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Feminist Legal Theories

Feminism is a dirty word. . . . Misconceptions abound. Feminists are portrayed as bra-burners, manhaters, sexists, and castrators. Our sexual preferences are presumed. We are characterized as bitchy, . . . aggressive, confrontational, and uncooperative, as well as overly demanding and humorless.
—Leslie Bender, "A Lawyer's Primer on Feminist Theory and Tort"

[W]oman is the Other.
—Simone de Beauvoir, *The Second Sex*

My life is a sheer privilege because my parents didn't love me less because I was born a daughter. My school did not limit me because I was a girl. My mentors didn't assume that I would go less far because I might give birth to a child one day. These influences are the gender equality ambassadors that made me who I am today. They may not know it but they are the inadvertent feminists needed in the world today. We need more of those.
—Emma Watson, Hermione from *Harry Potter* and UN Goodwill Ambassador, speech to UN HeForShe Campaign

What is distinctive about feminist *legal* theory? Do criteria exist for who can be a "feminist"? Are there compulsory feminist beliefs? What is the meaning of equality?

The development of feminist legal theory was intertwined with the growth of feminism generally. Many of the first rights the women's movement fought for were political rights, like the right to vote. Some of the early strategies—such as Sojourner Truth's claim to equal treatment because she had "ploughed and planted" just like a man—

foreshadowed visions of equality that would emerge as important *legal* theories in later years. Often, feminist political action preceded feminist legal theory. While feminist lawyers were urging courts in the 1960s and early 1970s to address gender inequalities, it was not until the later 1970s and early 1980s that legal scholars developed distinct branches of feminist legal theory.

Feminist legal theory comes in many varieties, with some overlap. But all the theories share two things—the first an observation, the second an aspiration. First, feminists recognize that the world has been shaped by men, who for this reason possess larger shares of power and privilege. All feminist legal scholars emphasize the rather obvious (but unspoken) point that nearly all public laws in the history of existing civilization were written by men. If American law historically gave men a leg up, this news can hardly come as a surprise. Second, all feminists believe that women and men should have political, social, and economic equality. But while feminists agree on the goal of equality, they disagree about its meaning and about how to achieve it.

Equal Treatment Theory

> Sex-based generalizations are generally impermissible whether derived from physical differences such as size and strength, from cultural role assignments such as breadwinner or homemaker, or from some combination of innate and ascribed characteristics, such as the greater longevity of the average woman compared to the average man.
> —Wendy W. Williams, "Equality's Riddle"

The first wave of feminist legal theory began in the early 1960s with the emergence of equal treatment theory (also referred to as "liberal" or "sameness" feminism). Equal treatment theory is based on the principle of formal equality that inspired the suffrage movement, namely, that women are entitled to the same rights as men. The theory drew from liberal ideals in philosophy and political theory that endorse equal citizenship, equal opportunities in the public arena, individualism, and rationality.[1] The equal treatment principles were simple: the law should not treat a woman differently from a similarly situated man. Also, the

law should not base decisions about individual women on generalizations (even statistically accurate ones) about women as a group.

Early efforts to attain equal treatment for women pursued two goals. The first was to obtain equivalent social and political opportunities, such as equal wages, equal employment, and equal access to government benefits. The second was to do away with legislation intended to protect women by isolating them from the public sphere. Examples of such protective legislation included limiting women's career options or employment hours. Perhaps in part as a reaction to the historical treatment of women as in need of special protection, equal treatment theorists stressed the ways women were similar to men, and used this as the platform for claiming equal employment and economic benefits.

In the 1970s and 1980s, organizations such as the American Civil Liberties Union (ACLU), the National Organization for Women, and the League of Women Voters won a series of lawsuits in the Supreme Court that helped dismantle barriers for women as breadwinners, property owners, and economic players. In the 1970s, the ACLU created a Women's Rights Project (WRP) to bring sex discrimination lawsuits. Under the direction of future Supreme Court Justice Ruth Bader Ginsburg, the WRP followed the strategy of civil rights pioneers in seeking formal equality. To obtain equal treatment under the Constitution, women had to establish that they were "similarly situated" to men, so the WRP argued that women did not differ from men in ways that should matter legally. In 1971 in *Reed v. Reed,* they persuaded the Supreme Court that men and women were equally qualified to administer estates, so a law that preferred male relatives over female relatives as administrators of a decedent's estate was unconstitutional.[2] Two years later, in *Frontiero v. Richardson*,[3] the WRP argued in an amicus brief[4] that female members of the military deserved the same family benefits as male service members. In *Frontiero* the Supreme Court held unconstitutional a benefits policy in the military that presumed that all wives of servicemen were financially dependent on their husbands but did not make the same presumption in the case of *husbands* of service *women*. In his opinion for the Court, Justice Brennan observed that "our Nation has had a long and unfortunate history of sex discrimination . . . rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage."[5]

The WRP initially adopted a strategy that used male plaintiffs to challenge laws that, at least superficially, favored women. WRP lawyers surmised that since most judges were men, they would see discrimination best if they could envision themselves as its possible victims. The strategy produced mixed results. The Court upheld a law giving widows, but not widowers, a property tax exemption. The state tax exemption, in the Court's view, was an appropriate equalizing measure for the discrimination that women encounter in the job market, because the law was "reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden."[6] On the other hand, the Court struck down a law that prohibited the sale of low-alcohol beer to females under the age of eighteen and males under the age of twenty-one, basing its decision on the supposedly greater traffic-safety risks posed by underage males.[7] When the state presented only weak empirical evidence of a correlation between gender and driving drunk (0.18 percent of females and 0.2 percent of males between eighteen and twenty-one were arrested for driving under the influence), the Court rejected the stereotype that young men were more reckless than young women.

One of the strengths of Ginsburg's approach in litigating the equal treatment cases was that she directly attacked the notion that "natural" differences justified dissimilar treatment under the law. She showed that many of these differences were socially constructed—that social norms prescribed different roles for men and women. She also argued that if biological differences distinguished the sexes, discrimination based on these immutable differences justified a higher level of judicial scrutiny.

During the late 1970s and the 1980s, the formal equality tactic was usually successful in eliminating explicit barriers to equal treatment. The Supreme Court found that a statute imposing obligations only on husbands to pay alimony violated equal protection, as did a congressman's discharge of a female administrative assistant because of her sex.[8] Nursing schools could not reject potential students because they were male; attorneys could not reject potential jurors because they were female.[9] In some cases, though, the Court permitted women to recoup such benefits as extra Social Security allotments as compensation for market disadvantages they experience.[10]

Equal treatment theory achieved immense gains in access for women, particularly in the areas of education and employment. Its rationale was easy to understand and was accepted by the mainstream. Part of the reason the strategy won public support was that it targeted individual instances of inequality and sought only gradual change. But, this meant the theory was tame, incremental, and slow moving. In addition, equal treatment lawsuits remained focused on public activities—such as taxes, liquor sales, and education—rather than on the more controversial realm of personal behavior.

Equal treatment theory accepts male experience as the reference point or norm. Women attain equality only to the extent that they are similarly situated with men. One flaw in this symmetrical approach is that its emphasis on similarity disadvantages women on issues related to pregnancy, childbirth, and allocation of property at divorce.[11] In response, a second group of theorists challenged the equal treatment framework, arguing that women's rights should be defined without reference to a male baseline. This premise gave rise to cultural feminism.

Cultural Feminism

> I will never be in a man's place, a man will never be in mine. Whatever the possible identifications, one will never exactly occupy the place of the other—they are irreducible the one to the other.
> —Luce Irigaray, *An Ethics of Sexual Difference*

Cultural feminism (also called "difference theory" or, sometimes pejoratively, "special treatment theory") argues that formal equality does not always result in substantive equality. Cultural feminists criticized the sameness model as male-biased, serving women only to the extent that they could prove they were like men. Purely formal equality of opportunity did not lead to equality of results. People judged women harshly on the basis of their inability to conform to the male norm. Gender-neutral laws can keep women down if they do not acknowledge women's different experiences and perspectives. This theory emphasizes the differences between men and women, whether the differences in question are biological differences related to childbearing or cultural

differences reflected in social relationships. Cultural feminists note that many institutions, such as the workplace, follow rules based heavily on male-dominated experiences, which can disadvantage women. For instance, the voluntary-quit rules of unemployment compensation typically disqualify from receiving benefits people (predominantly women) who leave their jobs because of work-family conflicts. Damages in most tort cases are based on anticipated losses of future earning capacity, so female plaintiffs often receive damage awards discounted by anticipated work absences during childrearing years. Traditional self-defense rules in criminal law, which require an imminent threat before a defense is allowed, offer limited protection to a battered woman who, though she lives in constant fear of a domestic attack, is unable to predict exactly when her partner will strike.

Cultural feminists argue that men and women should not be treated the same where they are relevantly different and that women should not be required to assimilate to male norms. They urge instead a concept of legal equality in which laws accommodate the biological and cultural differences between men and women. Some cultural feminists see the connectedness of women as rooted in biological as well as cultural origins. They maintain that women are "essentially connected" to other humans, through the physical connections of intercourse, pregnancy, and breastfeeding, and to humanity, through an ethic of care. The problem with legal theory, then, is that it "is essentially and irretrievably masculine" because it treats humans as distinct, physically unconnected, and separate from others.[12]

Cultural feminist theory in law drew on the "different voice" scholarship of educational psychologist Carol Gilligan.[13] Gilligan challenged the dominant theory in psychology, associated with Lawrence Kohlberg, that use of abstract concepts of justice and rights was correlated with higher stages of moral development. She advanced the theory that boys and girls learn different methods of moral reasoning. Girls are taught to value empathy, compassion, preservation of harmony, and a sense of community, while boys are taught to privilege abstract moral principles, rights, autonomy, and individualism. Girls grow into women who reason with "an ethic of care," emphasizing connections and relations with other people; boys become men who reason with "an ethic of justice" that values abstract rights, rules, and autonomy.

Advocates of special treatment urged a model that focuses on differences between the sexes, whether rooted in culture or biology: differences in reproductive functions, caretaking responsibilities, and even emotions and perceptions, such as the ways women perceive rape, sexual harassment, and various aspects of reproduction. Cultural feminists say that significant differences between men and women should be acknowledged and compensated legally where they disadvantage one sex. They have favored special maternity leaves, flexible work arrangements, or other workplace accommodations for women. Further, cultural feminists have advocated for female-centric standards in the law, such as the reasonable woman standard in sexual-harassment employment-discrimination cases, whereby the harassed female plaintiff has the option to instruct the jury to examine her claim from a woman's point of view, rather than a person's (arguably a male's) point of view.[14]

Some feminists have criticized Gilligan's methodology as anecdotal, arbitrary in its assignment of characteristics as masculine or feminine, and based on an inadequate sample of privileged subjects. A number of these critics deny that many differences exist along gender lines, and point out that more variation exists among women than between men and women.[15] Others say that creating social policies with an emphasis on differences will reinforce gender stereotypes. Gilligan has replied to these methodological critiques, and others have supported her findings, although the empirical support has not been strong.[16] But, intriguingly, these criticisms have not diminished the general acceptance of her theories.

Cultural feminism does more than identify women's differences; it applauds them: "Cultural feminists, to their credit, have reidentified these differences as women's strengths, rather than women's weaknesses. Women's art, women's craft, women's narrative capacity, women's critical eye, women's ways of knowing, and women's heart, are all, for the cultural feminist, redefined as things to celebrate."[17] In other words, "Vive la différence!"

Legal theorists argued that this distinctively feminine approach to moral and legal reasoning had been omitted, or at least discounted, in law. Feminist legal theorists used Gilligan's work to argue for a rethinking of some long-accepted rules of law. For instance, under traditional tort law, which values individual autonomy, citizens have no obligation

to assist strangers in need, even when they can do so without putting themselves in any jeopardy. In almost all states, one can watch a blind person walk into traffic with no legal obligation even to yell out a warning. (It is not nice, but it's not tortious.) Using the idea that law ought to encourage communal responsibilities of care, feminist legal scholars advocated the creation of tort duties to assist strangers who are in peril. Some cultural feminists argued that women, who more often organize their lives around caregiving relationships, have been harmed by gender-neutral custody standards. Others have advocated less adversarial, more cooperative styles of lawyering, such as a greater use of mediation as opposed to litigation. More generally, cultural feminists argued for a movement away from a male-oriented rights model and a greater incorporation into law of an ethic of care.

A primary criticism of cultural feminism is that it values women only if they adopt conventional social roles. In celebrating attributes associated with women—empathy, nurturing, caretaking—cultural feminism reinforces women's stereotypical association with domesticity. Another objection is that it characterizes women as needing special protection. As the Supreme Court observed, protectionist laws historically have disadvantaged women by putting them "not on a pedestal, but in a cage."[18]

The question of which model—formal equality or celebration of difference—leads to more fairness is known as the "equal treatment–special treatment" or "sameness-difference" debate. A key disagreement between equal treatment theorists and cultural feminists concerns pregnancy and maternity leave. A 1987 Supreme Court case, *California Federal Savings & Loan Association v. Guerra* ("*Cal Fed*"),[19] illustrates the positions of the two camps. In *Cal Fed* a California statute required employers to provide women up to four months of unpaid maternity leave, but did not require similar leave for other temporary disabilities. Cultural feminists and equal treatment theorists filed "friend of the court" briefs on opposite sides of the case. Equal treatment theorists, including the ACLU's Women's Rights Project and NOW's Legal Defense and Education Fund, argued that the state law violated federal Title VII provisions, because employers refused similar leaves to workers with other temporary "disabilities." They contended that special treatment for pregnant women reinforced stereotypes that women in the workforce need protective legislation. In support of the state law, a cultural femi-

nist group, the Coalition for Reproductive Equality in the Workplace (CREW), argued that biological differences between men and women justified different leave policies and that accommodation of pregnancy would actually promote Title VII's goal of workplace equality: "without the statute, women were forced to choose between having children and maintaining job security—a choice not imposed on men."[20]

Thus, equal treatment theorists maintained that pregnancy should be treated the same as other disabilities, while cultural feminists countered that a pregnancy-specific disability policy was constitutional and sensible because pregnancy is a unique condition that burdens only women. The Supreme Court upheld the state law, noting that "[b]y 'taking pregnancy into account,' California's pregnancy disability leave statute allows women, as well as men, to have families without losing their jobs."[21]

Following the *Cal Fed* debate, the sameness and difference camps attempted to join hands in support of the Family and Medical Leave Act (FMLA). Recent scholarship, though, demonstrates the recurrent divide between equal treatment and cultural feminist groups. For example, with respect to the FMLA, theorists have observed that, in practice, "only mothers take leave," which means that the statute "only accommodates women's caretaking, protection that gives them a measure of job security but at the same time preserves employers' incentive to prefer male employees."[22] One possible resolution is to require paid family leave, which would remove part of the disincentive for men to assume primary caregiving responsibilities.

Theorists continue to argue about which model better promotes true equality: the assimilation model that emphasizes the sameness between women and men or the accommodation model that stresses their differences. The debates continue with respect to such issues as a parent track that permits working parents to work less than full-time so that they can devote time to childrearing; custody rules that favor the "primary caregiver" (or the question of whether that presumption discriminates against men); and the issue of whether the principles of formal equality that underlie dramatic decreases in maintenance (alimony) result in poverty for nonworking mothers. Some feminists have tried to move beyond the equal treatment–special treatment divide by questioning basic institutional structures and the social ideas that perpetuate them. Joan Williams, for example, asks whether the work world needs to be built around

the norm of an "ideal worker" who can work full-time plus overtime and has no childcare responsibilities.[23] Theorists have recognized that equal treatment poses difficulties by ignoring real differences while different treatment "is a double-edged sword permitting unfavorable as well as favorable treatment against an historic background of separate spheres ideology."[24] For law professor Martha Minow, the difference dilemma boils down to a single question: "When does treating people differently emphasize their difference and stigmatize and hinder them on that basis, and when does treating people the same become insensitive to their differences and likely to stigmatize or hinder them on that basis?"[25]

Dominance Theory

Take your foot off our necks, and then we will hear in what tongue women speak.
—Catharine A. MacKinnon, *Feminism Unmodified*

Dominance theory rejects the sameness/difference debate and departs from equal treatment theory and cultural feminism, noting that both used the male standard as the primary benchmark—with equal treatment theorists emphasizing how similar women are to men and cultural feminists celebrating how different women are from men: "Under the sameness standard, women are measured according to our correspondence with man, our equality judged by our proximity to his measure," while "[u]nder the difference standard, we are measured according to our lack of correspondence with him."[26] The goal of both equal treatment theory and cultural feminism is equivalence between women and men; the goal of dominance theory is liberation from men.

Dominance theorists focus instead on the difference in *power* between women and men. First introduced in 1979 by Catharine MacKinnon, dominance theory (or radical feminism) focuses on the power relations between men and women. Dominance theory argues that the inequalities women experience as sex discrimination in the economic, political, and familial arenas result from patterns of male domination. This theory says that men are privileged and women are subordinated, and this male privileging receives support from most social institutions as well as a complex system of cultural beliefs. Law is complicit

with other social institutions in constructing women as sex objects and inferior, dependent beings. Dominance theorists cite the lack of legal controls on pornography and sexual harassment, excessive restrictions on abortion, and inadequate responses to violence against women as examples of the ways laws contribute to the oppression of women.

In particular, dominance theory provided a different perspective on violence against women and children in areas such as rape, intimate violence, sexual harassment, and child pornography.[27] For instance, in 2011, when a police officer in Toronto observed that to "not be raped, women should 'avoid dressing like sluts,'" he inspired a series of grassroots protest rallies called SlutWalk that took place in Canada, India, Singapore, Mexico, Finland, Germany, South Africa, and numerous cities in the United States.[28] Equality theories were ill equipped to address these experiences, since they "failed to address the patriarchal structures of power that led to and perpetuated them."[29] Patriarchy means the rule or "power of the fathers." It is a system of social and political practices in which men subordinate and exploit women. The subordination occurs through complex patterns of force, social pressures, and traditions, rituals, and customs. This domination does not just occur in individual relationships, but is supported by the major institutions in society.

Within the family, men, as "heads of the household," control women. Domestic violence is domination in an extreme form. This dominance is tolerated, since the criminal justice system imposes lenient sentences on people who perpetrate violence against women. In the employment sphere, a gendered division of labor occurs whereby women are segregated into low-status jobs at lower wages. Dominance theorists have demonstrated the ways that laws, most of which have been drafted by men, assist in reinforcing male domination. For instance, in most states, a rape victim must prove she did not consent, even where violence occurs. As another example, in the law of unemployment insurance, if women are forced to quit jobs for family reasons (such as a lack of childcare), they are not eligible for compensation.

Patriarchy is created and reinforced by a system of beliefs that says men should be superior in education, employment, politics, and religion. It is "a political structure that values men more than women."[30] Women are relegated to the status of second-class citizens. Catharine MacKinnon describes the ways men are dominant and privileged:

> Men's physiology defines most sports, their needs define auto and health insurance coverage, their socially designed biographies define workplace expectations and successful career patterns, their perspectives and concerns define quality in scholarship, their experiences and obsessions define merit, their objectification of life defines art, their military service defines citizenship, their presence defines family, their inability to get along with each other—their wars and rulerships—defines history, their image defines god, and their genitals define sex.[31]

The media display degrading images of women that treat women as possessions, while the legal system supports these demeaning depictions as protected speech. Women are forced into stereotypic molds that demand that they present themselves as feminine and deferential and that they assume a disproportionate share of the responsibility for housework, childcare, and eldercare. Patriarchy gives men control of women's sexuality, their reproductive freedom, and their lives.

Patriarchy includes sexual domination by men and sexual submission by women. Sexuality in this society focuses on men's desires and satisfaction. Women live with the fear of rape and sexual abuse. They learn to trade on their sexuality for advancement. Women are treated in the work environment as objects of attraction rather than as professional peers. Women are represented, in everything from fashion ads to pornography, as sexual objects or commodities.

In 1983, Andrea Dworkin and Catharine MacKinnon proposed an antipornography ordinance that created a cause of action for sex discrimination for pornography that showed "the graphic sexually explicit subordination of women, whether in pictures or in words" and women being "presented as sexual objects."[32] The outcome of the antipornography campaign is discussed in chapter 6, but for present purposes, this attempt to translate one type of feminist legal theory into law is an example of dominance theory's sweeping critique of patriarchy and the search for systematic and institutional remedies.

Patriarchy shapes men, too, when it values characteristics associated with traditional definitions of masculinity, so that men learn to reject intimacy and repress emotions. Both men and women are socialized toward stereotypic gender behaviors characteristic of their sex. Men who do not conform to traditional images of manliness and who act

in effeminate ways are considered a threat to masculinity and are not only subordinated like women but also often punished for their gender transgressions.[33]

One method of promoting the traditional patriarchal structure is to discourage same-sex relationships and compel heterosexuality. "Compulsory heterosexuality"[34] operates through legal rules, such as the military's former "Don't Ask, Don't Tell" policy, and through much more subtle forms of cultural indoctrination, ranging from the male fear of all things pink to the epidemic use of "faggot" among high school boys (just as popular in our day). Politicians, better than most, understand our subconscious attraction to the alpha male. Thus, in the 2004 Republican National Convention, California governor Arnold Schwarzenegger mocked critics of his party's economic plan by calling them economic "girlie men."[35]

When women live in a patriarchal society, they may internalize the beliefs of the dominant group. They may seek out, choose, and even enjoy dependent or submissive relationships or caretaking roles. "Women value care," according to MacKinnon, "because men have valued us according to the care we give them. . . . Women think in relational terms because our existence is defined in relation to men."[36] This psychological aspect of oppression is called "false consciousness."

To create awareness of oppression and expose this system of internalized beliefs, MacKinnon suggests that women engage in "consciousness-raising"—that they join women-only groups and discuss their experiences with housework, sexuality, caregiving, and menial jobs. Through this process women will make visible to themselves and each other the daily micro-inequities that are the product of male privilege and build collective knowledge about their experiences of oppression.

Other feminists have criticized the idea of false consciousness—that women cannot make independent choices—as "infuriatingly condescending," and the remedy of consciousness-raising as unworkable because relating personal experiences will not inevitably lead to political solutions.[37] Dominance theory has also drawn criticism for "gender essentialism"—the assumption that all women share the same experience, namely, that of victims. Critics have also charged that dominance theory mistakenly "universalize[s] the experience of white women as the experience of all women, ignoring differences of race, class, and ethnic-

ity," and that it devalues women's experiences as mothers.[38] Nonetheless, the theory has powerfully influenced legal thinking—particularly on the subjects of rape, sexual harassment, and pornography.

Anti-Essentialism

> [I]n feminist legal theory, as in the dominant culture, it is mostly white, straight, and socio-economically privileged people who claim to speak for all of us.
> —Angela P. Harris, "Race and Essentialism in Feminist Legal Theory"

Critical Race Feminism

In the mid- to late 1980s, a number of legal theorists, principally women of color and lesbians, complained that feminist legal theory omitted their experiences and concerns. By pointing the spotlight only on gender, traditional white feminists ignore important differences that exist *among* women, most notably, differences of race. They charged that feminist legal theory doted excessively on the needs of privileged white women. Mainstream feminists made universal assertions about women's experiences (for example, that all women experienced subordination or that women are generally more nurturing and compassionate than men). This phenomenon of "feminist essentialism"—that "a unitary, 'essential' women's experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience"—stifled the voices of lesbians and minority-race women "in the name of commonality."[39]

Opponents of essentialism—who call themselves "anti-essentialists"—argue that discrimination is best understood, not from the center of an oppressed group's membership (meaning, for women, white, middle-class, and heterosexual), but from the margins. In other words, discrimination functions differently depending on a person's combination of personal characteristics. Sexism surely affects all women, from Rosa Parks to Taylor Swift. But it is the *intersection* of characteristics like sex, race, wealth, and sexual orientation that really suggests how people will treat you.[40]

Critical race feminists argue that legal doctrines in various areas, such as rape, sexual harassment, and domestic violence, do not adequately address discrimination based on the intersections of these categories. As just one example, the requirement in employment discrimination for a black woman to identify either as a woman or as a racial minority and to claim either sex or race discrimination ignores the ways racism and sexism intertwine. In the job market, poor women of color must overcome a "triple" disadvantage, as they confront challenges of income, sex, and race. Immigrant women suffer intimate violence at higher rates than other populations; and, faced with threats of deportation, they lack support services, shelters, and legal representation. Men of color are prosecuted more often, convicted more readily, and sentenced more harshly than white men or women.[41] Critical race theorists reject formal equality as being empty, because formal guarantees of equality accept current measures of merit, such as one-dimensional standardized tests and traditional employment credentials.

The multiple categories of human identity suggest another insight of critical race feminism—that people exhibit multiple consciousness. A person occupies various positions or relationships all at once and slips seamlessly into many roles: daughter, perhaps mother, student, bank teller, Latina, and lesbian. This kaleidoscope of roles means not just that people feel oppression at different pressure points but that, with practice, people can begin to understand oppression from perspectives other than their own. This ability, which law professor Mari Matsuda calls "multiple consciousness," is more than (to use her words) "a random ability to see all points of view, but a deliberate choice to see the world from the standpoint of the oppressed."[42]

Multiple consciousness is important to the study and practice of law: it enables outsiders to use formal legal discourse without losing their empathic understanding—their consciousness—of oppression. This way of thinking makes it possible for lawyers to contemplate laws beyond current rigid doctrines that do not acknowledge powerlessness: to think about tort damages for racial hate speech, to understand the needs of same-sex clients who want to adopt, to envision reparations for slavery. Critical race feminism draws from the critical legal studies movement the idea that many laws are not neutral or objective, as they purport to be, but are actually ways that traditional power relationships are main-

tained. For example, traditional First Amendment law prohibits people who have been the victims of virulent hate speech from suing for damages. In allowing the vilification of women and people of color, law has been instrumental in continuing hierarchies of gender and race.

Critical race feminists sometimes employ a more personal kind of storytelling or narrative scholarship to explain how multiple forms of oppression shape the lives of people of color.[43] The experiences of women of color are not the experiences of most women. One way to blend minority experiences into legal analysis is to tell "stories." Such stories, or personal narratives, introduce readers to challenges and emotions that might otherwise not be considered by majority-group members.

When law professor Patricia Williams went Christmas shopping in New York City one year, a white teenager (chomping bubble gum) refused to press the buzzer to admit her to a Benneton store. In a well-known essay, Professor Williams later used this experience to explore the social connections among race, sex, crime, and commerce.[44] Adele Morrison tells stories of lesbian victims seeking shelter from intimate violence but having their batterers admitted to the safe house because they are also women.[45] Law professor Anthony Alfieri, a former legal aid lawyer, recalls an interview he once had with a woman seeking food stamps. In addition to legal need, the woman's story revealed to him the dignity and pride she felt caring for children and foster children.[46] As Richard Delgado observes, "Stories, parables, chronicles, and narratives are powerful means for destroying mindset—the bundle of presuppositions, received wisdoms, and shared understandings against a background of which legal and political discourse takes place."[47] The idea is to make law acknowledge the experiences of these outsiders.

Critical race theorists challenge the view that race is a biological phenomenon. Of course, if biological differences among races lead to innate performance differences, this would undermine affirmative action measures as an instrument in the movement toward equality. It also affirms *Bell Curve* concepts of educational tests as reflective of "merit."[48] Flatly, it justifies racism as a benign product of naturally occurring differences.

The very notion of race presents deep challenges. There is no question that many characteristics associated with race—skin color, hair, facial features, and other physical traits—are rooted in biology and evolutionary history. But biologists do not recognize genetic categories for human

races.[49] Indeed, the boundaries between one human race and another have frequently varied over time and across societies. In this way, race may be viewed as more of a social construct—a belief system about the importance of an individual's particular package of outward physical characteristics. This process of social construction means that the inferior and negative meanings attached to various races are also social inventions. The biological view of race led to laws in the recent past prohibiting interracial marriage and justifies contemporary resistance to transracial adoption. Critical race feminists have extended this critique of biological race to demonstrate its continuing influence on laws and legal decisions. They have shown how this belief in genetic race influences courts to make surrogacy decisions that view black women acting as gestational surrogates simply as breeders. They have also exposed how pregnant women of color who use drugs are more likely than white women to be prosecuted on drug charges or for child endangerment, abuse, or neglect.[50]

Critical race feminists believe that a jurisprudential method recognizing "that differences are always relational rather than inherent" can lead to liberation.[51] They also emphasize the instrumental value of storytelling or narrative. Because legal cases always begin with human stories, making sure the stories of oppression are told—"speaking truth to power"—is a first step toward equality.[52]

Lesbian Feminism

Lesbian legal theory focuses on the legal issues confronted by persons who identify as lesbian, gay, bisexual, or transgender (collectively "LGBT"). Beginning in the 1970s, some lesbian feminists wrote that sexual orientation is more about politics than desire. Lesbian theorists rejected the portrayal of LGBT people as deviant by drawing on scientific evidence about sexuality that showed the prevalence of same-sex inclinations and the spectrum of different sexualities. In law, numerous gay and lesbian theorists catalogued the basic civic rights that the government denies to nonheterosexuals: rights to marry, to serve openly in the military (the "Don't Ask, Don't Tell" policy), to adopt, and to hold jobs without discrimination. As this book goes to press in 2015, it is still legal in most states to fire lesbians, gay men, bisexuals, and the transgendered because of their sexual orientation or gender identity.[53]

Denounced in the 1970s by Betty Friedan, then president of the National Organization for Women, as the "lavender menace," lesbian feminists and their concerns have long been dismissed by the mainstream feminist movement. This marginalization is an example of the larger phenomenon of dominant subgroups excluding a subordinate one in order to leverage their own acceptance. Other theorists have made the point that lesbian feminists have excluded gay men and bisexuals from their analyses, given minimal attention to the voices of poor lesbians and gays and those of color, and have entirely omitted the impact of laws on transsexuals.[54]

Early lesbian and gay legal theorists revealed the links between heterosexism and sexism. They showed how traditional ideas of masculinity demanded segregation of the sexes, repression of feminine traits in men, and the exclusion, harassment, and vilification of those assumed to be sexually deviant. This promoted the supremacy of "masculinity over femininity as well as the elevation of heterosexuality over all other forms of sexuality."[55] They traced the penalties law imposes on lesbians and gay men and explained that this condemnation was tied to social meanings of gender that approve only of traditional familial arrangements (think: Ward, June, Wally, and the Beave). To escape the oppression, subordination, and exclusion, gay and lesbian legal theorists have tried a range of arguments, from constitutional (debating whether gays and lesbians are a suspect class deserving heightened scrutiny under the Equal Protection Clause) to communitarian (emphasizing the common humanity of all people).[56]

Concerns of lesbian feminists in law may differ from those of straight feminists—the latter may be trying to get male partners to assume more childcare responsibilities, while the former are fighting to obtain custody of their children. The daily lives of lesbians are affected in myriad ways by state exclusions from basic benefits, familial arrangements, and employment rights that straights take for granted. If you are gay or lesbian, disclosure of your sexual orientation can justify termination of employment. At the moment, same-sex marriage exists in most, but not all states. Thus, some same-sex partners are not entitled to the same insurance, property, inheritance, custody, or adoption rights as straight couples. The General Accounting Office has identified 1,049 federal laws in which "benefits, rights and privileges" are dependent upon marriage.[57] For this reason,

gays and lesbians have worked hard campaigning and litigating for marriage equality. We'll look more at these issues in chapter 6.

Some legal theorists have written on whether sexual orientation has a biological basis. They have drawn on evidence from the sciences concerning the genetic and biological origins of sexuality: Simon LeVay's autopsy study revealing that a part of the brain, the hypothalamus, was twice as large in heterosexual men as in homosexual men; twin studies showing that if one twin is gay, a 50 percent chance exists that the other is as well; research showing that gays and lesbians who undergo "conversion therapy" or "reparative counseling" for the purpose of changing their sexual orientation experience a high failure rate.[58] Lesbian, gay, bisexual, and transgender (LGBT) legal theorists have used these scientific findings to argue that if sexual orientation exerts a strong biological influence, it should be a suspect classification, like race and gender, and should command heightened constitutional scrutiny. If sexuality originates in biology, how can a legal blame system be justified? Others, like law professor Sam Marcosson, argue that sexual orientation is "constructively immutable"—it is a characteristic that is immutable for "all relevant legal and political purposes . . . even if it is a product of social construction."[59] The point is that sexual orientation, perhaps like religious orientation, is so intimately connected to personal identity that even if it is not purely biological, it must be treated as something beyond voluntary choice. The social meanings attached to sexual orientation are so powerful in maintaining a disfavored social class that LGBT individuals need constitutional protection from discrimination.

In one sense, the structure of lesbian and gay legal theory has followed a pattern reminiscent of the sameness/difference debate in feminist legal theory. Some formal equality theorists have tried to show that LGBT couples are similar to the "ideal"—the heterosexual norm—as committed partners and loving parents. They try to demonstrate that LGBT identity is not just about sexuality and that differences in sexual orientation should not make a difference, socially or legally. Difference theorists (called, in this context, antisubordination theorists) critique the heterosexual norm as they challenge the ways society has artificially constructed sexual nonconformists as deviants. But perhaps it is not surprising at all that discussions of equality often return to concepts of sameness and difference, since one version of equality is treating similarly situated people alike.

Ecofeminism

> My first step from the old white man was trees. Then air. Then birds. Then other people. But one day when I was sitting quiet . . . it come to me: that feeling of being part of everything, not separate at all. I knew that if I cut a tree, my arm would bleed.
> —Alice Walker, *The Color Purple*

Ecofeminism describes women's rich and varied relationships with society and nature. First advanced in the 1970s,[60] ecofeminism has since flowered into a stunning array of variations, with emphases ranging from economics to spiritualism, from animal rights to international human rights. The most recent and, perhaps, most promising version of ecofeminism emphasizes the intersections of human oppression (sexism, racism, and so on) and environmental destruction. The analysis begins where all ecofeminism begins: with the premise that the oppression of nature and the oppression of women are closely connected.[61] In this view, sexism and environmental destruction flow from the same problem: a false duality in Western thought that favors the human mind and spirit over the natural world and its processes. Because Western culture often associates the masculine with mind and spirit (science, reason, Descartes) and the feminine with the natural world (sex, instinct, Mother Nature), this dualism casts a double whammy, subordinating nature and women at the same time. This hierarchy—as old as Adam[62]—has been used to explain everything from the country's obsession with damming rivers to the pope's opposition to premarital sex.

Most ecofeminists challenge this dominance of masculine ideals by promoting greater respect for the feminine, "nature-based" values, a strategy reminiscent of cultural feminism.[63] Other ecofeminists argue that the duality between male and female is overemphasized and should give way to a more unified attack on oppression in general. This strategy is reminiscent of dominance theory. For many ecofeminists, the dynamics of separation and control that enable sexism and environmental destruction also perpetuate other forms of oppression. This leads to a multilayered analysis of sexism and the abuse of power. As Ellen O'Loughlin explains, because most women "experience [discrimination]

in more than one way (that is, through the dynamics of racism, classism, heterosexism, and ageism, as well as sexism), ecofeminism, in order to fight the oppression of women and nature, must look at more than just the ways in which sexism is related to naturism."[64]

Some of the affirmative contributions of environmental philosophy are its appreciation of aesthetics, its contemplation of equal access to natural resources, and its valuing of ecological ethics over human-centered utilitarianism. These ideas inform environmentalists' projects, such as efforts to preserve the Arctic National Wildlife Refuge for future generations instead of drilling it now in hopes of oil discovery. These same considerations of connections among living things and valuation of community over self dovetail in ecofeminism with feminist principles of respect, inclusion, and compassion for others.

One might be tempted to see ecofeminism as just a "green" interpretation of anti-essentialism. But the ecofeminist view of compound oppression contributes something new. First, ecofeminism holds *as its core principle* a recognition of shared oppression between women and nature. This principle not only encourages the examination of other shared oppressions but also makes avoidance of compound oppressions conceptually impossible: to take the "eco" or the "feminism" out of ecofeminism negates the whole idea.

Second, ecofeminism provides an important metaphor for understanding shared oppression: the ecological system. In fact, the concept of ecology provides us with an almost poetic image for understanding many difficulties that women face. Ellen O'Loughlin writes,

> An ecologist cannot just add up the parts of a pond and think she is coming close to describing that ecosystem and how it functions. A fish in a pond and a fish in an ocean, looked at ecologically, must be understood as inhabiting different, maybe similar but not the same, places. Likewise women are in different places. Whether I am in a field or an office, what I do there, my niche, is at least partially determined by the interconnection of societal environmental factors.[65]

It is precisely this emphasis on compound oppressions in the context of an ecological whole that makes the theory so useful in building coalitions among legal organizers.

Some good examples come from the environmental justice movement, a grassroots movement concerned with environmental dangers affecting the poor and people of color. In the United States, the environmental justice (EJ) movement is mainly populated and directed by women. This was a grassroots movement that in part grew up around kitchen tables across the country, as women compared notes on the illnesses their children were suffering and traced these shared ailments to contaminated well water or landfills that leached toxins into the ground.[66] As a result, EJ advocates emphasize pollution problems affecting families and children—childhood asthma in the inner city (which is aggravated by air pollution), lead-based paint in old houses, or contamination in the drinking water. Flexible collaborators, EJ advocates have joined forces with mainstream environmentalists, public health advocates, and poverty lawyers. The factor that holds these groups together is not necessarily love of nature, although that may be a part, but rather love of justice—the commitment to fight oppression in all its forms.

A social-justice perspective enables these new environmentalists to draw connections between contamination and discrimination. When national studies show correlations between neighborhood pollution and wealth or race,[67] EJ advocates question zoning laws that perpetuate the segregation of poor single mothers and minorities. When the federal government warns women of childbearing years to lower their intake of tuna because of mercury contamination,[68] EJ advocates question pollution limits that were made strict enough to protect men but not women.

The ecofeminist movement received a *global* boost when, in 2004, Kenyan activist Wangari Maathai won the Nobel Peace Prize for leading thousands of African women in crusades against deforestation, poverty, and authoritarian government. Each of these problems posed important challenges to women. Deforestation, for instance, deprived rural communities of firewood, requiring women and girls to trek miles in search of cooking fuel. In addition, many legal and social traditions limit African women's participation in the workforce and public life, making them particularly vulnerable to poverty and corrupt autocrats. Describing that year's choice, a representative of the Nobel Committee said, "We have added a new dimension to the concept of peace. We have emphasized the environment, democracy building, and human rights and especially women's rights."[69]

Maathai exhibited ecofeminist ideals through her work in the Green Belt Movement, which, among other things, assisted women in planting more than forty million trees on community properties and farms and around schools and churches in an effort to assist in poverty reduction for women through environmental conservation. While the ecofeminist movement appears to have its strongest following outside of the United States, its American advocates have proved to be very enthusiastic and creative. In the United States, ecofeminists have campaigned for animal rights, security for migrant farmworkers, better healthcare for women, and environmental protection for Native Americans.

Pragmatic Feminism

> We must look carefully at the nonideal circumstances in each case and decide which horn of the dilemma is better (or less bad), and we must keep redeciding as time goes on. . . . [We must] confront each dilemma separately and choose the alternative that will hinder empowerment the least and further it the most. The pragmatic feminist need not seek a general solution that will dictate how to resolve all double bind issues.
>
> —Margaret Jane Radin, "The Pragmatist and the Feminist"

Pragmatic legal feminism offers as a primary insight that a search for contextual solutions is typically more useful than abstract theorizing. Feminist legal pragmatists draw on the works of the classical pragmatists in philosophy, such as John Dewey and Charles Sanders Peirce, especially their understanding that "truth is inevitably plural, concrete, and provisional."[70] This means that pragmatists reach tentative conclusions and know that their truths are usually incomplete and open to change. Feminist legal pragmatists criticize the universalism (e.g., all men dominate women) of some of the other types of feminist legal theories, and stress instead the importance of context and perspective. They recognize that "all observations are relative to a perspective," including "the time and place where they occur . . . [and] the set of prior beliefs and attitudes that are held by the observing party."[71]

Pragmatists generally steer away from abstractions: for them, abstract concepts do not dictate real-world practical solutions. Feminists as pragmatists do not look for solutions in formal legal rules, but instead view legal rules as partial explanations for outcomes in individual cases. Pragmatic feminists recognize that many of the debates among feminists are about different visions of an ideal means to reach the goal of equality. They also recognize that subordinated groups often face a "double bind" and that an outcome along ideal dimensions may leave individuals without a remedy. For instance,

> When we single out pregnancy, for example, for "special treatment," we fear that employers will not hire women. But if we do not accord special treatment to pregnancy, women will lose their jobs. If we grant special treatment, we bring back the bad old conception of women as weaker creatures; if we do not, we prevent women from becoming stronger in the practical world.[72]

Different times and contexts may necessitate different approaches or outcomes. Many feminist issues are presented in concrete, specific settings. For example, the issue might be whether a particular law firm should institute a nonpartnership track to allow parents more family time with their children. A concern of some feminists might be that this would become a "mommy track," a form of second-class citizenship utilized primarily or even exclusively by female lawyers. A pragmatic feminist might view the parent track not as a perfect outcome (a more ideal outcome might be to modify billable-hour requirements for all the lawyers in a firm), but as the best possible among less-than-ideal choices: a way of expanding the choices and assisting in the reconciliation of family/work conflicts for some individuals who are most affected at that place and time. Pragmatic feminists recognize the danger of universals and look for context-specific solutions.[73]

Some have criticized pragmatism generally for its emphasis on individual perspective, its uncertainty, and its refusal to commit to abstract theorizing. "Being a legal pragmatist," jokes law professor Jack Balkin, "means never having to say you have a theory."[74] The serious challenge, though, is finding, in the absence of any foundational theory, a workable standard of morality.

Consider, for example, how a pragmatic feminist's approach might differ from that of an equal treatment theorist. In some tribal societies, land is generally inheritable only by male heirs, but customary norms impose an obligation on families to care for unmarried daughters by giving them a piece of land. An unmarried or divorced daughter who has children of her own to care for might argue for an extension of those cultivation or occupancy rights to her situation—not on the basis that she should have rights equal to her brothers but on the basis that families have an obligation to care for all their daughters. The latter strategy has a much better chance of success in this culture than the former approach. This pragmatic approach may produce a favorable outcome in the individual case, but might not contribute to theoretically satisfactory or lasting egalitarian results: "For long-term gender equality, however, this recognition of customary rights is not a real victory. It is premised on the perception that women's interests in property belonging to their natal families are contingent. . . . Daughters are only accommodated in exceptional circumstances, namely when they fail to marry, or when their marriages fail."[75]

Pragmatism comes with no firm convictions but does offer perhaps an improved set of methods for coming to conclusions—tentative and partial though they might be. Feminist pragmatism contributes less in the way of concrete legal solutions and more in terms of methodological suggestions. Since one aspect of feminist methodology is to look at the realities of experience, pragmatic feminists find truths in the particulars of women's daily realities. Thus, for pragmatists, personal experiences help build theories, and theories need to incorporate the concrete situations of diverse individuals.

Postmodern Feminism

I am in favor of localized disruptions. I am against totalizing theory.
—Mary Joe Frug, "A Postmodern Feminist Legal Manifesto"

We have been thinking about different feminist legal theories as if they were so many flavors of ice cream. Some swear by vanilla; others like rocky road. But postmodern feminist theory (and to a lesser extent

pragmatism) is more of an interpretive tool than a uniform flavor. It's like an ice cream scoop.

Postmodern feminist legal theory presents another attempt to move beyond the categories of sameness and difference. Postmodern feminists argue that the comparative approaches of equal treatment ("women are like men") and cultural feminism ("women are *not* like men") inaccurately assume that *all* women are roughly the same, as are *all* men. This assumption is particularly false—and damaging—when one speaks of women or men across the lines of race, economics, or country of origin. Postmodern feminist legal theorists therefore reject notions of single truths and recognize instead that truths are multiple, provisional, and thus linked to individuals' lived experiences, perspectives, and positions in the world.

Postmodern feminism shares with critical feminist theories and with pragmatism a rejection of essentialism—the idea that all women share any single experience or condition. But postmodernists play on a whole different level of abstraction. Unlike anti-essentialists who find truth in a harmony of many voices, postmodernists think harmony is impossible. And truth, well, that's a figment of your imagination too.

As the name implies, postmodernism emerged as a response to modernism, an intellectual movement that rejected the formal structures of Victorian art (narrative in literature, realism in painting) in hopes of capturing a more immediate, less stylized picture of human experience. Modernists wanted truth boiled down to the bone. Postmodernists also reject traditional styles and forms but go further by rejecting the very notion of objective knowledge or experience. Postmodernists challenge the very possibility of truth or objectivity. In the postmodern view, knowledge can never be certain or empirically established since, as Peter Schanck explains, "[W]hat we think is knowledge is always belief"—and "[b]ecause language is socially and culturally constituted, it is inherently incapable of representing or corresponding to reality."[76] Boil truth down to the bone, and all that's left is steam.

Postmodern analysis begins with a technique called "deconstruction." Developed in the 1960s and '70s by French philosopher Jacques Derrida, deconstruction entails taking a hard look at historical, artistic, or linguistic details to reveal the political messages and biases hidden within. Textual accounts always encode hidden messages because language is unavoidably packed with explicit and implicit information that changes

with context. Consider the "Whites Only" signs of the Jim Crow South. One could say (as some politicians did) that the message was one of separation only, not subordination, but most people today would agree that the stronger, hidden message was about class power. This is the postmodern thesis: that when you get down to it, there is no such thing as justice, beauty, or truth—only power and the quest to maintain it. Pull up the floorboards of any opera, treatise, or constitution, and you will find a foundation built on the geometry of power. Every document, text, piece of language, work, or discussion contains hierarchies. Justice (or what passes for justice) belongs not to the ages but to today's ruling class, who define and shape it to their advantage, until, of course, a new class topples the first and imposes its own version. (If this reminds you of the French Revolution, you are getting the idea.) The trick for postmodernists is to identify these power structures through deconstruction and then to reverse those structures through political action.

Postmodern feminists use the tools of deconstruction to challenge the modernist idea of an unchangeable rule of law. Laws are not objective or impartial—they are crafted from political biases, so reliance on laws, and on traditional ways of practicing law, can reinforce inequalities. Postmodern practices critique many subtle hierarchies of power—even power hierarchies between lawyers and their clients. These strategies are intended to reveal the nonobvious ways that power works in relationships.

Postmodernism reveals that language, knowledge, and power are connected in ways that transmit cultural norms of gender. Because postmodernism focuses on oppression, it is especially concerned with how hierarchies are created and passed on in culture. Postmodernists suggest that we create and transmit hierarchies such as gender oppression by subtle and pervasive systems of speaking and acting (discourse and so-called discursive practices). For instance, women may internalize the expectations of advertisements that depict them as anorexically thin, perfectly coifed, and able to expertly wield cleaning products, just as they understood the messages of some older protectionist laws that limited the number of hours women could work in order to protect women from strenuous labor.

The postmodern strategy of understanding the connections between discourse and power is used to prompt rethinking of traditional gender

identities so that they are more fluid and less attached to biological sex or to cultural norms. Feminists influenced by postmodernism view gender not as natural, fixed, or objective but as socially constructed, relative, dependent on experiences, and mutable over time and according to situations. They stress that individuals have multiple identities and roles that they play. Gender is performed or presented (through, among other things, clothing, work, and mannerisms) differently each day. As an example of the ways language constructs identities, consider Judith Butler's postmodern explanation of how gender identity is "performatively constituted" by expressions:

> If I claim to be a lesbian, I "come out" only to produce a new and different "closet." The "you" to whom I come out now has access to a different region of opacity. Indeed, the locus of opacity has simply shifted. . . . so we are out of the closet, but into what? What new unbounded spatiality? The room, the den, the attic, the basement, the house, the bar, the university, some new enclosure. . . . For being "out" always depends to some extent upon being "in"; it gains its meaning only within that polarity. Hence, being "out" must produce the closet again and again in order to maintain itself as "out."[77]

Sometimes postmodern analysis, like the above paragraph, looks more like performance art than legal critique. The response is that such "transgressive" rants, or riffs, are riffs of resistance. By challenging the language of social relationships, and resisting proper forms of speaking and writing, postmodernists say they can neutralize subliminal messages of inequality transmitted by the dominant culture. Perhaps. Still, it's hard to locate and fight injustice if we can't even agree on the meaning of "out" or "in." In the words of Catharine MacKinnon, "Postmodernism as practiced often comes across as style—petulant, joyriding, more posture than position. . . . Postmodernism imagines that society happens in your head."[78]

Some feminists find postmodernism neither liberating nor effective. For them, the postmodern challenge of foundational truths undermines the stark realities of discrimination, intimate violence, and subordination that women have been trying to document. They worry that the emphasis on multiple perspective reduces the realities of rape, sexual

abuse, prostitution, and sexual harassment to just another set of "narratives." Furthermore, critics say that postmodernism operates at too a high a level of theory to be of political use:

> According to postmodernism, there are no facts; everything is a reading, so there can be no lies. Apparently it cannot be known whether the Holocaust is a hoax, whether women love to be raped, whether Black people are genetically intellectually inferior to white people, whether homosexuals are child molesters. To postmodernists, these factish things are indeterminate, contingent, in play, all a matter of interpretation.[79]

Postmodernists and dominance theorists have also battled over whether women have "agency"—free will to choose, for example, sadomasochistic sex. In the postmodern view, S/M might be "a potentially pleasurable and subversive sexual practice,"[80] while a dominance theorist might dismiss the idea that S/M practices can ever be freely chosen or argue that any such "choice" is actually a product of false consciousness.

This is just one example of the larger debate about postmodern approaches. Postmodernism counsels that people should adopt "subversive practices" and try to escape oppression. It rallies citizens to fight chauvinism and resist autocracy but shows little interest in what equality or democracy should really look like. When the oppressed have finally broken their chains and slipped through the bars, how will they know they are free?

Questions for Discussion

1. At the turn of the twenty-first century, the movement for gender equality seems to have stalled. Some of the most significant battles, such as the fight for suffrage, *Roe v. Wade*, basic equal pay cases, and men's rights to sue for sexual harassment, have already been fought. Many of the issues that remain are second-generation discrimination issues—such as the glass ceiling in employment, the absence of paid family leave, women doing a disproportionate share of unpaid domestic work, or simply societal beliefs about appropriate gender roles. Can you identify some others of these smaller second-

generation issues: the more subtle forms of discrimination that are not clearly proscribed by existing laws and the micro-inequities that it is difficult for law to even reach? Do any major or landmark legal issues still remain to be fought?

2. The diversity among feminist legal theorists raises the difficulties of building coalitions among oppressed groups. Some anti-essentialists call for greater coalition building. Others caution against it, because alliances among minorities or between minority and dominant groups usually operate to serve the more powerful groups, whose interests may diverge. Choose one of the issues you identified in question 1. Would coalition building be a critical strategy in addressing that issue?
3. Are some of these philosophies of feminism too bleak to gain many adherents or too critical to provide a positive platform? For instance, dominance theory seems to suggest that most, if not all, women are subordinated in many ways—and that they may not even know it (the problem of false consciousness). Individuals, in the postmodern view, are almost purely social and cultural creations. If, as postmodernism seems to suggest, women's experiences are not "homogeneous," this raises the question whether they "can ever ground feminist theory."[81] Will dominance theory gather supporters or will it be perceived as relegating women to permanent victim status? Will postmodernism lead to more fluid gender roles or create such anxiety over ambiguity that the status quo remains the preferred model of interpreting gender roles? Even if neither theory gains more adherents, how does its presence in the field of feminist theory affect other, more generally accepted theories?