differences may sound like marching directly into the valley of the stereotypes. Those who consider Carol Gilligan's discovery of "a different voice" sexist are not likely to find this appealing. Nevertheless, allow me to make two disclaimers. First, almost all cultural differences are, or could easily be, "more or less." Lots of biological men exhibit socially female characteristics (for which they are all too often punished); at least as many biological women exhibit socially male ones (for which they are often rewarded, although they are simultaneously punished for not having the biological form to match); and many more women and men fall in the middle, exhibiting no readily identifiable "male" or "female" behavior patterns. Second, what is objectionable about stereotypes is not that they are *never* true, but rather that they are not *always* true. Demonstrating that not every women with children is primarily responsible for their care may help those women who do not have such responsibility to compete for certain jobs, but it does little to help those women struggling to hold down two jobs, only one of which is paid.

Disclaimers aside, what is relevant for this exercise is not the accuracy or inaccuracy of any set of gendered complements, but rather how the complements reward or punish those who are perceived to fall on one side or the other. Studies of sex-segregated work places tend to show that there is a high correlation between employer perceptions of gender differences and the segregation patterns themselves. These perceived gender differences, such as lifting strength and small-muscle dexterity, are of the more-or-less type, and tend to fall toward the middle of the "source" axis. Requiring individual testing alleviates segregation to some extent, but it only helps those women who do not fit the female stereotype (at the expense, of course, of those men who do not fit the male stereotype). However, the main problem was sex segregation is that promotion patterns and pay scales are determined by entry-level job classifications. Thus, those women who do fit the female stereotype (of say, low lifting strength and high small-muscle dexterity) are stuck. They are not harmed by the "female" job classification as such; they are harmed by the disparity in pay and opportunity for promotion that goes along with it. And the disparity in promotion opportunities continues the cycle of overvaluation of "male" characteristics and undervaluation of "female" ones, because employers will continue to select those biological men and women who are socially male.

If, alternatively, both "male" and "female" entry-level positions paid the same and offered the same promotion opportunities, individual testing would not matter so much. Indeed, assuming proportionate numbers of openings, applicants might well self-select into the classification that better utilizes their particular strengths and minimizes their particular weaknesses. If so, the segregation pattern would gradually break down unless employers actively and, legally speaking, "intentionally" sought to maintain it. Moreover, even if self-selection by individual skills did not occur, a better sex mix at the management level would eventually have a significant impact throughout the firm.

As Frances Olsen sets forth in *The Sex of Law*, we tend to think in dichotomies, and those dichotomies are both sexualized (with one side masculine and the other feminine) and hierarchicized (with one side in each pair superior).[11] She argues that the sexualization and hierarchicization should be attacked simultaneously, to the end of deconstructing the dichotomies themselves. While I do not disagree with this goal, I do think Olsen's strategy is impractical. Dichotomies that purport to describe gender differences are, I think, only likely to fall apart once they no longer accurately describe differences in pay scales, hiring patterns, or promotion ladders. Additionally, since we presently think in these dichotomies, we may as well use them to help us in our struggle to discard them.

The rigidity of sexualized dichotomies does appear to be gradually breaking down in many areas. With regard to the practical problem of implementation,

[11] Olsen (1990). 18 Int. J. Soc. Law 199.

however, the true breakdown of any particular male-female dichotomy is not a problem, but a benefit. It puts us one step closer toward eliminating them entirely.

Equality as acceptance provides a methodology for assuring that sexual differences do not take on the unnecessary consequence of sexual inequality. In order to apply that methodology, we must open inquiry into the identification, use, and meaning of such differences. Through a model of equal acceptance, the legal system, which has historically been a conduit through which perceived difference between both sexes has rationalized concrete disadvantage to one, may finally become an arena for reclaiming equality across difference.

Conclusion

As I look back on the argument made here on behalf of the model of acceptance, I perceive these major points: (1) in order to be faithful to feminist critique, a reconstructed equality norm must be capable of application across or beyond difference; (2) although no reconstruction undertaken under conditions of inequality can claim to be completely free from phallocentric bias, a reconstruction can increase equality and invite later, freer reconstructions by shifting the frame and moving the margin into the picture; (3) making difference costless (or even cost less) will shift the frame, allowing us to see ever more subtle forms of phallocentric bias while reducing the danger that difference will be used to recreate inequality; (4) the model of costless difference can be applied *within* contexts without impeding later efforts to apply it *across* contexts; and (5) much of the model's usefulness can be realized now, without waiting for major legislative or cultural change.

KATHERINE T. BARTLETT

Feminist Legal Methods

(1990)[12]

In what sense can legal methods be "feminist"? Are there specific methods that feminist lawyers share? If so, what are these methods, why are they used, and what significance do they have to feminist practice? Put another way, what do feminists mean when they say they are doing law,[13] and what do they mean when, having done law, they claim to be "right"?

Feminists have developed extensive critiques of law and proposals for legal reform. Feminists have had much less to say, however, about what the "doing" of law should entail and what truth status to give to the legal claims that follow. These methodological issues matter because methods shape one's view of the possibilities for legal practice and reform. Method "organizes the apprehension of truth; it determines what counts as evidence and defines what is taken as verification.[14] Feminists cannot ignore method, because if they seek to challenge existing structures of power with the same methods that have defined what counts within those structures, they may instead "recreate the illegitimate power structures [that they are] trying to identify and undermine."[15]

Method matters also because without an understanding of feminist methods, feminist claims in the law will not be perceived as legitimate or "correct." Feminists have tended to focus on defending their various substantive positions or

[12] [From (1990) 103 Harv. L. Rev. 829]

[13] This article is primarily about "doing law" in the limited sense encompassed by the professional activities of practicing lawyers, lawmakers, law professors, and judges.

[14] MacKinnon 7 Signs 515, at 527.

[15] Singer, *Should Lawyers Care About Philosophy?* 1989 Duke L.J. 1752.

political agendas, even among themselves. Greater attention to issues of method may help to anchor these defenses, to explain why feminist agendas often appear so radical (or not radical enough), and even to establish some common ground among feminists.

As feminists articulate their methods, they can become more aware of the nature of what they do, and thus do it better... [pp. 830–831]

Feminist doing in law

When feminists "do law," they do what other lawyers do: they examine the facts of a legal issue or dispute, they identify the essential features of those facts, they determine what legal principles should guide the resolution of the dispute, and they apply those principles to the facts. In doing law, feminists like other lawyers use a full range of methods of legal reasoning—deduction, induction, analogy, and use of hypotheticals, policy, and other general principles.

In addition to these conventional methods of doing law, however, feminists use other methods. These methods, though not all unique to feminists, attempt to reveal features of a legal issue which more traditional methods tend to overlook or suppress. One method, asking the woman question, is designed to expose how the substance of law may silently and without justification submerge the perspectives of women and other excluded groups. Another method, feminist practical reasoning, expands traditional notions of legal relevance to make legal decisionmaking more sensitive to the features of a case not already reflected in legal doctrine. A third method, consciousness-raising, offers a means of testing the validity of accepted legal principles through the lens of the personal experience of those directly affected by those principles...

Asking the woman question

A question becomes a method when it is regularly asked. Feminists across many disciplines regularly ask a question—a set of questions, really—known as "the woman question,"[16] which is designed to identify the gender implications of rules and practices which might otherwise appear to be neutral or objective...

In law, asking the woman question means examining how the law fails to take into account the experiences and values that seem more typical of women than of men, for whatever reason, or how existing legal standards and concepts might disadvantage women. The question assumes that some features of the law may be not only nonneutral in a general sense, but also "male" in a specific sense. The purpose of the woman question is to expose those features and how they operate, and to suggest how they might be corrected.[17]

Women have long been asking the woman question in law. The legal impediments associated with being a woman were, early on, so blatant that the question was not so much whether women were left out, but whether the omission was justified by women's different roles and characteristics. American women such as Elizabeth Cady Stanton and Abigail Adams may seem today all too modest and

[16] See, *e.g.* Gould, "The Woman Question: Philosophy of Liberation and the Liberation of Philosophy" in *Women and Philosophy: Toward a Theory of Liberation* (C. Gould & M. Wartofsky eds. 1976), p. 5 (discussing the woman question in philosophy); Hawkesworth, "Feminist Rhetoric: Discourses on the Male Monopoly of Thought" (1988) 16 Pol., Theory 444, 452–56 (examining the treatment of the woman question in political theory). The first use of the term "woman question" is in S. De Beauvoir, *The Second Sex* (1957), p. xxvi.

[17] See Wishik, *ante*, 1287–1288.

tentative in their demands for improvements in women's legal status. Yet while social stereotypes and limited expectations for women may have blinded women activists in the eighteenth and nineteenth centuries, their demands for the vote, for the right of married women to make contracts and own property, for other marriage reforms, and for birth control challenged legal rules and social practices that, to others in their day, constituted the God-given plan for the human race.

Within the judicial system, Myra Bradwell was one of the first to ask the woman question when she asked why the privileges and immunities of citizenship did not include, for married women in Illinois, eligibility for a state license to practice law.[18] The opinion of the United States Supreme Court in Bradwell's case evaded the gender issue, but Justice Bradley in his concurring opinion set forth the "separate spheres" legal ideology underlying the Illinois law.

Women, and sometimes employers, continued to press the woman question in challenges to sex-based maximum work-hour legislation, other occupation restrictions, voting limitations, and jury-exemption rules. The ideology, however, proved extremely resilient.

Not until the 1970's did the woman question begin to yield different answers about the appropriateness of the role of women assumed by law. The shift began in 1971 with the Supreme Court's ruling on a challenge by Sally Reed to an Idaho statute that gave males preference over females in appointments as estate administrators.[19] Although the Court in *Reed* did not address the separate spheres ideology directly, it rejected arguments of the state that "men [are] as a rule more conversant with business affairs than ... women,"[20] to find the statutory preference arbitrary and thus in violation of the equal protection clause. This decision was followed by a series of other successful challenges by women arguing that beneath the protective umbrella of the separate spheres ideology lay assumptions that disadvantage women in material, significant ways.

Although the United States Supreme Court has come to condemn explicitly the separate spheres ideology when revealed by gross, stereotypical distinctions, the Court majority has been less sensitive to the effects of more subtle sex-based classifications that affect opportunities for and social views about women. The Court ignored, for example, the implications for women of a male-only draft registration system in reserving combat as a male-only activity.[21] Similarly, in upholding a statutory rape law that made underage sex a crime of males and not of females, the Court overlooked the way in which assumptions about male sexual aggression and female sexual passivity construct sexuality in limiting and dangerous ways.[22]...

Feminists today ask the woman question in many areas of law. They ask the woman question in rape cases when they ask why the defense of consent focuses on the perspective of the defendant and what he "reasonably" thought the woman wanted, rather than the perspective of the woman and the intentions she "reasonably" thought she conveyed to the defendant.[23] Women ask the woman question when they ask why they are not entitled to be prison guards on the same terms as men; why the conflict between work and family responsibilities in women's lives is seen as a private matter for women to resolve within the family

[18] See *Bradwell* v. *Illinois* (1873) 83 U.S. (16 Wall.) 130.

[19] See *Reed* v. *Reed* (1971) 404 U.S. 71.

[20] Brief for Appellee at 12, *Reed* (No. 70–4).

[21] See W. Williams, 7 Women's Rights L. Rep. 175, at 181–90.

[22] See *ibid.*

[23] See S. Estrich, *Real Rape* (1987) pp. 92–104.

rather than a public matter involving restructuring of the workplace;[24] or why the right to "make and enforce contracts" protected by section 1981 forbids discrimination in the *formation* of a contract but not discrimination in its *interpretation*.[25] Asking the woman question reveals the ways in which political choice and institutional arrangement contribute to women's subordination. Without the woman question, differences associated with women are taken for granted and, unexamined, may serve as a justification for laws that disadvantage women. The woman question reveals how the position of women reflects the organization of society rather than the inherent characteristics of women. As many feminists have pointed out, difference is located in relationships and social institutions—the workplace, the family, clubs, sports, childrearing patterns, and so on—not in women themselves. In exposing the hidden effects of laws that do not explicitly discriminate on the basis of sex, the woman question helps to demonstrate how social structures embody norms that implicitly render women different and thereby subordinate.

Once adopted as a method, asking the woman question is a method of critique as integral to legal analysis as determining the precedential value of a case, stating the facts, or applying law to facts. "Doing law" as a feminist means looking beneath the surface of law to identify the gender implications of rules and the assumptions underlying them and insisting upon applications of rules that do not perpetuate women's subordination. It means recognizing that the woman question always has potential relevance and that "right" legal analysis never assumes gender neutrality . . . [pp. 836–843]

Feminist practical reasoning

Some feminists have claimed that women approach the reasoning process differently than men do.[26] In particular, they say that women are more sensitive to situation and context, that they resist universal principles and generalizations, especially those that do not fit their own experiences, and that they believe that "the practicalities of everyday life" should not be neglected for the sake of abstract justice. Whether these claims can be empirically sustained, this reasoning process has taken on normative significance for feminists, many of whom have argued that individualized factfinding is often superior to the application of bright-line rules,[27] and that reasoning from context allows a greater respect for difference[28] and for the perspectives of the powerless.

As a form of legal reasoning, practical reasoning has many meanings invoked in many contexts for many different purposes. I present a version of practical reasoning in this section that I call "feminist practical reasoning." This version combines some aspects of a classic Aristotelian model of practical deliberation with a feminist focus on identifying and taking into account the perspectives of the excluded.

[24] See Dowd, "Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace" (1989) 24 Harv. C.R.-C.L. L. Rev. 79; Olsen, "The Family and the Market: A Study of Ideology and Legal Reform" (1983) 96 Harv. L. Rev. 1497; Taub, "From Parental Leaves to Nurturing Leaves" (1985) 13 N.Y.U. Rev. L. & Soc. Change 381; J. Williams, "Deconstructing Gender" 87 Michigan L. Rev 797; W. Williams, "Equality's Riddle" (1984) 13 NYU Rev. Law & Soc. Change 325.

[25] *Cf.* "The Supreme Court, 1988 Term—Leading Cases" (1989) 103 Harv. L. Rev. 137, 330.

[26] See C. Gilligan, *In a Different Voice*.

[27] Bartlett, "Re-Expressing Parenthood" (1988) 98 Yale L.J. 293, 321–26; Sherry, (1986) 72 Va. L.R. 543, at 604–613.

[28] See Minow & Spelman, "Passion for Justice" (1988) 10 Cardozo l., Rev. 37, 53; Scales, (1986) 95 Yale L.J. 1373 at 1388.

Feminist practical reasoning. Feminist practical reasoning builds upon the traditional mode of practical reasoning by bringing to it the critical concerns and values reflected in other feminist methods, including the woman question. The classical exposition of practical reasoning takes for granted the legitimacy of the community whose norms it expresses, and for that reason tends to be fundamentally conservative. Feminist practical reasoning challenges the legitimacy of the norms of those who claim to speak, through rules, for the community. No form of legal reasoning can be free, of course, from the past or from community norms, because law is always situated in a context of practices and values. Feminist practical reasoning differs from other forms of legal reasoning, however, in the strength of its commitment to the notion that there is not one, but many overlapping communities to which one might look for "reason." Feminists consider the concept of community problematic,[29] because they have demonstrated that law has tended to reflect existing structures of power. Carrying over their concern for inclusionism from the method of asking the woman question, feminists insist that no one community is legitimately privileged to speak for all others. Thus, feminist methods reject the monolithic community often assumed in male accounts of practical reasoning, and seek to identify perspectives not represented in the dominant culture from which reason should proceed.

Feminist practical reasoning, however, is not the polar opposite of a "male" deductive model of legal reasoning. The deductive model assumes that for any set of facts, fixed, pre-existing legal rules compel a single, correct result. Many commentators have noted that virtually no one, male or female, now defends the strictly deductive approach to legal reasoning.[30] Contextualized reasoning is also not, as some commentators suggest,[31] the polar opposite of a "male" model of abstract thinking. All major forms of legal reasoning encompass processes of both contextualization and abstraction. Even the most conventional legal methods require that one look carefully at the factual context of a case in order to identify similarities and differences between that case and others. The identification of a legal problem, selection of precedent, and application of that precedent, all require an understanding of the details of a case and how they relate to one another. When the details change, the rule and its application are likely to change as well.

By the same token, feminist methods require the process of abstraction, that is, the separation of the significant from the insignificant.[32] Concrete facts have significance only if they represent some generalizable aspect of the case. Generalizations identify what matters and draw connections to other cases. I abstract whenever I fail to identify every fact about a situation, which, of course, I do always. For feminists, practical reasoning and asking the woman question may make more facts relevant or "essential" to the resolution of a legal case than would more nonfeminist legal analysis . . .

Similarly, the feminist method of practical reasoning is not the polar opposite of "male" rationality. The process of finding commonalities, differences, and

[29] See Abrams, "Law's Republicanism" (1988) 97 Yale L.J. 1591, 1606–07 Sullivan, "Rainbow Republicanism" (1988) 97 Yale L.J. 1713, 1721.

[30] See, *e.g.* Bennett, "Objectivity in Constitutional Law" (1984) 132 U. Pa. L. Rev. 445, 495 ("'Mechanical' jurisprudence has no visible contemporary adherents."); Stick, "Can Nihilism Be Pragmatic?" (1986) 100 Harv. L. Rev. 332, 363–65 (asserting that outside a "core area," in which the application of legal rules is certain, "only the most unreconstructed logical positivist" accepts a strict deductive model of legal reasoning).

[31] See, *e.g.* Matsuda, "Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist, Critique of Rawls's Theory of Justice" (1986) 16 N.M.L. Rev. 613, 618–24; Scales, *ante*, note 31 at 1376–78.

[32] *Cf.* K. Llewellyn, *The Bramble Bush* (1960), p. 48 (arguing that a concrete fact is significant because it is "*representative* of a wider abstract *category* of facts").

connections in practical reasoning is a rational process. To be sure, feminist practical reasoning gives rationality new meanings. Feminist rationality acknowledges greater diversity in human experiences and the value of taking into account competing or inconsistent claims. It openly reveals its positional partiality by stating explicitly which moral and political choices underlie that partiality,[33] and recognizes its own implications for the distribution and exercise of power.[34] Feminist rationality also strives to integrate emotive and intellectual elements and to open up the possibilities of new situations rather than limit them with prescribed categories of analysis. Within these revised meanings, however, feminist method is and must be understandable. It strives to make more sense of human experience, not less, and is to be judged upon its capacity to do so.

Applying the Method.—Although feminist practical reasoning could apply to a wide range of legal problems, it has its clearest implications where it reveals insights about gender exclusion within existing legal rules and principles. . . .

[An] example is the 1981 New Jersey Supreme Court case, *State* v. *Smith*.[35] In rejecting the defendant's marital-exemption defense in a criminal prosecution for rape, the court engaged in a multi-layered process of reasoning; it examined the history of the exemption, the strength and evolution of the common law authority, the various justifications offered by the state for the exemption, the surrounding social and legal context in which the defendant asserted the defense, and the particular actions of the defendant in this case that gave rise to the prosecution. This process of reasoning deserves close analysis because it differs markedly from the abstract, formalistic reasoning used by other courts considering related issues.

In his opinion for a unanimous court, Justice Pashman began with an examination of the source of the common law marital exemption to rape. It found the basis for the exemption "in a bare, extra-judicial declaration made some 300 years ago"[36] by Sir Matthew Hale: "'But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.'"[37] From this authority, the court determined that the common law exemption to rape "derived from the nature of marriage at a particular time in history."[38] At that time, marriages were "effectively permanent, ending only by death or an act of Parliament."[39] The court reasoned that the rule was stated "in absolute terms, as if it were applicable without exception to all marriage relationship,"[40] because marriage itself was not retractable at the time of Lord Hale. But things have changed. "In the years since Hale's formulation of the rule," the court observed, "attitudes towards the permanency of marriage have changed and divorce has become far easier to obtain."[41] Moreover, even during Lord Hale's time, the court surmised, the rule may not have applied in all situations, as when a judicial separation was granted. The court drew from its historical analysis a tentative conclusion, but reserved the ultimate question in the case for fuller analysis: "The rule, formulated under vastly different conditions, need not prevail when those conditions have changed."[42]

The court then explored the major justifications "which might have constituted the common law principles adopted in this State,"[43] including the notion that the woman was the property of her husband or father, the concept that a husband and wife were one person, and the justification that a wife consents to sexual intercourse with her husband.[44] The court engaged in a detailed analysis of each justification. The property notion, it concluded, was never valid in this country in that rape statutes "have always aimed to protect the safety and personal liberty of women."[45] The marital unity concept could not now be valid, the court decided, given the other crimes against a wife, such as assault and battery, of which a husband could be convicted, and because in many other areas of the law the "'principle' of marital unity was discarded in this State long before the commission of defendant's alleged crime."[46] The implied-consent justification, the court reasoned, is not only "offensive to our valued ideals of personal liberty," but is "not sound where the marriage itself is not irrevocable." The court noted that under the facts of this case—a year before the attack, a judge allegedly had ordered defendant to leave the marital home following another violent incident, the parties lived apart in different cities, the defendant broke into his wife's apartment at about 2:30 a.m., "over a period of a few hours, repeatedly beat her, forced her to have sexual intercourse and committed various other atrocities against her person," and caused her to require medical care at a hospital[47]—the husband could not claim that consent was implied.[48]

The *Smith* court's analysis is typical of many judicial opinions which "interpret" the common law and statutes by delving deeply into historical and policy considerations.[49] Thus, its use of practical reasoning has deep roots in American jurisprudence. I use it as an example because it demonstrates a conventional model upon which feminist practical reasoning can usefully build.

The *Smith* case helps to show, for example, how the particular facts of a case do not just present the problem to be solved, but also instruct the decisionmaker about what the ends and means of law ought to be. The circumstances of the estrangement, the middle-of-the-night break-in (two doors were broken to get inside), and defendant's repeated attacks and "atrocities" illustrate a kind of broken relationship that puts into perspective the interests a state might have in spousal reconciliation, in preventing false recriminations, or in marital privacy. Faced with the abstract question whether the marital exemption to rape should be available to husbands who have separated from their wives, more serene images come to the minds of most judges, even those who have experienced unhappy

[33] See Haraway, "Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective" (1988) 14 Feminist Stud. 575, 590.

[34] See Haraway, *supra* n. 37 at 590; Minow, 101 Harv. L. Rev. 10 at 65–66; see also Flax, 12 *Signs* 621 at 633 (describing the need to be sensitive to interconnections between knowledge and power); Minow & Spelman, (1988) 10 Cardozo L. Rev 37, at 57–60 (calling for "a direct human gaze between those exercising power and those governed by it"); Gabel & Harris, "Building Power and Breaking Images: Critical Theory and the Practice of Law" (1982–83) 11 N.Y.U. Rev. L. & Soc. Change 369, 375 (suggesting a focus on "counter-hegemonic" law practice that draws attention to issues of power distribution). [and see *ante*, 1217–1219].

[35] 85 N.J. 193, 426 A.2d 38 (1981). [See also the English case of *R.* v. *R.* [1992] 1 A.C. 199].

[36] 85 N.J. at 200, 426 A.2d at 41.

[37] *ibid.* (quoting I M. Hale, *History of the Pleas of the Crown* *629).

[38] *ibid.* at 201, 426 A.2d at 42.

[39] *ibid.* (citing H. Clark, *Law of Domestic Relations* (1968), pp. 280–282.

[40] *ibid.*

[41] *ibid.*

[42] *ibid.*

[43] *ibid.* at 204, 426 A.2d at 43 (footnote omitted).

[44] See *ibid.* at 205, 426 A.2d at 44.

[45] *ibid.* at 204, 426 A.2d at 44.

[46] *ibid.* at 205, 426 A.2d at 44 (citing as examples the Married Women's Acts, abolition of spousal tort immunity, alienability of a wife's interest in property held in tenancy by the entirety, the rule allowing wife to use her own surname, and indictment of husband and wife for conspiracy).

[47] *ibid.* at 197, 426 A.2d at 40.

[48] See *ibid.* at 207, 426 A.2d at 45. The Virginia Supreme Court used similar reasoning to reach the same result. See *Weishaupt* v. *Commonwealth* (1984) 315 S.E.2d 847, 855.

[49] See M. Eisenberg, *The Nature of the Common Law* (1988), p. 196, n. 35.

marriages. The concrete facts of *Smith* present one picture that might not readily surface to inform decisionmakers about what legal rules are practical and wise.

The *Smith* case also illustrates how practical reasoning respects, but does not blindly adhere to, legal precedent. In contrast to courts that have followed more formalistic approaches, the *Smith* court saw itself as an active participant in the formulation of legal authority. Without ignoring the importance to law of consistency and tradition, the Court took an approach sensitive to the human factors that a more mechanical application of precedent might ignore.

Although the *Smith* case illustrates some of the attributes of a highly contextual, pragmatic approach to decisionmaking, feminist practical reasoning would pursue some elements further than the court did. For example, feminist practical reasoning would more explicitly identify the perspective of the woman whose interest a marital rape exemption entirely subordinates to that of her estranged husband. This recognition would help to demonstrate how a rule may ratify gender-based structures of power, and thus provide the court stronger grounds for finding the exemption inapplicable to the *Smith* facts. On the other hand, feminist practical reasoning would also require more explicit recognition of the interests that supported the exemption and that the court too summarily dismissed. For example, the court rejected without discussion the state's interest in the reconciliation of separated spouses that the marital rape exemption was intended in part to serve. It also failed to address the state's concern about the evidentiary problems raised in marital rape cases. The facts of the *Smith* case illustrate the weakness of these state interests. A more forthright analysis of them would have given a fuller picture of the issues, as well as guidance for other courts to which these factors may seem more significant.

A fuller, practical-reasoning approach would also have given greater attention to the "due process" notice interests of the defendant who, when he acted, may have thought his actions were legal. Despite the heinous nature of the defendant's actions in this case, practical reasoning requires the examination of all perspectives, including those that a court might ultimately reject. The *Smith* court examined some relevant factors in its due process analysis, such as whether the court's ruling would be unexpected, the relationship between the exemption and the rule to which the exemption applied, and the type of crime. It failed, however, to examine the role social conditioning plays in acculturating men to expect, and demand, sex. Such an examination, repeated in other cases, may help to identify the real problems society has to face in rape reform, and to challenge more deeply both male and female expectations about sex.

Feminist Practical Reasoning: Method or Substance?—The *Smith* case raises further questions about the relationship between feminist method and substance.

On the other hand, if one assumes that one neither can nor should eliminate political and moral factors from legal decisionmaking, then one would hope to make these factors more visible. If political and moral factors are necessarily tied into any form of legal reasoning, then bringing those factors out into the open would require decision-makers to think self-consciously about them and to justify their decisions in the light of the factors at play in the particular case.

Feminists, not surprisingly, favor the second set of assumptions over the first. Feminists' substantive analyses of legal decisionmaking have revealed to them that so-called neutral means of deciding cases tend to mask, not eliminate, political and social considerations from legal decisionmaking. Feminists have found that neutral rules and procedures tend to drive underground the ideologies of the decisionmaker, and that these ideologies do not serve women's interests well. Disadvantaged by hidden bias, feminists see the value of modes of legal reasoning that expose and open up debate concerning the underlying political and moral considerations. By forcing articulation and understanding of those considerations, practical reasoning forces justification of results based upon what interests are actually at stake.

The "substance" of feminist practical reasoning consists of an alertness to certain forms of injustice that otherwise go unnoticed and unaddressed. Feminists turn to contextualized methods of reasoning to allow greater understanding and exposure of that injustice. Reasoning from context can change perceptions about the world, which may then further expand the contexts within which such reasoning seems appropriate, which in turn may lead to still further changes in perceptions. The expansion of existing boundaries of relevance based upon changed perceptions of the world is familiar to the process of legal reform. The shift from *Plessy* v. *Ferguson*[50] to *Brown* v. *Board of Education*,[51] for example, rested upon the expansion of the "legally relevant" in race discrimination cases to include the actual experiences of black Americans and the inferiority implicit in segregation. Much of the judicial reform that has been beneficial to women, as well, has come about through expanding the lens of legal relevance to encompass the missing perspectives of women and to accommodate perceptions about the nature and role of women. Feminist practical reasoning compels continued expansion of such perceptions.

Consciousness-raising

Another feminist method for expanding perceptions is consciousness-raising.[52] Consciousness-raising is an interactive and collaborative process of articulating one's experiences and making meaning of them with others who also articulate their experiences. As Leslie Bender writes, "Feminist consciousness-raising creates knowledge by exploring common experiences and patterns that emerge from shared tellings of life events. What were experienced as personal hurts individually suffered reveal themselves as a collective experience of oppression."[53]

Consciousness-raising is a method of trial and error. When revealing an experience to others, a participant in consciousness-raising does not know whether others will recognize it. The process values risk-taking and vulnerability over caution and detachment. Honesty is valued above consistency, teamwork over self-sufficiency, and personal narrative over abstract analysis. The goal is individual and collective empowerment, not personal attack or conquest.

Elizabeth Schneider emphasizes the centrality of consciousness-raising to the dialectical relationship of theory and practice. The interplay between experience

[50] (1896) 163 U.S. 537.

[51] (1954) 347 U.S. 483.

[52] Catharine MacKinnon sees consciousness-raising as *the* method of feminism. MacKinnon, *ante*. Many feminist legal thinkers have emphasized the importance of consciousness-raising to feminist practice and method. See, *e.g.* Law, "Equality: The Power and Limits of the Law" (1986) 95 Yale L.J. 1769, 1784; Scales at 1401–02; Schneider, at 602–604. For historical perspectives in the American women's movement, see C. Hymowitz & M. Weissman, *A History of Women in America* (1978), pp. 351–55; and G. Lerner, *The Majority Finds Its Past* 1979, at 42–44.

[53] Bender, "A Lawyer's Primer on Feminist Theory and Tort" (1988) 38 L. Legal Educ. 3, 9; see also Z. Eisenstein, *Feminism and Sexual Equality: Crisis in Liberal America* (1984) pp. 150–57 (stressing the importance of building feminist consciousness out of sex-class consciousness); T. De Lauretis, *Alice Doesn't: Feminism, Semiotics, Cinema* (1984), p. 185 (describing consciousness-raising as "the collective articulation of one's experience of sexuality and gender—which has produced, and continues to elaborate, a radically new mode of understanding the subject's relation to social-historical reality"); J. Mitchell, *Woman's Estate* (1971), p. 61 (maintaining that through consciousness-raising, women proclaim the painful and transform it into the political).

and theory "reveals the social dimension of individual experience and the individual dimension of social experience" and hence the political nature of personal experience.[54]

Consciousness-raising operates as feminist method not only in small personal growth groups, but also on a more public, institutional level, through "bearing witness to evidences of patriarchy as they occur, through unremitting dialogues with and challenges to the patriarchs, and through the popular media, the arts, politics, lobbying, and even litigation."[55] Women use consciousness-raising when they publicly share their experiences as victims of marital rape, pornography, sexual harassment on the job, street hassling, and other forms of oppression and exclusion, in order to help change public perceptions about the meaning to women of events widely thought to be harmless or flattering.

Consciousness-raising has consequences, further, for laws and institutional decisionmaking more generally. Several feminists have translated the insights of feminist consciousness-raising into their normative accounts of legal process and legal decisionmaking. Carrie Menkel-Meadow, for example, has speculated that as the number of women lawyers increases, women's more interactive approaches to decisionmaking will improve legal process.[56] Similarly, Judith Resnik has argued that feminist judging will involve more collaborative decisionmaking among judges.[57] Such changes would have important implications for the possibilities for lawyering and judging as matters of collective engagement rather than the individual exercise of judgment and power.

The primary significance of consciousness-raising, however, is as meta-method. Consciousness-raising provides a substructure for other feminist methods—including the woman question and feminist practical reasoning—by enabling feminists to draw insights and perceptions from their own experiences and those of other women and to use these insights to challenge dominant versions of social reality.

Consciousness-raising has done more than help feminists develop and affirm counter-hegemonic perceptions of their experiences. As consciousness-raising has matured as method, disagreements among feminists about the meaning of certain experiences have proliferated. Feminists disagree, for example, about whether women can voluntarily choose heterosexuality, or motherhood; or about whether feminists have more to gain or lose from restrictions against pornography, surrogate motherhood, or about whether women should be subject to a military draft. They disagree about each other's roles in an oppressive society: some feminists accuse others of complicity in the oppression of women.[58] Feminists disagree even about the method of consciousness-raising; some women worry that it sometimes operates to pressure women into translating their experiences into positions that are politically, rather than experientially, correct.[59]

These disagreements raise questions beyond those of which specific methods are appropriate to feminist practice. Like the woman question and practical

[54] (1986) 61 N.Y.U. Law. Rev. 589 at 602–604. Hence the feminist phrase: "The personal is the political." MacKinnon's explanation of this phrase is perhaps the best: "It means that women's distinctive experience as women occurs within that sphere that has been socially lived as the personal—private, emotional, interiorized, particular, individuated, intimate—so that what it is to *know* the *politics* of woman's situation is to know women's personal lives." MacKinnon, *ante*, note 17, at 535.

[55] Bender, *supra*, note 56 at 9–10.

[56] See Menkel-Meadow, (1985) 1 Berkeley Women's L.J. 39, at 55–58.

[57] See Resnik, "On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges" (1988) 61 S. Cal. L. Rev. 1877, 1942–43.

[58] See C. MacKinnon, at 198–205 (accusing women who defend first amendment values against restrictions on pornography of collaboration).

[59] See Colker, (1988) 68 B.U.L. Rev. 217 at 253–54 (noting that consciousness-raising may influence women to adopt "inauthentic" expressions of themselves).

reasoning, consciousness-raising challenges the concept of knowledge. It presupposes that what I thought I knew may not, in fact, be "right." How, then, will we know when we *have* got it "right"? Or, backing up one step, what does it mean to *be* right? And what attitude should I have about that which I claim to know? [pp. 849–867]

Feminist knowing in law

A point—perhaps *the* point—of legal methods is to reach answers that are legally defensible or in some sense "right."

In this section, I explore several feminist explanations for what it means to be "right" in law. I look first at a range of positions that have emerged from within feminist theory. These include the three positions customarily included in feminist epistemological discussions: the rational/empirical position, standpoint epistemology, and postmodernism. In addition I examine a fourth stance called positionality, which synthesizes some aspects of the first three into a new, and I think more satisfactory, whole. I evaluate each position from the same pragmatic viewpoint reflected in the feminist methods I have described: how can that position help feminists, using feminist methods, to generate the kind of insights, values, and self-knowledge that feminism needs to maintain its critical challenge to existing structures of power and to reconstruct new, and better, structures in their place?

The Rational/Empirical Position

Feminists across many disciplines have engaged in considerable efforts to show how, by the standards of their own disciplines, to improve accepted methodologies. These efforts have led to the unraveling of descriptions of women as morally inferior, psychologically unstable, and historically insignificant—descriptions these disciplines long accepted as authoritative and unquestionable.

Similarly, feminists in law attempt to use the tools of law, on its own terms, to improve law. Using the methods discussed in Part II of this Article, feminists often challenge assumptions about women that underlie numerous laws and demonstrate how laws based upon these assumptions are not rational and neutral, but rather irrational and discriminatory. When engaged in these challenges, feminists operate from a rational/empirical position that assumes that the law is not objective, but that identifying and correcting its mistaken assumptions can make it more objective.

When feminists challenged employment rules that denied disability benefits to pregnant women, for example, they used empirical and rational arguments about the similarity between pregnancy and other disabilities. Each side of the debate defended a different concept of equality, but the underlying argument focused upon which is the most rational, empirically sound and legally supportable interpretation of equality.

In other areas of the law, feminists have also operated from within this rational/empirical stance. Susan Estrich, for example, argues that the correction of certain factual inaccuracies can better achieve the purposes of rape law—to prevent rape, to protect women, and to punish rapists. Estrich contends, for example, that the assumption that women mean "yes" when they say "no" is false and that a rational rape law would define consent so that "no means no."[60]

All of these arguments from the rational/empirical stance share the premise

[60] S. Estrich, *supra*, note 23, at 102. Estrich argues also that rape law would be more rational if a negligence standard were applied to the defendant's intent. See *ibid.* at 92–104.

that knowledge is accessible and, when obtained, can make law more rational. The relevant empirical questions are often very difficult ones: if parents, usually men, who fall behind in their child support obligations face almost certain jail sentences, will they be more likely to make their child support payments on time?[61] If state law singles out pregnancy as the only condition for which job security is mandated, how much additional resistance to hiring women, if any, is likely to be created, and what impact on the stereotyping of women, if any, is likely to result?[62] The rational/empirical position presumes, however, that answers to such questions can be improved—that there is a "right" answer to get—and that once gotten, that answer can improve the law.

Some feminists charge that improving the empirical basis of law or its rationality is mere "reformism" that cannot reach the deeper gendered nature of law.[63] This charge unfortunately undervalues the enormous transformation in thinking about women that the empirical challenge to law, in which all feminists have participated, has brought about. Feminist rational/empiricism has begun to expose the deeply flawed factual assumptions about women that have pervaded many disciplines, and has changed, in profound ways, the perception of women in this society. Few, if any, feminists, however, operate entirely within the rational/empirical stance, because it tends to limit attention to matters of factual rather than normative accuracy, and thus fails to take account of the social construction of reality through which factual or rational propositions mask normative constructions.[64] Empirical and rational arguments challenge existing assumptions about reality and, in particular, the inaccurate reality conveyed by stereotypes about women. But if reality is not representational or objective and not above politics, the method of correcting inaccuracies ultimately cannot provide a basis for understanding and reconstructing that reality. The rational/empirical assumption that principles such as objectivity and neutrality can question empirical assumptions within law fails to recognize that knowability is itself a debatable issue. I explore positions that challenge, rather than presuppose, knowability in the following sections.

Standpoint epistemology

The problem of knowability in feminist thought arises from the observation that what women know has been determined—perhaps overdetermined[65] by male culture. Some of the feminists most concerned about the problem of over-determination have adopted a "standpoint epistemology" to provide the grounding

[61] This was the principal research questions in D. Chambers, *Making Fathers Pay* (1979).

[62] See W. Williams, *ante*, note 27, at 355.

[63] Christine Littleton and Catharine MacKinnon, for example, associate rational/empirical efforts to open up more opportunities for women with "assimilationism" or "liberal feminism," which, in retaining its focus on individualism, provides no basis from which to challenge the way in which women's individuality has been determined by men rather than freely chosen, or to validate any of the choices that individuals make. See Littleton, (1989) 41 Stanford L. Rev. 751, at 754–763; C. MacKinnon, *Feminism Unmodified*, at 137.

[64] Feminists have made significant contributions to understandings about the social construction of reality. See, generally, S. de Beauvoir, *The Second Sex* (describing how men have defined women as other and created a myth of woman); S. Harding, *The Science of Feminism* (arguing that science is gendered); MacKinnon, *ante*, note 63 (arguing that gender is a social construct that embodies male sexual dominance).

[65] *Cf.* Alcoff, (1988) 13 *Signs* 405 at 416 (describing Derrida's and Foucault's view that "we are overdetermined ... by a social discourse and/or cultural practice"); J. Mitchell, *supra* note 53 at 99–122. Juliet Mitchell defines overdetermination as "a complex notion of 'multiple causation' in which the numerous factors can reinforce, overlap, cancel each other out, or contradict one another." (*Psychoanalysis and Feminism* (1974), p. 309.)

upon which feminists can claim that their own legal methods, legal reasoning, and proposals for substantive legal reform are "right."

Feminist standpoint epistemology identifies woman's status as that of victim, and then privileges that status by claiming that it gives access to understanding about oppression that others cannot have...

Feminists have located the foundation of women's subordination in different aspects of women's experiences. Feminist post-Marxists find this foundation in women's activities in production, both domestic and in the marketplace;[66] other emphasize women's positions in the sexual hierarchy,[67] in women's bodies,[68] or in women's responses to the pain and fear of male violence.[69]...

Standpoint epistemology has contributed a great deal to feminist understandings of the importance of our respective positioning within society to the "knowledge" we have. Feminist standpoint epistemologies question "the assumption that the social identity of the observer is irrelevant to the 'goodness' of the results of research," and reverse the priority of a distanced, "objective" standpoint in favor of one of experience and engagement.

Despite the valuable insights offered by feminist standpoint epistemology, however, it does not offer an adequate account of feminist knowing. First, in isolating gender as a source of oppression, feminist legal thinkers tend to concentrate on the identification of woman's true identity beneath the oppression and thereby essentialize her characteristics. Catharine MacKinnon, for example, in exposing what she finds to be the total system of male hegemony, repeatedly speaks of "women's point of view," of "woman's voice," of empowering women "on our own terms," of what women "really want," and of standards that are "not ours." Ruth Colker sees the discovery of women's "authentic self"[70] as a difficult job given the social constructions imposed upon women, but nonetheless, like MacKinnon, insists upon it as a central goal of feminism...

Although the essentialist positions taken by these feminists often have strategic or rhetorical value, these positions obscure the importance of differences among women and the fact that factors other than gender victimize women....

In addition to imposing too broad a view of gender, standpoint epistemologists also tend to presuppose too narrow a view of privilege. I doubt that being a victim is the only experience that gives special access to truth. Although victims know something about victimization that non-victims do not, victims do not have exclusive access to truth about oppression. The positions of others—co-victims, passive bystanders, even the victimizers—yield perspectives of special knowledge that those who seek to end oppression must understand.

Standpoint epistemology's claim that women have special access to knowledge also does not account for why all women, including those who are similarly situated, do not share the same interpretations of those situations—"a special explanation of non-perception."[71] One account argues that the hold of patriarchal ideology, which "intervenes successfully to limit feminist consciousness,"[72] causes "false consciousness." Although feminist legal theorists rarely offer this explanation explicitly, it is implicit in theories that associate with women certain

[66] See Hartsock, "The Feminist Standpoint: Developing the Ground for a Specifically Feminist Historical Materialism" in *Discovering Reality: Feminist Perspectives on Epistemology, Metaphysics, Methodology, and Philosophy of Science* (S. Harding & M. Hintikka eds. 1983), p. 283.

[67] See MacKinnon, *ante*, note 63.

[68] See, generally, Z. Eisenstein, *The Female Body and the Law* (1988).

[69] See West, 5 Wisc. Women's L.J. 91.

[70] See Colker, 68 B.U. Law. Rev. 216 at 218.

[71] Charles Taylor uses this phrase in describing the general phenomenon of false consciousness. See C. Taylor, *Philosophy and the Human Sciences* (1985), p. 95.

[72] Z. Eisenstein, *Feminism and Sexual Equality* (1984), p. 153.

essential characteristics, variance from which connotes a distortion of who women really are or what they really want...

A final difficulty with standpoint epistemology is the adversarial we/they politics it engenders. Identification from the standpoint of victims seems to require enemies, wrongdoers, victimizers. Those identified as victims ("we") stand in stark contrast to others ("they"), whose claim to superior knowledge becomes not only false but suspect in some deeper sense: conspiratorial, evil-minded, criminal. You (everyone) must be either with us or against us. Men are actors—not innocent actors, but evil, corrupt, irredeemable. They conspire to protect male advantage and to perpetuate the subordination of women. Even women must choose sides, and those who chose badly are condemned.

This adversarial position hinders feminist practice. It impedes understanding by would-be friends of feminism and paralyzes potential sympathizers. Even more seriously, it misstates the problem that women face, which is not that men act "freely" and women do not, but that both men and women, in different but interrelated ways, are confined by gender. The mystifying ideologies of gender construction control men, too, however much they may also benefit from them. As Jane Flax writes, "Unless we see gender as a social relation, rather than as an opposition of inherently different beings, we will not be able to identify the varieties and limitations of different women's (or men's) powers and oppressions within particular societies."[73] In short, gender reform must entail not so much the conquest of the now-all-powerful enemy male, as the transformation of those ideologies that maintain the current relationships of subordination and oppression.

Postmodernism

The postmodern or poststructural critique of foundationalism resolves the problem of knowability in a quite different way. While standpoint epistemology relocates the source of knowledge from the oppressor to the oppressed, the postmodern critique of foundationalism questions the possibility of knowledge, including knowledge about categories of people such as women. This critique rejects essentialist thinking as it insists that the subject, including the female subject, has no core identity but rather is constituted through multiple structures and discourses that in various ways overlap, intersect, and contradict each other. Although these structures and discourses "overdetermine" woman and thereby produce "the subject's experience of differentiated identity and ... autonomy,"[74] the postmodern view posits that the realities experienced by the subject are not in any way transcendent or representational, but rather particular and fluctuating, constituted within a complex set of social contexts. Within this position, being human, or female, is strictly a matter of social, historical, and cultural construction.[75]

Postmodern critiques have challenged the binary oppositions in language, law, and other socially-constituting systems, oppositions which privilege one presence—male, rationality, objectivity—and marginalize its opposite—female, irrationality, subjectivity. Postmodernism removes the grounding from these oppositions and from all other systems of power or truth that claim legitimacy on the basis of external foundations or authorities. In so doing, it removes external

[73] At 641. As Flax also writes, women cannot be "free of determination from their own participation in relations of domination such as those rooted in the social relations of race, class, or homophobia," while men are not. *ibid.* at 642.

[74] Coombe, "Room For Manoeuver: Toward a Theory of Practice in Critical Legal Studies" (1989) 14 Law & Soc. Inquiry 69, 85.

[75] See Fraser & Nicholson, (1989) 14 Law and Soc. Inquiry at 83–91; Rabine, "A Feminist Politics of Non-Identity" (1988) 14 Feminist Stud, 11, 25–26.

grounding from any particular agenda for social reform. In the words of Nancy Fraser and Linda Nicholson, postmodern social criticism "floats free of any universalist theoretical ground. No longer anchored philosophically, the very shape or character of social criticism changes; it becomes more pragmatic, ad hoc, contextual, and local."[76] There are no external, overarching systems of legitimation; "[t]here are no special tribunals set apart from the sites where inquiry is practiced." Instead, practices develop their own constitutive norms, which are "plural, local, and immanent."[77]

The postmodern critique of foundationalism has made its way into legal discourse through the critical legal studies movement. The feminists associated with this movement have stressed both the indeterminancy of law and the extent to which law, despite its claim to neutrality and objectivity, masks particular hierarchies and distributions of power. These feminists have engaged in deconstructive projects that have revealed the hidden gender bias of a wide range of laws and legal assumptions.[78] Basic to these projects has been the critical insight that not only law itself, but also the criteria for legal validity and legitimacy, are social constructs rather than universal givens.[79]

Although the postmodern critique of foundationalism has had some considerable influence on feminist legal theory, some feminists have cautioned that this critique poses a threat not only to existing power structures, but to feminist politics as well.[80] To the extent that feminist politics turns on a particular story of woman's oppression, a theory of knowledge that denies that an independent, determinate reality exists would seem to deny the basis of that politics. Without a notion of objectivity, feminists have difficulty claiming that their emergence from male hegemony is less artificial and constructed than that which they have cast off, or that their truths are more firmly grounded than those whose accounts of being women vary widely from their own. Thus, as Deborah Rhode observes, feminists influenced by postmodernism are "left in the awkward position of

[76] Fraser & Nicholson, *supra*, note 75 at 85.

[77] *ibid.* at 87.

[78] See, *e.g.* Dalton, 94 Yale. L.J. 997; Olsen, 96 Harv. L. Rev. 1487; Bender, 38 J. Legal. Educ. 3.

[79] Although feminist legal theory has taken seriously the postmodern critique of foundationalism, it has yet to make much sense or use of the postmodern critique of the subject. Marie Ashe has argued that the poststructural subject, defined as "a being that is maintained only through interactive exchanges within a social order," Ashe, "Mind's Opportunity: Birthing a Poststructuralist Feminist Jurisprudence" (1987) 38 Syracuse L. Rev. 1129, 1165, "appears utterly at odds with the notions of individual autonomy and personhood valued as fundamental in the liberal legal tradition." *ibid.* at 1151. The direction in which Ashe urges feminist jurisprudence should move, however, appears to turn on the existence of certain "real" experiences on the part of women who are pregnant and bear children, which are at odds, she suggests, with the reality assumed by law. In universalizing these experiences and speaking of the "inner discourses of mothers," Ashe seems to abandon the poststructural view. See "Law-Language of Maternity: Discourse Holding Nature in Contempt" (1988) 22 New Eng. L. Rev. 521. 527.

Drucilla Cornell has hinted at a concept of gender differentiation drawn from poststructural theory that might prove fruitful for feminist legal practice. Building on the importance of the excluded "Other" in the construction of women, she suggests that "what we are as subjects [can never be] fully captured by gender categories," that an interrelational intersubjectivity is more than the sum of its parts, and that immanent in the gender system is a "more than this" which has the potential for freeing us from the false choice between universality and absolute difference. See Cornell & Thurschwell, "Feminism, Negativity, Intersubjectivity" in *Feminism as Critique* (S. Benhabib & D. Cornell eds. 1987), pp. 143, 161–162.

[80] See, *e.g.* Bordo, "Feminism, Postmodernism, and Gender-Scepticism" in *Feminism/Postmodernism* (L. Nicholson ed. 1990), 133; Fraser & Nicholson, *supra* n. 75 at 83; Poovey, (1988) 14 Feminist Studies 51.

maintaining that gender oppression exists while challenging [their] capacity to document it."[81]

Feminists need a stance toward knowledge that takes into account the contingency of knowledge claims while allowing for a concept of truth or objectivity that can sustain an agenda for meaningful reform. The postmodern critique of foundationalism is persuasive to many feminists, whose experiences affirm that rules and principles asserted as universal truths reflect particular, contingent realities that reinforce their subordination. At the same time, however, feminists must be able to insist that they have identified unacceptable forms of oppression and that they have a better account of the world free from such oppression. Feminists, according to Linda Alcoff, "need to have their accusations of misogyny validated rather than rendered 'undecidable.'"[82] In addition, they must build from the postmodern critique about "how meanings and bodies get made," Donna Haraway writes, "not in order to deny meanings and bodies, but in order to build meanings and bodies that have a chance for life."[83]

To focus attention on this project of rebuilding, feminists need a theory of knowledge that affirms and directs the construction of new meanings. Feminists must be able to both deconstruct *and construct* knowledge...

Positionality

Positionality is a stance from which a number of apparently inconsistent feminist "truths" make sense. The positional stance acknowledges the existence of empirical truths, values and knowledge, and also their contingency. It thereby provides a basis for feminist commitment and political action, but views these commitments as provisional and subject to further critical evaluation and revision.

Like standpoint epistemology, positionality retains a concept of knowledge based upon experience. Experience interacts with an individual's current perceptions to reveal new understandings and to help that individual, with others, make sense of those perceptions. Thus, from women's position of exclusion, women have come to "know" certain things about exclusion: its subtlety; its masking by "objective" rules and constructs; its pervasiveness; its pain; and the need to change it. These understandings make difficult issues decidable and answers non-arbitrary.

Like the postmodern position, however, positionality rejects the perfectibility, externality, or objectivity of truth. Instead, the positional knower conceives of truth as situated and partial. Truth is situated in that it emerges from particular involvements and relationships. These relationships, not some essential or innate characteristics of the individual, define the individual's perspective and provide the location for meaning, identity, and political commitment. Thus, as discussed above, the meaning of pregnancy derives not just from its biological characteristics, but from the social place it occupies—how workplace structures, domestic arrangements, tort systems, high schools, prisons, and other societal institutions construct its meaning.

Truth is partial in that the individual perspectives that yield and judge truth are necessarily incomplete. No individual can understand except from some limited perspective. Thus, for example, a man experiences pornography as a man with a particular upbringing, set of relationships, race, social class, and sexual preference, and so on, which affect what "truths" he perceives about pornography. A woman experiences pregnancy as a woman with a particular upbringing, race, social class, set of relationships, sexual preference, and so on, which affect what

[81] D. Rhode, (1990) 42 Stanford Law Rev. 617, 620.
[82] Alcoff, *supra*, note 65 at 419.
[83] Haraway, *supra*, note 33 at 580.

"truths" she perceives about pregnancy. As a result, there will always be "knowers" who have access to knowledge that other individuals do not have, and no one's truth can be deemed total or final.

Because knowledge arises within social contexts and in multiple forms, the key to increasing knowledge lies in the effort to extend one's limited perspective. Self-discipline is crucial. My perspective gives me a source of special knowledge, but a limited knowledge that I can improve by the effort to step beyond it, to understand other perspectives, and to expand my sources of identity. To be sure, I cannot transcend my perspective; by definition, whatever perspective I currently have limits my view. But I can improve my perspective by stretching my imagination to identify and understand the perspectives of others.

Positionality's requirement that other perspectives be sought out and examined checks the characteristic tendency of all individuals—including feminists—to want to stamp their own point of view upon the world. This requirement does not allow certain feminist positions to be set aside as immune from critical examination. When feminists oppose restrictive abortion laws, for example, positionality compels the effort to understand those whose views about the sanctity of potential human life are offended by assertion of women's unlimited right to choose abortion. When feminists debate the legal alternative of joint custody at divorce, positionality compels appreciation of the desire by some fathers to be responsible, co-equal parents. And (can it get worse?) when feminists urge drastic reform of rape laws, positionality compels consideration of the position of men whose social conditioning leads them to interpret the actions of some women as "inviting" rather than discouraging sexual encounter.

Although I must consider other points of view from the positional stance, I need not accept their truths as my own. Positionality is not a strategy of process and compromise that seeks to reconcile all competing interests. Rather, it imposes a twin obligation to make commitments based on the current truths and values that have emerged from methods of feminism, and to be open to previously unseen perspectives that might come to alter these commitments. As a practical matter, of course, I cannot do both simultaneously, evenly, and perpetually. Positionality, however, sets an ideal of self-critical commitment whereby I act, but consider the truths upon which I act subject to further refinement, amendment, and correction.

Some "truths" will emerge from the ongoing process of critical reexamination in a form that seems increasingly fixed or final. For feminists, the commitment to ending gender-based oppression has become one of these "permanent truths." The problem is the human inclination to make this list of "truths" too long, to be too uncritical of its contents, and to defend it too harshly and dogmatically.

Positionality reconciles the existence of reliable, experienced-based grounds for assertions of truth upon which politics should be based, with the need to question and improve these grounds. The understanding of truth as "real," in the sense of produced by the actual experiences of individuals in their concrete social relationships, permits the appreciation of plural truths. By the same token, if truth is understood as partial and contingent, each individual or group can approach its own truths with a more honest, self-critical attitude about the value and potential relevance of other truths.

The ideal presented by the positionality stance makes clear that current disagreements within society at large and among feminists—disagreements about abortion, child custody, pornography, the military, pregnancy, and motherhood, and the like—reflect value conflicts basic to the terms of social existence. If resolvable at all, these conflicts will not be settled by reference to external or pre-social standards of truth. From the positional stance, any resolutions that emerge are the products of human struggles about what social realities are better than others. Realities are deemed better not by comparison to some external, "discovered" moral truths or "essential" human characteristics, but by internal truths

that make the most sense of experienced, social existence. Thus, social truths will emerge from social relationships and what, after critical examination, they tell social beings about what they want themselves, and their social world, to be.

In this way, feminist positionality resists attempts at classification either as essentialist on the one hand, or relativistic on the other. Positionality is both nonrelative and nonarbitrary. It assumes some means of distinguishing between better and worse understanding; truth claims are significant or "valid" for those who experience that validity. But positionality puts no stock in fixed, discoverable foundations. If there is any such thing as ultimate or objective truth, I can never, in my own lifetime, be absolutely sure that I have discovered it. I can know important and non-arbitrary truths, but these are necessarily mediated through human experiences and relationships. There can be no universal, final, or objective truth; there can be only "partial, locatable, critical knowledges."[84] no aperspectivity—only improved perspectives.

A stance of positionality can reconcile the apparent contradiction within feminist thought between the need to recognize the diversity of people's lives and the value in trying to transcend that diversity. Feminists, like those associated with the critical legal studies movement, understand that when those with power pretend that their interests are natural, objective and inevitable, they suppress and ignore other diverse perspectives. This understanding compels feminists to make constant efforts to test the extent to which they, also, unwittingly project their experiences upon others. To understand human diversity, however, is also to understand human commonality. From the positional stance, I can attain self-knowledge through the effort to identify not only what is different, but also what I have in common with those who have other perspectives. This effort, indeed, becomes a "foundation" for further knowledge.

Because of its linkage between knowledge and seeking out other perspectives, positionality provides the best foothold from which feminists may insist upon both the diversity of others' experiences, and their mutual relatedness and common humanity with others. This dual focus seeks knowledge of individual and community, apart and as necessarily interdependent. As others have noted, much of the recent scholarship that attempts to revive ideals of republicanism and the public virtue has given inadequate attention to the problem of whose interests are represented and whose are excluded by expressions of the "common" or "public" interest.[85] Positionality locates the source of community in its diversity and affirms Frank Michelman's conclusions about human commonality: "The human universal becomes difference itself. Difference is what we most fundamentally have in common."[86]

All three of the methods discussed in this Article affirm, and are enhanced by, the stance of positionality. In asking the woman question, feminists situate themselves in the perspectives of women affected in various ways and to various extents by legal rules and ideologies that purport to be neutral and objective. The process of challenging these rules and ideologies, deliberately, from particular, self-conscious perspectives, assumes that the process of revealing and correcting various forms of oppression is never-ending. Feminist practical reasoning, likewise, exposes and helps to limit the damage that universalizing rule and assumptions can do; universalizations will always be present, but contextualized reasoning will help to identify those currently useful and eliminate the others. Consciousness-raising links that process of reasoning to the concrete experiences

[84] Haraway, *supra*, note 33 at 584.

[85] See, *e.g.* Bell & Bansal, "The Republican Revival and Racial Politics" (1988) 97 Yale L.J. 1609 (1988); Young, "Impartiality and the Civic Public: Some Implications of Feminist Critiques of Moral and Political Theory" in *Feminism as Critique*, p. 66.

[86] Michelman, 100 Harv. L. Rev. 4, at 32. Michelman incorporates points made by Drucilla Cornell and Martha Minow.

associated with growth from one set of moral and political insights to another. Positional understanding enhances alertness to the special problems of oppressive orthodoxies in consciousness-raising, and the insights developed through collaborative interaction should remain open to challenge, and not be held hostage to the unfortunate tendency in all social structures to assume that some insights are too politically "correct" to question.

Positional understanding requires efforts both to establish good law and to keep in place, and renew, the means for deconstructing and improving that law. In addition to focusing on existing conditions, feminist methods must be elastic enough to open up and make visible new forms of oppression and bias. Reasoning from context and consciousness-raising are self-renewing methods that may enable continual new discoveries. Through critical practice, new methods should also evolve that will lead to new questions, improved partial insights, better law, and still further critical methods.

Conclusion: feminist methods as ends

I have argued that feminist methods are means to feminist ends: that asking the woman question, feminist practical reasoning, and consciousness-raising are methods that arise from and sustain feminist practice. Having established the feminist stance of positionality, I now want to expand my claim to argue that feminist methods are also ends in themselves. Central to the concept of positionality is the assumption that although partial objectivity is possible, it is transitional, and therefore must be continually subject to the effort to reappraise, deconstruct, and transform. That effort, and the hope that must underlie it, constitute the optimistic version of feminism to which I adhere. Under this version, human flourishing means being engaged in the world through the kinds of critical yet constructive feminist methods I have described. These methods can give feminists a way of doing law that expresses who they are and who they wish to become.

This is, I contend, a goal central to feminism: to be engaged, with others, in a critical, transformative process of seeking further partial knowledges from one's admittedly limited habitat. This goal is the grounding of feminism, a grounding that combines the search for further understandings and sustained criticism toward those understandings. Feminist doing is, in this sense, feminist knowing. And vice versa. [pp. 849–888]

LUCINDA M. FINLEY

Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning

(1989)[87]

Language matters. Law matters. Legal language matters.

I make these three statements not to offer a clever syllogism, but to bluntly put the central thesis of this Article: it is an imperative task for feminist jurisprudence and for feminist lawyers—for anyone concerned about what the impact of law has been, and will be, on the realization and meanings of justice, equality, security, and autonomy for women—to turn critical attention to the nature of legal reasoning and the language by which it is expressed.

[87] [From (1989) 64 Notre Dame Law Rev. 886]