMUNITY ACTION 9 [hereinafter TASK FORCE FINAL REPORT]. These figures include both single-parent households and extended family households. For data on the number of Black and Hispanic children living with persons other than their parents, see *infra* note 96 and accompanying text.

[T]raditional Korean families often consist of three generations, with elders and children cared for by the wife of the family's male income producer. In such an arrangement, obviously, the wife stays at home. Once in California, Korean families find that apartments are seldom large enough to accommodate three generations. Many women must give up the traditional home/caregiver role for out-of-home jobs that are necessary for the family's economic security, thus making care for elders an extra burden.

Id. at 87.

know that women overwhelmingly perform the caretaking functions in families,⁹¹ such women would not be eligible for leave to care for their extended family members or even for their spouse's parents, but only for their own.

Census information reveals that the above-mentioned exclusions are numerically significant. Over a million women live in a household with an unrelated adult of the other sex, and another 726,000 live with a partner of the same sex.⁹² None of these women are eligible for leave to care for their domestic partners. Additionally, 2.5 percent of all children in this country live with persons other than their father or mother.⁹³ Only 1.5 percent of white children live with other relatives or nonrelatives, but 7.5 percent of Black children and 2.4 percent of Hispanic children do so.⁹⁴ The women caring for these children are not eligible for child care leave, since the children are not legally related to them.

While these express exclusions from eligibility are both numerically significant and symbolically troubling, the greatest number of women are likely to be excluded from leave, not because they are ineligible, but because they simply cannot afford to take advantage of it. Under section 102 (c) of the FMLA, employers would be required only to provide *unpaid* leave.⁹⁵ Although the employee may elect to use paid vacation, personal or family leave instead, such an option depends on the employer already having a voluntary program of such other paid leaves. As indicated earlier, women may be less able to bargain for such voluntary programs, and thus will be less able to avail themselves of this option under the FMLA.⁹⁶

Not only will many working women be unable to afford foregoing income for any significant period of time, but in addition the

91. "[C]aring for elderly relatives, like other forms of domestic labor, continues to be allocated on the basis of gender. Women constitute 77 percent of adult children caring for parents." E. ABEL, *LOVE IS NOT ENOUGH: FAMILY CARE OF THE FRAIL ELDERLY* 14 (1987).

92. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *CURRENT POPULATION REPORTS: MARITAL STATUS AND LIVING ARRANGEMENTS*, Table 8 (Mar. 1989).

93. *Id.* at Table C.

94. The absolute number of children in such living arrangements has remained constant over the last ten years. Interestingly enough, the percentages were even higher earlier in the decade, when the FMLA's provisions were initially drafted. *Id.*

95. FMLA, *supra* note 18, § 102(c). Patricia Shiu of the Employment Law Center in San Francisco has, nevertheless, argued that job protection, even without income protection, is crucially important to poor working women. Shiu, *supra* note 43.

96. Of course, the failure to require *paid* leave represents a political compromise. Employer resistance to job-secured unpaid leave is likely to be lower than to job-secured leave with pay. If, as Shiu argues, *id.*, job protection is important even in the absence of income protection, this compromise may continue to be worthwhile.

lack of paid leave will affect decisions about caretaking responsibility in families with two workers eligible for caretaking leaves. Because men's wages continue to be significantly higher than women's,⁹⁷ it would be economically rational for a married woman to take the leave alone, as she would forgo a smaller income than her husband would, and his larger income would continue.⁹⁸ Thus the vision of allowing for more shared responsibility in child caretaking is unlikely to be achieved, regardless of its theoretical possibility, until more parity in wages has been won.⁹⁹

The lesson I draw from the preceding account of the history and politics of the Family and Medical Leave Act is that focusing on *women* can lead to a *more* inclusive focus, rather than a less inclusive one. A Women's Family and Medical Leave Act would provide for leave to care for domestic partners, regardless of marital status. It would provide for leave to care for healthy infants and sick children according to actual responsibility rather than legal relationship. It would allow for leave to care for elderly relatives of *either* the female employee *or* her partner. Male employees would thus be able to take care of their female domestic partners when they were ill. The Act would also require leave when male employees actually had responsibility for the care of children, elderly members of the household, or same-sex domestic partners, so that female relatives and friends would not feel pressured to pick up the burden. To prevent disincentives for families that decide either to share the burdens of caretaking between male and female members or to shift the burden to male members, all employees should be subject to the same documentation requirements.¹⁰⁰ Finally, the bill would at

97. Women currently earn 71% of men's wages. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, USUAL WEEKLY EARNINGS OF WAGE AND SALARY WORKERS: 3RD QUARTER 1990, Table 1 (1990).

98. Cf. Blumberg, *supra* note 17, at 1133.

Viewing themselves as an economic unit, couples tend to invest education and resources in the member with greater income-producing potential. Given pervasive sexual segregation in the labor force, gender-based pay differentials, higher female unemployment rates, and a tradition of male primacy, the object of the couple's investment is usually the male.

Id.

99. See *supra* note 70.

100. *Frontiero v. Richardson*, 411 U.S. 677 (1973), reminds us that assuming female dependency while requiring proof of male dependency locks women and men into traditionally prescribed roles. Therefore I would advocate a unitary standard for both women and men who wish to take a leave under the Women's Family and Medical Leave Act: they must assert that they have, or are undertaking, primary or co-equal responsibility for children, domestic partners or other members of their household. A signed statement by the employee should satisfy this requirement. Although there may be a

least start its legislative life with a requirement of paid leave, so that its sponsors could agree to drop that demand only if and when necessary in order to assure passage of the rest of the measure.

I am not sure that such a bill could come as close to passage as did the Family and Medical Leave Act of 1990, but I am equally unsure that it would not. Lesbian and gay organizations would be much more likely to support a bill that included same-sex domestic partners in its definition of family; African-American, Latino, Asian and other ethnic minority organizations might feel more strongly about a bill that embraced cultural diversity in its protections; feminists of all races and sexual orientations might more affirmatively, and less ambivalently, lend support. These constituencies might not be considered "powerful" by mainstream standards, but we are at least numerically significant. And if we do not take ourselves seriously enough to ask for what we want, rather than what we have been led to believe we can get, we will never have the chance to know our own power.

* * *

This analysis of the FMLA has explored the danger of overlooking women in an uncritical rush to "include" men. While this danger is significant, it is not the only one that accompanies inattention to women's experience as the starting point for feminist theory and practice. Another trap is mistaking apparently gender-neutral categories for factually gender neutral ones. This danger is explored in the succeeding pages by recounting the case of Pamela Besser.

II. LEAVING WOMEN OUT BY BRINGING "NEUTRALITY" IN: *FINGERT V. FINGERT*

The second trap that awaits the feminist lawyer whose attention is diverted from women is the assumption that gender neutral categories equally embody the experience of women.¹⁰¹ Question-

risk of fraudulent claims, the requirement of an affirmative assertion will serve to reduce that risk and the costs of any remaining "goldbricking" might well be less than the costs of requiring documentation in every case. (Such an assumption may underlie employers' general failure to require documentary proof that employees who state that they are married have in fact lawfully solemnized their vows.) Although the *Frontiero* court assumed that the government could and would require proof of dependency for both male and female service personnel before approving dependency benefits, 411 U.S. at 689-91, nothing in the opinion indicates any constitutional problem with the rule I have proposed here.

101. For an extensive discussion of how this danger arises in liberal legal equality doctrine, see *Reconstructing Sexual Equality*, *supra* note 7, at 1279-83, 1304-14.

ing that assumption can actually lead to a different "theory of the case" in concrete situations. I hope here to illustrate this claim by describing the *Fingert v. Fingert*¹⁰² case from my perspective as co-counsel for Pamela Besser (married name, Fingert) for the appeal of an order requiring her to move to her former husband's county of residence or lose custody of her son.¹⁰³

The factual history of this case demonstrates the enormous difficulties *any* parent or child faces after divorce. It also indicates the continuous and continuing insecurity in which custodial parents, most of whom continue to be women, must live. There are only hints in the earlier phases of the litigation of the extent to which *women* bear the brunt of these difficulties and insecurities. By the time I met Pamela Besser in the summer of 1989, it was already quite clear to many feminists (although not to the courts) that women's rights issues were directly involved in her case.¹⁰⁴

102. 221 Cal. App. 3d 1575, 271 Cal. Rptr. 389 (1990).

103. Representation of Pamela Besser was accepted by the American Civil Liberties Foundation of Southern California, with the ACLU's Jon Davidson as attorney of record. The Southern California Women's Law Center (described in Kuehl, *Why a Women's Law Journal/Law Center Experience*, 1 UCLA WOMEN'S L.J. 11 (1991)) was "of counsel" for the entire process of successful appeal to the California Court of Appeal, including the denial of hearing by the California Supreme Court. As a volunteer attorney for the Center (I also serve on the Board of Directors), I acted as *de facto* co-counsel with Mr. Davidson. Assistance in developing the legal theories as well as tutoring in the technicalities of California family law was provided by my colleague Professor Grace Ganz Blumberg, also serving as a volunteer for the Center, and by the Center's Co-Managing Attorney Sheila James Kuehl. Resolution of issues remaining after the appeal was handled exclusively by the ACLU.

104. To those familiar with employment discrimination doctrine, much of the following analysis will look somewhat similar to the "disparate impact" method of establishing discrimination. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (establishing that neutral rules with a significantly greater adverse effect on Blacks than on whites violate equal employment opportunity unless justified by the needs of the business). "Equal treatment" feminists, see *supra* notes 48-72 and accompanying text, do not reject disparate impact analysis, but rather view it as a necessary component of a strategy that seeks to replace sex- and gender-based categories with more neutral ones. See, e.g., Williams, *supra* note 1, at 331 (disparate impact analysis under Title VII will "squeeze the male tilt out" of employment practices that disadvantage women). In this way, asking a particular version of "the woman question" (are women more likely to be adversely affected than men?) becomes part of a method of establishing sex discrimination.

In contrast, I am seeking a method of uncovering and eliminating sexual subordination as well. While sex discrimination can be seen as the refusal to recognize culturally valuable traits when they are exhibited by women, sexual subordination involves the refusal to value traits or behaviors associated with women, regardless of the sex of the person exhibiting them. See *Reconstructing Sexual Equality supra* note 7, and *infra* note 136. The tactical distinction, see *supra* note 64, is between seeking ways to achieve neutrality ("squeezing out" any identifiable male bias) and seeking acceptance of women (making differences costless). The difference in methodology is which comes first,

But even in the earlier stages, faint tremors can be detected.

Pamela Besser married Michael Fingert in 1980. They purchased a home (with money bequeathed to Pam) near a business Michael started in Ventura, California. Pam became pregnant, but near mid-term Michael asked her to seek an abortion. When she refused, he filed for divorce. A few months later, while the divorce was pending, Joshua Fingert (usually called "Josh") was born.¹⁰⁵

For the first year of Josh's life, he and Pam remained in the family home. Although Michael's apartment was only two miles away, he rarely called or visited.¹⁰⁶ On May 26, 1983, a final judgment of dissolution was entered. As part of an agreement preceding the divorce, Pam received sole physical custody of Josh, but shared joint legal custody with Michael.

Having no family and few friends in Ventura, Pam decided to move into her parents' home in Chicago. As joint legal custodian, however, Michael was able to obtain an *ex parte* order, temporarily enjoining Pam from taking Josh out of California without his consent. During the hearing on this order, Pam decided to stay in California, and she subsequently moved to San Diego, where she had a cousin and a few close friends.

At least part of the reason for Pam's decision to abandon her Chicago plans was her fear of losing physical custody of Josh. That fear was hardly irrational. Relocation of even a sole custodial parent to a different state is generally considered "changed circumstances" sufficient to allow a challenge to an existing custody arrangement.¹⁰⁷ Not only is the moving parent frequently seen as

law or women? In the methodology I am advocating, women's experience is the perspective that law must accommodate itself to, rather than the means for testing whether law has been "neutral."

The methodologies may yield similar results in certain cases, and divergent results in others. Nevertheless I believe they are always distinct. For a fuller discussion of the methodology of women-centered feminism, see C. LITTLETON, *supra* note 2.

105. Transcript of Hearing, *Fingert v. Fingert* (In re Marriage of Fingert), 221 Cal. App. 3d 1575, 271 Cal. Rptr. 389 (1990) [hereinafter *Fingert* Transcript]. Copies of all briefs filed in the appellate phase of this litigation are on file with the *UCLA Women's Law Journal*, and the *Fingert* Transcript is on file with the author.

106. According to Pam's uncontradicted testimony, Michael did not refer to Josh as his son, hold him, go into his room, or celebrate his first birthday. *Fingert* Transcript, *supra* note 105, at 23, 297.

107. See, e.g., In re Marriage of Rosson, 178 Cal. App. 3d 1094, 1102, 224 Cal. Rptr. 250, 256 (1980). The doctrine of "changed circumstances" is an attempt to effectuate policies in favor of stability and continuity in custody arrangements. "Custody arrangements under an existing order can only be changed upon a showing of a substantial change of circumstances so affecting the child that modification is essential to the

unnecessarily disrupting the *status quo*,¹⁰⁸ but in a re-opened custody battle other factors, which would not themselves justify a challenge to custody, may nonetheless be used as ammunition by the party seeking a change in custody.

Even the modest relocation to San Diego (a car trip of approximately four hours) resulted in a loss of Pam's control over her and Josh's life. Rather than maintaining Pam's sole physical custody, the court awarded Michael physical custody on alternate weekends and certain summer and holiday periods — resulting in roughly two-thirds physical custody to Pam and one-third to Michael.

This result need not have been purely negative. Certainly it corresponded to an increase in Michael's interest in a relationship with Josh. In general, women might welcome such movement, not only because it provides an additional source of love and affection for the child, but also because it represents a decrease in mothers' own heavy burden of child care. Nevertheless, we should remember that these benefits usually come at the cost of a decrease in the autonomy a sole custodial mother might be able to exercise over her own life, as well as a decrease in the control she can exercise over her child's education, care, and social life.¹⁰⁹

child's welfare." HOGOBOOM & KING, CALIFORNIA PRACTICE GUIDE: FAMILY LAW § 17:55, at 17-34 (1989) (emphasis omitted).

108. See, e.g., *Guldelj v. Guldelj*, 41 Cal. 2d 202, 259 P.2d 656 (1953); *In re Marriage of Wood*, 141 Cal. App. 3d 671, 190 Cal. Rptr. 469; *In re Marriage of Ciganovich*, 61 Cal. App. 3d 289, 132 Cal. Rptr. 261 (1976); *Rosin v. Superior Court*, 181 Cal. App. 2d 486, 5 Cal. Rptr. 421 (1960). See *infra* notes 119-122 and accompanying text.

109. An analysis of joint custody arrangements is beyond the scope of this article. I am, however, troubled by any legal arrangement that assumes, rather than provides for, equality between male and female parents. In J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (1979), the authors urge that custodial decisions be based on the "least detrimental alternative" from the child's perspective. As part of this standard, they also suggest that *one* custodial parent be chosen, and that that parent "decide under what conditions he or she wishes to raise the child. Thus, the noncustodial parent should have no legally enforceable right to visit the child, and the custodial parent should have the right to decide whether it is desirable for the child to have such visits." *Id.* at 38. Although the authors' "child-centered" approach to custody has been adopted wholeheartedly by courts, their caution about shared custodial rights has been largely ignored. I do not claim the expertise to evaluate their claim that "[C]hildren have difficulty in relating positively to, profiting from, and maintaining the contact with two psychological parents who are not in positive contact with each other." *Id.* I do know that many women with whom I have spoken have reported feeling pressured by courts, mediators and society at large, into agreeing to share custody because it was "fair" or "good for the child," even when their own evaluation of the situation counseled against such an arrangement. For a discussion of how courts mistook legislative changes geared toward allowing divorcing couples to choose joint custody for legislative direction to prefer joint custody, see Blumberg, *supra* note 14. See also *infra* note 141.

Meanwhile Pam found a job in the computer industry. Working her way up in the field eventually meant considering an opportunity in Northern California. After consultation with therapists who had seen Josh, Pam decided that flying between Northern California and Ventura might actually be easier on Josh than frequent 200-mile drives between San Diego and Ventura. With Michael's consent, Pam and Josh relocated to a suburb of San Francisco. Through their attorneys, Michael and Pam entered into an informal modification of the alternate weekend visitation schedule. The new schedule called for Josh to spend three weeks of each month with Pam in Northern California and one week each month with Michael in Ventura. Josh flew back and forth between San Francisco and Ventura, accompanied or met at the airport by either Pam or Michael. By the time he was five Josh had his own "frequent flyer" account.¹¹⁰

Pam and Josh lived in Northern California for over three years. Before Josh was to enter kindergarten, Pam's father, who was ailing and anxious to retire, asked Pam to move to Chicago to take over management of his small publishing business. The offer appealed to Pam, who had by this time gained considerable expertise in the use of computers in publishing. In fact she was publishing her own newsletter for health organizations in the Bay Area. In addition, Josh would have a better chance to get to know her very large family.¹¹¹ In any event, the three weeks-one week schedule of visitation needed to be modified before Josh started kindergarten. Therefore Pam asked the court, which retained continuing jurisdiction, for permission to move to Chicago.

After a trial, the court denied Pam's request. Instead, the court's order confirmed the informal three week-one week arrangement. The effect of this order was to require Josh to attend school in San Mateo County for three weeks each month and then attend a different school in Ventura County for the remaining week. Despite the extreme difficulty of this arrangement for Josh, Michael refused to agree to a modification, and the court's order remained in effect.

110. *In Josh's Case, Life has Become a Tale of 2 Cities*, Ventura County Star Free Press, Aug. 21, 1988, at A6. Apparently Josh's situation is not unique. See Schlosberg, *Youngsters Become Frequent Fliers Shuttling Between Divorced Parents*, L.A. Times, Mar. 4, 1990, at J5, col. 1.

111. From Josh's position, this extended family consisted of "four grandparents and more than thirty-five aunts, uncles, and cousins in the Midwest." Appellant's Opening Brief, *In re Marriage of Fingert*, 221 Cal. App. 3d 1575, 271 Cal. Rptr. 389, at 4.

In April, 1988, Pam went back to court to try to compel a new schedule before Josh started first grade the next fall. She suggested that Michael see Josh on some weekends, most holidays and a longer period over the summer, so that Josh could continue his schooling in Northern California without the disruptive trips to Ventura for one week out of every month. The parents were ordered to meet with a court-appointed mediator,¹¹² and a hearing was set for May, rescheduled to June, to August and finally to September. When the hearing finally commenced, Josh had already begun first grade in Northern California.

By this time, both Pam and Michael agreed that Josh should attend only one school. However, Michael now took the position that "the optimum living arrangement for my six year old boy is for he and his mother to move back into the County of Ventura, allowing Joshua 50% time in each home while being a student at only one school."¹¹³ The mediator agreed.

Following the mediator's recommendations, the family court entered an order stating that "The minor's residence shall be in Ventura County and shall not be changed from said county without order of the Court or written agreement signed by both parties."¹¹⁴ Although the court recognized that it had no authority to order Pam directly to move, it certainly assumed that she would do so. The order itself specified that Michael "financially assist [Pam] in moving back to West Ventura County at a cost not to exceed \$1000.00 in connection with moving expenses,"¹¹⁵ and expressly

112. Since 1981, California law has required mediation of any contested custody or visitation proceeding. CAL. CIV. CODE § 4607(a) (West 1990). Every superior court is required to make available a mediator, who "may be a member of the professional staff of a family conciliation court, probation department, or mental health services agency, or may be any other person or agency designated by the court." CAL. CIV. CODE § 4607(b) (West 1990). The mediator is given broad authority — for example, "to exclude counsel from participation in the mediation proceedings." CAL. CIV. CODE § 4607(d) (West 1990). In addition, "the mediator may, consistent with local court rules, render a recommendation to the court as to the custody or visitation of the child or children." CAL. CIV. CODE § 4607(e) (West 1990). In large jurisdictions, local rules may provide for separation of the mediating functions, i.e., a mediator to help the parties try to reach agreement and a separate official to make recommendations to the court. In smaller jurisdictions, such as Ventura, these functions are performed by the same person.

113. *Fingert* Transcript, *supra* note 105, at 283. In the alternative, Michael suggested that Josh alternate living with him for one year and with Pam the next.

114. *Id.* at 347.

115. *Id.* at 375.

stated that it understood that its order would "force [Pam] to move to Ventura County or else give up custody of her child."¹¹⁶

Up until this point, the story of Pam, Josh, and Michael might have looked like a tragedy in the classic sense — sad and even desperate, but motivated by the virtues of the parents (both wanting to maintain connection to Josh), the timeless verities of human nature (marriage does not guarantee that love will last), and the mundane facts of economic and social life (good jobs may exist only in distant places; distance equals time; teleportation has yet to be invented). Yet even before the court ordered Josh's return to Ventura, there were indications that this tragedy might have political dimensions. Michael's interest in Josh, even though unexpressed until well after the birth, was nonetheless given significant standing in the decisions to grant a temporary restraining order against Pam's initial attempt to leave California. Despite Michael's earlier rejection of a co-parenting role, Pam was willing to agree to joint legal custody, thus insuring that she would never be able to make decisions for her "re-constituted family"¹¹⁷ without the possibility of Michael's veto. A court was willing to give Michael rights in the three week-one week custody plan despite its obvious disadvantages from the perspective of Josh's educational and social life apart from his parents. To what extent is Phyllis Chesler's observation that women who give less than one hundred percent to their children are seen as bad mothers while fathers who give more than zero are seen as good fathers relevant to this situation?¹¹⁸

Regardless of the extent to which Pam's status as a woman affected the decisions made prior to the order of December 22, 1988, from the time a court started to consider Michael's claim that

116. *Id.* at 377.

117. See Shernow, *Recognizing Constitutional Rights of Custodial Parents: The Primacy of the Post-Divorce Family in Child Custody Modification Proceedings*, 35 UCLA L. REV. 677 (1988). Shernow argues for substantial protection of the custodial parent-child family from interference by the noncustodial parent. Even if her argument is accepted, however, it does not apply to joint custody situations, even when, as in *Fingert*, the mother is the primary custodian.

118. P. CHESLER, *MOTHERS ON TRIAL* (1986).

Mothers are expected to perform a series of visible and non-visible tasks, all of which are never-ending. Mothers are not allowed to fail any of these obligations. . . . Fathers are expected to perform a limited number of tasks. They are also allowed to fail some or all of these obligations. In addition, fathers who do *anything* for children are often experienced and perceived as 'better' than mothers — who are supposed to do everything.

Id. at 50. See also Blumberg, *supra* note 14; Polikoff, *Why Mothers Are Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 7 WOMEN'S RTS. L. RPTR. 235 (1982).

Pam should be required to live in his chosen community, a focus on *women* makes a significant difference in how *Fingert v. Fingert* is viewed.

Michael argued that having Josh live in only one community would make life easier for Josh. This could be seen as a noncontroversial, and certainly sex-neutral assertion. After all, there is little plausibility in arguing that it is either easy or good for children to be forced to establish roots in two very different communities. However, focusing on whether Pam Besser's situation might better be described as a woman's situation than as a parent's situation provides a subtle, and important, shift in perspective.

For both economic and social reasons, the reality of most marriages is that, during the marriage, the couple is most likely to live where the husband's career has taken them.¹¹⁹ After divorce, many women will need to relocate in order to find a job to support themselves and their children, to make ends meet by moving to a less costly neighborhood,¹²⁰ or to rebuild an emotionally supportive life for themselves and their family.¹²¹ Thus, if parents who move after divorce are seen as the ones who are disrupting the status quo, unnecessarily subjecting their children to the difficulty of having two residences, then blame will be laid most often at the mother's door. Indeed, in Pam's case, Michael's attorney asserted, with some sense of exasperation, that "Mothers, as here, may be required to stop moving and stay in one place in order to benefit the child's best

119. See, e.g., *Boren v. Dep't of Employment Dev.*, 59 Cal. App. 3d 250, 130 Cal. Rptr. 683 (1976). "We take judicial notice, as a matter of common knowledge, that women are more likely than men to follow their spouses to a new job location . . ." 59 Cal. App. 3d at 258, 130 Cal. Rptr. at 688.

120. Studies have revealed that, just one year after divorce, "Men experienced a 42% improvement in their postdivorce standard of living, while women experienced a 73% loss." Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. REV. 1181, 1251 (1981). See also L. WEITZMAN, *THE DIVORCE REVOLUTION* 323-56 (1985); According to a Census Bureau report, monthly family income declined 37% as a result of the father's departure from the family. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, NO. 23, SERIES P-70, *FAMILY DISRUPTION AND ECONOMIC HARDSHIP: THE SHORT-RUN PICTURE FOR CHILDREN* 2 (1991).

121. Within four years of separation or divorce, 75% of custodial mothers move at least once; of that number, over half move again within the same period. Bane & Weis, *Alone Together: The World of Single-Parent Families*, 2 AMER. DEMOGRAPHICS 11, 12 (1980). Many divorced women also seek to "fall back upon ties with immediate family members to a greater extent than prior to divorce." Albrecht, *Relations and Adjustments to Divorce: Differences in the Experiences of Males and Females*, 29 FAM. REL. 59, 64 (1980).

interests by having meaningful and appropriate contact with both parents."¹²²

Michael also argued, and the court accepted, that his location should be preferred because Pam had moved in the past and, in his view, had the ability to move again because she worked part-time out of her home and earned only a nominal income. On the other hand, Michael owned a substantial business in Ventura, which he had operated for ten years.¹²³ Pam asserted that she worked full-time at her own business. Although she had earned only a small amount of income from it at that point, her health-care newsletter publishing business was already operating "in the black," and she was working hard to establish and expand its success.¹²⁴

The court's preference for a ten-year-old business that generated substantial income over a new venture that was only starting to pay off might also seem sex-neutral, *until* we re-focus attention on women's experience. In *Burchard v. Garay*¹²⁵ the California Supreme Court held that, in deciding between competing parental claims to custody, family courts abuse their discretion by considering "the relative economic position of the parties."¹²⁶ The majority identified two reasons for this ruling: First, there is no basis for assuming that wealth is likely to result in either good parenting or happiness;¹²⁷ Second, if the greater resources of one parent are needed to care for the child, this can be accomplished through a child support order rather than a change in custody.¹²⁸ The court also rejected any preference for a father who has remarried, and whose new wife is available to care for the child, over a mother who works and has her child in daycare, because "courts must not presume that a working mother is a less satisfactory parent or less fully

122. Respondent's Opening Brief at 9, *In re Marriage of Fingert*, 221 Cal. App. 3d 1575, 271 Cal. Rptr. 389 (1990) (emphasis omitted).

123. At the time, Michael was in the process of moving both his residence and his business to another town. Nevertheless, his argument was that he was too established in Ventura County to be required to move, not necessarily that he was too established in the city of Ventura. I therefore do not rely on this evidence of mobility on Michael's part.

124. In addition to her own reasons for wanting to remain in Northern California, Pam asserted that Josh's "roots" were there too. He had attended the same school in San Mateo County for three years, and was enrolled in his second year in a Sunday School there. Josh had also participated on the same soccer team for years and had had the same set of playmates there since he was three years old.

125. 42 Cal. 3d 531, 229 Cal. Rptr. 800, 724 P.2d 486 (1986).

126. 42 Cal. 3d at 535, 229 Cal. Rptr. at 802, 724 P.2d at 488.

127. 42 Cal. 3d at 539, 229 Cal. Rptr. at 805, 724 P.2d at 491 (quoting Klaff, *The Tender Years Doctrine: A Defense*, 70 CALIF. L. REV. 335, 350 (1982)).

128. *Id.* at 535, 539, 229 Cal. Rptr. at 802, 805-06, 724 P.2d at 488, 492.

committed to her child."¹²⁹ In a footnote, the majority indicated its suspicion that the effects of such a preference were "likely to discriminate against women."¹³⁰

The concurrence in *Burchard* by then Chief Justice Bird, the first woman to serve on the California Supreme Court, went further, stating that reliance on presumptions such as "a wealthier parent makes a better parent" or "a working mother is less likely to provide adequate care" "is of dubious constitutionality."¹³¹ Bird clearly recognized that "The burden [of a wealth-based preference] would certainly fall most heavily on women. In those cases where the father contests custody, he is the parent likely to have superior resources."¹³² While the majority in *Burchard* was willing to find an abuse of discretion in the trial court's reliance on wealth comparisons, only Bird was willing to base her objection to such comparisons squarely on the fact that "They fall unequally on women and men"¹³³ and thus violate equal protection guarantees.

As both *Fingert* and *Burchard* illustrate, asking "the woman question" makes it clear that the effects of apparently gender-neutral custody criteria such as length of residence and economic status are not gender-neutral. Interestingly enough, the beneficiaries of such judicial insight are likely to be *both* (many) women and (some) men. Preferences for wealthier parents do not simply weight the scales against women and in favor of men; they also weight the scales against precisely those men whose interests feminists might most wish to further. If the parent (or parents)¹³⁴ who engages in direct care of the child is subordinated to the parent with more money, nurturing fathers may in fact receive less consideration for

129. *Id.* at 539-40, 229 Cal. Rptr. at 806, 724 P.2d at 492.

130. *Id.* at 540 n.10, 229 Cal. Rptr. at 806 n.10, 724 P.2d at 492 n.10.

131. *Id.* at 546, 229 Cal. Rptr. at 810, 724 P.2d at 496 (Bird, C.J., concurring).

132. *Id.* at 544. See also Weitzman, *supra* note 120.

133. *Burchard*, 42 Cal. 3d at 546, 229 Cal. Rptr. at 810, 724 P.2d at 496 (Bird, C.J., concurring).

134. Truly equal co-parenting may be rare, but there is no reason to believe it does not exist, and indeed more of it might well occur if women and men had greater economic equality. See *supra* note 64 and accompanying text. Additionally, there is no reason to assume a maximum of two parents, as the law currently does. See Polikoff, *supra* note 89, at 473 ("The reality of a child's life does not depend upon legal rules. In assessing the rights of parents who do not fit the one-mother/one-father status, courts can either preserve the fiction of this status regardless of the child's reality, or they can recognize diversity and tailor rules accordingly."). See also Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Promise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 948 (1984) ("[I]t should not be assumed . . . that children cannot adjust to complex associations, or that a child should have only one mother or father.").

their efforts.¹³⁵ Of course a rule against wealth preferences directly benefits fewer fathers than mothers, but it will benefit those fathers who have been willing to risk social ostracism in order to take on a truly co- or primary parent role.¹³⁶

The preceding analysis does not exhaust the levels on which a focus on women and women's experience makes the *Fingert* case look substantially different. At least two other issues are apparent from a woman-centered perspective. Both of these issues arise from the trial court's uncritical acceptance of the court mediator's recommendations.¹³⁷

First, the mediator stressed "the significance of father and son relationships."¹³⁸ Because of this emphasis, he was of the view that

135. This analysis does assume that the less wealthy parent is so, at least in part, because she or he has foregone career enhancement opportunities in order to devote time and effort to direct child care. While this assumption may be valid in many instances, and is justifiable for the purposes of this Article, it should be noted that there are many other reasons why an individual may earn less money than her or his partner.

136. According to the terminology I used in *Reconstructing Sexual Equality*, *supra* note 7, at 1308-09, such fathers are behaving in socially female ways. Rewarding those fathers who are both biological and social males, while punishing those fathers and mothers who are socially female, is a form of sexual subordination. *See generally id.* For a brief overview of analytical distinctions between sex discrimination, gender oppression and sexual subordination, see Littleton, *Equality and Feminist Legal Theory*, 48 U. PITT. L. REV. 1043 (1987).

The above analysis does not address the tragedy of men who *accept*, rather than reject, traditional social roles, sacrificing a direct relationship with their children in order to fill the role of breadwinner. Despite the economic and social rewards for conforming, such men may in fact experience themselves as having lost something very precious. If so, my hope is that they will use that experience to help bring about changes that will equalize the benefits and burdens of women and men's participation in work and family.

137. Reliance on mediation (like reliance on adjudication) is likely, in the absence of significant equality-enhancing safeguards, to have gendered consequences. Some commentators have suggested that mediation exacerbates power imbalances between women and men in relationships, as women may be less likely to seek their own advantage, more likely to avoid conflict by agreeing to sacrifices and more eager to please the mediator (who, in this and many other cases, is also male). *See, e.g.,* Grillo, *The Mediation Alternative: Process Dangers for Women*, forthcoming in YALE L.J. (April 1991); *see also* Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1542 (1983). *Cf.* Rifkin, *Mediation from a Feminist Perspective: Promise and Problems*, 2 J.L. & INEQUALITY 21 (1984) (recognizing relationships of dominance, but suggesting that there is at least the potential for mediation to alter such patterns); Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984) (arguing that negotiation rather than adversarial litigation can allow for non-zero-sum results). *See also* Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727 (1988) (exploring "macro level" lack of power that disadvantages custodial mothers as a group, not just as individuals). Also, reliance on the recommendations of a mediator in no way either erases or excuses the court's own sex bias.

138. *Fingert* Transcript, *supra* note 105, at 368.

Michael should be allowed to continue to see Josh on a regular basis and that "neither a 'weekend' father arrangement, nor paternal visitation during holidays and vacations was the best situation."¹³⁹ Instead, "it would be best if Joshua and [Pam] moved to Ventura in order to make it easier for [Michael] and Joshua to continue to spend time together regularly."¹⁴⁰ Although the mediator found Josh to have a "good" relationship with *both* parents, and characterized his recommendations as intended to facilitate continuation of this state of affairs, no independent recognition was given to either the "significance" of mother and son relationships in general or the fact that Pam in particular had been Josh's sole or primary caretaker for all of his life. Even if the stress on father and son relationships was intended *only* to treat the Michael-Josh connection the *same* as the Pam-Josh connection, one might be given pause by the recollection that the parents had hardly acted in equal fashion.¹⁴¹

A related issue is the ease with which both the mediator and the court made the assumption that ordering Josh to move to Ventura *would* in fact achieve the desired goal of allowing him to enjoy regular contact with both parents. The only way that this *could* occur was if Pam sacrificed her own interests — economic, social and legal — in her choice to reside in Northern California to her interests in maintaining that relationship. Why did it seem so obvious to the court that, once the decision was made that *one* community should house all three parties, that community must of course be Michael's? The only explanations that occur to me are (1) the

139. *Id.*

140. *Id.*

141. An argument could be made that fathers should be given a realistic chance at custody in order to encourage them to take an active role in child care during a marriage. Katharine Bartlett and Carol Stack reject a coercive carrot-and-stick approach to this issue in their thoughtful defense of joint custody. See Bartlett & Stack, *Joint Custody, Feminism and the Dependence Dilemma*, 2 BERKELEY WOMEN'S L.J. 9, 33-34 (1986). Instead, they suggest that the law has a more expressive role to play in changing the social norms that impose the burden of primary child care on women. In their opinion, the institution of joint custody can be seen as setting new, nontraditional norms for fathers, whether or not individual fathers change their parenting behavior. *Id.* I agree with them that "it is doubtful that 'incentives' to share equally in parenting responsibilities would work in the context of marriage where, despite statistics to the contrary, couples rarely contemplate that they themselves will divorce and disagree about the custody of their children." *Id.* at 33. Nevertheless, I resist weakening the position of individual women who have been responsible over a period of years even in the service of an appealing new social order. Perhaps we could find ways to recognize and value nontraditional parenting (or parenting by nontraditional parents) instead, trying to equalize different *kinds* of parenting, rather than different *amounts*.

court assumed that Michael would not sacrifice (e.g., by moving to Northern California) in order to maintain connection, and that Pam would; or (2) that the sacrifice being asked of Pam was less than that being asked of Michael.¹⁴² Both assumptions are gendered to the core.

Pam's situation, while not unique,¹⁴³ is certainly unusual. Custodial parents are not often ordered to pull up roots and move back to locations they left years ago at the risk of losing their children. Yet a closely related phenomenon is quite common: custodial parents, more often custodial mothers, regularly are ordered *not* to move. Phyllis Chesler's recent study of custodially challenged mothers found that "Nearly a third of the fathers who won custody moved away afterward" with their children, half of them with formal court approval.¹⁴⁴ The story for mothers is quite different. "Nearly a third of the mothers wanted to move away. With one exception, they all were prevented from doing so — with their children."¹⁴⁵ Being forced to move is only half the story; being forced to stay is just as significant a denial of women's freedom, and almost as great a burden on women's material situation.

Fingert v. Fingert has a happy ending, at least from Pam's point of view. On July 13, 1990, the California Court of Appeal overturned the order requiring Josh to take up and maintain residence in Ventura County. Finding the "effects of the order appealed from here [to be] breathtaking,"¹⁴⁶ especially in light of the fact that "There is not the slightest hint that Pamela is not a capable, caring and competent parent,"¹⁴⁷ that court held the order to be an abuse of discretion on two grounds. First, "[A] court may not

142. A colleague has suggested a third possibility: by keeping all of the parties in Ventura County, the court retains control over the proceedings. This reason seems less likely to me, because the court retained jurisdiction over the action in any case. A change in the jurisdiction to another court within California would require the court of original jurisdiction to grant a motion for change in venue. *Ferreira v. Ferreira*, 9 Cal. 3d 824, 843, 109 Cal. Rptr. 80, 93, 512 P.2d 304, 317 (1973). Decision of such motions is within the court's discretion. See *Wood v. Silvers*, 35 Cal. App. 2d 604, 607, 109 Cal. Rptr. 80, 93, 512 P.2d 304, 317 (1939).

143. Pam's attorney has stated that the ACLU of Southern California has "heard of at least six cases where the Ventura County Superior Courts have ordered women to move from other cities or states to Ventura or else lose custody of their children so that fathers in Ventura could see their children more easily." Parker, *Ventura County Custody Appeal Alleges Gender Bias*, L.A. Daily J., Mar. 7, 1990, at 3 (quoting Jon Davidson).

144. P. CHESLER, *supra* note 118, at 112.

145. *Id.* at 112-13.

146. 221 Cal. App. 3d at 1580, 271 Cal. Rptr. at 391.

147. *Id.*, 271 Cal. Rptr. at 391-92.

decide a custody issue on the basis of the relative economic position of the parties."¹⁴⁸ Second, "[C]ourts cannot order individuals to move to and live in a community not of their choosing."¹⁴⁹ While relying on the right to travel assured in the United States and California constitutions, the appellate court concluded that the "order requiring Pamela to either relocate or lose custody" was an abuse of discretion.¹⁵⁰ Pam's "trial" (in both the lay and the legal sense of the word) may thus help thousands of other custodial parents — most of them women — trapped by their own laudable ties to their children in towns and cities of someone else's choosing.

The *Fingert* case illustrates the importance of challenging assumptions of gender neutrality, not only in legal rules themselves, but also in how questions are asked. The Ventura family court framed the issue in this case as which of two custodial parents should be required to move. If this framework were accepted, neither parent could credibly charge that the resulting order constituted sex discrimination. It would be exactly as discriminatory (or non-discriminatory) to order the female parent or the male parent to move to (or to continue to live in) the location chosen by the other. Sex discrimination doctrine, as developed and honed over the last twenty years, thus *seems* simply inapplicable to the *Fingert* case.¹⁵¹

Yet consider how the court must have arrived at its conclusion that Pamela Besser give up her home and business in Northern California and move to Michael Fingert's chosen location. If the court had ordered Joshua's residence changed and Pam had *not* moved, the result would have been even further from what the court was

148. *Id.* at 1580, 271 Cal. Rptr. at 391 (citing *Burchard v. Garay*, 42 Cal. 3d 531, 229 Cal. Rptr. 800, 724 P.2d 486 (1986)).

149. *Id.* at 1581, 271 Cal. Rptr. at 392.

150. *Id.* at 1582, 271 Cal. Rptr. at 393. The California Supreme Court denied hearing on August 22, 1990. Following the appellate litigation, Michael filed in the trial court for an order granting him sole custody, based on Pam's asserted intention to move back to Northern California after the Court of Appeals decision dissolving the Order requiring Josh to stay in Ventura County. Finally, on January 3, 1991, during a hearing on this request, Michael conceded that it might be in the best interests of all concerned to allow Pam and Josh to return to Northern California. As this Article goes to press, Pam and her family are preparing to return to San Francisco.

151. Indeed the Respondent's Opening Brief in *Fingert* makes precisely this argument. "Respondent agrees that if the decision of the trial court 'overtly discriminated' against the Appellant on the basis of sex, she is entitled to a reversal . . . [but] [i]t was not Appellant's gender that required her to move from the Bay area, it was her demonstrated mobility and her self-acknowledged lack of ties to a community she sought to abandon not one year earlier." Respondent's Opening Brief at 6-7, *In re Marriage of Fingert*, 221 Cal. App. 3d 1575, 271 Cal. Rptr. 389 (1990).

trying to achieve. Rather than having the entire family together, Josh would have been deprived of his primary parent. The court's order thus had to be premised on the notion that Pam would in fact not pursue her own interests in remaining in the location of her choice, that she would sacrifice her rights in order to maintain her relationship with her son. For this reason alone, the decision should be seen as discriminatory — even, or perhaps especially, if the assumption is (as it was in this case) absolutely accurate.

Without a focus on women, the discriminatory effects of preferring lengthy residence or greater wealth would not be apparent. Even more significant, however, without a focus that *values* women, the sacrifices of female parents would continue to be subordinated to the minor efforts of male parents. Indeed, it is as if Solomon, after threatening to cut the baby in half, had then given it to the claimant who had agreed to the severing, rather than to the woman who was willing to give up her rights in order to save the child.

Pretending that gender neutrality will save women from a male-biased world is, and for the foreseeable future will be, sheer fantasy. Feminists, the most pragmatic of revolutionaries, cannot afford to stop looking at women's concrete situation in favor of the chimera of gender neutrality. Even if it is true that, under our present constitutional order, with its passion for "neutrality,"¹⁵² gender neutral language is necessary in order to gain a hearing for women, we must keep asking the "woman question" in order to avoid mistaking the packaging for the reality. Indeed, the methodology of feminist legal theory and practice must be based in a willingness to go "behind" the asserted neutrality of any legal doctrine in order to find the gendered reality that prevents true equality.

CONCLUSION

In this Article I have tried to remind all of us (myself included) that women and women's experience count, and that it can make a real difference in our theory and practice when we take both seriously.¹⁵³ The problems of inclusion and exclusion, whether with

152. See *supra* notes 73–74 and accompanying text.

153. The illustrations — the FMLA and the *Fingert* case — are more suggestive than directive. I do not mean to create a litmus test for whether particular persons, concepts, arguments or lines of analysis are or are not "feminist," nor do I mean to suggest that every feminist will or should agree with my analysis of these issues. So long as there are divergent opinions on what women's experience is, how much room exists within the legal system for the expression of that experience, and what true sexual equality would look like, feminists will disagree about concrete cases. I am arguing for

respect to legislation, employee benefits or other arenas, will need to be addressed over and over again. Remembering that women are over half the world, and that a focus on women is not *automatically* a narrow one will help us avoid the trap of mistaking some forms of exclusion for inclusion, but it will not do all of our work for us. Similarly, a focus on women, and a willingness to value women, will help us avoid the trap of assuming actual gender neutrality where it does not exist, but we will still need to do the work of uncovering male bias, over and over again, in each institution, rule, and practice in which it resides.